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DIGITAL PURGATORY AND THE RIGHTS OF THE DEAD: PROTECTING AGAINST DIGITAL DISINTERMENT IN THE AGE OF ARTIFICIAL INTELLIGENCE

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INTRODUCTION

In the age of synthetic media, software such as OpenAI's DALL-E or ChatGPT can generate novel pieces of art and increase the overall supply for society.[1] Deepfakes may allow our favorite performers and personalities to entertain us forever.[2] Though this may be wonderful in some regards, there are also downsides. Synthetic media increases the spread of harmful misinformation and disinformation, unsettles our political order, and sows division in our society.[3] Synthetic media can put tens of thousands of artists and creators out of work.[4] Further, synthetic media creation requires copious amounts of digital source material,[5] and our online personas are ripe for the picking.[6] This theft of one's identity can create economic, emotional, and dignitary harms for the living. After

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1 Cade Metz, *Meet DALL-E, the A.I. That Draws Anything at Your Command*, N.Y. TIMES (Apr. 6, 2022, 11:43 AM), https://www.nytimes.com/2022/04/06/technology/openai-images-dall-e.html [https://perma.cc/3BEG-STJ8] (noting that DALL-E turns text prompts into pieces of digital art, and that its creators plan to offer DALL-E to artists to provide "shortcuts and new ideas" in the creation process); Kevin Roose, *How ChatGPT Kicked Off an A.I. Arms Race*, N.Y. TIMES (Feb. 3, 2023, 4:50 PM), https://www.nytimes.com/2023/02/03/technology/chatgpt-openai-artificial-intelligence.html [https://perma.cc/389Y-Z6ED] (noting that millions of people have already used ChatGPT to write poetry, a form of literary art).

2 *See generally* Shannon Flynn Smith, *If it Looks Like Tupac, Walks Like Tupac, and Raps Like Tupac, It's Probably Tupac: Virtual Cloning and Postmortem Right-of-Publicity Implications*, 2013 MICH. ST. L. REV. 1719 (2013) (discussing the rise of concerts performed by digital replicas of deceased entertainers, such as Tupac); *see also* Justin Matthews & Angelique Nairn, *Holograms and AI Can Bring Performers Back From the Dead – But Will the Fans Keep Buying It?*, THE CONVERSATION, (June 1, 2023, 4:00 PM), https://theconversation.com/holograms-and-ai-can-bring-performers-back-from-the-dead-but-will-the-fans-keep-buying-it-202431 [https://perma.cc/Y78P-5V4E] (discussing similar holographic tours by deceased artists such as Frank Zappa and Roy Orbison, and proposed tours for Whitney Houston, Amy Winehouse, and Ronne James Dio).

3 *See infra* Part I.

4 Marc Tracy, *Digital Replicas, a Fear of Striking Actors, Already Fill Screens*, N.Y. TIMES (Aug. 4, 2023, 4:43 PM), https://www.nytimes.com/2023/08/04/arts/television/actors-strike-digital-replicas.html [https://perma.cc/RRP6-5TFD] (noting that seventeen thousand active members of SAG-AFTRA performed background work that could be replaced by digital replicas within the last year).

5 *The Global AI Training Dataset Market Size is Expected to Reach $3.1 Billion by 2027, Rising at a CAGR of 17.4%*, CISION: PR NEWSWIRE (Dec. 13, 2021, 7:15 AM), https://www.prnewswire.com/news-releases/the-global-ai-training-dataset-market-size-is-expected-to-reach-3-1-billion-by-2027--rising-at-a-cagr-of-17-4-301442994.html [https://perma.cc/9Y5S-U8GP] ("Artificial intelligence trains machines to process a huge volume of data and control patterns to complete the task given to them.").

6 *See generally* Benj Edwards, *AI Image Generation Tech Can Now Create Life-Wrecking Deepfakes With Ease*, ARS TECHNICA (Dec. 9, 2022, 2:10 PM), https://arstechnica.com/information-technology/2022/12/thanks-to-ai-its-probably-time-to-take-your-photos-off-the-internet [https://perma.cc/RX58-NCK2] ("By some counts, over 4 billion people use social media worldwide. If any of them have uploaded a handful of public photos online, they are susceptible to this kind of [digital] attack from a sufficiently motivated person.").

one's death, those harms can be passed on to one's surviving family and loved ones.[7]

Historically, the unauthorized use of one's likeness or copyrighted material has been protected via the right of publicity, trademark law, and copyright law.[8] While trademark and copyright law offer federal protections, the right of publicity remains a state cause of action.[9] Today, rights of publicity protections vary widely amongst the states, casting a shadow of confusion over citizens and courts alike.[10]

This Note will attempt to show that the existing patchwork of rights of publicity statutes and case law are inadequate to protect citizens from online harms in the age of synthetic media.[11] Particularly, this Note will focus on postmortem right of publicity interests and protections because a robust market for the likenesses of deceased personalities exists and will likely grow in the age of synthetic media.

Part I will explain how synthetic media may contribute to an increase in the harms associated with rights of publicity violations, particularly after death. Part II will begin by outlining the legal landscape of publicity protections and postmortem protections. It will then highlight that different conceptualizations of the right can lead to different results for litigants. Next, Part II will discuss how trademark law and copyright law can serve as federal "analogs" to postmortem rights of publicity protections. Lastly, Part II will compare and contrast features from various postmortem rights of publicity statutes to assess which components are most and/or least desirable to include in a federal statute. Part III will then argue that the existing mosaic of state protections and federal analogs are inadequate to protect citizens from the dignitary and emotional harms that synthetic media will exacerbate. Part III will then propose key features of a federal postmortem right of publicity statute that would realign federal protection with the interests the right was initially intended to protect—namely, the right to privacy and control over the use(s) of one's likeness.

I. NATURE OF THE PROBLEM

If your likeness was non-consensually used to create a pornographic deepfake, would you want recourse? If that deepfake was created after

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7 *See infra* Section I.B.

8 *See infra* Sections II.A–II.B.

9 *See infra* Sections II.A–II.B.

10 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:6 (2d ed. 2023).

11 *See infra* Part III.

your death, would that change your answer? Should your friends or family be able to defend your dignity after your death? If so, what should their remedies be?

The proliferation of deepfakes and digital replicas by artificially intelligent (AI) software makes it increasingly difficult to determine when a piece of media has been altered.[12] Yet, synthetic media is nothing new.[13] Today, AI-generated synthetic media is often created by using existing datasets containing images, sounds, video, or text to "train" the software, which then creates either a digital replica of the source content or an entirely novel piece of content.[14]

Advancements in AI allow parties to create digital replicas, increasing the likelihood that public figures and ordinary citizens alike will have their rights of publicity violated during their lifetime.[15] Though this technology will open new avenues of artistic expression, deepfakes and synthetic media can be pernicious because humans tend to spread "negative and novel" information more readily than accurate news.[16] Infamously, Russia used social media bots to interfere in the United States' 2016 presidential election and widen political schisms.[17] Further, Russian social media bots have spread both pro- and anti-vaccine content on social media to further discord since at least 2018.[18] After Russia invaded Ukraine in February 2022, videos of Ukrainian president Volodymyr Zelenskyy asking Ukrainians to cease resisting and surrender to Russia appeared on social media—these videos were fake.[19] The viral

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12 Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1759 (2019).

13 Hany Farid, *Creating, Using, Misusing, and Detecting Deep Fakes*, J. ONLINE TR. & SAFETY, Sept. 20, 2022, at 1–2.

14 *Id.* at 2–7.

15 Chesney & Citron, *supra* note 12, at 1759–68.

16 *Id.* at 1766–67 (noting that humans are particularly attentive to novel, negative threats; "falsehoods were 70 percent more likely to get retweeted than accurate news").

17 Tim Mak & Dina Temple-Raston, *Where are the Deepfakes in This Presidential Election?*, NPR: MORNING EDITION (Oct. 1, 2020), https://www.npr.org/2020/10/01/918223033/where-are-the-deepfakes-in-this-presidential-election [https://perma.cc/J99J-SB4E]; David McCabe & Davey Alba, *Facebook Says it Will Ban 'Deepfakes'*, N.Y. TIMES (Jan. 7, 2020), https://www.nytimes.com/2020/01/07/technology/facebook-says-it-will-ban-deepfakes.html [https://perma.cc/4XZL-Y6SH].

18 Ana Santos Rutschman, *The COVID-19 Vaccine Race: Intellectual Property, Collaboration(s), Nationalism and Misinformation*, 64 WASH. U. J.L. & POL'Y 167, 200 (2021).

19 Kate Conger, *Hackers' Fake Claims of Ukrainian Surrender Aren't Fooling Anyone. So What's Their Goal?*, N.Y. TIMES (Apr. 5, 2022), https://www.nytimes.com/2022/04/05/us/politics/ukraine-russia-hackers.html [https://perma.cc/YYV7-4ZQQ].

spread of synthetic misinformation skews the public's perception of truth and reality, propagates division, and undermines democracy.[20]

During a health crisis, it can be particularly dangerous to spread misinformation.[21] Amidst the COVID-19 pandemic, social media influencers like Joe Rogan spread medical misinformation to their millions of loyal listeners.[22] In fact, the Center for Countering Digital Hate found that just twelve individuals were responsible for sixty-five percent of vaccine misinformation on social media platforms, dubbing them the "disinformation dozen."[23] Imagine the harm a bad actor could do if they used someone like Joe Rogan's likeness, without their consent, to spread either misinformation or disinformation via a deepfake.[24] In response to lawmakers' fears, Facebook and Twitter each announced bans on certain kinds of deepfakes in 2020.[25] These platforms sought to

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20 *See* Farid, *supra* note 13, at 10 (explaining the liar's divided as "providing the liar with the double-fisted weapon of both spreading falsehoods and using the specter of digital manipulation to cast doubt on the veracity of any inconvenient truths"); Jackson Cote, *Deepfakes and Fake News Pose a Growing Threat to Democracy, Experts Warn*, NE. GLOB. NEWS (Apr. 1, 2022), https://news.northeastern.edu/2022/04/01/deepfakes-fake-news-threat-democracy [https://perma.cc/XN6X-ZT2T] ("Deepfakes can potentially interfere with democratic elections and be used as propaganda to sow division and doubt . . . .").

21 Meghan McCarty Carino & Rosie Hughes, *Why Visual Misinformation Online Can be Tough to Stop*, MARKETPLACE (Jan. 31, 2023), https://www.marketplace.org/shows/marketplace-tech/why-visual-misinformation-online-can-be-tough-to-stop [https://perma.cc/RR7Z-SG5X] ("Visuals are the lingua franca of the internet, but their potential to easily spread misinformation—particularly about health topics—make them especially dangerous to the public.").

22 *See* Ben Rein, *Harnessing Social Media to Challenge Scientific Misinformation*, 185 CELL 3059, 3060, 3064 (2022).

23 CTR. FOR COUNTERING DIGIT. HATE, THE DISINFORMATION DOZEN: WHY PLATFORMS MUST ACT ON TWELVE LEADING ONLINE ANTI-VAXXERS 6 (2021), https://counterhate.com/wp-content/uploads/2022/05/210324-The-Disinformation-Dozen.pdf [https://perma.cc/92H7-3B4L].

24 *"Misinformation* is 'false information that is spread, regardless of intent to mislead.'" Meanwhile, disinformation refers to "'deliberately misleading or biased information; manipulated narrative or facts; propaganda.'" *"Misinformation" vs. "Disinformation"; Get Informed on the Difference*, DICTIONARY.COM (Aug. 15, 2022), https://www.dictionary.com/e/misinformation-vs-disinformation-get-informed-on-the-difference [https://perma.cc/KF2X-BPQY]; Joe Rogan's podcast, *The Joe Rogan Experience*, was Spotify's most popular podcast of 2020, 2021, and 2022. *See It's Here: The Top Songs, Artists, Podcasts, and Listening Trends of 2022*, SPOTIFY (Nov. 30, 2022), https://newsroom.spotify.com/2022-11-30/the-top-songs-artists-podcasts-and-listening-trends-of-2022 [https://perma.cc/VS65-2GEN]. Spotify had 515 million monthly active users as of April 2023. *See* Paul Sawers, *Spotify Passes 500M Users, but its Premium Subscriber Portion Falls to 40%*, TECHCRUNCH (Apr. 25, 2023, 7:42 AM), https://techcrunch.com/2023/04/25/spotify-now-has-more-than-500m-users [https://perma.cc/8XSU-HDP5].

