RETHINKING THE RIGHT OF PUBLICITY IN THE ERA OF GENERATIVE AI

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ABSTRACT

The right of publicity was created to protect against the nonconsensual commercialization of a person's likeness. The law has developed since its inception in 1950, expanding the definition of likeness, but since the creation of the internet, the doctrine has remained relatively static. While the law has stayed the same, technology and misappropriation methods have taken exponential leaps. The most profound of those leaps, regarding the misappropriation of publicity rights, has been generative AI. Generative AI platforms have taken the world by storm allowing users to create seemingly authentic images, videos, and songs featuring nearly every celebrity imaginable. The outputs of the systems and the datasets that train the systems contain the likenesses of celebrities, but these two uses frequently escape the protection that the contemporary right of publicity provides. Additionally, the speed at which these platforms create these works has resulted in a surplus of misappropriating materials that dilute the original celebrities' publicity rights.

The gap in protection and surplus in misappropriating materials calls for an update to the doctrine to address the shortcomings of the right of publicity exposed by generative AI. This article proposes

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that the law should be updated using equilibrium-adjustment theory. Equilibrium-adjustment theory is a balancing test implemented in the context of the Fourth Amendment to provide consistent privacy protection in response to technological improvements. Applying this theory to the right of publicity will bolster the right of publicity in response to advancements in generative AI, enabling the doctrine to provide the level of protection intended when the right of publicity was developed.

INTRODUCTION

The right of publicity provides a cause of action against a third party's use of a person's name, image, or likeness ("NIL") for commercial gain without the individual's consent.[1] Currently, the right of publicity is recognized in the majority of U.S. states through statutes or the common law and is similarly embodied in the laws of a few foreign nations.[2] On October 12, 2023, the Senate proposed the NO FAKES Act of 2024, which, if approved, could provide federal protection against the misappropriation of one's NIL in a digital replica.[3] Shortly after that, on January 14, 2024, the House of Representatives proposed the NO AI Fraud Act, which would, if approved, provide similar likeness protection.[4]

[1] MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 3:62 (2023).
[2] David Ervin & Joachim B. Steinberg, *AI and the Right of Publicity: A Patchwork of State Laws the Only Guidance, For Now*, CROWELL (Dec. 12, 2023), https://www.crowell.com/en/insights/client-alerts/ai-and-the-right-of-publicity-a-patchwork-of-state-laws-the-only-guidance-for-now [https://perma.cc/K64R-MURA].
[3] NO FAKES Act of 2024, S. 4875, 118th Cong. § 2 (2024).
[4] *See* NO AI Fraud Act, H.R. 6943 118th Cong. § 2 (2024); Wade Zhou, *Copying a person's likeness has become easy with AI. Is it legal?*, VERBIT (2024), https://verbit.ai/ai-technology/copying-a-

The NO FAKES Act and NO AI Fraud Act were drafted in response to growing concerns over the recent advancements in generative artificial intelligence ("AI") systems and the substantial misappropriation of publicity rights that have followed.[5] This misappropriation ranges from deepfake videos of celebrities endorsing apps they have never heard of,[6] to AI-generated images of Pope Francis playing basketball,[7] to "Heart on My Sleeve," the AI-generated Drake and The Weeknd track that was temporarily up for Grammy consideration.[8]

Generative AI has been utilized in chatbots to replicate human speech since 1960.[9] In 2014, the introduction of generative adversarial networks ("GANs") into generative AI platforms transformed these platforms into powerful tools capable of creating multimedia

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persons-likeness-has-become-easy-with-ai-is-it-legal/ [https://perma.cc/47FL-PDZ4].

[5] Christian Mammen & Seiko Okada, *Right of Publicity Bill Would federally Regulate AI-Generated Fakes,* JD SUPRA (Oct. 23, 2024), https://www.jdsupra.com/legalnews/right-of-publicity-bill-would-federally-4108699/ [https://perma.cc/7QS6-YCEE]; Zhou, *supra* note 4.

[6] Emma Roth, *Scarlett Johansen hits AI app with legal action for cloning her voice in an ad*, THE VERGE (Nov. 1, 2023, 6:02 PM), https://www.theverge.com/2023/11/1/23942557/scarlett-johansson-ai-app-developers-lawsuit [https://perma.cc/36G8-PADV].

[7] Asmir Pekmic, *AI-generated photos of Pope Francis playing basketball are taking over internet, here's why*, SPORTSKEEDA (Apr. 18, 2023, 5:02 PM), https://www.sportskeeda.com/basketball/news-ai-generated-photos-pope-francis-playing-basketball-taking-internet-here-s [https://perma.cc/HL4W-DSX8].

[8] Chloe Veltman, *When you realize your new favorite song is written by … AI*, NPR (Apr. 21, 2023, 5:00 AM), https://www.npr.org/2023/04/21/1171032649/ai-music-heart-on-my-sleeve-drake-the-weeknd [https://perma.cc/2C8E-7HR5].

[9] George Lawton, *What is generative AI? Everything you need to know*, TECH TARGET (June 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI [https://perma.cc/8MV5-Q6NF].

artifacts.[10] Modern generative AI platforms that utilize GANs can create convincingly authentic images, videos, and voices of real people nearly instantaneously.[11] GANs implement a recursive process with a generator model, real datasets, and a discriminator model that trains the generative AI platforms to create more realistic outputs.[12] Once trained, the platform can take a user prompt and produce a desired output virtually indistinguishable from the authentic version.[13]

The outputs of these systems frequently include the image or likeness of others.[14] The classic example of misappropriation is when a third party prompts the system to create an output of another's likeness, and the third party uses that output for commercial gain.[15] Misappropriation of the right of publicity by generative AI platforms, as currently understood, may entitle the victim to damages from the third party depending on the type of likeness misappropriated.[16] Courts have recognized protection against the nonconsensual use of an AI-generated image of

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[10] *Id.*

[11] *Generative AI Models Explained*, ALTEXSOFT (Sept. 4, 2024), https://www.altexsoft.com/blog/generative-ai/ [https://perma.cc/PX2Y-MS3R].

[12] *Id.*

[13] *Id.*

[14] Emily Alexandra Poler, *What's Real, What's Fake: The Right of Publicity and Generative AI*, AMERICAN BAR ASSOCIATION: BUSINESS LAW TODAY (Aug. 7, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-august/whats-real-whats-fake-the-right-of-publicity/ [https://perma.cc/XQ5V-7NZ8].

[15] Guardian Staff, *Tom Hanks says AI version of him used in his dental plan ad without his consent*, THE GUARDIAN (Oct. 1, 2023, 9:17 PM), https://www.theguardian.com/film/2023/oct/02/tom-hanks-dental-ad-ai-version-fake [https://perma.cc/Q9SL-R768].

[16] Eliana Torres, *From Deepfakes to Deepfame: The Complexities of the Right of Publicity in an AI World*, 16 LANDSLIDE 38, 42–43 (2023).

someone,[17] but whether the right of publicity protects against the nonconsensual use of an AI-generated voice mimicking an individual is still uncertain.[18] Due to the ease at which an individual's likeness can be misappropriated using generative AI, all forms of AI-generated likeness should be entitled to protection under the right of publicity. Courts have not yet recognized generative AI platforms as contributorily liable in misappropriation cases for their role in facilitating the misappropriation,[19] assuming the courts elect not to grant them immunity under 47 U.S.C. § 230.[20] The generative AI platforms not only provide a platform for the easy generation of people's likenesses, but they frequently advertise the platforms for such use.[21] Both of these shortcomings exemplify the need to update the right of publicity to protect the originally intended scope of publicity rights against the technological innovation that is generative AI.

One way to effectively update the right of publicity is by adopting the equilibrium-adjustment theory. This theory originated in the Fourth Amendment as a tool to provide a consistent scope of protection in response to technological advancements.[22] It establishes the "year

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[17] Young v. NeoCortext, Inc., 690 F. Supp. 3d 1091, 1104 (C.D. Cal. 2023).

