DIGITAL FAME: AMENDING THE RIGHT OF PUBLICITY TO COMBAT ADVANCES IN FACE-SWAPPING TECHNOLOGY

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I. Introduction

When a person reaches a level of popularity that inherently creates economic value in the use of their name and likeness, that person is entitled to the exclusive control of such use. Known as the right of publicity, this entitlement has developed into a unique area of intellectual property law that essentially allows every person to exclude others from using their identity as a means for acquiring economic gain. Although typically asserted by celebrities, the right

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1 See, e.g., Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575–76 (1977) (entitling famous stuntman to prohibit others from broadcasting his performances); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992) (ruling for plaintiff on a right of publicity claim where defendant’s acts directly implicated the commercial interest in plaintiff’s identity); Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 835 (6th Cir. 1983) (asserting that if claimant’s identity is commercially exploited by a third party, there has been a right of publicity violation); see also William L. Prosser, Privacy, 48 CALIF. L. REV. 383, 401–02 (1960) (stressing the exclusivity of the right to appropriate one’s own name and likeness). The U.S. Supreme Court has addressed the argument that the exclusivity of this right renders it unconstitutional, holding that the right to appropriate one’s own identity outweighs free speech concerns. See Zacchini, 433 U.S. at 578–79 (clarifying that the First and Fourth Amendments did not bar the Court from enforcing plaintiff’s exclusive right to control the use of his performance).
2 See 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2018) (describing the right of publicity as a person’s control over the commercial use of their identity); Andrew Beckerman-Rodau, Toward a Limited Right of Publicity: An Argument for the Convergence of the Right of Publicity, Unfair Competition and Trademark Law, 23 FORDHAM INTELL. PROP.

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of publicity is enforceable by any individual whose name, image, or likeness has been exploited. The right of publicity is violated by unauthorized use of an individual’s identity for commercial purposes.

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The rationale behind treating the right of publicity as property interest is to fairly compensate individuals who expend time and labor into achieving public recognition. See Beckerman-Rodau, supra, at 132 (discussing the underlying policy of allowing for a right publicity). In codifying the right of publicity, Arkansas included a section dedicated to the legislative intent behind the statute, providing:

The General Assembly finds that citizens of this state: (1) Are renowned for their hard work and accomplishments in many areas that contribute to the public health, welfare, and pursuit of happiness; (2) Often spend most of their lives developing and maintaining reputations of honesty and integrity; (3) Have a vested interest in maintaining the memory of personal traits that characterize them and their accomplishments; and (4) Should have the use of their names, voices, signatures, photographs, and likenesses protected for their benefit and the benefit of their families.

ARK. CODE ANN. § 4-75-1102(a) (West 2016).

See McCarthy & Schechter, supra note 2, § 1:3 (including the phrase “inherent right of every human being” in defining the right of publicity) (emphasis added); Jennifer E. Rothman, The Right of Publicity: Privacy Reimagined for a Public World 45 (Harvard Univ. Press 2018) (noting that by the 1950s, the right of publicity was widely accepted and could be asserted by both private and public figures). Despite this allowance, the plaintiff in a right of publicity case is often a famous entertainer or athlete. See, e.g., Zacchini, 433 U.S. at 562 (stuntman); Midler v. Ford Motor Co., 849 F.2d 460, 461 (9th Cir. 1988) (singer/actress); White, 971 F.2d at 1396 (game show hostess); Carson, 698 F.2d at 832 (television host); Wendt v. Host Int’l, Inc., 125 F.3d 808, 808 (9th Cir. 1997) (actor); Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 867 (2d Cir. 1953) (baseball players); Jordan v. Jewel Food Stores, Inc., 83 F. Supp. 3d 761, 765 (N.D. Ill. 2015) (basketball player); Abdul-Jabbar v. GMC, 85 F.3d 407, 409 (9th Cir. 1996) (basketball player). “The right of publicity is not merely a legal right of the ‘celebrity,’ but is a right inherent to everyone to control the commercial use of identity and persona and recover in court damages and the commercial value of an unpermitted taking.”

See McCarthy & Schechter, supra note 2, § 1:3.

Remedies for infringement are usually property-based and seek to recover the economic value of the identity that has been misappropriated. See Beckerman-Rodau, supra note 12, at 140. The term “identity” is broadly interpreted in right of publicity context. See, e.g., IND. CODE ANN. § 32-36-1-7 (West 1994) (defining the right of publicity as a property interest in an
Most right of publicity cases entail the defendant’s use of the plaintiff’s well-known name or likeness to create an association between the plaintiff and the defendant’s source of revenue in order to reach a larger consumer audience. However, non-commercial use of an individual’s identity is sometimes actionable as well. The right of publicity is recognized in the United States through state laws that are widely inconsistent with one another. Growth of interstate and international communications has increased the difficulty of enforcing the right of publicity when the entitlements under this area of law are so disparate across the country. Due to the accumulating need for

5 See ROTHMAN, supra note 3, at 11 (noting how “typical right of publicity cases [involve] the nonconsensual use of people’s likenesses, often on products and in advertisements”); Beckerman-Rodau, supra note 2, at 140 (using the example of “enhancing or promoting the sale of a product by associating it with a well-known person” to demonstrate the type of commercial context often observed in right of publicity cases); MCCARTHY & SCHCHTER, supra note 2, § 4:8 (explaining why celebrities are often used to advertise products); see also discussion infra Part II Section A.

6 See White, 971 F.2d at 1398 (stressing the irrelevance of the manner in which the defendant appropriated the plaintiff’s identity); MCCARTHY & SCHCHTER, supra note 2, § 1:36 (“Courts have recognized that for every challenged use, whether classified as ‘commercial’ or ‘non-commercial’ speech, there must be a balancing of the plaintiff’s assertion of the right of publicity with the defendant’s assertion of the right to free speech and expression.”). But see Midler, 849 F.2d at 462 (finding the purpose of the use of a person’s identity to be central). In Midler, the court declared that use of a person’s identity for “informative or cultural” purposes would be immune from a right of publicity claim. Id.

7 See ROTHMAN, supra note 3, at 2 (detailing several discrepancies among state right of publicity statutes); see also Brittany A. Adkins, Crying Out For Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act, 40 CUMB. L. REV. 499, 503 (2010) (examining the differences between right of publicity statutes in New York, California, Tennessee, and Indiana in order to illustrate the degree of legislative disparity); Right of Publicity State-by-State, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Jan. 21, 2019), archived at https://perma.cc/Z4LE-7HDF (providing an overview of the right of publicity laws in each state).

8 See ROTHMAN, supra note 3, at 3 (“The right of publicity, then, rather than a single, uniform right, is in reality many different laws. This variability itself makes these laws difficult to navigate and even to talk about in a coherent fashion.”); Adkins, supra note 7, at 505–18 (proposing a Uniform Right of Publicity Act to eliminate the inconsistencies and potential problems arising from the current legislative disparity); see also discussion infra Part II Section B.
stronger right of publicity laws, state legislatures have started to revisit their outdated definitions of this property right.\(^9\)

The recent increase in right of publicity disputes historically parallels technology’s profound impact on society.\(^{10}\) With social media platforms enabling global exposure of one’s identity, it has become faster and easier for a person to acquire commercial value in their name and likeness which consequently leaves them at risk for having their identity misappropriated.\(^{11}\) In addition, advances in technology have fostered vast opportunities for well-known individuals to be exploited for the commercial benefit of an unauthorized party.\(^{12}\) Face-swapping technology and artificial intelligence, for example, now make it possible for unauthorized parties to create and disseminate digital simulations of recognizable individuals.\(^{13}\) As these technologies improve, the chance that viewers

\(^9\) See discussion infra Part III Section A.

\(^{10}\) See Jonathan S. Jennings, Right of Publicity Law Meets Social Media, PATTISHALL (2013) [hereinafter Right of Publicity & Social Media], archived at https://perma.cc/MP57-KLY9 (drawing a connection between the increasing volume of right of publicity claims and the rise of social media platforms); see also Cristina Fernandez, The Right of Publicity on the Internet, 8 MARQ. SPORTS L. REV. 289, 321–22 (1998) (exploring the difficulty posed by the Internet in protecting the right of publicity).

\(^{11}\) See Jonathan S. Jennings, The Right of Publicity and Cyberspace, PATTISHALL (2003) [hereinafter Right of Publicity & Cyberspace], archived at https://perma.cc/6NYW-MMFR (stating that “[t]he ease of establishing a Web presence has increased the possibilities for more individuals to exploit their identity rights for commercial gain while also leaving them vulnerable to having others exploit them”). “The rise of mass media also facilitated the creation of more valuable personalities because of the ability to create a shared interest and recognition of particular celebrities across the country, and even across the globe.” ROTHMAN, supra note 3, at 15.

\(^{12}\) See Right of Publicity & Social Media, supra note 10, at 5 (inferring that the internet’s enablement of becoming a public figure simultaneously enables the misappropriation of public personalities); Kevin L. Vick & Jean-Paul Jassy, Why a Federal Right of Publicity Statute Is Necessary, 28 COMM. LAW. 2 (Aug. 2011) (explaining that technological advances have allowed for increased dissemination of digital content on both a national and international scale).

\(^{13}\) See Brian Higgins, At the Intersection of AI, Face Swapping, Deep Fakes, Right of Publicity, and Litigation, ARTIFICIAL INTELLIGENCE TECH. & L. BLOG (June 17, 2018), archived at https://perma.cc/HM3U-7R6Q (listing several websites that offer plenty of artificial intelligence learning models and use instructions as well as forums for learning how to face-swap). Higgins defines face-swapping as “a technique used
will perceive these computer-generated depictions to be authentic images of the projected individual increases.\(^{14}\)

Advancing technology coupled with the perpetual rise of social media necessitate stronger protection for the right of publicity. The number of individuals who are likely to face violations of their right of publicity has multiplied since this right first emerged, because there are more ways to gain “celebrity status” now than ever before. Social media enables individuals to have control over their public image, but this control is threatened by advances in digital technology that make it possible, if not easy, to create fake depictions of well-known individuals. Ultimately, today’s technology provides for endless means of misappropriating an individual’s identity for commercial purpose. While current law’s recognition of the right of publicity may have suited society half a century ago, social media’s expansion of the public eye has compelled a push for reform in this area of law.