25 *See* McCabe & Alba, *supra* note 17; Shirin Ghaffary, *Twitter is Finally Fighting Back Against Deepfakes and Other Deceptive Media*, VOX (Feb. 4, 2020, 4:00 PM), https://www.vox.com/recode/2020/2/4/21122653/twitter-policy-deepfakes-nancy-pelosi-biden-trump [https://perma.cc/ZP82-55FL].

ban "misleading" and "deceptive" deepfakes while leaving carveouts for parody and satire.[26]

Platforms took a narrower approach than banning deepfakes altogether, perhaps, because they feared the public would perceive such a broad ban as infringing their First Amendment rights,[27] and prohibiting harmless tools like filters that allow one to swap genders or artificially age their face.[28] Even if platform moderators remove a particular piece of content, they cannot catch all misinformation users share on their respective sites before millions view them because "[c]atching deepfakes with AI is something of a cat-and-mouse game."[29] Meaning, as detection tools improve, synthetic media will improve to avoid detection.[30] Lawmakers and social media platforms are seeking to guard against deceptive synthetic media due to its ability to hinder our collective responses to health crises.[31]

While it is clear that synthetic media can negatively impact political cohesion and hinder responses to health crises,[32] it is less clear how synthetic media can negatively impact an individual who does not typically use their likeness in a commercial setting. Instinctively, it is clear why many want to control the use of their likeness: an invasion of one's right of publicity is an invasion of one's right to privacy.[33] Others, however, want to protect their respective rights of publicity because they

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26 Monika Bickert, *Enforcing Against Manipulated Media*, META (formerly Facebook) (Jan. 6, 2020), https://about.fb.com/news/2020/01/enforcing-against-manipulated-media [https://perma.cc/XXV8-UG9B].

27 Many people mistakenly believe that private institutions are not allowed to infringe on their First Amendment rights. *See* AJ Willingham & Scottie Andrew, *The First Amendment Doesn't Guarantee You the Rights You Think it Does*, CNN: POLITICS (Jan. 12, 2021, 11:56 AM), https://www.cnn.com/2021/01/12/politics/first-amendment-explainer-2021-trnd/index.html [https://perma.cc/CZY2-VUD9]. This is incorrect, as the First Amendment only applies to governmental infringement. *Id.*

28 James Vincent, *Facebook's Problems Moderating Deepfakes Will Only Get Worse in 2020*, THE VERGE (Jan. 15, 2020, 12:36 PM), https://www.theverge.com/2020/1/15/21067220/deepfake-moderation-apps-tools-2020-facebook-reddit-social-media [https://perma.cc/478N-XSKC].

29 Will Knight, *Deepfakes Aren't Very Good. Nor Are the Tools to Detect Them*, WIRED (June 12, 2020, 1:38 PM), https://www.wired.com/story/deepfakes-not-very-good-nor-tools-detect [https://perma.cc/6SQG-3P8H].

30 Zoom Interview with Hany Farid, Digit. Forensics Expert and Prof., U.C. Berkeley (Oct. 24, 2022) [hereinafter *Farid Interview*]; Farid, *supra* note 13, at 19–20.

31 *See* Health Misinformation Act of 2021, S. 2448, 117th Cong. § 2(1) (2021) ("Access to accurate and reliable information is crucial for public health and safety during a national emergency or crisis, such as the COVID-19 pandemic.").

32 *See supra* notes 19–23 and accompanying text.

33 Though not explicitly stated in the Constitution as a fundamental right, the right of privacy traces back to 1849 and means either: (1) "[t]he right to personal autonomy," or (2) "[t]he right of a person and the person's property to be free from unwarranted public scrutiny or exposure." *Right of Privacy*, BLACK'S LAW DICTIONARY (11th ed. 2019).

view them as intangible property interests[34]—this is particularly true for celebrities and those seeking to monetize their respective likenesses.[35] Yet, today anyone can become "internet famous" overnight and their social media profile can be used to create synthetic media.[36] Therefore, as "ordinary citizens" continue to use social media and synthetic media improves, those citizens should expect that they are increasingly at risk for a bad actor to violate their rights of publicity.[37]

In addition to deceptive digital replicas, synthetic media can use another's likeness or intellectual property to create a completely novel piece of content.[38] If that piece of synthetic media uses an individual's likeness in the creation process, but the resulting content in no way resembles the individual, it leaves the question as to whether there has been a harm. Can one's right of publicity be violated if that piece of media is created and released after one's death? Can an individual even be harmed after death? Today's spread of synthetic media requires us, as a society, to revisit the deeply philosophical questions of: what remains of one's right of publicity after death, who can enforce those rights, should the law protect postmortem rights of publicity, and if so, how?

A. *Synthetic Media is Causing Economic and Dignitary Injuries*

Synthetic media greatly increases the ease with which a bad actor can non-consensually appropriate a famous person's likeness for commercial purposes, which would reduce the economic value of that celebrity's likeness and potentially confuse consumers.[39] Celebrities and other public figures often monetize their likenesses by authorizing third

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34 *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (applying principles of property and tort law to argue that one's right to privacy should be recognized and protected).

35 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:1 (5th ed. 2023).

36 Noa Dreymann, *John Doe's Right of Publicity*, 32 BERKELEY TECH. L.J. 673, 709–10 (2017).

37 *See* Chesney & Citron, *supra* note 12 , at 1760 n.15 and accompanying text.

38 *See, e.g.*, Speaking of AI, *AI Wrote and Performed a Jerry Seinfeld Routine!*, YOUTUBE (June 17, 2022), https://www.youtube.com/watch?v=1onxri0duN0 [https://perma.cc/8BHU-TPM9].

39 *See* Nadiya Ivanenko, *Deepfakes in Advertising Could Change the Industry, Creating New Legal and Ethical Issues*, MEZHA (Oct. 10, 2022, 4:57 PM), https://mezha.media/en/2022/10/26/deepfakes-in-advertising-could-change-the-industry-creating-new-legal-and-ethical-issues [https://perma.cc/KSM4-C9ZL] (noting that Woody Allen won a five million dollar settlement with American Apparel in 2009 for a right of publicity violation in an advertisement, and that "some celebrities may soon be inundated with advertisements featuring their unauthorized but very convincing likenesses"); *see also* Metz, *supra* note 1; Roose, *supra* note 1.

parties to use their likenesses for advertising and endorsement.[40] Synthetic media production makes this process much simpler. For example, despite his retirement from acting, Bruce Willis was widely reported to have licensed his likeness for a Megafon television commercial in Russia.[41] What is unique is that Willis never needed to step foot in Russia—instead, the advertisement creator, Deepcake, used tens of thousands of images to synthetically recreate Willis's likeness onto the body of a Russian actor.[42] Willis reportedly said that synthetic media offers "a great opportunity for [him] to go back in time. . . . With the advent of modern technology, [he] could communicate, work and participate in the filming, even being on another continent."[43]

As evidenced by Willis's commercial endeavor, synthetic media production can create a boon for celebrities by making it easier to contribute to artistic projects from afar.[44] If rights of publicity are not protected and bad actors can use another's likeness with impunity, then classical economic theory would suggest that the value of that image will decline because the market reached saturation.[45] The ease with which celebrities can monetize their likenesses via synthetic media is similar to the ease with which a bad actor could profit off of and cheapen the value of their respective rights of publicity.[46]

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40 *See, e.g.*, Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953) (disputing defendant's unauthorized use of players' likenesses on baseball cards); *cf.* Make Him Smile, Inc. v. Trek Bicycle Corp., No. 17-CV-07136, 2018 WL 5986983, at *1 (C.D. Cal. Jan. 18, 2018) (highlighting that Defendant's improper use of Plaintiff's likeness "devalued" Plaintiff's intellectual property due to Defendant's product recall).

41 Alice Hearing, *Bruce Willis Denies Selling the Rights to His Face Despite Appearing in Deepfake Russian Commercial*, FORTUNE (Oct. 3, 2022, 7:20 AM), https://fortune.com/2022/10/03/bruce-willis-denies-selling-rights-to-face-despite-appearing-deepfake-russian-commercial [https://perma.cc/X52C-JZMR] (chronicling the dispute between Willis and Deepcake—the Megafon advertisement's creator).

42 *Id.*

43 Maria Noyen, *Bruce Willis is Allowing Himself to be Deepfaked so His 'Digital Twin' Can Continue to Act After His Aphasia Diagnosis, Report Says*, INSIDER (Oct. 1, 2022, 8:05 AM), https://www.insider.com/bruce-willis-keeps-acting-through-deepfakes-after-aphasia-diagnosis-2022-10 [https://perma.cc/6725-M4MV]. *But see* Hearing, *supra* note 41 (noting that Willis denies licensing his likeness to Deepcake).

44 Noyen, *supra* note 43.

45 Marshall Hargrave, *Market Saturation*, INVESTOPEDIA (May 28, 2021), https://www.investopedia.com/terms/m/marketsaturation.asp [https://perma.cc/7JP5-MF24] ("[C]ompanies that operate in a saturated market usually end up waging price wars with each other, continuously undercutting prices to attract consumers.").

46 *See* Lutz Finger, *Overview of How to Create Deepfakes—It's Scarily Simple*, FORBES (Sept. 8, 2022, 8:00 AM), https://www.forbes.com/sites/lutzfinger/2022/09/08/overview-of-how-to-create-deepfakesits-scarily-simple/?sh=119031d82bf1 [https://perma.cc/J6BD-U3DN] (noting that one need not have programming skills to create a deepfake; it can be free to make and can take less than thirty seconds).

In addition to these potential economic harms, unauthorized uses of one's likeness in synthetic media can impose significant dignitary harms upon individuals. For example, individuals whose likenesses have been non-consensually used in pornographic deepfakes report feeling "humiliated," "scared," and reduced to "sex objects."[47] Some deem non-consensual pornographic videos to be a form of digital rape.[48] Furthermore, reputationally damaging pornographic deepfakes injure one's romantic and business opportunities, as well as their personal relationships.[49] In broader terms, losing control of one's online embodiment creates "profound" losses of liberty that follows them offline.[50] Given that one's right of publicity is increasingly separable from the identity-holder,[51] an identity-holder may lose their ability to control how their likeness is used in public.

When an identity-holder severs their right of publicity from their identity, the interests of a publicity-holder and identity-holder differ and can lead to conflict.[52] For instance, the publicity-holder could non-consensually use the identity-holder's likeness in a manner that courts have held to be akin to involuntary servitude and slavery.[53] Courts have described the forced alienization of one's right of publicity as similar to involuntary servitude because the publicity-holder could "affirmatively control the use of the identity-holder's name, likeness, and other indicia of identity" and potentially limit the identity-holder's endorsement and public appearance opportunities.[54] Today, synthetic media largely eliminates the concern that a living identity-holder will be compelled to

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47 Chesney & Citron, *supra* note 12, at 1773; Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1924–28 (2019).

48 Sophie Maddocks, *From Non-Consensual Pornography to Image-Based Sexual Abuse: Charting the Course of a Problem with Many Names*, 33 AUSTL. FEMINIST STUD. 345, 352 (2018) (defending the use of "digital rape" against criticism that it underplays the severity of physical rape).

49 Dhruva Krishna, *Deepfakes, Online Platforms, and a Novel Proposal for Transparency, Collaboration, and Education*, 27 RICH. J.L. & TECH. 4, 17 (2021) (citing Chesney & Citron, *supra* note 12, at 1774).

50 Mary Ann Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 238 (2011) (describing the loss of control of one's online embodiment as "profound"); *id.* at 246 (noting the ways that online harms follow women offline).

51 Identity-holder refers to the "underlying natural person upon whom the right of publicity and sometimes trademarks are based. The "publicity-holder is the person or entity that owns a person's right of publicity." Importantly, "if the right of publicity is transferable, then the publicity-holder could be someone other than the identity-holder." Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1273 n.2 (2022).

52 *Id.* at 1329–30 nn.285–91 and accompanying text.

53 *Cf.* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 189, 199, 212 (2012) (noting that forcing an in-person public appearance is akin to involuntary servitude and slavery).

54 *Id.* at 200.

physically appear in certain places. However, the unauthorized existence of one's likeness in public can still yield significant dignitary harms to living identity-holders.

For example, if the likeness of a Holocaust survivor was non-consensually used in a piece of media that denies the Holocaust occurred, whether the bad actor made money would likely be of less import than the fact that the survivor's likeness was used to deny their most traumatic lived experience.[55] Or, suppose you are devoutly religious, and your likeness was used to promote behavior your religion considered sinful. Though perhaps extreme, these examples highlight how non-commercial, non-consensual use of one's identity can cut to the core of one's identity and harm one's dignity.