[18] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

[19] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 3:20 (2d ed. 2024).

[20] *See* 47 U.S.C. § 230 (c)(2)(A); *see also* Tony Phillips & Jaria Martin, *Will Generative AI Break The Impenetrable Wall That Is Section 230?,* PILLSBURY (Jun. 16, 2023), https://www.pillsburylaw.com/en/news-and-insights/generative-ai-section-230.html [https://perma.cc/H73R-MTNW].

[21] DEEPFAKES WEB BLOG, https://blog.deepfakesweb.com/category/celebrity-deepfakes/ [https://perma.cc/KB93-89BK] (last visited Jan. 9, 2024).

[22] Orin S. Kerr, *Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 478 (2011).

zero" scope of the right and strengthens or diminishes the scope of the right depending on whether technology inequitably strengthens private citizens' privacy or law enforcement's power to enforce the law.[23] This theory meshes well with the right of publicity because of the similar effect that innovations in technology have on the adversarial system between missapropriators' interest in free speech and celebrities' interest in controlling the commercialization of their likeness.[24] Applying this theory to the right of publicity would enable the right to provide the same scope of protection that was intended at the right's inception regardless of advancements in technology.

First, Section II of this article will introduce the right of publicity and contemporary right of publicity laws. Next, section III will focus on generative AI and GANs. It will provide an overview of the generative AI systems and analyze the state of the misappropriation of publicity rights by generative AI platforms. Section IV will lay out the equilibrium-adjustment theory, explain why equilibrium adjustment theory is applicable to the right of publicity, and apply the theory to the doctrine. Additionally, the discussion of Section IV will highlight the shortcomings of the current legal framework and the benefits of the augmented right of publicity through working examples. Finally, Section V will conclude the article with a brief recap and an outlook on the future of the right of publicity.

RIGHT OF PUBLICITY

The following section outlines the growth of the right of publicity from its inception to its modern-day form. This section highlights the early developments in the doctrine through case law and the relative stagnancy of the

[23] *Id.* at 482.
[24] Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 86 (2020).

scope of the right of publicity since the 1980s. Additionally, this section discusses the elements of a modern misappropriation case and the increasing jurisdictional coverage of the right of publicity.

A. Origin of Right of Publicity

The right of publicity is a derivative of the right to privacy[25] that establishes the right of individuals to control the commercial use of their identity.[26] It was first postulated in 1890 by Samuel Warren and future Supreme Court Justice Louis D. Brandies in an article suggesting that a right to privacy existed against public disclosure of embarrassing facts.[27] The right to privacy, as discussed in the article, was first codified by New York in 1903.[28]

By 1954, the right of publicity was officially distinguished from the right to privacy in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc*.[29] Haelan had an exclusive agreement to use a player's image in marketing gum.[30] Topps entered a separate agreement with the player to use their likeness for gum advertisement.[31] Topps argued that the Haelan contract was a waiver that released liability for violating the player's right to privacy, and the two agreements were not in conflict because the right to privacy is personal and unassignable.[32] The court rejected the privacy-based

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[25] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).
[26] *See* 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 1:3.
[27] *See* Warren & Brandeis, *supra* note 25, at 196; *see also e.g.*, 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 1:4.
[28] *See* N.Y. CIV. RIGHTS LAW §§ 50–51 (2024).
[29] Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[30] *Id.* at 867.
[31] *Id.*
[32] *Id.*

argument, asserting that the right at issue in the contract was not privacy, but the distinct right of publicity that enables a person to license their likeness as their property.[33] Since the *Haelan* court distinguished the right of publicity, other courts have expanded the understanding of likeness beyond a person's name and image.

The next major step in expanding the right was taken in *Lombardo v. Doyle, Dane, & Bernbach*.[34] The defendants unsuccessfully tried negotiating a deal to get Lombardo into their advertisement.[35] After failing to land Lombardo, the defendants ran a New Year-themed advertisement that utilized the same gestures, musical beat, and choice of music with which Lombardo had become associated in the public's mind.[36] The court reasoned that this ad misappropriated Lombardo's publicity rights due to the element of deception of the public.[37] The *Lombardo* case laid the foundation for expanding the scope of publicity rights in the coming years.

Eleven years later, the court expanded its definition of what constituted a likeness in *Midler v. Ford Motor Co*.[38] After Ford unsuccessfully attempted to get Midler to perform her old song "Do You Want To Dance" in an advertisement, the company hired a sound-alike to sing the song in the commercial.[39] The company aired the advertisement without the consent of Midler, and many people who saw the ad believed that it was truly Midler.[40] The court found the actions of Ford to constitute misappropriation because the purpose of the imitation was

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[33] *Id.* at 868.
[34] Lombardo v. Doyle, Dane, & Bernbach, Inc., 396 N.Y.S.2d 661 (1977).
[35] *Id.* at 665 (Titone, J., dissenting).
[36] *Id.* at 664 (majority opinion).
[37] *Id.* at 665.
[38] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).
[39] *Id.* at 461.
[40] *Id.* at 462.

"to convey the impression that Midler was singing for them."[41] This case established that "when a distinctive voice of a professional singer is widely known and is deliberately imitated to sell a product," the sellers have violated the singer's right of publicity.[42] The court reaffirmed its position that a singer's voice constituted "likeness" four years later with its decision in *Waits*.[43] In the same year as the *Waits* decision, the court embraced its most expansive definition of what constitutes a likeness in *White v. Samsung Electronics America, Inc*.[44]

In *White v. Samsung Electronics America, Inc.*, the court extended the right to protect against evocations of a celebrity's identity absent explicit use of the celebrity's name or image.[45] Samsung ran a futuristic advertisement featuring a robot dressed to resemble White that turned letter panels in the same way White did in the TV show "Wheel of Fortune."[46] The court held that Samsung misappropriated White's likeness in airing the advertisement because the dress, setting, and actions of the robot combined to evoke White's identity.[47] This case represents the most expansive definition of likeness that the courts have adopted, and it is still binding precedent to this day. Since these cases, the scope of what is protected by the right of publicity has remained virtually unchanged,[48] but many more jurisdictions now provide protection.[49]

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[41] *Id.* at 463.
[42] *Id.*
[43] Waits v. Frito Lay, Inc., 978 F.2d 1093, 1100 (9th Cir. 1992).
[44] White v. Samsung Electronics America Inc., 971 F.2d 1395, 1399 (9th Cir. 1992).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *See* LEE, *supra* note 1, at § 13:24.
[49] Ervin & Steinberg, *supra* note 2.

B. Today's Right of Publicity

Today, the right of publicity protects elements that embody a person, such as their name, likeness, and persona.[50] Currently, the right of publicity allows a plaintiff to recover from those who directly misappropriate their publicity rights.[51] Additionally, Section 43(a) of the Lanham Act provides federal protection against the use of unauthorized AI-generated NIL by protecting consumers from false and misleading statements, or misrepresentations of fact, made in connection with goods and services, such as a deepfake celebrity endorsement of a product.[52] Although no one has been successful in the claim, the courts have not yet closed the door as to whether a claim for secondary liability for the misappropriation of publicity rights exists.[53]

When asserting that a defendant misappropriated a plaintiff's likeness, the plaintiff must establish that they have a valid claim to the right and that it was infringed.[54] To have a valid claim, the plaintiff must prove that they own the enforceable right.[55] To prove infringement, the plaintiff must demonstrate that the defendant used the plaintiff's likeness in such a way that the plaintiff is identifiable and that the use caused damage to the

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[50] 1 MCCARTHY & SCHECHTER, *supra* note 19, § 4:46
[51] *Id.* at § 11:31.
[52] Sharon S. Finklestein & Alexandra L. Kolsky, *Artificial Intelligence Wants your Name, Image and Likeness – Especially If You're a Celebrity*, VENABLE LLP (May 17, 2023), https://www.venable.com/insights/publications/2023/05/artificial-intelligence-wants-your-name-image#:~:text=Lanham%20Act%20Protections,connection%20with%20goods%20and%20services [https://perma.cc/ZBQ6-EU9E].
[53] LEE, *supra* note 1, § 3:113.
[54] 1 MCCARTHY & SCHECHTER, *supra* note 19, § 3:2.
[55] *Id.*

commercial value of the plaintiff's likeness.[56] No intent to harm or even identify the plaintiff is required to prove prima facie infringement.[57] Some damage to the persona is assumed once the infringement is proven, but if the plaintiff seeks monetary damages, they must prove and quantify commercial damages.[58] Proving commercial damages is relatively straightforward when dealing with infringements using the outputs of generative AI. On the other hand, quantifying the damages of using one's likeness in a dataset to train the AI system gets particularly difficult.