II. History

A. Right of Publicity’s Development at Common Law

The right to control the commercial use of one’s identity has recently found its home in intellectual property law, despite its existence being observed under the guise of a tort-based privacy right since the late nineteenth century.\(^{15}\) Interestingly, the concept of a publicity right was actually the seed from which privacy law grew.\(^{16}\)

to automatically replace the face of a person in a video with that of a different person.” Id.

\(^{14}\) See id. (anticipating that the latest artificial intelligence models “may appear so seamless and uncanny as to fool even the closest of inspections” due to improved quality).

\(^{15}\) See McCarthy & Schecter, supra note 2, § 1:7 (noting that the right of publicity was historically rooted in privacy law); Rothman, supra note 3, at 11 (tracing the right of publicity back “to the development of the right of privacy in the late 1800s”); Beckerman-Rodai, supra note 2, at 132 (acknowledging the right of publicity as the most recently developed area of intellectual property law). Leading commentators in right of publicity law defines this right as “a state-law created intellectual property right whose infringement is a commercial tort of unfair competition.” McCarthy & Schecter, supra note 2, § 1:3.

\(^{16}\) See Rothman, supra note 3, at 11 (referring to the right of publicity as “the animating impetus” for the formation of privacy laws). As Rothman points out, some of the first cases to establish a right of privacy involved fact patterns analogous to
Although publicity rights and privacy rights were practically indivisible at their inception, the difference between these rights as they are known today is much more apparent; simply stated, the right of publicity is a property right while the right of privacy remains a personal right. Rather than protecting against unwanted invasions, the right of publicity protects against unauthorized commercial appropriation.

Most scholars trace the development of privacy rights to a famous law review article, conveniently titled The Right to Privacy, published in 1890. The authors, and later United States Supreme...
Court Justices, Samuel Warren and Louis Brandeis were the first to address an individual’s right to be left alone as distinct from similar entitlements observed in pre-existing tort law. Pointing to a combination of “recent inventions and business methods” within the photography industry as the catalyst in necessitating privacy protection, Warren and Brandeis called on the law to provide a remedy for the unauthorized circulation of portraits of individuals. In emphasizing the need to prohibit the dissemination of a person’s image without that person’s consent, The Right of Privacy evidences how fact patterns that would constitute a right of publicity violation today were used to justify the right of privacy’s inception.

an independent right of privacy); Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 Ariz. L. Rev. 1, 1 (1979) (alleging that privacy rights date back to the 1890 article by Warren and Brandeis). *The Right of Privacy* led to judicial recognition of the right of privacy, which has been regarded as an outstanding illustration of the impact that law review articles can have on the courts. See Glancy, *supra* (purporting that *The Right to Privacy* essentially added a chapter to the common law).

20 *See* Warren & Brandeis, *supra* note 19, at 218–19 (distinguishing a privacy right independent from pre-existing torts of defamation and breach of confidence). Warren and Brandeis asserted that matters concerning the “private life, habits, acts and relations of an individual” warranted special protection that tort law at the time failed to protect. *See id.* at 216; *see also* McCarthy & Schecter, *supra* note 2, § 1:11 (commenting on the Warren and Brandeis article in great detail).

21 *See* Warren & Brandeis, *supra* note 19 (suggesting that recent developments have created a need for independent recognition of privacy which did not exist in earlier times) (quoting Pollard v. Photographic Co., 40 Ch. D. 345, 352 (1888)). Warren and Brandeis compare such developments to the societal changes that led to the creation of intellectual property law. *See id.* at 202–03. Many scholars believe that Warren and Brandeis article was prompted by the author’s personal experiences, specifically, a wave of press coverage surrounding Warren’s socially prominent wife who was the daughter of a U.S. Senator. *See* McCarthy & Schecter, *supra* note 2, § 1:11 (detailing the circumstances that led Warren and Brandeis to publish their article). It was Warren’s belief that personal affairs should be kept out of the newspapers, and the coverage of several lavish society parties thrown by Mrs. Warren prompted Mr. Warren to explore potential avenues of legal protection against such publications. *See id.*

22 *See* Warren & Brandeis, *supra* note 19 (focusing on the scenario where a person’s portrait is used in disseminated for commercial purposes without their knowledge or consent when describing the conduct that their proposed privacy right would protect against) (quoting Tuck v. Priester, 19 Q. B. D. 639 (1887)).
The right of publicity divaricated from privacy law as public realization of the value in one’s name or likeness grew. The term “right of publicity” was first coined in 1953 by the Second Circuit in Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc. Faced with a dispute concerning the use of athletes’ photographs on baseball cards, the Haelan court focused on the economic interest at stake in the ability to control one’s identity as opposed to the personal interests inherent in the right of privacy. This emphasis on the economic interest clearly distinguished Haelan from prior case law; rather than the issue being that the plaintiff did not want their photograph viewed by the public at all, the plaintiffs in Haelan did not want their photographs to be sold for profit by third parties. Nearly a quarter of a century later, the right of publicity gained U.S. Supreme Court recognition in Zacchini v. Scripps-Howard Broadcasting Co. when the Court ruled that a broadcasting company had substantially interfered with the economic value of a stuntman’s performance by

23 See Rothman, supra note 3, at 67 (discussing how the right of publicity “exploded across the country” in the wake of a series of court decisions that treated publicity as a commercial interest); Roberson v. Rochester Folding Box Co., 64 N.E. 442, 563 (N.Y. 1902) (Gray, J. dissenting) (holding that the economic value in one’s likeness is worthy of legal protection); Munden v. Harris, 134 S.W. 1076, 1078 (Mo. 1911) (confirming the right of publicity as a property right of value). The Munden court phrased the issue before them as “[i]f there is value in [a person’s identity], sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?” See Munden, 134 S.W. at 1078.

24 202 F.2d 866, 868 (2d Cir. 1953).

25 See Haelan, 202 F.2d at 867 (recognizing baseball players’ rights to exercise control of the commercial use of their identities in granting a company the exclusive right to use their photographs on baseball cards). It should be noted that Haelan involved a dispute over breach of contract and not a right of publicity claim, however, they were the first to articulate a designation for the right to control the use of one’s identity. Id. at 868. Also, the Haelan court specifically declined to categorize this as a property right, which it is widely accepted as today. Id. See also Zehra Betul Ayranç, Right of Publicity, ABA FORUM ON THE ENTERTAINMENT & SPORTS INDUSTRIES (Aug. 8, 2017), archived at https://perma.cc/EF2Z-CKZ2 (discussing the development of right of publicity as a majority-viewed property right).

26 See Haelan, 202 F.2d at 867 (distinguishing plaintiffs’ claims from prior claims of right of privacy invasions).

airing his entire act on television without his consent. The Court explained the purpose of enforcing a right of publicity as “protecting the proprietary interest of the individual in his act in part to encourage such entertainment.” Notably, this purpose corresponds the economic philosophy behind granting patent and copyright ownership, which is to encourage the creation of inventions and creative works that will eventually contribute to a robust public domain. The Zacchini court expressly distinguished the right of publicity from the right of privacy and impliedly categorized it as a property right.

28 See Zacchini, 433 U.S. at 574–75 (recognizing an economic value in the right of plaintiff’s exclusive control over the publicity given to his performance).

29 See Zacchini, 433 U.S. at 576 (interpreting the rationale behind the right of publicity as incentivizing performance artists to entertain the public).

[The] decision to protect petitioner’s right of publicity here rests on more than a desire to compensate the petitioner for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.

Id.

30 See Beckerman-Rodau, supra note 2, at 148–52 (providing detailed discussion on the justifications of protecting intellectual property rights); see also Joshua L. Simmons & Miranda D. Means, Split Personality: Constructing a Coherent Right of Publicity Statute, 10 LANDSLIDE 5 (2018) (analyzing the different interest justifications for the right of publicity). The Constitution provides that Congress shall have the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. The goal in providing these exclusive rights in the products of one’s labor is to incentivize the creation of such products that ultimately contribute to a robust public domain. See Mazer v. Stein, 347 U.S. 201, 219 (1954). In expressly recognizing a need to protect a performer’s incentive in order to encourage the production of entertainment, the Zacchini court seemingly acknowledged an intellectual property interest in the right of publicity.

See Zacchini, 433 U.S. at 575–76.

31 See Zacchini, 433 U.S. at 571 (finding that the right of publicity is “an entirely different tort” from its former counterparts in privacy law). Zacchini is arguably responsible for shifting the right of publicity towards intellectual property law. See ROTHMAN, supra note 3, at 76 (hypothesizing that today’s “IP-centered vision of the right of publicity largely stems from the unique facts of the Zacchini case”); MCCARTHY & SCHECHTER, supra note 2, § 1:33 (noting the significance of the Zacchini court articulating the right of publicity as distinct and separate from privacy law and defamation law).
With a right to publicity in one’s likeness established, courts were then tasked to define what could constitute one’s likeness. For example, in 1989 renowned singer and actress, Bette Midler, succeeded on her right of publicity action against Ford Motors for its unauthorized use of a “sound-alike” performer in one of its commercials. After efforts to have Midler record a demo for a commercial proved unsuccessful, Ford resorted to use of the “sound-alike” in order to fulfill its goal of having Midler’s voice in its commercial. The court found that what Ford had sought for its own use—Midler’s voice—amounted to “an attribute of Midler’s identity . . . as distinctive and personal as a face.” Thus, the deliberate imitation of Midler’s distinctive voice for a commercial benefit constituted misappropriation of her identity. Although, at the time, a person’s voice did not fall under the protected attributes under California’s right of publicity statute at the time, the court found that Midler still had a valid claim under the common law.