B. *Synthetic Media Will Likely Cause Economic and Dignitary Harm After Death*

Rights of publicity violations cannot directly harm individuals after their deaths because they are dead. However, because the right of publicity is often treated as an intangible property interest, rights of publicity violations can economically harm heirs, devisees, assignees, licensees, and any other third-party publicity-holder.[56] Synthetic media allows a celebrity's estate to generate substantial revenue after the identity-holder's death.[57] If the legal system does not adequately protect separable postmortem rights of publicity, then identity-holders' estates may not receive the full financial windfalls associated with authorizing a third party's use of the identity-holders' likenesses.[58] Absent postmortem protections, synthetic media can allow bad actors to drive the market

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55 *See* Claire Leibowicz, *Preparing for a World of Holocaust Deepfakes*, TABLET (May 4, 2021), https://www.tabletmag.com/sections/news/articles/holocaust-denial-deepfakes-misinformation-claire-leibowicz [https://perma.cc/W355-WLFC]; USC Shoah Foundation, *Deepfakes and Holocaust Testimony*, YOUTUBE (Oct. 7, 2021), https://www.youtube.com/watch?v=xqUDFAAPjsM [https://perma.cc/A2EY-2U9A] (discussing historical uses of manipulated media to deny the Holocaust and other genocides, and how deepfakes pose risks to historical preservation).

56 Rothman, *supra* note 53, at 237–40.

57 Loren Cheri Shokes, *Life After Death: How to Protect Artists' Post-Mortem Rights*, 9 HARV. J. SPORTS & ENT. L. 27, 35–36 (2018) (noting that Michael Jackson's estate's value increased by one billion dollars after his death because it partnered with Cirque du Soleil to create holographic performances).

58 For example, the Hebrew University of Jerusalem, Albert Einstein's publicity-holder, could not pursue a postmortem right of publicity claim against General Motors for its use of Einstein's likeness because the court held that Einstein's postmortem right of publicity terminated fifty-years after his death. *See* Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 942 (C.D. Cal. 2012).

value of a celebrity's likeness to zero because that likeness's ubiquity will destroy its good will.[59]

Though a dead person cannot directly experience dignitary or emotional harms,[60] synthetic media will exacerbate the harms that their heirs and subsequent publicity-holders can experience. A dead person's private information is still attached to the living world via the interpersonal relationships that the identity-holder had while alive.[61] "Post-mortem privacy . . . is located in and across relationships and as such [is] deeply social; it is not protective of the individual versus the community, but of individuals within communities and is constitutive of these communities."[62] According to Professor Jennifer Rothman, "postmortem right[s] of publicity . . . protect the dignitary and emotional interest of the close survivors, such as a child, who might not want to see her parent's image and name used on a sex toy line" after the parent's death.[63]

Professor Rothman's conception of postmortem dignitary harm suggests that postmortem rights of publicity (PROP) should extend beyond one's death, but not beyond the first generation of living heirs.[64] For the right of publicity to better address dignitary harms, some believe that it should function like a tort "to better reflect its roots in dignity and privacy."[65] Those scholars believe that if the claim seeks to address a predominantly economic harm, it should fall under trademark law which

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59 Given that courts often recognize a property right in a celebrity's likeness similar to that of a trademark holder under section 43(a) of the Lanham Act, trademark law's notion of goodwill as an intangible asset is instructive for right of publicity analysis. *See* 5 MCCARTHY, *supra* note 35, § 28:15; 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 2:15 (5th ed. 2023) ("Great care must be taken in the nature of [good will's] use and in the way it is assigned or licensed, lest the significance of the mark be damaged or destroyed.").

60 Protecting one's right to privacy "protects against intrusion upon an individual's private self-esteem and dignity." 5 MCCARTHY, *supra* note 35, § 28:6. Privacy rights terminate "with the person whose privacy was allegedly invaded." 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 9:1 (2d ed. 2023).

61 For example, Facebook allows the accounts of the deceased to turn into "memorialized accounts" to serve as a tribute. It is not uncommon for friends and family to post memories or condolences. Catherine Shu, *Facebook is Introducing a New 'Tributes' Section for Memorialized Accounts*, TECHCRUNCH (Mar. 4, 2019, 11:38 PM), https://techcrunch.com/2019/03/04/facebook-is-introducing-a-new-tributes-section-for-memorialized-accounts [https://perma.cc/Q86G-VA3C].

62 Uta Kohl, *What Post-Mortem Privacy May Teach Us About Privacy*, 47 COMPUT. L. & SEC. REV., Nov. 2022, at 16.

63 Jennifer E. Rothman, *The Right of Publicity: Privacy Reimagined for New York*, 36 CARDOZO ARTS & ENT. L.J. 573, 595 (2018).

64 *Id.*; Rothman, *supra* note 53, at 240.

65 Fred O. Smith, Jr., *The Constitution After Death*, 120 COLUM. L. REV. 1471, 1511 (2020) (citing JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 72–73 (2018) [hereinafter ROTHMAN, PRIVACY REIMAGINED]. *But see generally* Olivia Wall, *A Privacy Torts Solution to Postmortem Deepfakes*, 100 WASH. U. L. REV. 885 (2023) (proposing that existent privacy torts are inadequately suited to combat postmortem deepfakes).

requires market confusion.[66] As Part II will discuss, postmortem rights of publicity claims often overlap with claims of trademark infringement and copyright violation, but differ in their treatment of dignitary and emotional harms.

II. LEGAL LANDSCAPE

A. *Origin of the Right of Publicity*

The right of publicity originated in 1890[67] and seeks to protect an identity-holder from their likeness being circulated without their consent.[68] Initially, Samuel D. Warren and not-yet Justice Brandeis conceived of the right of publicity as a derivative of Thomas Cooley's "right to be let alone."[69] Warren and Brandeis believed that unwanted publicity inflicts more severe "mental pain and distress" than bodily injuries.[70] New York became the first state to enact a privacy statute in 1903, following the New York Court of Appeals' rejection of common law privacy rights the year prior.[71] By the mid-twentieth century, U.S. courts largely accepted that one had a right to privacy,[72] and conceived of that right as "personal and not proprietary[,]" meaning that "the damages are exclusively those of mental anguish."[73]

Following the Second Circuit's 1953 decision in *Haelan v. Topps*, courts began to treat the right of publicity as an intangible property interest because privacy rights inadequately protected celebrities' interests in monetizing their respective likenesses.[74] By the 1970s, courts largely accepted that rights of publicity were "new and separate legal

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66 Smith, *supra* note 65, at 1511 (citing Mark A. Lemley, *Privacy, Property, and Publicity*, 117 MICH. L. REV. 1153, 1153–54 (2019) (reviewing ROTHMAN, PRIVACY REIMAGINED, *supra* note 65)).

67 "The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will." *See* Warren & Brandeis, *supra* note 34, at 214–15 (establishing the right to privacy, from which the right of publicity derivates).

68 *See* ROTHMAN, PRIVACY REIMAGINED, *supra* note 65, at 20.

69 *Id.*

70 *Id.*

71 MCCARTHY & SCHECHTER, *supra* note 10, § 1:16.

72 *Id.* § 1:18.

73 *Id.* (citing Eick v. Perk Dog Food Co., 106 N.E.2d 742, 745 (Ill. App. Ct. 1952)).

74 Lemley, *supra* note 66, at 1154; Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) ("[I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph . . . .").

right[s], quite different in shape from the more familiar 'hurt feelings' or 'insulted dignity' right of privacy."[75]

The Supreme Court first addressed the right of publicity and distinguished it from the right to privacy in the seminal 1977 case, *Zacchini v. Scripps-Howard Broadcasting Co*. There, the Court held that Defendant's broadcast of Zacchini's entire human-cannonball act violated Zacchini's right of publicity because it effectively prevented Zacchini from charging an admission fee for his act or capitalizing on his good will.[76] Since *Haelan* and *Zacchini*, publicity claims largely focused on a plaintiff's economic harms, whereas privacy claims focused on dignitary harms.[77]

By the 1990s, the right of publicity had gained enough acceptance that it found its way into the 1995 Restatement of the Law of Unfair Competition.[78] The Restatement described the right of publicity as "resting on [the] protection of 'personal dignity and autonomy,' and thus concludes that only real persons, not corporations or other legal entities, have a right of publicity."[79]

The right of publicity, as a vestige of one's right of privacy, protects against dignitary harms in addition to economic harms.[80] Both economic claims and dignitary ones promote and protect "individual dignity, personhood, and liberty, and the recovery of (and prevention of) economic and emotional injuries to an individual."[81] Contrary to popular framing, Rothman posits that *Haelan*'s legacy was not creating a property interest in one's right of publicity but, rather, that *Haelan* made publicity rights potentially transferable.[82] The transferability of publicity rights may limit an identity-holder's ability to bring claims of dignitary harm against the publicity-holder or an infringer because the parties may have diametrically opposing incentives.[83] Similarly, the alienability of publicity rights limits a publicity-holder's ability to bring claims of dignitary harm against an infringer because dignitary harms are specific to an identity-holder.[84] When the publicity-holder, who has an economic incentive to preserve the identity-holder's reputation, is no longer the

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75 MCCARTHY & SCHECHTER, *supra* note 10, § 1:32.

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

77 ROTHMAN, PRIVACY REIMAGINED, *supra* note 65, at 64, 110.

78 MCCARTHY & SCHECHTER, *supra* note 10, § 1:32.

79 *Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmts. c–d. (AM. L. INST. 2022)).

80 ROTHMAN, PRIVACY REIMAGINED, *supra* note 65, at 64.

81 *Id.* at 112; *see also* Rothman, *supra* note 53, at 187.

82 ROTHMAN, PRIVACY REIMAGINED, *supra* note 65, at 64.

83 *See* Rothman, *supra* note 53, at 209–11 (noting that if one's right of publicity were freely alienable, then the publicity-holder could compel an identity-holder to virtually appear and endorse products, even if those products/appearances caused dignitary harm to the identity-holder).

84 ROTHMAN, PRIVACY REIMAGINED, *supra* note 65, at 112.

identity-holder, the publicity-holder cannot sue for indignities and slights to the identity-holder.

Rothman argues that "[a]llowing the transfer of a person's name and likeness and other indicia of identity significantly impairs the rights to liberty, freedom of speech, and freedom of association."[85] If rights of publicity are alienable, then creditors and ex-spouses could potentially control another's publicity rights, and force virtual appearances and endorsements.[86] As postmortem virtual appearances become more common, legislators must decide whether, and if so how, to limit the alienability of publicity rights so as to protect against both dignitary and economic harms.

1. Origin of the Postmortem Right of Publicity

What happens when the identity-holder dies? Traditionally, one's right of publicity did not extend beyond death.[87] The rationale is that they are dead and thus cannot complain. Can, and should, their likenesses enter the public domain?

Today, some states have postmortem rights of publicity while others do not.[88] New York and California, as states with higher concentrations of celebrities and high net-worth individuals, offer fairly robust rights of publicity protections—even after death.[89] These states adopt the view that "the right of publicity recognizes a property right in identity that can be legally separated from the person" and "can endure long beyond the living self of the individual who creates it."[90] Meanwhile, other state legislatures do not recognize postmortem rights of publicity because, as privacy-based rights, they think it should terminate at death.[91] Regardless of which side's claims are more valid, the heirs and assignees of deceased

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85 *Id.* at 119.

86 *See* Rothman, *supra* note 53, at 199–202.

87 Peter L. Felcher & Edward L. Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 YALE L.J. 1125, 1127 (1980).

88 MCCARTHY & SCHECHTER, *supra* note 10.

89 *See* CAL. CIV. CODE § 3344.1 (Deering 2022) (protecting postmortem rights of publicity for seventy years after the identity-holder's death); *see also* N.Y. CIV. RIGHTS LAW § 50-f (McKinney 2022) (protecting postmortem rights of publicity for forty years after the identity-holder's death).

90 MCCARTHY & SCHECHTER, *supra* note 10, § 1:26 (citing Robert C. Post, *Rereading Warren & Brandeis: Privacy, Property and Appropriation*, 41 CASE W. L. REV. 647, 668 (1991)).

91 *See* Rothman, *supra* note 53, at 203; *see also* Jennifer E. Rothman, *Montana*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/montana [https://perma.cc/6ETC-X789]; Jennifer E. Rothman, *Kansas*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/kansas [https://perma.cc/CA9G-D4W4]; MCCARTHY & SCHECHTER, *supra* note 10, § 1:27 ("'[P]rivacy' could never be the foundation of a commercial market for 'publicity values' because the law had defined privacy as a person, nonassignable right.").

celebrities' rights of publicity have vested economic interests in protecting the deceased identity-holder's postmortem right of publicity.[92] Furthermore, a decedent's loved ones may experience dignitary harms of their own when the identity-holder's likeness is unflatteringly misappropriated by a bad actor.[93]

2. Is the Right of Publicity a Privacy Right or Property Interest?

Whether courts treat the right of publicity as a privacy-based right or property interest impacts citizens' abilities to protect their postmortem rights of publicity. If the legal system conceives of one's right of publicity as a privacy right, then it terminates at the identity-holder's death—thus, eliminating postmortem publicity rights.[94] In this scenario, heirs and other third-party publicity-holders would likely not have standing to sue an infringer because the "dignitary and proprietary interests that support the recognition of a right of publicity become substantially attenuated after death."[95] On the other hand, if the legal system conceives of one's right of publicity as a property interest, then it can be sold, assigned, licensed, and others can be excluded from its use—sometimes in perpetuity.[96]

Courts treat rights of publicity cases differently depending upon their jurisdiction's conception of the right of publicity. At the federal level, courts must spend a tremendous amount of time discussing where the parties are domiciled, which state's law to apply, and guessing how the state's highest court would rule on the matter (if the right is derived

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92 The Hebrew University of Jerusalem currently earns about $12.5 million per year in licensing fees for the use of Albert Einstein's likeness. *See* Simon Parkin, *Who Owns Einstein? The Battle for the World's Most Famous Face*, THE GUARDIAN (May 17, 2022, 1:00 PM), https://www.theguardian.com/media/2022/may/17/who-owns-einstein-the-battle-for-the-worlds-most-famous-face [https://perma.cc/7X6R-LU6B].