This right is recognized by common law or statute in the majority of U.S. states.[59] Congress recently proposed the NO FAKES Act and NO AI Fraud Act that, if approved, could provide federal protection against the misappropriation of one's NIL in a digital replica.[60] Additionally, Canada and Germany have a right of publicity protection nearly identical to those in the United States.[61] England and Australia also have protections for the misuse of one's likeness through the right to privacy.[62] These are more similar to the pre-1953 understanding of the right to privacy as it implicates likeness.[63]

Through developments in case law, the right of publicity has evolved to adequately protect a person's likeness from all forms of misappropriation pre-internet. However, the law has not been substantially updated since then, and technology has improved exponentially. More specifically, generative AI has made misappropriation substantially easier and more accessible than ever before,

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Ervin & Steinberg, *supra* note 2.
[60] S. 4875, 118th Cong. (2024); H.R. 6943, 118th Cong. (2024).
[61] 1 MCCARTHY & SCHECHTER, *supra* note 19, §§ 6:166, 6:169.
[62] *Id.* §§ 6:161, 6:163.
[63] *Id.* § 1:29; Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

introducing many new issues regarding the right of publicity.[64]

GENERATIVE AI

The following section will outline what generative AI is, how it functions, and how it is used today. Additionally, this section will discuss how current uses of generative AI implicate the right of publicity and the misappropriation concerns they raise. The section will conclude by analyzing several recent decisions involving generative AI platforms and the right of publicity to show how the law currently treats these issues.

A. What is Generative AI?

Generative AI systems are software technology that allows users to produce various outputs of text, images, voices, deepfake videos, and synthetic datasets.[65] These systems take user input and produce the desired output instantaneously.[66] Generative AI originated in the 1960s with chatbots designed to create crude sentences based on a few grammatical rules.[67] Over the years, various improvements to generative AI systems have been implemented to get generative AI to where it is today, but none has had such a profound effect as GANs.[68]

GANs are a specific type of software model frequently used in generative AI systems that are vital to the "learning" process of generative AI systems.[69] GANs implement a recursive process with a generator model, real datasets, and a discriminator model that trains the

[64] Poler, *supra* note 14.
[65] Lawton, *supra* note 9.
[66] *Id.*
[67] *Id.*
[68] *Generative AI Models Explained*, *supra* note 12.
[69] *Id.*

generative AI platforms to create hyper-realistic outputs.[70] The generator model creates fake data based on the input,[71] and the discriminator model classifies real data from fake generated data.[72] A GAN is trained by first generating an output based on a user input or a dataset.[73] Next, the discriminator receives a dataset including both the generator's output (fake) and real data from its data library, and it determines whether each piece of data is real or fake.[74] Following the determination by the discriminator, the generator receives a learning signal telling it how close the discriminator was to believing the generated data was real and updates its model accordingly.[75] The closer the discriminator was to believing the data was real, the more the model will attempt to replicate similar generations.[76] The discriminator also receives a learning signal based on how well it correctly identified real data and fake data in the dataset and updates its model accordingly.[77] Naturally, the more correct the discriminator was in its determinations, the more it will rely on similar methods of

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[70] *Id.*

[71] *The Generator*, GOOGLE FOR DEVELOPERS (July 18, 2022), https://developers.google.com/machine-learning/gan/generator [https://perma.cc/6YN8-QE7Z].

[72] *The Discriminator*, GOOGLE FOR DEVELOPERS (July 18, 2022), https://developers.google.com/machine-learning/gan/discriminator [https://perma.cc/W6XZ-3XZV].

[73] Anshita Solanki, *CNNs vs. GANs: How do they differently contribute to your business?*, SOFTWEB SOLUTIONS (Oct. 12, 2023), https://www.softwebsolutions.com/resources/cnn-vs-gan.html [https://perma.cc/X9BG-MQTF].

[74] *Id.*

[75] Manning Publications, *What are GANs and how do they work*, YOUTUBE (May 22, 2021), https://www.youtube.com/watch?v=f6ivp84qFUc [https://perma.cc/8RHC-EYQG].

[76] *Id.*

[77] *Id.*

discrimination.[78] When these models are run sufficiently in this recursive process, they can produce convincingly realistic outputs of images, deepfake videos, and music.[79] The outputs of these systems and the datasets that train them are frequently used as the basis involved in the misappropriation of publicity rights.[80]

B. How is the Right of Publicity Implicated?

The right of publicity is implicated by generative AI through the outputs and datasets of the generative AI platforms, and each generative AI platform implicates a different facet of the right of publicity. For instance, music generators implicate likeness by mimicking an artist's voice, image generators implicate an individual's likeness by copying their face and pose, and deepfake video generators implicate likeness by copying their face and voice. Each platform misappropriates publicity rights when it trains itself using the datasets comprised of others' likenesses and when it produces the respective output that embodies another's likeness.[81] Generative AI misappropriation cases arise in one of two forms. The first cause of action is against a third party utilizing generative AI to replicate another's likeness and using it for a commercial purpose.[82] The second cause of action is directly against the generative AI platform for profiting from its ability to replicate individuals' likeness. Both causes of action will be discussed below.[83]

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[78] *Id.*
[79] *Generative AI Models Explained*, *supra* note 11.
[80] Poler, *supra* note 14.
[81] *See* discussion *infra* Sections III.B.i, III.B.ii.
[82] *See* discussion *infra* Section III.B.i.
[83] *See* discussion *infra* Section III.B.ii.

1. Direct Misappropriation by a Third Party

The most common type of third-party misappropriation of publicity rights is output-based misappropriation by a third party. This occurs when a third party utilizes a generative AI system to create an output of a person's likeness and uses that output without the person's consent for the third party's commercial gain. Prominent examples of this include the company Lisa AI, which used the AI-generated voice of Scarlet Johansen in ads to sell their generative AI app,[84] and a dental plan that used a deepfake of Tom Hanks in its advertisements.[85] Both of these advertisements utilized generative AI technology to deceive consumers into believing that the celebrities endorsed the company's product or service, putting the advertisements directly in violation of Section 43(a) of the Lanham Act.[86] Third-party misappropriation is not limited to deepfake generators.[87] On TikTok, user Ghostwriter977 released "Heart on My Sleeve," an AI-generated song that sounded as if it was sung by both Drake and The Weeknd.[88] Ghostwriter977 developed a generative AI program that had learned to emulate the singing voices of both artists, but by mimicking the artists' singing voices in the song, Ghostwriter977 violated their publicity rights.[89] For more artistic works like the Ghostwriter song, a common defense is that the work is a

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[84] Roth, *supra* note 6.
[85] *Tom Hanks says AI version of him used in his dental plan ad without his consent*, *supra* note 15.
[86] Roth, *supra* note 6; *see also* 15 U.S.C. § 1125.
[87] Poler, *supra* note 14.
[88] Rachel Reed, *AI created song mimicking the works of Drake and The Weeknd. What does that mean for copyright law?,* HARVARD LAW TODAY (May 2, 2023), https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/ [perma.cc/P62S-2387].
[89] *Id.*

transformative use.[90] Although there are numerous examples of third-party use of generative AI in advertisements that misappropriate likenesses, none have been litigated in court. Since most of these disputes are straightforward violations of publicity rights and the violators want to avoid negative publicity, the parties tend to settle the disputes out of court.[91]

Although this cause of action has yet to be pursued, generative AI platforms should be held liable under a theory of contributory misappropriation for providing a platform that facilitates the misappropriation by a third party.[92] Some states, including California, have recognized secondary liability for those who know that a direct infringer's conduct constitutes an infringement and also give substantial assistance or encouragement to the direct infringer.[93] Many generative AI platforms focus their business model on being a tool for misappropriation.[94] For example, Deepfakesweb.com, a deepfake generator, advertises the misappropriation of celebrities' likenesses as a selling point to users.[95] This website has a collection of tutorials on how to create deepfakes of twenty-two different celebrities with stock videos to pull the celebrities' faces

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[90] *What Should Rights Holders Know about Generative AI?*, RAINS (June 5, 2023), https://rains.law/insights/what-should-rights-holders-know-about-generative-ai [https://perma.cc/A28G-78L9].