32 See Rothman, supra note 3, at 11–29 (tracing the process of how the common law right of publicity was developed). Defining what constituted an individual’s likeness resulted in the scope of publicity rights being established. See id. Early cases defined a broad scope that was later narrowed by subsequent decisions as courts felt that the right of publicity began to interfere with free speech. See id. at 17.

33 See Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988) (holding that when a distinctive voice of a professional singer who is widely known is used to sell a product, the sellers have appropriated what is not theirs).

34 See id. at 461–62 (providing the facts of the case).

35 See id. at 463 (applying a broad definition of identity). The court further noted that a person’s voice is one of the easiest ways to identify them, giving the example of being able to instantly recognize a friend’s voice over the phone. Id.

36 See id. at 463–64; see also Waits v. Frito-Lay, Inc. 978 F.2d 1093 (9th Cir. 1992) (demonstrating an almost identical fact pattern where the court ruled in favor of plaintiff on a right of publicity claim due to defendant’s use of a “sound-alike” purposed to duplicate plaintiff’s voice).

37 See Midler, 849 F.2d at 463 (pointing out that although the statute recognized an action in the use of a person’s “name, voice, signature, photograph or likeness,” it was inapplicable to this case because defendants did not use Midler’s actual voice). The court also made a point to clarify that the term “likeness” as used in the statute referred to a visual image, thus preempting any argument that a person’s voice could fall under that category. Id. In addition, the court rejected an argument that defendants’ acts constituted unfair competition, as they were not in competition with Midler. Id. at 462. After exhausting the possibility of statutory remedy, the court found that Midler nonetheless had a cause of action at common law, holding that
recognizing a person’s voice as a protectable attribute of their identity, other courts have likewise broadened the scope of publicity rights to encompass various identifiable features, such as a distinctive racecar that was well-known as belonging to a famous driver, and a television show host’s opening catch-phrase. Case law continues to provide the clearest illustration of what may constitute a person’s likeness, although it is a boundless list.

B. Statutory Disparity

A majority of states recognize the right of publicity under common law, statutory law, or both. Unfortunately, the statutory versions vary significantly from state to state. Some statutes omit the common law assumption that the unauthorized use is to be commercially purposed in order to be categorized with a right of

“when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.” Id. at 463.


39 See White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1398 (9th Cir. 1992) (“Motschenbacher, Midler, and Carson teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity.”)

40 See ROTHMAN, supra note 3, at 3 (noting that over half of the states in the U.S. have enacted right of publicity statutes); McCARTHY & SCHECHTER, supra note 2, § 6:2 (stating that as of 2018, thirty-three states had adopted some form of right of publicity law).

41 See ROTHMAN, supra note 3, at 3, 96 (discussing the variance among statutory rights of publicity). Most states that have codified the right of publicity maintain the typical “name and likeness” language, however some states replace the term “identity” with the term “personality.” See, e.g., WASH. REV. CODE ANN. § 63.60 (West 2019) (titling this chapter “Personality Rights”).

It is difficult to group the statutes into any sort of coherent “types” or subspecies. They were enacted over a period of more than a century: a period during which the state of the law of the rights of privacy and publicity has grown and changed considerably. Each statute is largely a product of its time and place.

McCARTHY & SCHECHTER, supra note 2, § 6:4.
publicity violation, while others strictly require commercial use. Some states provide for a specific class of people that the right of publicity applies to. The fifteen statutes that provide for the right of publicity to survive at death provide for a wide range of duration periods, with an eighty-year difference between the shortest and longest post-mortem terms. Only a few states explicitly address the

42 Compare WASH. REV. CODE ANN. § 63.60.050 (West 2004) (stating that “an infringement may occur under this section without regard to whether the use or activity is for profit or not for profit”), with ALA. CODE § 6-5-772 (1975) (limiting liability for “use of indicia of identity without consent” to commercial use). ARIZ. REV. STAT. ANN. § 12-761 (2007) (limiting violations of publicity to commercially related acts), FLA. STAT. ANN. § 540.08 (West 2007) (requiring commercial use for a right of publicity violation), NEV. REV. STAT. ANN. § 597.790 (West 1995) (providing non-commercial as a valid defense against a right of publicity claim), and IND. CODE ANN. § 32-36-1-6 (West 2019) (requiring the exploitive acts to be related to commerce). California’s right of publicity statute is particularly strict on requiring the use to be commercially purposed:

The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required . . . solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person’s name, voice, signature, photograph, or likeness was so directly connected with the commercial [use].

CAL. CIV. CODE § 3344(e) (West 2019). In 2016, Oklahoma enacted a right of publicity statute that contains identical language to the California statute regarding the commercial use requirement. See OKLA. STAT. ANN. tit. 12, § 1449 (West 2019). Several statutes specify that individuals are entitled to exclude others from commercially appropriating their identity even if they themselves choose not to. See TENN. CODE ANN. § 47-25-1103 (West 1984) (stating that the right of publicity “do[es] not expire upon the death of the individual so protected, whether or not such rights were commercially exploited by the individual during the individual’s lifetime”) (emphasis added); IND. CODE ANN. § 32-36-1-6 (West 2019) (allowing for enforcement “whether or not the person uses or authorizes the use of the person’s rights of publicity for a commercial purpose during the person’s lifetime”).

43 See ARIZ. REV. STAT. ANN. § 12-761 (2019) (providing for a right of publicity exclusive to soldiers); TEX. PROP. CODE ANN. § 26.002 (West 2019) (limiting right of publicity actions to deceased individuals). The Texas statute is of particular confusion, as it provides that the right of publicity does not arise until after death, but simultaneously allows the right to be transferred before death. See TEX. PROP. CODE ANN. § 26.004 (West 2019).

44 See ARK. CODE ANN. § 4-75-1107 (West 2019) (50 years); FLA. STAT. ANN. § 540.08 (West 2019) (40 years); IND. CODE ANN. § 32-36-1-8 (West 2019) (100 years); 42 PA. STAT. AND CONST. STAT. ANN. § 8316 (West 2019) (30 years); S.D.
right of publicity as a property right. There are even a handful of states that have yet to codify or judicially address the right of publicity and thus the right remains intertwined with the right of privacy. Several statutes are of particular ambiguity and some contain unique provisions that are not recognized in other states. Perhaps one of the

CODIFIED LAWS § 21-64-2 (2019) (70 years); TENN. CODE ANN. § 47-25-1104 (West 2019) (10 years); VA. CODE ANN. § 8.01-40 (West 2019) (20 years).

45 See WASH. REV. CODE ANN. § 63.60.010 (West 2019) (labeling the use of a name, voice, signature, photograph, or likeness as a property right); TENN. CODE ANN. § 47-25-1103 (West 2019) (stating that the right of publicity “constitutes a property right”); TEX. PROP. CODE ANN. § 26.002 (West 2019) (providing for when an individual’s “property right” in their likeness is established).

46 See WIS. STAT. ANN. § 995.50 (West 2019) (labeling “[t]he use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without . . . consent of the person” as an invasion of privacy under Wisconsin tort law).

47 See WASH. REV. CODE ANN. § 63.60.020 (West 2019) (creating unnecessary difficulty in interpreting the statute by treating “individuals” and “personalities” separately). Under the Washington statute, “individual” means a natural person, living or dead, and “personality” is defined as “any individual whose name, voice, signature, photograph or likeness has commercial value.” Id. In addition to the superfluous decision to define these terms separately, the Washington statute further provides “personalities” and “individuals” with very different durations of post-mortem protection. Compare WASH. REV. CODE ANN. § 63.60.040(1) (West 2019) (“[T]he rights protected in this chapter are exclusive to the individual . . . for a period of ten years after the death of the individual.”) with WASH. REV. CODE ANN. § 63.60.040(2) (West 2019) (“[T]he rights protected in this chapter are exclusive to the personality . . . for a period of seventy-five years after the death of the personality.”).

The Texas statute is complicated regarding when and to whom the right of publicity applies, containing language that implies that the right is only available to deceased individuals while simultaneously providing that the right may be transferred before death. See TEX. PROP. CODE ANN. § 26.002 (West 2019) (“An individual has a property right in the use of the individual’s name, voice, signature, photograph, or likeness after the death of the individual.”) (emphasis added); but see TEX. PROP. CODE ANN. § 26.004(b) (West 2019) (“The property right may be transferred before or after the death of the individual.”). It is confusing that the Texas statute allows the property right to be transferred before death when it explicitly provides that the right does not exist until after death. See id. Lastly, the South Dakota statute includes a specific provision that renders the right of publicity inapplicable to individuals who only have commercial value in their identity due to public attention regarding a crime they committed. See S.D. CODIFIED LAWS § 21-64-9 (2019) (“[T]he provisions of this chapter do not apply to a personality whose name, voice, signature, photograph, image, likeness, distinctive appearance, gesture, or mannerism has commercial value solely because the personality has been formally charged with or convicted of a
more striking differences between the states are those that allow the right of publicity to be transferable and those that do not. This disparity among the states’ treatment of the right of publicity inhibits clear enforcement against misappropriation and blurs comprehension of publicity laws on a national scale.

48 Compare ARK. CODE ANN. § 4-75-1104 (West 2019) (allowing the right of publicity to be transferred, assigned, licensed, and/or bequeathed), and FLA. STAT. ANN. § 540.08 (West 2019) (allowing the right of publicity to be licensed and to descend to spouses and children), and TENN. CODE ANN. § 47-25-1103 (West 2019) (providing that the right of publicity is “freely assignable and licensable” as well as descendible), with MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2019) (containing no language indicating that the right of publicity is transferable), and 9 R.I. GEN. LAWS ANN. § 9-1-28 (West 2019) (implying that the right of publicity is not transferable). The Ohio statute provides for particularly liberal transferability of the right of publicity, even allowing the right to be divisible:

The following persons may bring a civil action to enforce the [right of publicity]: (1) A person . . . who collectively owns all of an individual’s right of publicity . . . (2) A person, including a licensee of an individual’s right of publicity, who is expressly authorized in writing by the owner . . . (3) Except as otherwise expressly provided in an agreement transferring an aspect of an individual’s right of publicity . . . a person to whom ownership or any portion of ownership of an individual’s right of publicity has been transferred.