93 Rothman, *supra* note 53, at 238 ("Although postmortem privacy claims are almost universally rejected (unless a claim arose prior to death), a number of states have allowed limited privacy actions by surviving relatives grounded in the survivors' own privacy interests rather than those of the deceased.").

94 Rothman, *supra* note 53, at 203 ("Privacy rights terminate with the death of the privacy-holder. Once a person is dead, she can no longer suffer the dignitary or emotional harms that flow from a violation of privacy rights.").

95 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. h (AM. L. INST. 2022). *But see* Rothman, *supra* note 53, at 238 ("[A] California Court of Appeal recently permitted the parents and siblings of a deceased teenager to bring a privacy-based suit against the highway patrol, whose officers had circulated photographs of their daughter and sister's mutilated and decapitated head and body.").

96 *See* Rothman, *supra* note 53, at 188; *see also id.* at 196–98.

from common law as opposed to statute).[97] Today, these differing conceptions of rights of publicity create a landscape in which individuals, businesses, attorneys, and courts do not firmly understand the interests at stake.

For instance, in *Reynolds*, Arizona's Court of Appeals discussed the distinction between one's right of privacy and one's right of publicity. The *Reynolds* court discussed the Second Circuit's distinction between the right of privacy, "which might give rise to a claim for personal injuries for hurt feelings caused by publication of one's picture," and a person's right of publicity, which is "that person's 'right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture.'"[98] This distinction is important because under the property view, publicity interests are assignable and transferrable,[99] meaning that posthumous-publicity-holders could seek recourse.

Meanwhile, under the "privacy" view, only the identity holder could seek recourse because one's right to privacy is unique to the identity-holder and, therefore, unassignable.[100] The *Reynolds* court found that one's right of publicity is similar to a property right and, therefore, "the tort of appropriation affords redress of [such] commercial injuries."[101] The court then contrasted this with the "personal injuries" implicated by intrusion or publication of private facts.[102] Importantly for non-celebrities, the court held that identity-holders need not have exploited their rights of publicity during their lifetimes for their estate to assert the decedent's postmortem rights.[103] Though the court ultimately determined that the defendant's action did not violate the plaintiff's deceased mother's right of publicity because the defendant's blog was an "expressive work" and not an unauthorized commercial use of the

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97 For example, in *Milton Greene Archives v. CMG Worldwide*, Marilyn Monroe's domicile at the time of her death was being contested. In the 66-page opinion, "domicile" appears 173 times. If you search by the root "domicil" it rises to 203 instances. Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc., 568 F.Supp.2d 1152 (C.D. Cal. 2008). *See generally* Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739 (9th Cir. 2007) (dismissing Washington claim because Hendrix was domiciled in New York at death and, at the time, New York did not recognize a postmortem right of publicity); Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., No. 10-CV-2333, 2013 WL 822173 (S.D.N.Y. Mar. 6, 2013) (declining to grant summary judgment for either party because genuine issues of material fact exist regarding Lee's domicile).

98 Reynolds v. Reynolds (*In re* Estate of Reynolds), 327 P.3d 213, 215 (Ariz. Ct. App. 2014) (citing Haelen Labs. Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d. Cir. 1953)) (emphasis added).

99 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. g (AM. L. INST. 2023).

100 RESTATEMENT (SECOND) OF TORTS § 652I cmt. a (AM. L. INST. 2023).

101 *Reynolds*, 327 P.3d at 215.

102 *Id.*

103 *Id.* at 217.

decedent's name or likeness, this case shows how courts struggle to reconcile these opposing conceptions.[104]

In reality, distinguishing the right of publicity as either property-based or privacy-based is a fool's errand because the two are inseparable.[105] The same misappropriation can cause both economic and dignitary harms.[106] To distinguish between the two "creates a false dichotomy that devalues the complexity of the relevant harm as well as the experiences of the injured party."[107] Therefore, publicity rights should remain grounded in the underlying identity-holder and their interests.[108] Here, the true interest at stake is the identity-holder maintaining control over their likeness for either economic or dignitary reasons. As previously mentioned, both of these interests can be affected after one's death. Therefore, as this Note will address below, courts and legislatures should ground their analyses on the rights and interests of the deceased identity-holder and those close to them.[109]

B. *Current Federal "Analogs"*

1. Trademark Law

Though claims for violations of one's right of publicity are matters of state law, they are often brought alongside claims for federal trademark infringement under the Lanham Act.[110] Generally, the Lanham Act seeks to protect a party's goodwill and prevent consumer confusion.[111] Both federal trademark and state publicity claims can arise from the same misappropriation of one's likeness.[112]

Some believe that the Lanham Act is, and has always been, poised to address dignitary harms due to its focus on preventing consumer confusion and maintaining brand value.[113] Thomas McCarthy—author of the leading treatise on trademark and unfair competition—notes that

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104 *Id.* at 218.

105 Rothman, *supra* note 53, at 219 (noting that one's commercial identity is inseparable from their dignitary identity. This then implies that economic harm is inseparable from dignitary harm, and vice versa).

106 *Id.* at 205–06.

107 *Id.*

108 *Id.* at 240.

109 *See infra* Section III.E.

110 MCCARTHY & SCHECHTER, *supra* note 10, § 6:146 ("[I]n many cases, the unpermitted use of one's persona will *in addition* to infringing upon the right of publicity also infringe trademark or service mark rights in personal identity . . . .").

111 MCCARTHY, *supra* note 59, § 2:1.

112 MCCARTHY, *supra* note 35, § 28:14.

113 Rothman, *supra* note 51, at 1308 n.169.

trademark law serves the dual purpose of preventing consumer deception and "protect[ing] the plaintiff's infringed trademark as property."[114] Importantly, these identified interests are economic in nature and serve to "incentivize the production of high-quality and consistent goods and services for the public's benefit."[115] Both rights of publicity claims and trademark infringement claims can stem from the same misappropriation of one's likeness because "[i]nfringement of the right of publicity is a commercial tort, and a form of unfair competition."[116] Professor Jennifer Rothman recently argued that trademark law's theory of personality encompasses dignitary harms because, in limiting the transfer and assignment of goodwill, trademark law recognizes that it is "impossible" to disentangle an individual's personality from their personal and professional goodwill.[117]

Under Section 43(a) of the Lanham Act, a plaintiff can assert a false endorsement claim for the unpermitted use of their persona, so long as they prove that the advertising is false.[118] In some states, plaintiffs must also establish that they commercialized their respective likenesses before asserting a right of publicity claim.[119] In *Longoria v. Kodiak Concepts LLC*, the plaintiffs were a group of models who sued the defendant, a strip-club operator, for using their images in advertisements despite never hiring, contracting with, employing, or paying the plaintiffs.[120] The Arizona District Court held that Kodiak's unauthorized use of plaintiffs' photos in its strip-club advertising was, undoubtedly, a use in commerce for purposes of a Lanham Act claim.[121] It is unclear whether, if the plaintiffs in *Longoria* instead complained that their likenesses were used in a pornographic deepfake rather than in an advertisement, that a pornographic deepfake would be considered to have been used in commerce.

In the above hypothetical, the deepfake creator would likely not be liable under the Lanham Act because the appropriation would likely not

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114 MCCARTHY, *supra* note 59, § 2:2; *see also* Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., No. 10-CV-2333, 2013 WL 822173, at *19 (S.D.N.Y. Mar. 6, 2013) (finding that false endorsement claims under the Lanham Act require that "prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question, or are likely to believe that the mark's owner sponsored, endorsed, or otherwise approved of the defendant's use of the mark." (quoting Naked Cowboy v. CBS, 844 F. Supp. 2d 510, 517 (S.D.N.Y. 2012))).

115 Rothman, *supra* note 51, at 1289.

116 MCCARTHY, *supra* note 35, § 28:1.

117 Rothman, *supra* note 51, at 1309–12.

118 *See* 15 U.S.C. § 1125(a); MCCARTHY, *supra* note 35, § 28:14.

119 Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 90 (2020).

120 527 F. Supp. 3d 1085, 1092–93, 1112 (D. Ariz. 2021) (denying defendant's motion for summary judgment on plaintiffs' right of publicity and false association claims).

121 *Id.* at 1106.

cause consumer confusion and the work may be entitled to First Amendment protection as an "expressive work."[122] The Lanham Act is constrained by the First Amendment and "ought to be applied 'only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.'"[123] Rights of publicity claims will, certainly, be subject to the same First Amendment constraints that the Lanham Act is.[124] Yet, the Lanham Act's particular focus on commercial uses, on or in connection with a good or service, means that many expressive works will be exempted.[125] Thus, the Lanham Act will not offer a remedy to the identity-holder or their agents if a confusing and unauthorized appropriation of one's likeness in an expressive work passes the transformative use test.

Generally, a victim of trademark infringement may be entitled to some combination of injunctive relief,[126] monetary recovery,[127] and/or the court-ordered destruction of infringing articles.[128] When a registered trademark is infringed upon, "the plaintiff shall be entitled, . . . subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action."[129] If the infringement was willful, the defendant will be liable for much higher treble damages.[130] The Lanham Act's inclusion of treble damages serves to strongly disincentivize willful trademark infringement in commercial settings. Scholars note that, in reality, courts are unlikely to award damages unless the infringement is willful.[131]

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122 Quentin J. Ullrich, *Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address It*, 55 COLUM. J.L. & SOC. PROBS. 1, 19 (2021); *see also* Post & Rothman, *supra* note 119, at 90–91 (noting that "[t]hose who wish to create expressive works that incorporate the identities of actual people" are inhibited because courts have poorly defined the scope of rights of publicity in relation to the First Amendment).

123 *See* Post & Rothman, *supra* note 119, at 152 ("[T]he court in *Rogers* held that the Lanham Act ought to be applied 'only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.'"(quoting Rogers v. Grimaldi, 875 F.2d 994, 999 (1989))).

124 *Id.* at 149–62 (discussing courts' difficulties in applying the First Amendment to commercial speech); *id.* at 165–72 (discussing the First Amendment's interactions with the right of publicity's purpose to protect one's dignity).

125 *Id.* at 152.

126 15 U.S.C. § 1116.

127 15 U.S.C. § 1117.

128 15 U.S.C. § 1118.

129 15 U.S.C. § 1117(a).

130 15 U.S.C. § 1117(b).

131 Mark A. Lemley, *The Fruit of the Poisonous Tree in IP Law*, 103 IOWA L. REV. 245, 262 (2017).

2. Copyright Law

Rights of publicity statutes and federal copyright law may, at times, protect against the same appropriation of one's likeness. However, the right of publicity is broader in scope.

Copyright law protects "original works of authorship fixed in any tangible medium of expression . . . ."[132] Put another way, copyright protects expressions of ideas, but not ideas themselves.[133] Six exclusive rights flow from copyright ownership. These are the rights to: (1) reproduce and make copies of an original work; (2) prepare derivative works based on the original work; (3) distribute copies to the public by sale or another form of transfer, such as rental or lending; (4) publicly perform the work; (5) publicly display the work; and (6) perform sound recordings publicly through digital audio transmission.[134]

Copyright protects different interests than rights of publicity statutes because, in general, one cannot copyright their name, likeness, or persona.[135] Copyright laws protect a creator's right to distribute a particular piece of content, while a right of publicity claim stems from "'the very identity or persona of the plaintiff as a human being.'"[136] This means that an unauthorized appropriation of one's likeness may give rise to a right of publicity claim and not a copyright claim.[137] However, when a right of publicity claim arises from a copyright violation, courts will often preempt the right of publicity claim.[138]

Importantly, as with both rights of publicity claims and trademark claims, First Amendment considerations place an important guardrail on copyright protection.[139] However, courts struggle to define the boundaries between state rights of publicity claims and copyright

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132 17 U.S.C. § 102.

133 Yankee Candle Co. v. Bridgewater Candle Co., 99 F. Supp. 2d 140, 144 (D. Mass. 2000).

134 17 U.S.C. § 106.