[91] Chris Cooke, *Rick Astley settles publicity rights law suit against Yung Gravy*, COMPLETE MUSIC UPDATE (Sept. 29, 2023), https://completemusicupdate.com/rick-astley-settles-publicity-rights-lawsuit-against-yung-gravy/ [https://perma.cc/GW9S-9AGH].

[92] Jennifer Kenedy & Jorden Rutledge, *Death By A Thousand Cuts: Right of Publicity in the Age of AI*, JD SUPRA (May 31, 2023), https://www.jdsupra.com/legalnews/death-by-a-thousand-cuts-right-of-8578503/ [https://perma.cc/Y9TK-PZ76].

[93] 1 MCCARTHY & SCHECHTER, *supra* note 19, § 3:18.

[94] DEEPFAKES WEB BLOG, https://blog.deepfakesweb.com/category/celebrity-deepfakes/ [https://perma.cc/P97T-FCCW] (last visited Sept. 14, 2024).

[95] *Id.*

from.[96] Additionally, there are music generators, such as MusicAI and Voicify, that advertise the creation of AI-generated music using the singing voices of real celebrities without the singers' consent.[97] Even AI image generators like Dalle-3 and Grok can be used to create images of a person's likeness without their consent if you know how to work around the prompt screening software.[98] Even though it seems that generative AI platforms could be held contributorily liable, one statutory provision poses a unique concern.

The major concern with holding generative AI platforms contributorily liable is 47 U.S.C. § 230. Section 230(c)(2)(A) provides federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.[99] Despite the looming concern that § 230 presents, it appears that Congress is trending towards not extending § 230 immunity to the generative AI platforms.[100]

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[96] *How to Make a Brad Pitt Deepfake*, DEEPFAKES WEB BLOG (Aug. 4, 2021), https://blog.deepfakesweb.com/brad-pitt-deepfake/ [https://perma.cc/7RCW-V63T].

[97] Karen William, *How to Create Music Covers with Famous People AI Voices?*, IMYFONE (July 16, 2024), https://filme.imyfone.com/cover-song/famous-voices-to-cover-songs/ [https://perma.cc/T3A8-AT7W]; *see* MUSICAI, https://filme.imyfone.com/ai-music-generator/ [https://perma.cc/PY4E-WBYA] (last visited Sept. 14, 2024); *see also* JAMMABLE, https://www.voicify.ai/ [https://perma.cc/2NX2-RESE] (last visited Sept. 14, 2024).

[98] *See* Meghan Marrone, *Musk's Grok bot generates AI images with few limits*, AXIOS (Aug. 15, 2024), https://www.axios.com/2024/08/15/elon-musk-xai-grok-bot-ai-images [https://perma.cc/VLJ6-LCV3]; *see also Image Creator*, MICROSOFT BING, https://www.bing.com/images/create/famous-flavortown-guy-eating-shoe/1-66e61c1436bf40549d6561d4c2d9355e?FORM=GENCRE [https://perma.cc/ZR5G-FHV7] (last visited Sept. 14, 2024).

[99] *See* 47 U.S.C. § 230; *see also* Phillips & Martin, *supra* note 20.

[100] Phillips & Martin, *supra* note 20; *see also* Peter J. Benson & Valerie C. Brannon, *Section 230 Immunity and Generative Artificial*

Although it is still unclear whether the generative AI platforms can be contributorily liable, several courts have begun finding the platforms directly liable for infringement.[101]

2. Direct Misappropriation by the Generative AI Platform

Misappropriation claims attempting to hold the generative AI platform directly liable tend to have more intricate legal arguments, so these issues have begun to enter the courts.[102] The two theories for holding the generative AI platforms liable are that the outputs of the platforms contain misappropriated likenesses[103] and the datasets that the systems are trained on contain misappropriated likenesses.[104] The following subsection will discuss a recent example of output-based misappropriation claims against a generative AI platform.

Output-Based Direct Misappropriation by Generative AI Platforms

In September 2023, a California court found that an individual, representing a class of people, whose face was replicated by an AI deepfake generator had a valid right of publicity direct misappropriation case against the generative AI platform.[105] NeoCortex owned the app "Refaced," an AI deepfake generator.[106] The app

Intelligence, CONGRESSIONAL RESEARCH SERVICE (Dec. 28, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB11097 [https://perma.cc/W6KS-YWS9].

[101] Torres, *supra* note 16, at 42.

[102] *Id.*

[103] Young v. NeoCortext, Inc., 690 F. Supp. 3d 1091, 1104 (C.D. Cal. 2023).

[104] *In re* Clearview AI, Inc., Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1127 (N.D. Ill. 2022).

[105] *Young*, 690 F. Supp. 3d at 1104.

[106] *Id.* at 1095.

advertised its ability to enable "users to swap their faces with actors, musicians, athletes, celebrities, and other well-known individuals in scenes from popular shows, movies, and other short-form internet media."[107] The suit was brought by a reality TV star representing a class of individuals whose likenesses had been misappropriated by the application.[108] The court ruled that the plaintiff had adequately pleaded a misappropriation case by showing that NeoCortex compiled the images of the plaintiff, accompanied by his name, and made them available for app users to create deepfakes.[109] The following subsection will discuss dataset-based misappropriation claims against the generative AI platform, as well as a recent example of this form of misappropriation that survived a motion to dismiss.

Dataset-Based Direct Misappropriation by Generative AI Platforms

Discriminators in generative AI platforms use actual data, consisting of the likeness of others, to train themselves to distinguish characteristics of "real data."[110] The actual data used to train the discriminator system will shape the discriminator's understanding of what "real data" is.[111] This will result in the generator learning to produce outputs similar to the training dataset to "beat" the discriminator.[112] If a training dataset includes the likeness of a person, the generator is more likely to generate images resembling that person. Additionally, generative AI systems gain commercial value from having well-trained discriminators that produce more realistic outputs, so using

[107] *Id.*
[108] *Id.* at 1096.
[109] *Id.* at 1104.
[110] *Generative AI Models Explained*, *supra* note 11.
[111] *Id.*
[112] *Id.*

someone's likeness to improve the system's outputs is using the likeness for commercial gain.[113] Furthermore, when these likenesses are being analyzed, some discriminator systems collect biometric data while analyzing the datasets.[114] Therefore, a platform can misappropriate an individual's publicity rights by using their likeness without their consent in the training dataset. This issue has begun to reach the courts, being litigated much more frequently in the past two years.[115]

In 2022, the court recognized that a person whose likeness was used in a dataset by a third-party AI system to train the AI without the person's consent has a viable misappropriation claim against the third party.[116] Here, Rocky Mountain Data Analytics, an agent of Clearview AI,[117] scraped over three billion photographs of facial images from the internet and then used generative AI to scan the face geometry of each individual and harvested each individual's unique biometric identifiers.[118] Rocky Mountain then sold access to its database of the biometric data derived from the three billion images.[119] Since the defendants gained valuable biometric information by scraping the photos in the database without the individuals' consent and thereafter sold or otherwise profited from the biometric information, the court found that the individuals had a viable misappropriation claim.[120] The Northern

[113] Rick Spair, *Understanding the Importance of Data in Generative AI*, MEDIUM (Oct. 23, 2023) https://medium.com/@rickspair/introduction-understanding-the-importance-of-data-in-generative-ai-9603780ab256 [https://perma.cc/2B68-QUY2].
[114] Torres, *supra* note 16, at 42.
[115] *Id.*
[116] *In re* Clearview AI, Inc., Consumer Priv. Litig., 585 F. Supp. 3d 1111, 1127 (N.D. Ill. 2022).
[117] *Id.* at 1125.
[118] *Id.* at 1118.
[119] *Id.* at 1120.
[120] *Id.* at 1127–30.