OHIO REV. CODE ANN. § 2741.06 (West 2019) (emphasis added). Ohio is not the only state to treat the right of publicity as a potentially divisible right. See IND. CODE ANN. § 32-36-1-16 (West 2019) (allowing the right of publicity to be “freely transferable and descendible in whole or in part”) (emphasis added); ARK. CODE ANN. § 4-75-1104 (West 2019) (permitting fractional transfers of the right of publicity).

49 See ROTHMAN, supra note 3, at 96 (“Because of the widespread variations it is difficult to know exactly when a use will, or will not, violate a person’s right of publicity.”); Right of Publicity & Cyberspace, supra note 11 (pointing out the vast amount of issues that arise from the lack of uniformity among right of publicity statutes throughout the U.S.). A law review article from 2011 clearly articulates the problem with disparity:

Because of the wide distribution of all forms of media, those producing content—whether it be advertising, news, expressive works, etc.—must consider and account for the right of publicity laws of every jurisdiction nationwide. These considerations increase compliance and transaction costs. They lead to uncertain and inconsistent results based on choice of law determinations that
C. Right of Publicity in the Intellectual Property World

The property interest protected by the right of publicity is in the potential profit derived from association with a particular individual in commercial context.\(50\) With the keystone of this right being its economic value, the right of publicity clearly fits within the class of property rights.\(51\) Publicity rights are essentially an intangible marketplace tool, which is consistent with several other interests that are protected by intellectual property law.\(52\) All areas of intellectual property are outcome-determinative and possibly result-oriented. They lead to courts in plaintiff-friendly states issuing decisions that may affect parties in other states, e.g., ‘a national injunction and damages for national injury.’ Vick & Jassy, supra note 12 (quoting J. Thomas McCarthy & Roger E. Schechter, THE RIGHTS OF PUBLICITY AND PRIVACY § 11:12 (2d ed. 2018)).

\(50\) See, e.g., Haelan Labs., Inc. v. Topps Chewing Gum, 202 F.2d 866, 868 (2d Cir. 1953) (articulating a property right in the commercial value of a person’s identity); Carson v. Here’s Johnny Portable Toilets, Inc., 698 F.2d 831, 836 (6th Cir. 1983) (holding that any use in commercial context that creates association with a celebrity violates the celebrity’s right to such commercial use); McCarthy & Schechter, supra note 2, § 4:46 (identifying “persona” as interest protected by the right of publicity which consists of the “bundle of commercial values embodied in the ‘identity’ of a person”). “A ‘persona’ has commercial value in that it can attract consumers’ attention to an advertisement or product. In creating a right of publicity, the law recognizes the existence of this economic reality.” McCarthy & Schechter, supra note 2, § 4:46.

\(51\) See Haelan, 202 F.2d at 868 (emphasizing that the economic interest in the right to control one’s identity distinguished the right of publicity from the personal interests in the right of privacy); see also McCarthy & Schechter, supra note 2, § 1:7 (asserting that the right of publicity is correctly viewed as a form of intellectual property).

\(52\) See Kazunari Sugimitsu, Intellectual Property as a Marketing Tool, 13 J. OF INTELL. PROP. ASS’N OF JAPAN 3 2017, at 4, 6 (detailing potential uses of intellectual property for economic gain). Although the underlying rationale of all intellectual property is the promotion of innovative activity for a robust public domain, each area has implications on competition due to the rights afforded to entitlement holders. Id. For example, the economic value in patent portfolios that contain many patents in a particular field can enable the owner to leverage the portfolio as a market barrier; those who consider entering that field may hesitate at the likelihood of infringing upon the owner’s patents. See Richard D. Harris, A PRACTICAL GUIDE TO ORGANIZING A BUSINESS IN CONNECTICUT § 8.7.3 (MCLE 1st Ed. 2013) (discussing how commercial enterprises often see a substantial portion of the company’s value derived from intellectual property assets). In order to minimize unfair competition, intellectual property limits these rights to fixed periods of time and offers exceptions...
property—and even property law as a whole—seemingly acknowledge a stake in the exclusivity of property rights. For the right of publicity, exclusivity is granted in regards to the commercial use of a person’s name or likeness. Unlike right of privacy violations, the nature of a right of publicity violation is irrelevant; simply the occurrence of a person’s likeness being used for commercial purpose without authorization automatically violates that person’s exclusive right to such use.

Intellectual property is for certain uses that do not unjustly interfere with the entitlement holder’s rights. See Beckerman-Rodau, supra note 2, at 148 (asserting that the right of publicity should be subject to public policy-based restrictions similar to the restrictions imposed on other forms of property and providing examples of existing restrictions). As technology advances, there are changes in the mediums by which the interests protected by intellectual property law are embodied, leaving this area of law particularly susceptible to reform in light of new technologies. See John Tehranian, All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age, 72 U. CIN. L. REV. 45, 50 (2003) (discussing the effects of technological advancements on intellectual property); Edward Lee, Decoding the DMCA Safe Harbors, 32 COLUM. J. L. & ARTS 233, 233 (2009) (noting how copyright law was modified in light of the internet-era).

See Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (declaring that the right to exclude others is one of the most important rights attached to all property). Real property, personal property, and intellectual property all provide for owners to exclude others from using their property. See id. The appeal of exclusive rights to the products of one’s labor incentivizes such labor which ultimately benefits the public. See Beckerman-Rodau, supra note 2, at 148–52 (listing the right to exclude as one of the main rights that attach to property). A patent owner has the right to exclude others from making, using, or selling their invention. 35 U.S.C. § 154 (2015). Similarly, a copyright owner is entitled to exclude others from six enumerated uses of the copyrighted work, including reproduction and distribution of the work. 17 U.S.C. § 106 (2019). Trademark law empowers the owner of a registered trademark to exclude others from using any marks that are likely to be confused with the owner’s mark. 15 U.S.C. § 1115 (2019).

See Warren & Brandeis, supra note 19, at 204–05 (noting that individuals with economic value in their name or likeness are entitled to exclude others from misappropriating such value); MCCARTHY & SCHECHTER, supra note 2, § 1:7 (stressing that the right of publicity is a person’s exclusive right to control the commercial use of their identity which prevents all other individuals from engaging in such use without that person’s consent).

See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573–74 (1977) (finding the nature of the violation to be irrelevant for purposes of right of publicity so long as the unauthorized use was for commercial purposes); see also Warren & Brandeis, supra note 19, at 204–05 (comparing the personal nature of privacy against the detached economic nature of publicity).
grounded in a combination of labor and utilitarian theories, and close examination of the policy rationale underlying the right of publicity shows that it encompasses enough of said theories to be properly categorized as an area of intellectual property law.\textsuperscript{56}

\section*{III. Premise}

Societal developments have necessitated an updated approach to protecting the right of publicity.\textsuperscript{57} This section will explore such developments in terms of their implications on individuals with commercially viable personas. Section A will examine a proposed amendment to New York’s right of publicity law that reflects the fear of emerging technology’s potential uses. Section B will discuss the rapid advancements in face-swapping technology, followed by Section C’s exploration of social media’s dominating influence on today’s society. Finally, Section D will provide notable examples of recent right of publicity disputes.

\subsection*{A. Senate Bill S. 5959B: The First Modern Push for Reform}

New York has been attempting to increase protection against identity misappropriation since 2017, when a bill that effectively

\footnotesize{\textsuperscript{56} See Zacchini, 433 U.S. at 577–78 (implying both a labor theory justification behind the right of publicity as well as utilitarian considerations); Hart v. Elec. Arts, Inc., 717 F. 3d 141, 149–50 (3d Cir. 2013) (acknowledging that “the goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his identity through his labor and effort”); Beckerman-Rodau, \textit{supra} note 2, at 148–52 (discussing the policy considerations behind the right of publicity as compared with the rationales behind other areas of intellectual property); MCCARTHY & SCHECHTER, \textit{supra} note 2, § 1:7 (noting that the right of publicity bears resemblances to the law of unfair competition); MCCARTHY & SCHECHTER, \textit{supra} note 2, § 1:33 (likening the right of publicity to patent and copyright law).

\textsuperscript{57} See \textit{Right of Publicity & Cyberspace, supra} note 11, at 3–5 (providing detailed discussion on the problems of enforcing outdated right of publicity laws in the internet era). The notion that societal shifts call for legislative reform in accordance was wisely articulated by the Ohio Supreme Court in 2007 when it warned that “[t]oday, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered. As the ability to do harm has grown, so must the law’s ability to protect the innocent.” Welling v. Weinfeld, 866 N.E.2d 1051, 1058–59 (Ohio 2007) (emphasis added).}
redefines the right of publicity was brought before the Senate. The most recent version to be introduced—Senate Bill S. 5959B ("S. 5959B")—is purposed to replace sections 50 and 51 of the New York Civil Rights Law, which currently govern the right of publicity. S. 5959B explicitly separates the right of publicity from the right of privacy by defining them as:

“Right of privacy” means a personal right, which protects against the unauthorized use of a living individual’s name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent, extinguished upon death. . . .

“Right of publicity” means an independent property right, derived from and independent of the right of privacy, which protects the unauthorized use of a living or deceased individual’s name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent.

In contrast with section 50, this new definition better reflects the modern view that the right of publicity and the right of privacy are two fundamentally different rights. Another effect of S. 5959B that would considerably change the current law is that the right of publicity would become freely transferable and automatically descendible upon

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60 See id. Section 50, titled “Right of privacy,” currently states:

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

§ 50. Section 51 covers action and remedy for the misdemeanor proscribed in section 50. See § 51.