135 Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., No. 10-CV-2333, 2013 WL 822173, at *14 (S.D.N.Y. Mar. 6, 2013).

136 *Id.* at *14 (quoting 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 11:52 (2d ed. 2004)).

137 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.17 (2023) ("The name and likeness do not become works of authorship simply because they are embodied in a copyrightable work, such as a photograph.").

138 Though copyright does not categorically preempt general right of publicity claims, various courts continue to do so. *See id.* (discussing courts' historical treatment of concurrent copyright and rights of publicity claims).

139 *See* W. Woods Drinkwater, *Personality Beyond Borders: The Case for a Federal Right of Publicity*, 3 MISS. SPORTS L. REV. 115, 120–22 (2021) (highlighting that an infringing defendant's First Amendment interests are weighed against the plaintiff's publicity interests under the transformative use test).

claims.[140] If a piece of synthetic media incorporates copyrighted material in its creation, courts will need to consider whether the allegedly infringing work is a non-infringing fair use of the underlying work. However, Section 107 of the Copyright Act does not give guidance on how to weigh competing fair use factors, and each factor is only defined in general terms.[141]

Section 230 of the Communications Decency Act exempts internet platforms and shields them from liability.[142] Section 230 specifically excludes intellectual property claims, such as trademark and copyright claims.[143] As it relates to right of publicity actions, Section 230 hinders a plaintiff's abilities to enforce their rights against online platforms that, though themselves not violating the plaintiff's rights of publicity, allow for violating publications to appear on their websites.[144] At least according to *Ratermann*, publicity claims arising from New York's Civil Rights Law are not considered intellectual property claims and, therefore, Section 230 continues to shield interactive computer services providers.[145]

In successful copyright infringement cases, plaintiffs may be entitled to injunctions; impounding and disposition of infringing articles; damages and profits; costs; and attorney's fees.[146] Moreover, online copyright infringement will often result in takedown notices.[147] Yet, existing copyright remedies may be insufficient to address synthetic media's harms.[148]

C. *Comparison of State Postmortem Right of Publicity Statutes*

As mentioned in Section II.A, only some states protect an identity-holder's right of publicity after their death, and they do so to varying degrees.[149] To determine whether state postmortem rights of publicity statutes are adequately poised to defend against synthetic media, this Section will analyze the features of existing statutes and their treatments by courts. First, this Section will identify key commonalities between

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140 NIMMER & NIMMER, *supra* note 137, § 1.17.

141 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13F.09 (2023).

142 47 U.S.C. § 230.

143 *Id.* § 230(e)(2).

144 Ratermann v. Pierre Fabre USA, Inc., No. 22-CV-325, 2023 WL 199533, at *5 (S.D.N.Y. Jan. 17, 2023).

145 *See id.* at *5–7 (finding that Ratermann's claims under Section 50 and 51 of New York Civil Rights Law "do not fall within the intellectual property exception to Section 230.").

146 *See* 17 U.S.C. §§ 502–05.

147 Krishna, *supra* note 49, at 24.

148 *See infra* Section III.D.

149 *See supra* Section II.A.

state statutes with strong postmortem protections. Next, this Section will identify the key commonalities of states with limited postmortem rights of publicity protections. Last, this Section will attempt to predict how these statutes will fare under the deluge of synthetic media that is to come.

Even states with strong postmortem rights of publicity statutes implicitly recognize that both economic and non-economic harms become attenuated after death by establishing term limits. Looking to California, New York, and Indiana as examples of robust postmortem rights of publicity statutes, each does so for a set term of years.[150] Additionally, each state requires that the identity-holder's likeness be used for a commercial purpose.[151] Importantly, in rejection of previous trends, New York, California, and Indiana each abolished the lifetime exploitation requirement as a condition for postmortem protection.[152] This reflects the dominant, albeit incomplete, conception of rights of publicity as being akin to property rights.[153] Each state explicitly terminates a deceased personality's right of publicity if it was not transferred during their life, in a testamentary document upon their death, or, if there are no surviving persons to whom the right would pass, under intestate succession.[154] Each protects against the unauthorized appropriation of various aspects of one's persona, such as their voice, signature, photograph, or likeness.[155]

Rather than to broadly expand rights of publicity protections, some states are opting to limit the doctrine's postmortem applicability, or reject it altogether.[156] Those states that retract the scope of postmortem rights of publicity do so by limiting the class of potential plaintiffs to either celebrities or armed-service members, or by shortening the term for enforcement.[157] Another method of limiting one's postmortem right of publicity is to require that the decedent be domiciled in the state at the time of their death.[158] Each of these limitations, though commendable

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150 CAL. CIV. CODE §§ 3344, 3344.1 (West 2022); N.Y. CIV. RIGHTS LAW § 50-f (McKinney 2022); IND. CODE § 32-36-1-19 (2022).

151 *See* §§ 3344, 3344.1; § 50-f; §§ 32-36-1-22, 32-36-1-8.

152 MCCARTHY & SCHECHTER, *supra* note 60, § 9:15; *id.* § 9:28.

153 *See supra* Section II.A.2. (discussing how a property-based view of publicity rights can hinder its ability to protect against emotional and dignitary harms).

154 *See* § 3344.1(e); § 50-f(6); § 32-36-1-19.

155 *See* §§ 3344, 3344.1; § 50-f(2)(a); §§ 32-36-1-6, 32-36-1-7, 32-36-1-8.

156 Today, only Wisconsin comprehensively rejects postmortem rights of publicity. The issue has not been revisited in the state since 1995. *See* MCCARTHY & SCHECHTER, *supra* note 60, § 9:18.

157 Arizona's statute is limited to soldiers. *See* Jennifer E. Rothman, *Arizona*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/arizona [https://perma.cc/E4SA-AREA]. Virginia's statute only protects for twenty years. *See* Jennifer E. Rothman, *Virginia*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/virginia [https://perma.cc/EM8N-TAL7].

158 *See infra* note 210 and accompanying text.

efforts to control a potential deluge of litigation, limits rights of publicity in such a way that dignitary and emotional harms will not be protected in the face of synthetic media.

It seems that certain features will best help combat the rise of unauthorized appropriations in synthetic media while protecting First Amendment rights. For instance, Indiana's long-arm statute properly addresses the internet's scope and helps increase judicial efficiency by removing the domicile requirement.[159] By confining protection to identifiable features of one's persona—as New York, California, and Indiana do—these statutes will allow for most synthetic media to remain operational because synthetic media often uses real likenesses as "source material," to create novel synthetic likenesses; so long as the end-product is not recognizable as the aggrieved identity-holder, no right of publicity violation can occur. An ideal postmortem right of publicity statute will limit the term of enforcement to ensure that "descendants or heirs unto the nth generation" cannot "reap[] the commercial rewards of a distant and famous ancestor . . . ."[160]

Reviewing the state of postmortem rights of publicity protections also highlights some undesirable features to avoid. Part III of this Note will explain.

III. STATE PROTECTIONS ARE INADEQUATE; FEDERAL PROTECTIONS ARE NEEDED

A. *Why Postmortem Rights of Publicity Matter*

Our current legal framework exemplifies the fundamentally different philosophies of death that we, as a society, hold. Some think that a dead person cannot care about their postmortem right of publicity.[161] Others think that if their likenesses can live on, they should be able to control them.[162] These differing conceptions are both valid and have

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159 *See supra* Sections II.A, II.C (noting that courts often decide right of publicity actions based upon the deceased identity-holder's domicile, which is often a triable issue of fact best left to the jury).

160 MCCARTHY & SCHECHTER, *supra* note 60, § 9:16 (noting that perpetual protection would embody a "favored bloodline concept out of step with a society that has abolished hereditary titles.").

161 *See* Smith, Jr., *supra* note 65, at 1475 (arguing against the general rule that excludes the dead from protection under the U.S. Constitution).

162 *Id.*; *see also* Rebecca J. Roberts, *You're Only Mostly Dead: Protecting Your Digital Ghost from Unauthorized Resurrection*, 75 FED. COMM. L.J. 273, 275 (2023) (arguing that probate law should explicitly protect against "the unauthorized creation and use of a deceased person's digital clone.").

merit. However, given that postmortem likenesses are already in use,[163] it is unlikely that the "publicity genie" will be put back in the bottle when the estates of so many public figures have vested interests. Therefore, deceased identity-holders should be shielded from digital disinterment via a federal postmortem right of publicity statute.

Whether the right of publicity should extend beyond one's death is a contested topic because one's privacy rights terminate upon death and rights of publicity are an outgrowth of privacy rights.[164] This disagreement is evidenced by the fact that only a few states that protect publicity rights during one's life continue to protect them after death.[165] According to SAG-AFTRA's Director and Counsel of Government Affairs and Public Policy, "not one single performer . . . wants their likeness to enter the public domain upon [their] death."[166] In the 2023 SAG-AFTRA strike, union members feared that studios would replace their jobs using digital replicas.[167] This suggests that identity-holders envision their publicity rights as property interests that extend beyond their deaths because they seek to exclude others from using their likenesses.[168] Heirs and other publicity-holders clearly view publicity rights as a form of property; the estates of dead celebrities generate significant revenue via postmortem licensing deals and often pursue lawsuits for violations of the identity-holder's right of publicity.[169] Therefore, it seems unlikely the United States can, should, or will categorically eliminate postmortem rights of publicity protections

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163 *See, e.g.*, Shokes, *supra* note 57.

164 *Id.*

165 Drinkwater, *supra* note 139, at 128–29.

166 Sarah "Alex" Howes, *Digital Replicas, Performers' Livelihoods, and Sex Scenes: Likeness Rights for the 21st Century*, 42 COLUM. J.L. & ARTS 345, 346 (2019).

167 *See* Tracy, *supra* note 4; *see also* Bobby Allyn, *Movie Extras Worry They'll be Replaced by AI. Hollywood is Already Doing Body Scans*, NPR (Aug. 2, 2023, 9:58 AM), https://www.npr.org/2023/08/02/1190605685/movie-extras-worry-they'll-be-replaced-by-ai-hollywood-is-already-doing-body-scan [https://perma.cc/AYR8-X9P2]; Adam B. Vary, *Voice Actors Decry AI at Comic-Con Panel With SAG-AFTRA's Duncan Crabtree-Ireland: 'We've Lost Control Over What Our Voice Could Say'*, VARIETY (July 22, 2023, 4:08 PM), https://variety.com/2023/tv/news/voice-actors-ai-sag-aftra-strike-comic-con-1235677541 [https://perma.cc/7FMP-ZL72] ("At issue for the panel was the growing certainty that without explicit contractual and statutory protections in place, AI could not only effectively replace the vast majority of work for voice actors, but manipulate their voices to create content without their expressed consent.").

168 Drinkwater, *supra* note 139, at 120–22 (explaining the key interests property creates).

169 *See* Shokes, *supra* note 57. *See, e.g.*, Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739 (9th Cir. 2007); Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., No. 10-CV-2333, 2013 WL 822173 (S.D.N.Y. Mar. 6, 2013); A.V.E.L.A., Inc. v. Est. of Marilyn Monroe, LLC, 364 F. Supp. 3d 291 (S.D.N.Y. 2019); Shaw Fam. Archives, Ltd. v. CMG Worldwide, Inc., No. 05-CV-3939, 2008 WL 4127549 (S.D.N.Y. Sept. 2, 2008).

without affected parties posing a challenge.[170] However, presupposing that the right of publicity should be protected after death does not mean its protection should be overly broad or unlimited.[171]

Postmortem rights protections would create a digital analog to existing laws against the undignified disturbance of a deceased individual. Historically, disinterment laws are meant "to protect the dignity of the deceased."[172] Professor Smith, Jr. argues that historical legal protections for the dead are "rights," and that they "include the right to dignified interment, the right against undignified disturbance, the right to bodily integrity, and the right to transfer property."[173] The same interests are at stake in postmortem rights of publicity. Furthermore, guarding against digital disinterment is consistent with our national conception of autonomy and privacy.[174] Therefore, Congress can, and should, protect against digital disinterment via federal postmortem right of publicity protection.

In recognition of the right of publicity's origin as a privacy protection,[175] it should be interpreted as a constitutional right worthy of protection.[176]

B. *Have States Already Gone Too Far?*

Some states may have over-expanded their protections of postmortem rights of publicity beyond the confines of the Constitution or the right's intended purpose.[177] The dormant Commerce Clause[178] may

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170 *See, e.g.*, N.K. Collins, LLC v. William Grant & Sons, Inc., 472 F. Supp. 3d 806, 828 (D. Haw. 2020) (declining to apply Hawaii's postmortem right of publicity statute to Defendant because it "would impair their prior substantial existing rights.").

171 *See infra* Section III.E.

172 Smith, Jr., *supra* note 65, at 1499.

173 *Id.* at 1491.