District of Illinois ruled that the actions of Rocky Mountain violated the right of publicity statutes of Virginia,[121] California,[122] and New York.[123] These cases are helpful for understanding the landscape of the right of publicity and display some of the doctrine's shortcomings concerning generative AI. The current right of publicity's inability to address the new issues that generative AI presents calls for an update to the doctrine to capture these innocuous misappropriations. The ideal tool to facilitate this update is the equilibrium-adjustment theory.

EQUILIBRIUM-ADJUSTMENT FOR THE RIGHT OF PUBLICITY

The following section will discuss a proposed expansion of the right of publicity in response to this new technology similar to the expansion of the Fourth Amendment right to privacy postulated by Professor Orin Kerr.[124] This section argues why the equilibrium-adjustment theory should be applied to the right of publicity and expands upon how the equilibrium-adjustment theory would augment the right of publicity in response to generative AI. Finally, this section concludes by analyzing the "Heart on My Sleeve" misappropriation case using both the current right of publicity and the right of publicity augmented by the equilibrium-adjustment theory and then comparing the results of each.

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[121] *Id.* at 1127–28.
[122] *In re* Clearview AI, Inc., Consumer Priv. Litig., 585 F. Supp. 3d at 1129.
[123] *Id.* at 1130.
[124] Kerr, supra note 22, at 479.

A. What is Equilibrium-Adjustment Theory?

Equilibrium-adjustment theory originated as a way to interpret judicial decision-making surrounding the scope of protection of the Fourth Amendment.[125] Equilibrium-adjustment theory reflects the balancing of interests the judiciary undergoes when faced with new technology or social facts regarding developments in Fourth Amendment protection.[126] Essentially, equilibrium-adjustment theory reflects judges' efforts to maintain the original scope of Fourth Amendment protection.[127] When judges recognize that changing technology or social practice significantly strengthens police power to enforce the law, courts adopt higher levels of Fourth Amendment protections for these new circumstances to help restore the status quo or "year zero" protection.[128]

Kerr identified six distinct scenarios where this occurs in the context of the Fourth Amendment.[129] The ones that relate to evolutions in technology are: the government using a new tool to find evidence, criminals using a new tool to evade detection, both criminals and police using a new tool, and both criminals and police defeating countermeasures.[130] These scenarios produce a need to augment the specific applications of the Fourth Amendment to reflect the broad underlying principles of the Fourth Amendment.[131] A prominent application of the equilibrium-adjustment theory is the doctrinal shift regarding the protections surrounding the contents of

[125] *Id.* at 487.
[126] *Id*.
[127] *Id*.
[128] *Id.*
[129] *Id.* at 489.
[130] Kerr, *supra* note 22, at 489.
[131] *Id.* at 490.

telephone calls that occurred in the court's decision in *Katz v. United States*.[132]

In 1920, forty years before *Katz*, the court in *Olmstead* characterized wiretapping as not a search.[133] The court in *Olmstead* reasoned that the previously recognized violations of the Fourth Amendment, "an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure," were absent in the officers' wiretapping procedure, which signified that the officers did not violate Olmstead's Fourth Amendment rights.[134] An important factor for consideration is that the caselaw that supported this decision was developed when trespass was typically required to listen into an individual's private conversations.[135] However, in *Katz*, the court embraced a new approach to the classification of searches to address the officers' new tactic of placing a listening device on a phone booth to listen to conversations inside the booth.[136] Although the previous caselaw would not protect this form of wiretapping, the court recognized the vital role that the public telephone has come to play in private communication and overruled *Olmstead* because it had "eroded."[137] The court later adopted a new approach outlined by Justice Harlan in his concurrence: the reasonable expectation of privacy test.[138] This test establishes that the government violates a person's Fourth

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[132] Katz v. United States, 389 U.S. 347, 354 (1967).
[133] Olmstead v. United States, 277 U.S. 438, 466 (1928).
[134] *Id.* at 466.
[135] *See generally* April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAGAZINE (Apr. 2018), https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/ [https://perma.cc/9VG9-QBL3].
[136] *Katz*, 389 U.S. at 352.
[137] *Id.* at 353.
[138] *Id.* at 360–61 (Harlan, J., concurring).

Amendment rights when it violates their reasonable expectation of privacy.[139] A reasonable expectation of privacy exists when a person has a subjective expectation of privacy and that expectation is objectively reasonable.[140] Notably, this new test provided greater flexibility to address this new technological development than the previous trespass-based test, which was established when the primary way to eavesdrop on a conversation presumed to be private was to physically trespass into that private area.[141] Another prominent example of equilibrium-adjustment theory in action is the court's response to law enforcement's use of thermal imaging guns in *Kyllo v. United States*.[142]

In *Kyllo*, officers suspected that Kyllo was growing marijuana in his home, so, while standing on the opposite side of the street, they scanned Kyllo's home with a thermal imaging gun to identify the location of heat lamps.[143] In attempting to retip the scales and provide greater Fourth Amendment protection, Justice Scalia instituted a new rule regarding this type of sense-enhancing technology.[144] The new rule stated that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use."[145] This rule reflects the equilibrium-adjustment theory's return to the "year zero" version of the Fourth Amendment because at "year zero," an officer attempting

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[139] *Id.*
[140] *Id.*
[141] *Id.* at 353 (majority opinion).
[142] Kyllo v. United States, 533 U.S. 27, 29 (2001).
[143] *Id.* at 29–30.
[144] *Id.* at 34.
[145] *Id.* (citation omitted).

to determine the temperature of the house would have had to physically touch or enter the home to ascertain that information.[146]

The effect of developments in generative AI on the right of publicity is akin to the effect of technological developments in surveillance that have resulted in the reshaping of the Fourth Amendment. Therefore, these developments in generative AI call for borrowing the equilibrium-adjustment theory and applying it to the right of publicity. In the same way that equilibrium-adjustment theory has allowed for flexibility in the development of the Fourth Amendment in response to technology, the right of publicity must be further broadened to protect against the generative AI-based misappropriation that the current case law fails to address. The following section will lay out how the protections of the right of publicity should be expanded and why the application of the equilibrium-adjustment theory to the right of publicity is the logical development of the doctrine.