61 S. 5959B § 1 (emphasis added).

62 See id. (labeling right of privacy as a personal right and right of publicity as a property right).
death.\(^{63}\) Additionally, S. 5959B expands New York’s previous scope of protection by specifying that the right of publicity protects against the unauthorized use of one’s identity for advertising purposes in addition to trade purposes, the latter of which was already proscribed under section 50.\(^{64}\)

Perhaps most notably, S. 5959B also prohibits the use of digital replicas to portray an individual.\(^{65}\) What this essentially means is that it would become illegal under S. 5959B to digitize a person’s face onto a different body without their permission.\(^{66}\) The particular technology used is not important; it comes down to whether an image (or video, hologram, etc.) has been created to depict a figure with enough resemblance to a certain individual that viewers would reasonably believe it to actually be that individual in the image.\(^{67}\) The provisions pertaining to digital replicas specifically restrict their use “for purposes of trade in an expressive work” or “in a pornographic work.”\(^{68}\) While such uses do not seem all-encompassing, these provisions still cast a wide net due to the fact that they are not subject to the exception for advertising or trade purposes as mentioned above.\(^{69}\) Instead, use of digital replicas are subject to narrower exceptions analogous to conduct that will almost always be protected as free speech under the

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\(^{63}\) See id. § 3 (enumerating methods of transfer and conveyance for the right of publicity). Under this section of S. 5959B, the right of publicity would be transferable by contract, license, gift, trust, testamentary document, and intestate succession. Id. Even if a person did not voluntarily bequest their right of publicity under S. 5959B, the right would automatically be distributed to their heirs upon death. See id. (providing that the right of publicity only terminates if there are no surviving persons to receive the deceased’s right through intestate succession).

\(^{64}\) See id. § 1 (expanding the scope of prohibited conduct under section 50 of the New York Civil Law by adding “advertising purposes” to the new definition); see also N.Y. CIV. RIGHTS LAW § 50 (providing the current scope of protection under section 50).

\(^{65}\) See S. 5959B § 4 (listing the types of conduct related to use of digital replicas that would constitute a violation of S. 5959B).

\(^{66}\) See Higgins, supra note 13 (detailing specific conduct that would be prohibited under N.Y. Assembly Bill No. A8155, which was the original version of S. 5959B).

\(^{67}\) See S. 5959B § 4 (specifying that use of a digital replica will constitute a violation of the right of publicity if it creates the impression that the individual represented by the replica is actually performing).

\(^{68}\) See id. (covering “digital replica for purposes of trade in an expressive work” and “digital replica use in a pornographic work”).

\(^{69}\) See id. (prefacing the exceptions to sections 1 through 3 with the language “except as otherwise provided in subdivisions three and four of this section”).
First Amendment (and thus free from liability even without statutory exemption).  

S. 5959B emulates the common law principle that an individual’s reputation does not need to be harmed for purposes of asserting their right of publicity. Even in situations where the use of face-swapping technology doesn’t affect the value of a person’s identity, the person is still entitled to prevent any use that reaps that value. Thus, all a person must show to constitute a violation under S. 5959B is that (1) someone else used their identity, whether by actual depiction or digitally replicated depiction, for purposes of trade or advertisement, (2) they did not consent to such use, and (3) the use does not fall under any of the numerated exemptions.

The digital replication provision is novel to right of publicity law. Since its introduction, S. 5959B and its prior versions have stirred considerable controversy, with declarations of both support and opposition coming from a wide range of organizations. Most of

70 See id. (discharging the consent requirement for use of a digital replica for purposes of trade in an expressive work where the work constitutes a “parody, satire, commentary, or criticism” or is of “political, public interest, or newsworthy value”). Notably, these exemptions are only provided for expressive works and not for pornographic works. Id.

71 See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (finding that the right of publicity has “little to do with protecting feelings or reputation”).

72 See id. at 575 (focusing on the exclusivity of the right of publicity). “The right to exploit the value of [an individual’s] notoriety or fame belongs to the individual with whom it is associated.” McFarland v. Miller, 14 F.3d 912, 919 (3d Cir. 1994).

73 See S. 5959B § 4 (providing an extensive list of actionable conduct).

74 See Letter from Lisa Pitney, Vice President Gov’t Relations, The Walt Disney Co., to The Honorable Martin J. Golden, N.Y. State Senator (June 8, 2018) [hereinafter Disney Opposition], archived at https://perma.cc/TP3P-TSHD (noting that the rights conferred by the digital replica provisions of the bill are “entirely unprecedented”).

75 See Eriq Gardner, Disney Comes Out Against New York’s Proposal to Curb Pornographic “Deepfakes,” THE HOLLYWOOD REP. (June 11, 2018), archived at https://perma.cc/WC7Y-ZKTK (noting that the two sides of the argument are at odds over whether “free expression or unfettered exploitation” is more worthy of protection). See also Judy Bass, New York Right of Publicity Bill Passage Drama Ends With No Action by State Senate, THE ENT., ARTS & SPORTS L. BLOG (June 25, 2018), archived at https://perma.cc/A9ES-5RTP (discussing the controversy surrounding the bill and listing several organizations that submitted statements of opposition to the legislature). Opponents of the bill include Disney, Warner Bros. Entertainment, Viacom, the Motion Picture Association of America (“MPAA”), Getty Images, the Electronic Frontier Foundation, the New York State Broadcasters
those opposing S. 5959B are filmmakers and media outlets whose argument emulates First Amendment principles in that the bill’s enactment would hinder creative freedom. On the other side of the argument are those who believe that any suppression of speech by S. 5959B is not only minimal, but justified by the right to be free from unwanted commercial exploitation.

The first version of S. 5959B passed Assembly in 2017 with a vote of twenty-one to two, and was then delivered to the Senate in 2018. The Committee did not vote on the bill during the 2017-2018 Association, the Media Coalition, the Entertainment Software Association, and the Digital Media Licensing Association. *Id.*

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76 See Memorandum from NBC Universal in Opposition to New York Assembly Bill A8155B (Right of Publicity) (June 8, 2018), archived at https://perma.cc/PRAU-AWNX (alleging that the bill would jeopardize their ability to tell stories about real people). NBCUniversal took up particular issue with the bill’s ban on digital replicas for purposes of trade in an expressive work, as they stated “[e]xpressive works like television shows and films are entitled to full First Amendment protection” in dissecting the “serious flaws” of the proposed legislation. *Id.* See also Motion Picture Ass’n of Am., Memorandum in Opposition to New York Assembly Bill A8155B (Morelle, Right of Publicity) (June 8, 2018), archived at https://perma.cc/KSB4-EKXA (making their plea for legislature to reject the bill on First Amendment principles). Similar to NBCUniversal’s argument, the MPAA pointed to “decades of well-settled case law . . . barr[ing] right of publicity and similar claims in the context of motion pictures, television shows, and other expressive works.” *Id.* (emphasis added); see also Disney Opposition, *supra* note 74 (complaining that the bill would put Disney’s expressive activities at risk in New York).

77 See SAG-AFTRA Statement on the Passing of New York Assembly Bill A8155B, SAG-AFTRA (June 18, 2018) [hereinafter SAG-AFTRA Statement], archived at https://perma.cc/U939-QMCG (arguing that the bill clearly maintains free speech rights while protecting against the high risk of identity misappropriation “in an era of rapid technological advancements and unprecedented information sharing”); *The U.S. Supreme Court and 23 States, Including California, Agree that a State Must Prevent Exploitation of Performers in the Digital Era!,* SAG-AFTRA (Jan. 20, 2019) [hereinafter Exploitation of Performers], archived at https://perma.cc/Z4XT-MDH4 (urging members of the New York Legislature to pass the 2017 version of the bill because “[i]t is imperative that performers, musicians, models, athletes and all Americans be able to control commercial exploitation of their image, identity and voice”).

78 See Senate Bill S5857B, N.Y. STATE SENATE (Nov. 16, 2018), archived at https://perma.cc/KR3L-UE23 (providing the initial bill’s history and a graph of the Judiciary Committee’s voting results). The first version to be introduced was Assembly Bill A. 8155B. Out of the twenty-one votes in favor of A. 8155B,
legislative session, and it was reintroduced in 2019 as S. 5959B. As of January, 2020, the bill remains active before the Senate Judiciary.

B. Artificial Intelligence and the “Deepfake” Scare

It is widely accepted that today’s technology is better than it was yesterday, but not as good as it will be tomorrow. While this concept of perpetual advance typically rings positive in today’s progress-driven society, certain advancements carry unintended consequences. This double-edged sword—advanced technology that represents society’s intellectual growth while simultaneously posing a societal threat—was recently seen in artificial intelligence face-swapping technology.

seventeen members voted “aye” and four voted “aye with reservations.” Id. The bill was then delivered to the Senate as S. 5857B on June 18, 2018. Id. See 2018 End of Session Report, N.Y. STATE AFL-CIO (Jan. 20, 2019), archived at https://perma.cc/CV8Q-KAKH (listing S. 5857B as “Unfinished Business” that will continue to be pursued during the next legislative session).


See Tim Healy, The Unanticipated Consequences of Technology, MARKKULA CENTER FOR APPLIED ETHICS AT SANTA CLARA UNIV. (Jan. 20, 2019), archived at https://perma.cc/FX27-7V45 (investigating past results of technology that deviated from its intended purpose and addressing the question of why these consequences occur). Healy discusses how the complexity of certain technologies stems from vast interconnections among many components, and the more components there are, the harder it becomes for the developer to anticipate every interconnection. Id. It is these unforeseen interconnections that produce results that were not intended by the technology’s creation. Id.