174 *See* Mitchell F. Crusto, *Right of Self*, 79 WASH. & LEE L. REV. 533, 570–75 (2022) (proposing a federal Right of Self and arguing that "every individual is entitled to control how, if at all, their right of publicity is commercialized by third parties . . . .").

175 *See supra* Section II.A.2.

176 *See* Shannon Reid, *The Deepfake Dilemma: Reconciling Privacy and First Amendment Protections*, 23 U. PA. J. CONST. L. 209, 228–37 (2021) (discussing how the right of privacy can receive stronger constitutional protection).

177 *See* Christian B. Ronald, *Burdens of the Dead: Postmortem Right of Publicity and the Dormant Commerce Clause*, 42 COLUM. J.L. & ARTS 123, 149 (2018) (arguing that "all comers" provisions are facially unconstitutional under the dormant Commerce Clause); *see also* Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 233 (2005); *id.* at 226 n.7.

178 The "dormant" Commerce Clause proscribes certain state regulations that discriminate against interstate commerce. "In a dormant Commerce Clause analysis, the court must inquire whether the challenged law discriminates against interstate commerce, in which case the law is

prevent New York's or Indiana's "all comers" provisions because "the extraterritoriality doctrine is designed to prohibit precisely this type of 'inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another state.'"[179] In a way, "all comers" provisions show that while some states may have gone too far, the federal government has not yet gone far enough.

When statutes protect postmortem rights of publicity for seventy-five to one hundred years, certain economic and dignitary harms become too attenuated for plaintiffs to have standing. For instance, in *Hebrew University of Jerusalem v. General Motors LLC*, Defendant GM used Albert Einstein's face in an advertisement for a GM vehicle.[180] The Central District of California court rejected Plaintiff's argument that postmortem rights of publicity violations affect a "deeply personal right," noting that the personal interest at stake becomes attenuated after the identity-holder dies.[181] The court rejected this argument because it is unlikely a consumer would be confused that Albert Einstein was endorsing a GM product fifty-five years after his death.[182]

On the other hand, perhaps states have not yet sufficiently protected one's postmortem right of publicity. Neither the Lanham Act nor certain state statutes defending rights of publicity adequately protect against dignitary harms because they require that the identity-holder's likeness be used in a commercial setting.[183] The commercial use requirement and statutory carveouts for expressive works mean that many unauthorized appropriations of a non-celebrity's likeness will go unabated.[184] Furthermore, state statutes cannot go far enough because, by design, a state statute cannot address injuries beyond its borders.[185] Because

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virtually per se invalid, and survives only if it advances legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause, U.S. Const. Art. I, § 8, cl. 3—Supreme Court Cases*, 41 A.L.R. Fed. 2d 1, 2 (2023).

179 *See* Ronald, *supra* note 177 (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 336–37 (1989)).

180 Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 932 (C.D. Cal. 2012).

181 *Id.* at 937.

182 *Id.*

183 Post & Rothman, *supra* note 119, at 90; *see* Longoria v. Kodiak Concepts LLC, 527 F. Supp. 3d 1085, 1098 (D. Ariz. 2021) (noting that Arizona state law requires that a defendant appropriate the "commercial value of a person's identity . . . for purposes of trade" to establish liability); *see also* Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS AND ENTERTAINMENT L.J. 213, 241–42 (1999) (noting that the Sixth Circuit Court of Appeals "fail[ed] to appreciate the dignitary interest implicated by the appropriation of one's identity" in a Lanham Act unfair competition claim when it failed to recognize that Johnny Carson suffered dignitary harm due to a portable toilet company's misappropriation of his likeness).

184 *See* Judith B. Bass, *New York's New Right of Publicity Law: Protecting Performers and Producers*, 93-JUN. N.Y. ST. BAR J. 33, 36 (2021).

185 *See* Ronald, *supra* note 177.

technological innovation outpaces the law, and synthetic media will likely grow, even the most current of statutes will likely fail to foresee every possible harm synthetic media creates.[186] Few state statutes, if any, adequately protect against the coming wave of synthetic media because they focus too heavily on commercial uses and economic harm, rather than on the identity-holder's postmortem privacy interest.

C. *Free Speech Considerations*

1. What Have Courts Held to Date?

Since the right of publicity's inception, courts and legislators have had to grapple with the instances where one party's right of publicity conflicts with the other's First Amendment freedom of speech. Since *Zacchini*—the first Supreme Court case to address the right of publicity—courts have struggled to balance where one party's right of publicity ends and where the other party's First Amendment right of free speech begins.[187] In *Zacchini*, the Court concluded that the defendant's use of Zacchini's likeness did, in fact, violate Zacchini's right of publicity because it infringed Zacchini's proprietary interest in the "right of exclusive control over the publicity given to [his] performance."[188] In so concluding, the Court rejected Scripps' argument that its broadcast was protected under the First Amendment as a piece of news.[189]

Today, courts still struggle to balance one party's free speech with the other's right of publicity, as evidenced by cases like *Hart v. Electronic Arts*. In *Hart*, the Third Circuit Court of Appeals interpreted *Zacchini* to mean that "the right of publicity can triumph even when an essential element for First Amendment protection is present."[190] The majority explained that, "the protection of free speech serves the needs 'of the human spirit—a spirit that demands self-expression,' adding

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186 Shannon Bond & Hanry Farid, *As Tech Evolves, Deepfakes Will Become Even Harder to Spot*, NPR: WEEKEND EDITION SUNDAY (July 3, 2022, 7:54 AM), https://www.npr.org/2022/07/03/1109607618/as-tech-evolves-deepfakes-will-become-even-harder-to-spot [https://perma.cc/LS9R-A6SB] ("I think the fact is that the regulatory regime moves way too slowly. Members of the U.S. Congress are simply not sophisticated enough, frankly, to understand the complexity in these technologies.").

187 MCCARTHY & SCHECHTER, *supra* note 60, § 8:25 ("Courts have noted that the Supreme Court in *Zacchini* balanced the defendant television station's free speech rights against plaintiff Zacchini's right of publicity claim.").

188 Pamela Samuelson, *Reviving* Zacchini: *Analyzing First Amendment Defenses in Right of Publicity and Copyright Cases*, 57 TUL. L. REV. 836, 921 (1983) ("[I]f the public can see the act free on television, it will be less willing to pay to see it at the fair.").

189 Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578–79 (1977).

190 Hart v. Elec. Arts, Inc., 717 F.3d 141, 167 (3d Cir. 2013).

that . . . [s]uppressing such expression, therefore, is tantamount to rejecting 'the basic human desire for recognition and [would] affront the individual's worth and dignity.'"[191] The court ultimately held that Hart's digital replica in the NCAA Football videogame violated his right of publicity because Electronic Arts' use was not sufficiently transformative.[192] Courts' inabilities to coalesce around a balancing test for First Amendment-publicity cases "chills speech and incentivizes jurisdictional gamesmanship."[193]

To address the right of publicity's intersection with the First Amendment, some scholars and courts settled on the "transformative balancing test."[194] In recent years, scholars have urged that the right of publicity return to its privacy roots, rather than be couched as a type of intellectual property claim.[195] One sees this trend beginning with an issue of first impression in the Southern District of New York. There, the court recently embraced this view by finding that right of publicity claims under N.Y. Civil Rights Law Sections 50 and 51 are not intellectual property claims for purposes of copyright's Section 230 exemption.[196] It remains too early to tell whether this trend will continue.

2. Have We Chilled Free Speech or Enhanced It?

The answer depends on how one views transformative uses. If creating digital replicas, such as the college players in Electronic Arts' NCAA Football videogame, is a transformative use, then no, we have not chilled free speech.[197] However, if creating a digital replica is not transformative, as the Third Circuit Court of Appeals held in *Hart*, then,

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191 *Id.* at 149 (quoting Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring)).

192 *Id.* at 168–69.

193 *See* Post & Rothman, *supra* note 119, at 127–32.

194 MCCARTHY & SCHECHTER, *supra* note 10, § 1:36 (noting that "if the accused use in an expressive work (such as a work of art or a video game) 'transforms' the plaintiff's identity to a sufficient degree, then it is likely to be immunized from liability for right of publicity infringement.").

195 *See generally* ROTHMAN, PRIVACY REIMAGINED, *supra* note 65.

196 Ratermann v. Pierre Fabre USA, Inc., No. 22-CV-325, 2023 WL 199533, at *5–7 (S.D.N.Y. Jan. 17, 2023) (noting that "the 'right of publicity' is encompassed under the Civil Rights Law *as an aspect of the right of privacy*.").

197 Had the court instead held that creating a digital replica, such as Electronic Arts' NCAA football, is transformative, then the right of publicity claim would have failed. If the right of publicity claim failed, then it seems like nearly all digital replicas will be permitted and free speech would not be chilled. However, it would come at the expense of one's right of publicity. *But cf. Hart*, 717 F.3d 141 (holding that Electronic Arts' NCAA Football videogame was not sufficiently transformative to defeat the plaintiff's right of publicity claim).

perhaps, yes.[198] To date, publicity cases likely have not chilled speech to any significant extent because many works are transformative, creators are rapidly producing new synthetic works, and enforcement remains difficult—particularly for dignitary harms.[199]

Perhaps a better test would be the "predominant purpose" test adopted by Missouri courts in *Doe v. TCI Cablevision*.[200] In *Doe*, the Supreme Court of Missouri held, en banc, that the Restatement (Third) of Unfair Competition's relatedness test and California's transformative use test "give too little consideration to the fact that many uses of a person's name and identity have both expressive and commercial components."[201] "These tests operate to preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation."[202] The court describes the predominant use test as follows:

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some "expressive" content in it that might qualify as "speech" in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.[203]

Under this test, the court concluded that TCI's free speech rights should give way to the plaintiff's right of publicity because the inclusion of the plaintiff's likeness was "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression . . . ."[204]

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198 If a digital replica is not sufficiently transformative, then the right of publicity claim would survive. Had the court upheld the plaintiff's right of publicity action in *Brophy v. Almanzar* by deeming it not transformative, then Cardi B's artistic recontextualization of the plaintiff's tattoo would likely have been infringing. This hypothetical result would have chilled the artist's right to free speech. *Cf.* Brophy v. Almanzar, No. SACV 17-01885, 2022 WL 18278468, at *4–5 (C.D. Cal. Dec. 28, 2022) (applying the transformative use test to find that Cardi B, a famous rapper, did not violate plaintiff's right of publicity when she digitally replicated plaintiff's back tattoo onto a model for the cover of *Gangsta Bitch Music, Vol. I* because the cover was sufficiently transformed).

199 *See* Bond & Farid, *supra* note 186 (noting the prevalence of nonconsensual deepfake pornography on the internet and the difficulties with stopping it).

200 Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

201 *Id.*

202 *Id.*

203 *Id.*

204 *See id. But see* Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 (3d Cir. 2013) (rejecting the predominant use test, describing it as "subjective at best, arbitrary at worst" and that "adopting Appellant's suggested analysis would be tantamount to admitting that it is proper for courts to analyze select elements of a work to determine how much they contribute to the entire work's expressiveness.").

Though the Third Circuit Court of Appeals declined to adopt the predominant use test for California cases,[205] it is interesting to note that the California district court in *Brophy v. Almanzar* couched its analysis in language that resembles the predominant use test.[206] The district court reached its conclusion by highlighting that plaintiff's back tattoo, which was used in Cardi B's mixtape cover, played a "minor role in what was a larger visual commentary on sexual politics . . . .The purpose, Cardi B testified, was to show her in control, reversing traditional gender roles."[207] Whether right of publicity protections chill speech will likely depend on which test courts adopt.

D. *The Existing Legal Framework to Address These Injuries is Inadequate*

The current patchwork of state postmortem rights of publicity statutes fundamentally frustrates each state's attempt to protect rights of publicity because the internet knows no borders. A state-by-state approach to rights of publicity may appeal to some because it allows states to experiment with different solutions and create local solutions to local problems. Here, however, the problem is not local because, barring instances of state or institutional censorship, the internet is global and borderless;[208] therefore, a workable solution must be as borderless as the internet itself.[209] Jurisdictional differences create a structure in which what determines whether one's likeness will enter the public domain upon death is not the identity-holder's intent, but rather, where the identity-holder is domiciled at death.[210]

Further, state statutes are frustrated because they are met with constitutional resistance when they seek to protect their citizens from right of publicity violations occurring outside their state. Some state courts offer nationwide damages for violations of state rights of publicity statutes, despite the fact that each state may create its own publication

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205 *Hart*, 717 F.3d at 154.

206 Brophy v. Almanzar, No. SACV 17-01885, 2022 WL 18278468, at *5 (C.D. Cal. Dec. 28, 2022).

207 *Id.*

208 "Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live." John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/6AB3-5VUB].

209 *See* David R. Johnson & David Post, *Law and Borders--The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370–78 (1996) (discussing the difficulty of territorial lawmaking in cyberspace).