B. Equilibrium-Adjustment Theory Applied to Right of Publicity

1. Why Apply Equilibrium-Adjustment Theory to the Right of Publicity?

First, equilibrium-adjustment theory is a tool that addresses technological developments and ensures consistency in the scope of protection.[147] Even though it is used exclusively in the Fourth Amendment context, there is no reason to limit the doctrine this way because other areas of law, like the right of publicity, are similarly affected by technological advancements.[148] In the same way that

[146] Kerr, *supra* note 22, at 496.
[147] *Id.* at 487–88.
[148] *See* Kerr, *supra* note 22, at 496.

officers' use of sense-enhancing technologies required the courts to increase Fourth Amendment protection to return the Fourth Amendment to the status quo,[149] the increased use of generative AI to misappropriate the likenesses of celebrities should prompt an expansion of the right of publicity to protect against this new means of misappropriation. Generative AI facilitates and expedites the misappropriation of publicity rights on a scale that the current caselaw is incapable of properly curtailing. This type of leap in technology surrounding the law is exactly what equilibrium-adjustment theory cures.[150]

Second, the Fourth Amendment and the right of publicity are closely related enough to justify the extension of equilibrium-adjustment theory into the right of publicity. Before it was recognized as a separate right, the right of publicity was founded in the Fourth Amendment right to privacy.[151] Both the right to privacy and the right of publicity are negative rights.[152] Additionally, equilibrium-adjustment theory in the Fourth Amendment context reflects a balancing of interests between law enforcement interests and private citizens' privacy interests. [153] Similarly, within the right of publicity, there is a balancing of interests between the plaintiff's interests in their identity and the defendant's constitutional interests in their speech.[154]

Finally, the newness and uncertainty surrounding the capabilities of generative AI require a tool, like

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[149] *See generally* Kyllo v. United States, 533 U.S. 27 (2001).
[150] *See* Kerr, *supra* note 22, at 496.
[151] *See* Warren & Brandeis, *supra* note 25.
[152] Eric E. Johnson, *Disentangling the Right of Publicity*, 111 NW. U. L. REV. 891, 891 (2017); Claire Andre & Manuel Velasquez, *Rights Stuff*, MARKKULA CENTER FOR APPLIED ETHICS (Nov. 16, 2015), https://www.scu.edu/mcae/publications/iie/v3n1/homepage.html [https://perma.cc/CJ83-KSL2].
[153] *See* Kerr, *supra* note 22, at 487.
[154] Post & Rothman, *supra* note 24.

equilibrium-adjustment theory, that is capable of overcoming a lack of empirical evidence.[155] The process of using a baseline "year zero" understanding of the law gives courts the flexibility to interpret new facts and tailor the law accordingly to the perceived and anticipated effects of the new facts.[156] The equilibrium-adjustment theory will instruct the court on whether to increase or decrease protection, but the amount of correction remains at the judiciary's discretion.[157] If the courts erroneously overprotect a use case and the use case does not have the anticipated detrimental effect, this system allows for self-correction. This semi-recursive process will ensure that the modern interpretation of the right of publicity reflects the "year zero" intended scope of the law.[158] The following section will outline how equilibrium-adjustment theory would apply to the right of publicity.

2. How Equilibrium-Adjustment Theory Would Modify the Right of Publicity in Response to Generative AI

In applying equilibrium-adjustment theory to a new area of law, one must determine what "year zero" is and what the scope of the law was at that time.[159] For the right of publicity, "year zero" would be 1953—the year of the *Haelan* decision.[160] At this time, the intended scope of the right of publicity was to prevent the unsolicited use of a person's likeness by third parties in a commercial capacity.[161] While the only likeness considered in *Haelan*

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[155] Kerr, *supra* note 22, at 535.
[156] *Id.* at 537.
[157] *Id.*
[158] *See generally id.*
[159] *Id.*
[160] *See generally* Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).
[161] *Id.* at 868.

was a photograph,[162] the courts have expanded the definition of likeness to encompass voice, name, image, and elements that embody a person.[163] In 1953, the misappropriation of likeness was a difficult task. To create an advertisement using the image of another, one would have had to manually stitch together the picture of the individual and build the advertisement or hire an illustrator to draw the advertisement. To advertise using the voice of another individual, advertisers would have had to hire a soundalike, which was very hard to find. In response to the difficulty in actually misappropriating a likeness, the court harped upon "deceptive intent" in its analysis as a requisite factor for a misappropriation claim.[164] This standard may have been sufficient when misappropriation was a more involved task in 1950, but today, anyone can create more convincing misappropriating materials in a matter of seconds with generative AI.

In response to the ease at which misappropriating materials can be created, the bar for what constitutes misappropriations should accordingly be lowered. As proposed in the NO FAKES Act, the courts should provide protection, under the right of publicity, against unsolicited use and creation of all forms of digitally replicated likenesses.[165] This would directly combat the forms of misappropriation that are facilitated by generative AI, and tip back the scales towards "year zero." Additionally, the court's emphasis on deceptive intent should be done away with.[166] The emphasis on deceptive intent primarily serves as a legal loophole to protect those who misappropriate publicity rights. Emphasizing deceptive intent allows for a

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[162] *Id.*
[163] 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 4:46.
[164] Lombardo v. Doyle, Dane, & Bernbach, Inc., 396 N.Y.S.2d 661, 664–65 (1977).
[165] NO FAKES Act of 2024, S. 4875, 118th Cong. § 2 (2024).
[166] *See generally* Ervin & Steinberg, *supra* note 2.

third party to create misappropriating work with generative AI and disclaim the work as a generative AI replication to avoid liability. Allowing these disclaimed misappropriations to avoid liability incentivizes misappropriation and leads to the dilution of the celebrity's publicity rights. Generative AI has tipped the scale too far in favor of those misappropriating publicity rights, so the emphasis on deceptive intent, which primarily serves those misappropriating publicity rights, should be eliminated to change the scope of the right back to its "year zero" protections.

Furthermore, courts should start allowing claims of contributory liability for the misappropriation of publicity rights, modeled after contributory copyright infringement, against generative AI platforms used to create misappropriating works. Failure to embrace contributory liability in this context allows these platforms to profit from facilitating mass misappropriation while being shielded by the users of their platform. These platforms need the looming threat of litigation to incentivize them to implement better safeguards that prevent their users from being able to use the platform to misappropriate likenesses. Additionally, courts should require generative AI platforms to get consent from or establish licensing deals with the celebrities they feature on their platforms. If a company advertises that you can create a deepfake of or have your song sung by Taylor Swift, they should be required to obtain permission from Taylor Swift before rolling out the feature on their platform. The following section will explore how these augmentations to the right of publicity would change the outcome of the "Heart on My Sleeve" misappropriation case previously discussed.

C. Applying the Doctrinal Augmentations to the "Heart on My Sleeve" Case

In April 2023, a TikTok user, Ghostwriter977, released the song "Heart on My Sleeve" "featuring" the AI-generated singing voices of Drake and The Weeknd.[167] The generative AI system, trained on Drake and The Weeknd's music, was able to reproduce the seemingly authentic vocals of both artists.[168] The song gained mass popularity shortly after it was released, but with the popularity came legal action from both Drake and The Weeknd.[169] In the original iteration of this legal dispute, "Heart on My Sleeve" was removed for using an unauthorized sample, but the right of publicity misappropriation claim was never argued.[170] The remainder of the section will analyze what the right of publicity misappropriation claim would have looked like if it had played out using the current right of publicity and the right of publicity augmented by equilibrium-adjustment theory.

1. Misappropriation Analysis Using the Current Right of Publicity

For this hypothetical analysis, the "defendant" will be Ghostwriter977, and the "plaintiffs" will be both Drake and The Weeknd. Similar to the actual case, the cause of action for misappropriation is that Ghostwriter977 trained an AI system on the music of Drake and The Weeknd and used that AI system to develop a song, "Heart on My Sleeve," that sounded like it was sung by both artists.[171]

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[167] Reed, *supra* note 88.
[168] Scott Hervey, *Legit or Lawsuit – Fake Drake AI Song*, JD SUPRA (May 19, 2023), https://www.jdsupra.com/legalnews/legit-or-lawsuit-fake-drake-ai-song-7985646/ [https://perma.cc/9ULD-CJSK].
[169] Reed, *supra* note 88.
[170] *Id.*
[171] *Id.*

Additionally, Ghostwriter997 posted this AI-generated song to TikTok, Spotify, and YouTube.[172] To establish a prima facie case of misappropriation of publicity rights, the plaintiffs must establish that they have a valid claim to the right and that the right was infringed.[173]

Drake and The Weeknd would establish that they own the enforceable right to satisfy the first prong. Here, the cases of both *Midler* and *Waits* establish that a person has an enforceable right of publicity in their singing voice when it is distinctive and widely known.[174] Therefore, both Drake and The Weeknd own the enforceable rights to their distinctive and widely known singing voices and would satisfy the first element of a claim for misappropriation.