See Alex Gray, What new technologies carry the biggest risks?, WORLD ECON. FORUM (Jan. 11, 2017), archived at https://perma.cc/TM9M-8PKG (asserting that “[the emerging technology with by far the most negative consequences is artificial intelligence and robotics”): Robert Chesney & Danielle Citron, Deep Fakes: A Looming Crisis for National Security, Democracy and Privacy?, LAWFARE (Feb. 21, 2018), archived at https://perma.cc/KUL6-4BZ2 (warning that dangerous types of digital impersonation are on the rise due to artificial intelligence).
Face-swapping technology became user-friendly in 2015 through mobile apps that allowed users to swap their face with another person’s while taking a photo with their device’s camera. While the initial apps sometimes yielded results that were more comical than accurate, such software has since improved and can accurately detect and swap people’s faces in real-time. In 2017, the accuracy of face-swapping technology became problematic when a human image synthesis technique known as “Deepfake” emerged. “Deepfakes” are artificial-intelligence systems that use machine-learning to superimpose subject images onto existing photos or videos. Much more complex than previous face-swapping technology, “Deepfakes” are able to produce content that appears authentic rather than doctored. “Deepfakes” accuracy shifts from impressive to

84 See Caitlin Dewey, Behind the scenes of Face Swap Live, the ‘creepy’ app that launched a thousand memes, WASH. POST (Jan. 13, 2016), archived at https://perma.cc/H2HU-MBSE (noting that the first face-swapping app known at Face Swap Live became available on the app store in December of 2015). The website for Face Swap Live advertises that the app lets you “record videos or photos of yourself swapping faces with a celebrity, friend or any fun picture from the internet or your phone.” See FACE SWAP LIVE (Jan. 20, 2019), archived at https://perma.cc/XGY4-T6SC.

85 See Dewey, supra note 84 (providing pictures that were produced by the app and went viral due to hilarious inaccuracies); Kaushal, 7 Best Face Swap Apps for Android and iOS (2018), TECHWISER (Sep. 28, 2018), archived at https://perma.cc/728Q-KGDZ (noting the improvement of smartphone camera technology and listing the most accurate apps that have been released in the wake of Face Swap Live).

86 See John Donovan, Deepfake Videos Are Getting Scary Good, HowSTUFFWORKS (Sep. 5, 2018), archived at https://perma.cc/YFSH-T2X6 (discussing when and how the “Deepfake” controversy began); Joan E. Solsman, Deepfakes may ruin the world. And they can come for you, too, CNET (Apr. 4, 2019), archived at https://perma.cc/SAX3-Y885 (providing context regarding “Deepfake” software to illustrate the technology’s accuracy); Will Knight, This AI lets you deepfake your voice to speak like Barack Obama, MIT TECH. REV. (Feb. 27, 2019), archived at https://perma.cc/X63M-TXU3 (detailing the potential uses of machine learning technology).


88 See Chesney & Citron, supra note 83 (defining “Deepfakes” as “digital manipulation of sound, images, or video to impersonate someone or make it appear that a person did something—and to do so in a manner that is increasingly realistic, to the point that the unaided observer cannot detect the fake”).
concerning in light of recent controversy over people using the software to swap celebrities’ faces onto the bodies of people in pornographic videos. The practice of falsely depicting celebrities engaging in pornography drew attention to “Deepfakes” and sparked concern over artificial intelligence’s potential to be further misused. Despite the obvious immorality of “Deepfake” pornography, there is no clear legal recourse for those whose faces are edited into these videos.

89 See, e.g., Higgins, supra note 13 (discussing the problematic use of “Deepfakes” for pornographic purposes); Gardner, supra note 75 (covering the public outrage over the use of celebrities’ faces in “Deepfake” pornography videos); Jeremy Hsu, Experts Bet on First Deepfakes Political Scandal, IEEE SPECTRUM (Jun. 22, 2018), archived at https://perma.cc/L4LB-MSZY (providing detail on the practice of using “Deepfake” technology to digitally swap celebrities’ faces onto the bodies of performers in pornographic videos).

90 See Olivia Beavers, Washington fears new threat from ‘deepfake’ videos, THE HILL (Jan. 20, 2019), archived at https://perma.cc/S3DA-K5HC (reporting that experts and lawmakers are worried about the potential damage that “Deepfake” videos could have besides the fake pornography videos). Experts have provided examples of the type of harmful scenarios that could occur at the hands of artificial intelligence, such as “terrorist groups ISIS or al Qaeda manufacturing videos of American soldiers creating atrocities on the battlefield as propaganda; videos falsely showing political candidates making controversial remarks before an election; or CEOs announcing incorrect financial projections.” Id. It is predicted that this ability to create misinformation could have disastrous fallout. Id. See Megan Ellis, Deepfakes Explained: The AI That’s Making Fake Videos Too Convincing, MAKE USE OF (Nov. 21, 2018), archived at https://perma.cc/4PBB-2E8W (explaining why “Deepfakes” are making people nervous). Perhaps most frightening is the fact that artificial intelligence “is gaining pace so rapidly we may soon no longer know how to tell what’s real and what’s fake.” See Ellis, supra; accord Hsu, supra note 89 (speculating further implications of the use of these technologies on political climate, such as attempts of influencing elections by using “Deepfakes” to disgrace candidates).

91 See Damon Beres & Marcus Gilmer, A guide to ‘deepfakes,’ the internet’s latest moral crisis, MASHABLE (Feb. 2, 2018), archived at https://perma.cc/P8QV-8NUH (casting doubt on the likelihood of a “Deepfake” pornography victim prevailing in a lawsuit); J.M. Porup, How and why deepfake videos work—and what is at risk, CSO (Apr. 10, 2019), archived at https://perma.cc/R663-HWR6 (pointing out that regulators and lawmakers are struggling to deal with the “Deepfake” problem).
C. Social Media’s Impact on Individuals’ Net Worth: “Influencer Marketing”

As of 2018, there were over three billion people using social media. More impressive than the number of social media users is the rate at which this amount is increasing, considering that the largest platforms have existed for less than two decades. For example, Instagram alone went from having 90 million users in 2013 to one billion users in 2018. Social media began to play a new role in society as these platforms grew, particularly in the business world. As businesses began to realize that their consumers were spending more and more time on social media, they started enlisting those with large social media followings to endorse and promote their products. There is a term for individuals with mass followings on social media platforms: influencers. Today, influencer marketing has become a

92 See Simon Kemp, DIGITAL IN 2018: WORLD’S INTERNET USERS PASS THE 4 BILLION MARK, WE ARE SOCIAL (Jan. 30, 2018), archived at https://perma.cc/Z2VH-C6BZ (providing a statistical report of global internet use).  93 See Kemp, supra note 92 (stating that today’s 3.196 billion social media users up 13% from the amount reported in 2017). This rate of growth is significant compared to the other reported statistics; internet users and mobile phone users only increased in 2018 by 7% and 4%, respectively. Id. The content-sharing platforms that today’s social media users frequent the most began appearing in 2005, with the development of YouTube, followed by Facebook in 2006 and Instagram in 2010. See Kevin Murnane, Which Social Media Platform Is The Most Popular In The US?, Forbes (Mar. 3, 2018), archived at https://perma.cc/7JLJ-WVP7 (listing the social media platforms that Americans use the most); see also Keith Terrell, The History of Social Media: Social Networking Evolution!, HISTORY COOPERATIVE (June 16, 2015), archived at https://perma.cc/D8JB-LTJF (tracing the history of social media);  94 See Social Media & User-Generated Content, STATISTA (Jan. 20, 2019), archived at https://perma.cc/V63L-SWXA (graphing the number of active Instagram users reported each year from 2013 to 2018).  95 See Max N. Helveston, Regulating Digital Markets, 13 N.Y.U. J. L. & BUS. 33 (2016) (exploring social media’s effect on digital markets). “The omnipresence of the internet and social media provides business with unprecedented access to consumers.” Id.  96 See Adrienne Sconyers, Corporations, Social Media, & Advertising: Deceptive, Profitable, or Just Smart Marketing, 43 IOWA J. CORP. L. 417 (2018) (discussing how companies and celebrities together use platforms such as Facebook, Instagram, Snapchat, and Twitter to promote products).  97 See Greg Swan, What Is Influencer Marketing & Why It Matters, CPC STRATEGY (Apr. 20, 2018), archived at https://perma.cc/F8KW-TQ47 (defining influencer as “a social media user that can have anywhere from several hundred to several million
commonplace business method. The productivity of having an influencer promote one’s business stems from the fact that consumers do not recognize influencers as paid endorsements, they see them as real people who they connect with online thus, consumers are more likely to believe that influencers are actually using the products and services they post about because of their quality, rather than because they’re being paid.

The success of influencer marketing has made this a very appealing way for people to earn a living. Considering the fact that followers”). Unlike celebrities, who are typically in the entertainment industry and gain fame by producing successful work, influencers achieve their status simply by amassing a large social media following. Id. See What is Influencer Marketing: An in Depth Look at Marketing’s Next Big Thing, INFLUENCER MARKETING HUB (Jan. 20, 2019) [hereinafter Marketing’s Next Big Thing], archived at https://perma.cc/F6ZK-MBYN (comparing the role of celebrities to the role of influencers). Influencers are often more selective when it comes to the products they agree to endorse in order to preserve their reputation. Id. The commitment to protecting one’s reputation makes sense in light of the influencer’s effort in “building their own brand and cultivating their audience.” Id.

98 See Sconyers, supra note 96 (addressing the FTC’s attempt to regulate celebrity social media advertisements and its impact on companies that hire influencers to promote their products). See Lindsay Tigar, Becoming an Influencer: The Pros and Cons of Being an Influencer (2 of 5), CLEARVOICE (Oct. 11, 2018), archived at https://perma.cc/X8TJ-MJ45 (claiming that influencer marketing has grown exponentially over the last five years). Influencer marketing has even grabbed the attention of The Federal Trade Commission (FTC). Id.