210 *See supra* note 97 and accompanying text.

torts.[211] For instance, in 2008, Washington amended its right of publicity statute to include protections for postmortem right of publicity violations, "regardless of place of domicile or place of domicile at time of death."[212] In a later case involving Experience Hendrix L.L.C., a Washington district court "held that Washington's choice-of-law clause was unconstitutional under the Commerce Clause, encouraging forum shopping in violation of the Due Process Clause and Full Faith and Credit Clause, while producing inconsistent results across the states."[213] The Ninth Circuit Court of Appeals reversed the district court's unconstitutionality finding on narrow grounds.[214] The Ninth Circuit left open the question of whether Washington's approach to postmortem personality rights requires another state to recognize Washington's broad personality rights.[215] By failing to clarify whether Washington's expansive publicity statute does or does not violate the Constitution on broader grounds, the court left potential plaintiffs confused.

Suppose Bruce Willis is domiciled in Idaho upon his eventual death,[216] his publicity-holders are domiciled in California,[217] and a budding content creator domiciled in North Dakota[218] non-consensually replicates Willis's likeness via TikTok. Can the California publicity-holders sue the North Dakotan, and if so, under which state's law? In this morbid hypothetical, courts will likely enforce Idaho law because Willis

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211 Debra R. Cohen, *The Single Publication Rule: One Action, Not One Law*, 62 BROOK. L. REV. 921, 923–24 (1996). *But see supra* note 177 and accompanying text.

212 WASH. REV. CODE ANN. § 63.60.010 (West 2008).

213 Sharon L. Klein & Jenna M. Cohn, *The Post-Mortem Right of Publicity: Defining it, Valuing it, Defending it, and Planning for it*, 49 EST. PLAN. 3, 4 (2022) (citing Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd., 766 F. Supp. 2d 1122 (W.D. Wash. 2011)).

214 Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd., 762 F.3d 829, 835–37 (9th Cir. 2014).

215 *Id.* at 835–36.

216 As of November 2022, Idaho does not recognize a right of publicity by statute or common law, and postmortem rights have yet to be considered. *See* Jennifer E. Rothman, *Idaho*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/idaho [https://perma.cc/8F7M-EM4V].

217 As discussed in Section II.C, California's right of publicity statute is robust, likely because many celebrities and high net-worth individuals live there. Some even refer to Section 3344 as "the Celebrities Rights Act." *See Rights of Publicity & Privacy*, THE SYVERSON LAW FIRM, https://www.syversonlaw.com/rights-of-publicity-privacy.html [https://perma.cc/U7X2-UDTF]. California protects one's right of publicity during their lifetime and after their death. CAL. CIV. CODE §§ 3344, 3344.1 (West 2022).

218 As of November 2022, North Dakota "has not explicitly recognized a right to privacy or a right of publicity, but has suggested the possibility that a privacy-based appropriation tort might be recognized." Jennifer E. Rothman, *North Dakota*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, https://rightofpublicityroadmap.com/state_page/north-dakota [https://perma.cc/V2CF-SPQX].

was domiciled there upon his death.[219] This approach is incongruent with the nature of the internet and, perhaps, with the hypothetical decedent's wishes.

A state-by-state approach to protecting rights of publicity can create transaction costs for attorneys and national media producers.[220] Synthetic media producers will have to determine whether to create content that adheres to the strictest state statutes or the weakest state statutes. While large production companies likely have the time, money, and legal resources to make this determination confidently, up-start producers may find themselves unknowingly violating another state's laws. Once a case reaches trial, attorneys will have to spend significant time and resources to determine the authenticity of each piece of digital content—thus increasing the cost of litigation and decreasing judicial efficiency.[221] "As explained by the Second Circuit in *American Booksellers*, the 'boundary-less' nature of the Internet makes it very difficult for businesses engaging in Internet commerce to adhere to conflicting state regulations."[222]

A patchwork of state statutes encourages forum shopping because plaintiffs will seek the most liberal right of publicity statute available to pursue their claim. This is exemplified by Indiana's "expansive" right of publicity law.[223] One of the reasons why Indiana's Law is so expansive is because of CMG Worldwide, "an Indiana-based company that represents the heirs and estates of large numbers of deceased celebrities."[224] The estates of celebrities like Marilyn Monroe, Duke Ellington, and Bruce Lee have all sued under Indiana law, despite lacking much connection to the state.[225]

Given that federal trademark law and copyright law provide crude analogs to those wishing to make right of publicity claims, state statutes

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219 *See* Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739, 740 (9th Cir. 2007) (affirming lower court's grant of partial summary judgment to the James Marshall Hendrix Foundation due to Jimi Hendrix being domiciled in New York upon death).

220 "Transaction cost" is defined as "A cost connected with a process transaction, such as a broker's commission, the time and effort expended to arrange a deal, or the cost involved in litigating a dispute." *Transaction Cost*, BLACK'S LAW DICTIONARY (11th ed. 2019). Complying with many different laws at once is difficult and takes time. Typically, transaction costs include search and information costs; bargaining costs; and policing/enforcement costs. *Transaction Costs*, Corp. Finance Inst. (May 28, 2023)), https://corporatefinanceinstitute.com/resources/economics/transaction-costs [https://perma.cc/K5KT-BKTX].

221 *See generally* Riana Pfefferkorn, *"Deepfakes" in the Courtroom*, 29 B.U. PUB. INT. L.J. 245 (2020).

222 Ronald, *supra* note 177, at 151 (quoting Am. Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003)).

223 Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMMC'N. L. 14, 16 (2011); IND. CODE § 32-36-1-1 (2012).

224 Vick & Jassy, *supra* note 223, at 16.

225 *See id.* at 16–17 (discussing how a patchwork of state laws incentivizes forum shopping).

may be duplicative and unduly burden the courts.[226] In many of the aforementioned cases, courts spent precious time comparing and contrasting trademark and copyright claims with right of publicity claims.[227] When courts fail to recognize how privacy-based dignitary harms and property-based pecuniary harms overlap, they fail to protect both the identity-holder and the publicity-holder.

Under the Lanham Act, non-celebrity and celebrity plaintiffs often receive disparate treatment. Even in advertisements, the Lanham Act fails to protect non-celebrity identity holders from unauthorized appropriations of their likenesses. Though each federal jurisdiction assesses likelihood of confusion in a slightly different manner, they all assess the strength of the plaintiff's mark—making this an important factor for consideration.[228] A non-celebrity would struggle to prove that a self-mark in either their first or last name acquired distinctiveness under the Abercrombie spectrum.[229] Generally, courts have been unwilling to side with an aggrieved non-celebrity's Lanham Act claim because the strength of their "mark" (here, their persona) is weak.[230] Federal trademark law's inability to protect non-celebrities from unauthorized

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226 *See generally* Rothman, *supra* note 51 (discussing that federal trademark law may preempt state right of publicity claims, even for emotional and dignitary harms); Robert W. Clarida & Robert J. Bernstein, *Copyright Preemption and the Right of Publicity*, N.Y. L.J. (Nov. 19, 2020), https://www.law.com/newyorklawjournal/2020/11/19/copyright-preemption-and-the-right-of-publicity [https://plus.lexis.com/api/permalink/facd17e0-1ac3-4c78-9335-ebf55bcb9433/?context=1530671] (noting that the Second Circuit found the rapper 50 Cent's right of publicity claim was preempted by federal copyright law).

227 *See, e.g.*, Ratermann v. Pierre Fabre USA, Inc., No. 22-CV-325, 2023 WL 199533, at *5 (S.D.N.Y. Jan. 17, 2023); Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., No. 10-CV-2333, 2013 WL 822173, at *14 (S.D.N.Y. Mar. 6, 2013) (finding that plaintiff's right of publicity claim is not preempted by the Copyright Act); Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 937–39 (C.D. Cal. 2012) (discussing the copyright implications of plaintiff's right of publicity claim).).

228 JANE C. GINSBURG, JESSICA LITMAN & MARY KEVLIN, TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND MATERIALS, 453–54 (7th ed. 2022).

229 A mark must be distinctive to be legally protected as a trademark. If a mark is distinctive, it means that it "is used by a substantial number of people as a symbol to identify and distinguish one source. The Abercrombie Spectrum separates marks into varying levels of distinctiveness. Arbitrary, fanciful, and suggestive marks are inherently distinctive and do not require secondary meaning. Descriptive, geographic, and personal name marks are not inherently distinctive and require a showing of secondary meaning. Generic marks, however, show no distinctiveness, and therefore do not receive protection. *See* MCCARTHY, *supra* note 59, § 4:13; *see also* 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 11:1, 11:2 (5th ed. 2023).

230 Ji v. Bose Corp., 538 F. Supp. 2d 349, 353 (D. Mass 2008) (dismissing plaintiff's false endorsement claim due to an "absence of any meaningful level of recognition" by consumers); Electra v. 59 Murray Enters., Inc., 987 F.3d 233, 258 (2d Cir. 2021) (affirming district court's dismissal of false endorsement claims brought by models because their marks were too weak to create confusion).

appropriations of their likenesses highlights that further legislation is necessary to protect against synthetic media's non-economic harms.

Federal trademark law will be unable to address the dignitary and societal harms synthetic media poses because not all pieces of synthetic media are used in commerce, and trademark law's theory of personality does not yet appear to be widely adopted. While Professor Rothman's account of trademark law's theory of personality is compelling, the theory falls short of protecting against the kinds of harm complained of in *Reynolds* because the Lanham Act is purely concerned with uses in commerce on, or in connection with, a good or service.[231] Furthermore, trademark law is poorly suited to protect the dignitary interests of deceased, non-celebrity identity holders or their agents. This is because suggestions of false endorsement become increasingly attenuated after an identity-holder dies.[232] While Professor Rothman offers helpful tools for "navigating the identity thicket," this Note suggests that identity-holders, publicity-holders, and content creators alike would benefit more from federal legislation that clears the thicket.[233]

Copyright law will fare poorly because when synthetic media creates a new piece of content, the creator of the synthetic work may be able to apply a fair use defense.[234] Copyright law's focus on "commerciality as a dividing line for liability" creates chaos because the foundational "dichotomy between communicative, expressive speech and pure commercial speech" is "misguided."[235] Copyright's fair use test focuses heavily on the defendant's for-profit or not-for-profit status.[236] This focus may allow not-for-profit infringers to continue infringing, despite the deceased identity-holder's desire to keep their likeness out of the public domain.

For new synthesized works, a copyright infringement claim will likely not be viable because "[w]hile the AI algorithms do utilize copyrighted works to analyze voice patterns and create new works, there is little indication that any of the exclusive rights protected by copyright

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231 *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:54 (5th ed. 2023) ("The power of Congress to protect and regulate trademarks stems from the Commerce Clause of the Constitution . . . .This is the reason that 'use in commerce' is required by the statute before there can be infringement of a federally registered trademark."); *see also* Ullrich, *supra* note 122, at 19.

232 Hebrew Univ. of Jerusalem v. Gen. Motors LLC., 903 F. Supp. 2d 932, 937 (C.D. Cal. 2012).

233 *See* Rothman, *supra* note 51.

234 17 U.S.C. § 107; Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1948–49 (2015).

235 *Cf.* Rothman, *supra* note 234, at 1978, 2008 (concluding that intellectual property law's focus on commerciality creates chaos).

236 *See id.* at 1947 n.69 and accompanying text (citing cases in which courts determined that finding speech to be commercial weighs against fair use); *see also id.* at 1947–48 n.70 (citing cases in which a finding of nonprofit or noncommercial use weighs in favor of fair use).

[are] infringed in this context."[237] As Rothman noted elsewhere, the right of publicity's transformative use defense is derived from copyright's fair use defense.[238] Different judicial treatments of both fair use and transformative use defenses[239] suggests that copyright law will be unable to protect against borderless digital harms.

For example, a recent New York case highlights how different statutory and judicial conceptions of the right of publicity lead to different results for plaintiffs. The Southern District of New York in *Ratermann v. Pierre Fabre USA, Inc.*, recently analyzed an issue of first impression—whether claims under New York's Sections 50 and 51 are intellectual property claims or whether the statutes establish a statutory right to privacy.[240] By finding that New York's right of publicity statute is a privacy claim and not an intellectual property claim, the court shielded third-party websites from liability despite the infringing material appearing on their sites.[241] This case shows the difficulty of using copyright law to protect one's right of publicity because neither of the third-party defendants were found to be parties to the case.[242] Further, the party with which Ratermann contracted, QuickFrame, was found not to be liable for violating Ratermann's rights because Ratermann failed to allege that QuickFrame itself used her likeness in a manner contemplated by Sections 50 and 51.[243] While the analytical weight of the district court's decision may be augmented by higher courts, this case illustrates that right of publicity violations are hard to protect against under the current legal framework.