As for the second element, infringement, Drake and The Weeknd would likely be unable to establish that their right of publicity was infringed if they rely on current case law. To prove infringement, the plaintiffs must show that the defendant used the plaintiffs' likeness in such a way that the plaintiffs are identifiable and that the use caused damage to the commercial value of the plaintiffs' likenesses.[175] The court in *Midler* established that Ford hiring a singer to emulate the voice of Midler was an infringement of Midler's right of publicity because the defendant used an "imitation to convey the impression that Midler was singing for them."[176] Here, the song by Ghostwriter977 explicitly stated that it was not Drake and The Weeknd but AI voices that were programmed to sound

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[172] Jordan Pearson, *Viral AI-Generated Drake Song 'Heart on My Sleeve' Removed from Spotify, YouTube*, VICE (Apr. 18, 2023), https://www.vice.com/en/article/xgwx44/heart-on-my-sleeve-ai-ghostwriter-drake-spotify [https://perma.cc/CY2E-HLBD].
[173] 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 3:2.
[174] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988); Waits v. Frito Lay, Inc., 978 F.2d 1093, 1100 (9th Cir. 1992).
[175] 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 3:2.
[176] *Midler*, 849 F.2d at 463.

like them.[177] Since Ghostwriter977 conveyed the impression that it was the AI program "singing" and not Drake and The Weeknd, he would potentially be able to avoid liability based on the language of Midler. Therefore, Drake and the Weeknd would not be able to establish the second element in their misappropriation case using the current right of publicity framework, and they would fail on their misappropriation claim.

The result of this not-so-hypothetical misappropriation claim is concerning, to say the least. First, the current case law's emphasis on deceptive intent[178] essentially allows infringers to replicate the voices of artists using AI if they disclaim that the voices are generated using AI. This would create a slippery slope that would promote the mass creation of music by AI versions of artists, and this overflow of AI music would dilute the value of the real artist's works.[179] Second, the only reason that the song is popular is due to the fame of the artists whose AI-generated voices were used to create it. Therefore, even if the AI-generated song is not misappropriating the artist's voice, Ghostwriter977 and similar potential infringers are still profiting off of the name of the artist whose voice the AI system is emulating. Third, if Ghostwriter977 used a third-party AI music generator, rather than his personal AI system, the third-party system would avoid liability

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[177] Kristin Robinson, *Ghostwriter, the Mastermind Behind the Viral Drake AI Song, Speaks For the First Time*, BILLBOARD (Oct. 11, 2023), https://www.billboard.com/music/pop/ghostwriter-heart-on-my-sleeve-drake-ai-grammy-exclusive-interview-1235434099/ [https://perma.cc/9WHF-6GJX].

[178] *See* Waits v. Frito Lay, Inc., 978 F.2d 1093, 1099–1100 (9th Cir. 1992).

[179] Michael Nash, *Something New: Artificial Intelligence and the Perils of Plunder*, MUSIC BUSINESS WORLDWIDE (Feb. 14, 2023), https://www.musicbusinessworldwide.com/michael-nash-universal-something-artificial-intelligence-and-the-perils-plunder/ [https://perma.cc/7C6H-SMBB].

because no claim of contributory liability for misappropriation of publicity rights has survived a motion to dismiss for failure to state a claim.[180] Finally, the current doctrine allows generative AI to undermine the fundamental purpose of the right of publicity: protecting a person's right to control the commercial use of their identity.[181] By allowing the creator of the AI song to determine how the song—using the AI voice of the artist—is commercialized, the current doctrine strips the original artist of their ability to control the commercialization of their publicity rights.

Another potential claim would be against Ghostwriter977 for using the singer's voices in the datasets that trained his AI system and profiting from that system. However, this claim would similarly fail. Although courts have recognized the usage of likenesses to train datasets as misappropriation, the courts have only held that there was a claim when further information was taken from the likenesses in the datasets, such as biometric data.[182] Even though the specific vocal patterns of the singers were taken from the dataset and may qualify as "further information,"[183] the court has not yet recognized this in the context of a celebrity's singing voice.

This section has highlighted the failures of the current right of publicity to address the new issues generative AI presents. The following section will display how the right of publicity augmented by equilibrium-adjustment theory captures these innocuous misappropriations and enables the right of publicity to provide meaningful protection to one's likeness.

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[180] 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 3:20.
[181] *Id.* at § 1:3.
[182] Young v. NeoCortext, Inc., 690 F. Supp. 3d 1091, 1091 (C.D. Cal. 2023).
[183] *Id.*

2. Misappropriation Analysis Using the Right of Publicity Augmented by Equilibrium-Adjustment Theory

The hypothetical "Heart on My Sleeve" misappropriation case has a much more satisfying outcome when utilizing the right of publicity augmented by equilibrium-adjustment theory. The right of publicity augmented by equilibrium-adjustment theory does not change the misappropriation analysis for the first prong: proving that the artists own the enforceable right of publicity. As previously stated, Drake and The Weeknd would easily satisfy the first prong because the precedent from *Midler* and *Waits* established that likeness, in the context of the right of publicity, includes a singer's distinctive voice,[184] and the voices at issue are those of both Drake and The Weeknd. As opposed to the analysis of the first prong, the misappropriation analysis for the second prong changes substantially using the right of publicity augmented by equilibrium-adjustment theory.

The expansion of the right of publicity discussed in the previous section removes the legal loopholes arising in the second prong that frustrate the true purpose of the right of publicity. To prove the second prong, the plaintiffs must prove that the defendant used the plaintiffs' likenesses in such a way that the plaintiffs are identifiable and that the use caused damage to the commercial value of the plaintiffs' likenesses.[185] Both the output-based and dataset-based theories of misappropriation discussed above highlighted different shortcomings of the right of publicity, so they will be analyzed individually.

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[184] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988); Waits v. Frito Lay, Inc., 978 F.2d 1093, 1099 (9th Cir. 1992).
[185] 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 3:2.

The output-based misappropriation theory is that the song produced by Ghostwriter977 misappropriated the likenesses of Drake and The Weeknd because it featured an AI-generated version of their singing voices. The holdup with the analysis for this prong under the contemporary right of publicity was the courts' emphasis on deceptive intent.[186] This allowed this form of misappropriation so long as it is disclaimed that the generative AI software was "singing" not Drake and or The Weeknd.[187] The augmented right of publicity diminishes the importance of deceptive intent in the misappropriation analysis so that it is no longer an unofficially requisite element. This would make the disclaimer irrelevant to the analysis. Utilizing the augmented right of publicity and relying solely on the statutory language, the court would find that Ghostwriter977's actions satisfy prong two of the misappropriation analysis.[188] The singing voices of Drake and The Weeknd are identifiable in the song, and Ghostwriter977's failure to compensate the artists for the commercial use of their voices amounts to commercial harm.[189] Therefore, Drake and The Weeknd would be successful in their output-based misappropriation claim utilizing the augmented right of publicity.

The dataset-based misappropriation case against Ghostwriter977 for using the voices of both Drake and The Weeknd to train his AI system to produce the singing voices of both artists for his song which he commercialized would be successful under the augmented right of publicity. The analysis for the dataset-based misappropriation claim also failed under the second prong using the current right of publicity. Under the current right of publicity, misappropriation cases that relate to using likenesses to

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[186] *See Waits*, 978 F.2d at 1099–1100.
[187] *Id.*
[188] *See* 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 3:2.
[189] Hervey, *supra* note 168.

train datasets have only been successful when the AI system takes further information, such as biometric data, from the likeness.[190] There is no precedent under the current law to establish that voice data suffices as further information.[191] This grey area of what constitutes further information is the exact scenario where the equilibrium-adjustment theory should be applied to the right of publicity to interpret scenarios to favor protecting publicity rights. In this context, the augmented right of publicity lowers the bar for what suffices as further information, so voice data, which courts have recognized "is as distinctive and personal as a face,"[192] would certainly qualify as further information. Since voice data meets the further information bar using the augmented right of publicity, Drake and The Weeknd would be successful in their dataset-based misappropriation claim.[193]

To further illustrate the benefits of the right of publicity augmented by equilibrium-adjustment theory, consider the scenario where Ghostwriter977 uses a generative AI platform, such as MusicAI,[194] to develop the songs rather than his own generative AI software. This fact pattern provides two new causes of action: a contributory misappropriation claim and a direct misappropriation claim both against MusicAI.