99 See Social Upends Traditional Media in Driving Shopping Purchases, INFLUENCE CENTRAL (Jan. 21, 2019), archived at https://perma.cc/67MD-2AUA (providing details and results of the survey). See Swan, supra note 97 (pointing out that the potential to generate authenticity is one of influencer marketing’s greatest strengths). See also The Importance of Authenticity in Influencer Marketing, MUSEFIND (Jan. 16, 2017), archived at https://perma.cc/T7J4-ZW75 (recalling a survey of marketing employees in which 87% responded that “influencer marketing’s top benefits entail creating authentic content about their brand”). In a consumer survey conducted in 2016, social media influencers were reported as one of the top factors in inducing purchases. Id.

100 See Sophie Alexander, Kylie Jenner Has Several Other Young Billionaires to Thank for Her Success, BLOOMBERG (Mar. 6, 2019), archived at https://perma.cc/NXQ9-9CFL (claiming that Jenner’s company would not be as successful without social media); see also Shane Barker, How to Become an Instagram Influencer and Start Earning Money Now, THE STARTUP (Feb. 7, 2018), archived at https://perma.cc/W29N-CXCZ (pointing to one particular influencer who charges $25,000 for a single post on Instagram); see also Zain Dhanani, Why Social Influencers Outsell Celebrities, FORBES (Oct. 31, 2017), archived at
a public profile on Instagram can be accessed by all one billion of the platform’s users, reaching a large audience is much more attainable now than it was before social media. With the rate that the number of social media influencers has increased over the past several years, it is likely we will continue to see more individuals achieve a large following and make themselves a powerful marketing tool that businesses are eager to procure.

D. Recent Claims of Right of Publicity Violations

There have been several allegations of right of publicity violations within the past year that have made headlines; in February of 2019, a reality-television star sued a clothing company for advertising their cheap versions of designer clothing by using

https://perma.cc/AA32-UFY3 (discussing the perks of companies utilizing the growing trend of influencer marketing); Lizzy Hillier, Behind Kylie Jenner’s success in a saturated cosmetics industry, ÉCONSULTANCY (Mar. 11, 2019), archived at https://perma.cc/6MWN-AYEW (explaining that Jenner’s use of social media to promote her products is “an invaluable way of creating demand, urgency and a strong brand identity”); see also Polina Kounavina, Kylie’s Social Media is the Reason She’s so Successful, MEDIUM (Apr. 7, 2017), archived at https://perma.cc/MK7W-NUJE (noting that Jenner uses social media as her main source of advertising for her company, Kylie Cosmetics); Melody Nouri, The Power of Influence: Traditional Celebrity vs Social Media Influencer, SANTA CLARA UNIVERSITY (2018) (arguing that influencers are an even more powerful marketing force than the traditional celebrity); see also Tigar, supra note 98 (discussing the perks of becoming an influencer). To illustrate the potential economic gain from advertising one’s product on social media, Kylie Jenner was recently named the world’s youngest self-made billionaire at the age of twenty-one due to the fortune derived from her cosmetics company, which she advertises primarily on Instagram and Snapchat. See Natalie Robehmed, At 21, Kylie Jenner Becomes the Youngest Self-Made Billionaire Ever, FORBES (Mar. 5, 2019), archived at https://perma.cc/MK7W-NUJE (quoting Jenner as saying “[i]t’s the power of social media . . . I had such a strong reach before I was able to start anything” in regard to her success); Polina Kounavina Kylie’s Social Media is the Reason She’s so Successful, MEDIUM (Apr. 7, 2017), archived at https://perma.cc/MK7W-NUJE (highlighting Jenner’s use of social media to promote her cosmetic company).

101 See sources cited supra notes 93–94.

102 See Lindsay Tigar, Becoming an Influencer: A Look at the Emergence of the Influencer (1 of 5), CLEARVOICE (Oct. 4, 2018), archived at https://perma.cc/4KJF-6F37 (alleging that influencer marketing is still in its beginning stages by pointing to social media’s infancy in comparison with other methods of advertising such as newspapers, magazines, and television).
photographs of her wearing outfits that resembled the company’s knock-off versions. At the close of 2018, a video game developer was sued by three individuals for right of publicity violations as well as copyright infringement over the company’s depiction of certain dance moves in the game Fortnite. While the copyright claims are weak, the individuals could potentially succeed on their right of publicity claims if it is found that dance moves constitute “likeness.”

103 See Kimsapprincess, Inc. v. Missguided USA, Inc., No. 2:19-cv-01258 (C.D. Cal 2019). See also Kim Kardashian is Suing Missguided, Cites Right of Publicity Violations, Trademark Infringement, THE FASHION LAW (Feb. 20, 2019), archived at https://perma.cc/7KQM-TGY at reporting that West is suing the company for misappropriating her persona by using her name and image in an attempt to “leverage her celebrity status and social media following without her consent”). West’s right of publicity claim is strong, as the company not only uses her image in its advertising, but it also uses her name in a section of its website labeled “Shop Kim K.” Id. West is suing the company for $10 million, alleging that they have profited immensely from “systematically us[ing] the names and images of [West] to advertise and spark interest in its website and clothing.” Id. (reporting the amount of damages sought by West).


105 See Tim Cushing, Creators Of Dance Moves Suing Creators Of Fortnite Over Copyright Infringement That Can’t Possibly Have Happened, TECHDIRT (Jan. 2, 2019), archived at https://perma.cc/LBT3-LPHV (discussing the flaws in the individual’s copyright claims); Fortnite’ maker pushes back against copyright lawsuit: ‘No one can own a dance step,’ NBCNEWS (Feb. 13, 2019), archived at https://perma.cc/2S3H-7KX6 (discussing Epic Games’ opposition to the copyright infringement claims). Epic Games filed a motion to dismiss the copyright claims on the grounds that plaintiffs lacked copyright protection in the dance moves. See Defendant’s Memorandum of Points and Auths. in Support of Motion to Dismiss for Failure to State a Claim at 8, Ferguson v. Epic Games, Inc., C.D. Cal. (2019) (No. 2:18-CV-10110-CJC). In its Motion to Dismiss, Epic Games pointed out that “the Copyright Office has made clear that ‘short dance routines consisting of only a few movements or steps with minor linear or spatial variations, even if the routine is novel
Additionally, in January of 2019, a model sued the company that owns Fiji Water for displaying life-size cardboard cut-outs of her at various retail locations. Fiji filed a counter-claim against the model, alleging that they had authorized permission to use her image, which would effectively defeat a right of publicity claim if found to be true. Notably, the model involved in this lawsuit had been unknown to the public until pictures of her “photobombing” celebrities at the 2019 Golden Globes went viral. The photos were immediately posted online and had been circulated online by various news outlets before the ceremony had even ended, demonstrating how quickly a person

or distinctive,’ are not protectable.” See id. at 10 (referencing the Copyright Office’s Compendium § 805.5(A)). In contrast, the additional argument posed by Epic Games that the individuals’ right of publicity claims are barred by the First Amendment is less convincing. See id. at 17. As discussed, the U.S. Supreme Court has held that right of publicity violations are not excused under the First Amendment. See discussion supra note 1; Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578–79 (1977).


107 See Cross-complaint, supra note 106, at 14–18 (alleging that Steinbach had signed an agreement authorizing Fiji to use her name, likeness, and performance for a one-year period commencing on January 9, 2019); see also Rachel Thompson, Photobombing FIJI Water Woman is suing Fiji Water and yes, you read that right, MASHABLE (Feb. 1, 2019), archived at https://perma.cc/5SN4-SXWS (discussing the conflicting claims within Steinbach’s complaint and Fiji’s counter-claim). If Fiji is able to prove that Steinbach willfully entered into this agreement, their acts will not constitute a right of publicity violation under California law. See Thompson, supra. See CAL. CIVIL CODE § 3344(a) (West 1984) (specifying that the right of publicity is only violated when a person’s likeness is used “without such person’s prior consent”).

108 See Complaint, supra note 106, at 1 (admitting that Steinberg “is widely known as the ‘Fiji Water Girl’ due to her appearance [at the] 76th Golden Globe Awards”); Cross-complaint, supra note 106, at 12 (“The photos of Ms. Steinbach photobombing celebrities became widely circulated on the internet and as viral internet memes on various social media websites and apps”).
IV. Analysis

A. Why the Right of Publicity Needs an Update in Light of Advancing Technology

It is time for the right of publicity to be revisited by legislators. This area of law developed during the eighteenth century when technology lacked the societal impact that it has today. It is not only easier to violate an individual’s right of publicity, but there is now an increased incentive to do so. As technology continues to advance, commercially valuable identities will become more vulnerable. The following discussion will illustrate exactly how today’s technology threatens the right of publicity.

1. Modern Artificial Intelligence Provides New Means of Identity Misappropriation

The changes posed by S. 5959B that target advanced technology demonstrate that today’s right of publicity laws are

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109 See Cross-complaint, supra note 107, at 2 (asserting that Steinbach’s representation of Fiji at the Golden Globe Awards was responsible for her “fleeting fifteen minutes of internet fame”).

110 See S. 5959B (exemplifying New York’s attempt to redefine the right of publicity in light of advancing technology); Jennings, supra note 11 (warning of the difficulty in enforcing current right of publicity statutes in the Internet era); SAG-AFTRA Statement, supra note 77 (calling for a much needed update of the current right of publicity laws).

111 See ROTHMAN, supra note 3, at 12–16 (describing the relevant technologies available in the 1800s when the right of publicity emerged); Right of Publicity & Cyberspace, supra note 11, at 3 (noting how technology has changed since the right of publicity first developed at common law).