As discussed above and elsewhere, though copyright law and trademark law both incorporate concepts of human dignity and autonomy,[244] each of these federal schemes cannot protect against the emotional and dignitary harms associated with harmful synthetic media.

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237 Danielle S. Van Lier, Romaine Marshall & Katherine Bravo, *As Deepfakes Get Deeper, Security Risks Heighten*, ACC DOCKET (Dec. 6, 2021), https://docket.acc.com/deepfakes-get-deeper-security-risks-heighten [https://perma.cc/XFE9-TYBU].

238 *See* Post & Rothman, *supra* note 119, at 129.

239 *Id.* at 125–32 (discussing current "First Amendment Chaos").

240 Ratermann v. Pierre Fabre USA, Inc., No. 22-CV-325, 2023 WL 199533, at *5 (S.D.N.Y. Jan. 17, 2023).

241 *Id.*

242 *See id.* at *3–7 (dismissing claims against Amazon, Walmart, and Ulta under Section 230 immunity); *see also id.* at *7–8 (dismissing claims against Walgreens, Pierre Fabre, and QuickFrame to the extent they seek exemplary damages under N.Y. Civil Rights Law Sections 50 and 51; claims otherwise survive).

243 *Id.* at *7–8.

244 *See* Rothman, *supra* note 51, at 1275–76 (discussing trademark law's theory of personality); Post & Rothman, *supra* note 119, at 165–72 (discussing the First Amendment's relationship to the right of dignity in relation to rights of publicity).

Postmortem rights of publicity violations remain a quagmire because technological innovation outpaces legislation and case law. Curbing the spread of harmful synthetic media is already difficult because, like cybersecurity, bad actors significantly "outgun" the good actors.[245] It is often difficult to trace infringing pieces of content back to their respective sources.[246] If you cannot identify the infringing party, how will they ever be held to account? Even if we could consistently and confidently locate infringers, it is unclear whether it is technologically possible to exclude a specific individual's likeness from the enormous datasets that synthetic-media production software uses to create new likenesses.[247] The consequence of these technological impediments is that equitable relief is unlikely in most cases involving primarily dignitary harm.[248] Drafting effective legislation is difficult because the types of infringements and scopes of harm are not yet predictable.

E. *Proposed Solutions*

This Part will incorporate the above analysis to determine how postmortem rights of publicity should be protected moving forward. Precise language for a federal statute is beyond the scope of this Note and will not be provided.

1. Federal Right of Publicity Statute Would Eliminate Jurisdictional Inconsistencies

The United States should adopt a federal right of publicity statute to eliminate the jurisdictional chaos that has existed for decades.[249] As discussed above, issues of extraterritoriality, jurisdictional gamesmanship, and judicial inefficiency plague our national treatment of the right of publicity.[250] Put simply, the solution to inconsistency is uniform federal legislation.

The passage of the 2016 Defend Trade Secrets Act (DTSA) provides a useful analogy for why uniform federal legislation is appropriate.[251]

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245 *Farid Interview*, *supra* note 30.

246 *Id.*

247 *Id.*

248 On the other hand, violations causing primarily economic harm are easier to trace because the content must serve some source-identifying function for the profiteer.

249 Ronald, *supra* note 177, at 149; Post & Rothman, *supra* note 119, at 90.

250 *Supra* Section III.D.

251 Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 76.

Proponents of the DTSA supported it because it sought to create a federal floor for trade secret protection and provide access to federal courts.[252] Meanwhile, opponents of the DTSA were concerned that federal legislation would conflict with the relatively uniform patchwork of state laws and create more judicial uncertainty.[253] Importantly, this concern does not apply to rights of publicity due to the wide-ranging state statutory and common law schemes for publicity protections.

2. PROP Protections Should Be Included in a Federal Right of Publicity Statute

Synthetic media allows us to live forever, so a deceased identity-holder's intent should remain important. Heirs and other third parties already have economic interests in protecting postmortem rights of publicities because (postmortem) celebrity endorsements are already common and will likely become more common.[254] Because dignitary harms extend beyond one's death,[255] a federal statute should ensure that victims of postmortem dignitary harms have recourse.

For a publicity-holder that primarily intends to monetize the deceased identity-holder's likeness, they should still have to prove economic harm. Economic harm can be measured in a similar way to trademark law, where defendants are disgorged of their unjust enrichments and, in cases of willful infringement, a form of punitive damages.[256] A federal statute would help plaintiffs recover because, today, disgorgement of a defendant's profits is not available as a remedy in some states' rights of publicity cases.[257]

For a publicity-holder that has not and does not intend to monetize the deceased identity-holder's likeness, they should not have to prove economic harm because it will likely be too difficult to prove. Even though the economic harm is difficult to prove, the law should still attempt to disincentivize bad actors from non-consensually appropriating a deceased person's likeness.

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252 Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 BERKELEY TECH. L.J. 829, 854 (2017).

253 *Id.* at 856.

254 *See generally* Experience Hendrix LLC v. James Marshall Hendrix Found., 240 F. App'x 739 (9th Cir. 2007); Parkin, *supra* note 92 and accompanying text (noting that Albert Einstein's likeness is highly valuable).

255 *Supra* Section I.B.

256 Pamela Samuelson, John M. Golden & Mark P. Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. REV. 1999, 2011–12 (2020).

257 *Id.* at 2003 n.13.

3. PROP Protections Should Extend to the Earlier of One Generation Beyond the Identity-Holder's Death or 75 Years After the Identity-Holder's Death

This solution helps address the concern that economic and dignitary harms become too attenuated after a period of time.[258] Plus, it would still allow likenesses to enter the public domain after a fixed period of time.[259] A statutory time limit will preempt the potential question of who should control the deceased identity-holder's right of publicity many generations after the identity-holder's death. For instance, imagine if Genghis Khan lived today and his future heirs (assuming they could be traced) had to manage his identity and could sue potential infringers in perpetuity. That would be quite confusing given the number of his progeny.

4. PROP Should be Alienable, but with Limits

One's postmortem right of publicity should not be dividable.[260] To alienate different facets of one's persona to different parties means that no party will be incentivized to maintain the persona's long-term goodwill. In this way, a dividable postmortem right of publicity would suffer from the tragedy of the commons.[261]

A deceased identity-holder should have the testamentary power to authorize or ban certain kinds of uses of their likeness.[262] An identity-holder knows best how they would like to manage their affairs and preserve their dignity upon their death. Therefore, a federal postmortem right of publicity statute should, as much as is possible, prioritize the interests of the decedent over the interests of a living publicity-holder.

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258 *See supra* note 58.

259 The "public domain" is defined as, "[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement." *Public Domain*, BLACK'S LAW DICTIONARY (11th ed. 2019).

260 For example: Party A controls the voice; Party B controls the image; and Party C controls the decedent's holographic public appearance.

261 The tragedy of the commons occurs when, in a common property system, each individual can appropriate the entire value of the common resource while the costs of each individual's resource utilization is borne on the group as a whole. Joseph W. Dellapenna, *The Tragedy of the Commons*, *in* ENV'T L. § 49:14 (Elizabeth Burleson ed., 2022).

262 *See* Roberts, *supra* note 162, at 290–93.

5. Remedies Must Always be Monetary, but only Sometimes Equitable

Remedies will likely have to be monetary because injunctions will be technologically difficult and require long-term judicial enforcement.[263]

For those with monetized likenesses, the measure of damages should be either the amount of profit their likeness generated or the market value of their likeness, whichever is higher. Given that it may be hard to determine how much one's likeness contributed to the final product, right of publicity cases can borrow from copyright law and trademark law's theory of apportionment. The details of how apportionment should apply to rights of publicity cases is an interesting topic for further research, but beyond the scope of this Note.

Dignitary harms will require an arbitrary monetary damage because injunctions are too unwieldy to tackle synthetic media publicity violations. It can be difficult to locate the bad actor if they use internet privacy tools such as proxy servers.[264] Even if one could locate the bad actor, it would be functionally impossible to determine how much one's likeness, when used as source material, contributed to the final product's likeness due to the enormity of the datasets that synthetic-media production software uses.[265] Even if one could locate the bad actor and determine the degree to which their likeness contributed to the final product, courts will be unable to enforce an injunction because they are unable to monitor the internet and play "whack-a-mole" with publicity violations.[266]

6. Preventative Measures to Ease Future Litigation

One potential method to combat the threats that synthetic media poses is to create a type of technological "watermark" in videos, still images, and audio recordings to determine the content's provenance.[267] This would, in theory, allow victims and content publishers to trace any violation back to its root.

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263 *See supra* notes 242–45 and accompanying text.

264 Dave Johnson, *A Guide to Proxy Servers, the Computer Systems that Relay Information Between Users and Networks, and How They Can Disguise Users' Online Presence*, BUS. INSIDER (Apr. 23, 2021, 5:04 PM), https://www.businessinsider.com/guides/tech/what-is-a-proxy-server?op=1 [https://perma.cc/HG5C-H3P9] (noting that proxy servers can "substantially increase" online privacy).

265 *Farid Interview*, *supra* note 30.

266 *Id.*

267 *Id.*

Additionally, a federal statute should hold platforms more responsible for authenticating non-artistic media. Perhaps, this accountability program resembles a GDPR-type program for one's likeness, where one has an opportunity to opt out of their image being accessible to appropriators.[268] In a way, most all opted into having their personal information harvested by using social media. As issues of misinformation and disinformation spread, media platforms ought to be held more responsible.[269]

F. *Further Problems and Considerations*

The cat-and-mouse game of innovation makes defending against harmful synthetic media difficult. Infringers will always outgun those trying to prevent them—such is the reality of technological development.[270] In crafting legislation, lawmakers should center the interests that the right of publicity seeks to protect, rather than on specific kinds of technology or dissemination. As cases challenging the use of one's likeness to create a non-imitating, novel likeness crop up, it will be important to watch how courts treat this potentially transformative use.

Will a federal postmortem right of publicity statute open the floodgates of litigation? Possibly, but probably not. It is more likely that synthetic media will continue to create new likenesses rather than to replicate old ones. Synthetic media will, however, make PROP claims more difficult to litigate because parties will need to verify a piece's authenticity, and apportionment will be a key issue.[271]

Imagine that synthetic media production software harvests the likenesses of many individuals—say, via social media—and mashes them up to create a completely unrecognizable synthetic likeness, and then uses that synthetic likeness to replace a catalog model. Has any right of publicity been violated if the synthetic likeness is unrecognizable as the individual on whom it is based? What if a bad actor harvests the content of every comedian that released a Netflix special from the past five years, creates a new synthetic bit, and then tries to sell that bit to Netflix. Who

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268 The European Union's General Data Protection Regulation (GDPR) embodies the "right to be forgotten" (which sounds quite similar to Thomas Cooley's "right to be let alone") and requires "a consent system that must be completely unambiguous and requires a clear opt-in." *GDPR Compliance Guide – 2022*, GDPR, https://www.gdpreu.org/gdpr-compliance [https://perma.cc/2943-7QEJ].

269 *See* Krishna, *supra* note 49, at 46–47.

270 DANIEL L. BYMAN, CHONGYANG GAO, CHRIS MESEROLE, & V.S. SUBRAHMANIAN, BROOKINGS INST., DEEPFAKES AND INTERNATIONAL CONFLICT 5 (2023), https://www.brookings.edu/wp-content/uploads/2023/01/FP_20230105_deepfakes_international_conflict.pdf [https://perma.cc/J8JC-K5KF].

271 Pfefferkorn, *supra* note 221, at 259–65.

gets paid? These instances will likely fall outside the scope of one's right of publicity because the final "product" is not identifiable as the identity-holder. However, they raise interesting copyright law questions that should be developed in further literature.

CONCLUSION

Synthetic media is a double-edged sword; while it helps creators produce new content for us to enjoy, it also opens the door to widespread economic, dignitary, and emotional harms associated with right of publicity violations.[272] This Note proposes that dignitary and emotional interests of deceased identity-holders and their loved ones are worthy of legal protection under a federal statute. Postmortem rights of publicity are important to protect because digital reanimation is a form of digital disinterment that harms families and disrespects the deceased.

Courts initially understood the right of publicity as a tool with which to protect one's right to privacy.[273] Yet, in recent years, courts have focused more on the property interests created by one's right of publicity.[274] Concurrently, courts weakened the right of publicity's ability to protect privacy interests—particularly after death. In reforming the current patchwork, courts and lawmakers should couch their analyses of right of publicity cases in the interests of the identity-holder or their designated publicity-holders so as to prevent digital disinterment.

The current state-by-state approach to publicity rights is inadequate to shield against the nature of online harms because it creates jurisdictional confusion. A federal postmortem right of publicity statute should ensure that a deceased identity-holder's wishes are respected. Importantly, postmortem rights of publicity should not last forever.

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272 *Supra* Sections I.A–I.B.

273 *Supra* Section II.A.

274 *Id.*