For the contributory misappropriation claim, modeling it after copyright contributory infringement, the plaintiffs must prove that the defendant had knowledge of

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[190] *See* Young v. NeoCortext, Inc., 690 F. Supp. 3d. 1091 (2023).

[191] *See generally Id.*; *See generally* Aruni Soni, *Voice Actors' AI Suit Confronts Federal Publicity Rights Gap (1)*, BLOOMBERG LAW (Aug. 14, 2024), https://news.bloomberglaw.com/ip-law/voice-actors-ai-suit-confronts-federal-publicity-rights-gap [https://perma.cc/28NN-QWKB].

[192] Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

[193] *See generally Young*, 690 F. Supp. 3d.

[194] *See* MUSICAI, https://filme.imyfone.com/ai-music-generator/ [https://perma.cc/E6V4-TGQ9] (last visited Jan. 9, 2024).

the misappropriation and materially contributed to that misappropriation.[195] As established above, Ghostwriter977 would be liable for the misappropriation of the voices of both Drake and The Weeknd, so a contributory liability claim can be pursued.[196] Although MusicAI does not have direct knowledge of the specific misappropriation, the platform advertises that its software can be used to replicate the voices of Drake and The Weeknd to develop songs.[197] The fact that MusicAI advertises that the platform can and will likely be used in this manner[198] is sufficient to establish the knowledge prong. Since MusicAI's platform facilitated the creation of the misappropriating work and advertised its ability to facilitate the work, MusicAI materially contributed to the misappropriation. Therefore, Drake and The Weeknd would be successful in establishing that MusicAI is liable for contributory misappropriation of their publicity rights.

Drake and The Weeknd would also likely be successful in a direct misappropriation claim against MusicAI. The first prong is met so all that is left is to establish the second prong. For the second prong, the plaintiffs must prove that the defendant used the plaintiffs' likenesses in such a way that the plaintiffs are identifiable and that the use caused damage to the commercial value of the plaintiffs' likenesses.[199] Here, the homepage for the platform advertises its ability to cover songs using different artists, and the first two examples are Drake covering "Kill Bill" by SZA and The Weeknd covering "Attention" by

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[195] *International Inducement of Copyright Infringements Act of 2004: Hearing on S. 2560 Before S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, The Register of Copyrights).
[196] *See* Kennedy & Rutledge, *supra* note 92.
[197] *See* MUSICAI, https://filme.imyfone.com/ai-music-generator/ [https://perma.cc/E6V4-TGQ9] (last visited Jan. 9, 2024).
[198] *Id.*
[199] 1 MCCARTHY & SCHECHTER, *supra* note 19, at § 3:2.

Charlie Puth.[200] Additionally, the platform utilizes these likenesses for commercial gain because the ability to create covers using the voices of Drake and The Weeknd increases the commercial value of the platform to users and users pay subscriptions to use the platform.[201] The fact that they are the two first artists listed further signifies how access to the artists' likenesses increases the commercial value of the platform. Failure to compensate Drake or The Weeknd for the use of their likeness in the platform amounts to commercial damage to both artists because access to their likenesses in this form would typically be licensed, and being connected to an AI music generator could decrease their reputation and value as a celebrity.[202] Additionally, with the augmented right of publicity, it is irrelevant that the users would know it is the software "singing" rather than the artists. Since the voices of Drake and The Weeknd are made available for replication by MusicAI[203] and MusicAI neglected to compensate the artists, Drake and The Weeknd would be successful in their direct misappropriation claim against MusicAI.

These hypothetical misappropriation cases demonstrate how applying equilibrium-adjustment theory to the right of publicity enables the right to provide the same meaningful protection in one's persona as it did in 1953. In each of the claims mentioned above, the augmented right of publicity protects against modern forms of misappropriation. Protecting celebrities from these innocuous misappropriations incentivizes them to continue

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[200] *See* MUSICAI, https://filme.imyfone.com/ai-music-generator/ [https://perma.cc/E6V4-TGQ9] (last visited Jan. 9, 2024).
[201] *See id.*
[202] *See generally* 1 MCCARTHY & SCHECHTER, *supra* note 19, § 3:2.
[203] *See* MUSICAI, https://filme.imyfone.com/ai-music-generator/ [https://perma.cc/E6V4-TGQ9] (last visited Jan. 9, 2024).

building value in their personas and furthers the original intent behind the right of publicity.[204]

CONCLUSION

The original intent behind the right of publicity was to incentivize individuals to build value in their persona.[205] Case law from the mid to late nineties codified and expanded the scope of protection provided by this right, but since then, the law has remained unchanged.[206] While the law has not changed since the nineties, technology has progressed exponentially. As a result of the improved technological capabilities, it has become easier than ever for people to misappropriate others' publicity rights. Today, one of the primary technological innovations for the facilitation of misappropriation is generative AI.[207]

Generative AI platforms implicate the right of publicity in two ways: through their outputs and the datasets that train the systems. While both the outputs and datasets frequently contain the likenesses of celebrities, the current framework of the right of publicity does not capture some of these forms of misappropriation. The case law from the early nineties has created legal loopholes allowing these more innocuous misappropriations to evade the scope of the right of publicity's protection.[208] These gaps in protection highlighted by generative AI display the need to update the right of publicity so it can provide meaningful

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[204] *See* Zacchini v. Scripps-Howard Broadcasting Co., 443 U.S. 562, 567 (1977).
[205] *Id.*
[206] *See generally The Right of Publicity in the Age of AI*, QUINN EMANUEL TRIAL LAWYERS (Oct. 2, 2023), https://www.quinnemanuel.com/the-firm/publications/the-right-of-publicity-in-the-ai-age/ [https://perma.cc/DT8T-QTVG].
[207] *See* Zhou, *supra* note 4.
[208] *See infra* Section IV.

coverage from modern misappropriation. The proper tool to carry out this update is equilibrium-adjustment theory.

Equilibrium-adjustment theory originated in the context of the Fourth Amendment.[209] It was a way to ensure that the Fourth Amendment provided the same privacy protections today as it was intended to in 1792.[210] The theory balances the anticipated privacy expectations of private citizens with law enforcement interests. As technology has made police work easier (e.g., through the use of thermal imaging guns), the courts have stepped in to prevent the use of such technology, reasoning that allowing the use of such technology would infringe on a privacy right that private citizens have historically enjoyed.[211] The balancing act that is the equilibrium-adjustment theory has provided consistent Fourth Amendment privacy protections with the advancement of technology, but there is no reason to limit equilibrium-adjustment theory to the Fourth Amendment when other areas of law, such as the right of publicity, are facing similar struggles with technology.

Equilibrium-adjustment theory applied to the right of publicity would expand the scope of the right of publicity to capture the innocuous misappropriations that occur with generative AI. The problem with generative AI is that it can create more realistic misappropriating materials faster and easier than ever before which creates an influx of misappropriating material, and the contemporary right of publicity is ill-equipped to handle this misappropriation. Generative AI has tipped the scales too far in favor of infringers, and to tip them back, the courts must begin interpreting these generative AI cases in favor of celebrities to restore the right of publicity to its "year zero" scope. Tipping the scales back and adding stronger protections will further incentivize celebrities to

[209] *See* Kerr, *supra* note 22, at 487.
[210] *Id.*
[211] *Id.* at 497.

build value in their persona and carry on the intent behind the origin of the right of publicity. Otherwise, the value of the personas that the right of publicity was intended to protect will be diluted to nothing, and the right of publicity will cease to provide any meaningful protection in one's likeness.