112 See discussion supra Part III Section C.

113 See Higgins, supra note 13 (predicting an increase in right of publicity violations as artificial intelligence face-swapping technology continues to improve); see also SAG-AFTRA Statement, supra note 77 (arguing that technological advancements have necessitated stronger right of publicity laws).
One logical conclusion as to why the use of digital replicas was specifically prohibited in S. 5959B is that recent developments in artificial intelligence technology have increased the ease and rate at which such replicas are being used to violate the right of publicity. Assuming that legislators had the “Deepfake” issue in mind when drafting S. 5959B, it is evident that the issues posed by this type of technology fall within the realm of right of publicity violations. When the right of publicity first emerged, cases involving the use of a person’s image entailed the defendant disseminating a pre-existing image of the plaintiff. Regardless whether the plaintiff consented to their photo being taken, the important takeaway here is that it was in fact the plaintiff in the image that the defendant used in these early cases. Technology at that time did not allow for undetectably doctored images to the extent that it does today. It is safe to assume that when drafting the first right of publicity statutes in the mid to late 1900s, legislators did not anticipate scenarios where one manufactures an image or video realistically depicting actions that never occurred. Now that such scenario is not only possible but has already occurred, right of publicity laws need to

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114 See S. 5959B (proposing an amendment that expressly prohibits certain conduct involving digital image technology). The dispute over S. 5959B reflects the broad trend of public figures’ rights conflicting with content creators’ rights that has become a more common occurrence since technology has progressed. See Simmons & Means, supra note 30 (arguing that the current laws afford inadequate protection in light of how society has changed since the right of publicity first developed).

115 See Hsu, supra note 89 (providing detail on the types of technology being used to digitally swap celebrities’ faces onto the bodies of performers in pornographic videos). In this article, Hsu speculates further implications of the use of these technologies on political climate, such as attempts of influencing elections by using deep fakes to disgrace candidates. See id. See also Chesney & Citron, supra note 83 (asserting that digital impersonation is on the rise due to artificial intelligence); Higgins, supra note 13 (suggesting that the original version of S. 5959B was drafted in response to the deep fake controversy).

116 See SAG-AFTRA Statement, supra note 77 (stressing the need for the 2017 version of S. 5959B to pass in order to protect the right of publicity during today’s era of rapid technological advancements).

117 See ROTHMAN, supra note 3, at 12–25 (discussing the early right of publicity cases, which typically involved the nonconsensual taking and/or dissemination of photographs).

118 See id. at 12 (detailing the technology used to violate individuals’ right of publicity in the 1880s, which at the time had only advanced to the basic portable camera used by amateur photographers).
be updated in order to prohibit this type of activity. With artificial intelligence and face-swapping technology on the rise, misappropriating a person’s image will continue to become easier. The digital replica provisions of S. 5959B are an attempt to bolster the current right of publicity laws in light of this advancing technology.

2. How Social Media Affects the Commercial Value in One’s Identity

The rise of the influencer has certainly disproved the assumption that only celebrities have a valid interest in their right of publicity. The connection between influencers and the right of publicity is undeniable given that influencers are purposed to promote products, meaning their name and likeness is constantly being used in commercial context. When it is the influencer promoting a product themselves this raises no issue; however, it is now entirely possible for a third party to create a fake simulation of a particular influencer promoting the third party’s product without the influencer’s

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119 See Higgins, supra note 13 (suggesting how revisiting right of publicity laws is necessary to protect against the potential violations that “Deepfakes” pose); Exploitation of Performers, supra note 77 (campaigning for the 2017 version of S. 5959B by warning that advanced technology has “made it possible for content creators and advertisers to insert living and deceased personalities into projects without the participation of—or possibly even authorization from—the individual”).

120 See Chesney & Citron, supra note 83 (warning of the future consequences of artificial intelligence as it continues to improve); Higgins, supra note 13 (linking the increase of artificial intelligence face-swapping technology with a potential increase of right of publicity violations).

121 See SAG-AFTRA Statement, supra note 77 (commending legislators for drafting the 2017 version of S. 5959B in order to encompass violations at the hands of advancing technology).

122 See ROTHMAN, supra note 3, at 35–44 (addressing the misconception that the right of publicity only applies to celebrities). The law makes no explicit requirement that the person asserting their right of publicity be a “celebrity” in the traditional sense. See MCCARTHY & SCHECHTER, supra note 2, § 4.20. Rather, this assumption is due to the fact that celebrities have the most obvious economic value in their name or likeness and thus end up comprising a majority of those who have sued for right of publicity violations. Id.

123 See Marketing’s Next Big Thing, supra note 97 (exploring the view of influencers as marketplace tools used solely in online commercial settings); Nouri, supra note 100 (detailing the commercial use of social media influencers and its potential for economic gain).
knowledge or participation. In this scenario, the third party benefits from the fact that they didn’t have to pay the influencer for their endorsement although they got to benefit from associating their product with the influencer and thus increasing the product’s appeal to consumers. This activity is an obvious violation of the right of publicity. Ultimately, the growing number of influencers increases opportunity for such violations.

In addition, the influencer marketing trend evidences how social media not only increases the number of individuals with commercial value in their name and likeness, but also the amount of commercial value attributed to such individuals. The economic success that one may achieve by marketing products on social media is astounding. It follows naturally that if a particular person can multiply the sales of a product simply by advertising it on their social media.

See Ellis, supra note 90 (warning of artificial intelligence being able to depict individuals performing acts that they never engaged in); Chesney & Citron, supra note 83 (predicting the occurrence of celebrities being falsely depicted in videos created by artificial intelligence); Higgins, supra note 13 (exploring the dangers of fake digital simulations).

See Ellis, supra note 90; Beavers, supra note 90; Higgins, supra note 13 (pointing to concerns over “Deepfakes” ability to create fake content that viewers may perceive as real). The accuracy of “Deepfake” technology would allow a third party to endorse their product with an artificial replica that the public would likely assume to be real, thus reaping the same benefit as if they had actually enlisted the replicated individual themselves, but without the cost of doing so. See Higgins, supra note 13.

See McCarthy & Schechter, supra note 2, § 3:1 (asserting the right to control commercial use of one’s identity as a prima facie element of the right of publicity); see Ellis, supra note 90 (illustrating an example of how “Deepfakes” could be used to misappropriate the commercial use of a person’s identity).

See Tigar, supra note 98 (noting the rapid increase of the amount of influencers in light of social media’s recent emergence); see also Sconyers, supra note 96 (discussing the FTC’s anticipation that influencer marketing will continue to expand at a significant rate). This is not the first time that changes in technology have led to increased numbers of individuals with a valid interest in the right of publicity. See Rothman, supra note 3, at 12 (stating that technological advancements in the 1800s “let to calls for legal change” and protection for the “right to control the use of one’s image and name”).

See Nouri, supra note 100 (discussing how social media enables both influencers and traditional celebrities to generate profit through advertising on their social media platforms).

See id. (highlighting the potential economic success that influencer marketing facilitates); Hillier, supra note 100 (crediting social media advertising for the success of a famous influencer who became the world’s youngest billionaire).
media, then there is obvious incentive for companies to enlist that person to promote its own products or services.\textsuperscript{130} In seeking the individual’s consent, companies risk the individual either denying the use of their identity or seeking compensation for such use.\textsuperscript{131} When associating a product with a popular individual can result in immensely increased profit, can we trust that companies will always self-impose the consent requirement before using the individual’s name or likeness in its advertising? The recent surge of right of publicity violations tells us that we cannot.\textsuperscript{132} It is clear that the potential economic gain in misappropriating an individual’s identity creates strong temptation for engaging in such misappropriation and thus, it is likely that the number of right of publicity violations will continue to increase without stronger right of publicity laws.\textsuperscript{133}

\textbf{B. Suggested Reform for the Right of Publicity}

The inconsistencies among different states’ right of publicity statutes create difficulty in their enforcement.\textsuperscript{134} As modern

\textsuperscript{130} See Nouri, \textit{supra} note 100 (alleging that influencer marketing can multiply the amount of sales of a particular product or service); Dhanani, \textit{supra} note 100 (explaining why there is a high incentive for companies to engage in influencer marketing).

\textsuperscript{131} See Nouri, \textit{supra} note 100 (outlining the process of utilizing influencers for advertising purposes); Dhanani, \textit{supra} note 100 (providing advice for companies seeking to use influencers to market their products or services).

\textsuperscript{132} See sources cited \textit{supra}, Part III Section D. Not only should there be concern about companies not bothering to obtain the individual’s consent in the first place, but the \textit{Midler} case evidences that there should also be concern over companies moving forward with a plan to use an individual in their advertising despite being denied consent. See \textit{Midler} v. \textit{Ford} Motor Co., 849 F.2d 460, 461 (9th Cir. 1988) (illustrating an instance of a singer denying company’s request to use her voice in a commercial, and the company using a sound-alike anyways).

\textsuperscript{133} See \textit{MCARTHY} & \textit{SCHECHESTER}, \textit{supra} note 2, § 1:36 (acknowledging “the extraordinary sums of money at stake when the publicity rights of hugely famous individuals are involved”) Nouri, \textit{supra} note 100 (examining the lure of using an influencer to market one’s own products); Dhanani, \textit{supra} note 100 (noting the success of influencer marketing as compared to other methods of advertising, which implies strong temptation to use the former instead of the latter).

\textsuperscript{134} See Vick \& Jassy, \textit{supra} note 12 (arguing that the disparity among state right of publicity laws “results in a multistate patchwork that forces national content producers to engage in self-censorship and tailor their content to the laws of states
technology facilitates easier creation and dissemination of digital content, it has become difficult for existing laws to provide adequate protection for the right of publicity. Just as the influence of technology on other areas of intellectual property has resulted in frequent amendments to their respective governing laws, the right of publicity should be revisited in light of the technological advancements that have left it vulnerable to violations. In order to solve the issues posed by interstate violations of publicity rights, the U.S. should enact a federal right of publicity statute that reflects modern technology’s implications on the scope of actionable conduct. A uniform right of publicity law should cover the scope, duration, and effect of publicity rights. S. 5959B is an appropriate

that provide the least amount of protection to free speech rights”); Adkins, supra note 7 (detailing the problems posed by statutory disparity).

135 See Right of Publicity & Cyberspace, supra note 11. This fear of the law being outpaced by technology has existed for over two decades, with a law review article from 1998 warning that

[t]he digital age does bring numerous avenues for expression to those performances by non or less well-known artists. These are the ones who lack leverage when signing contracts and thus, they are the ones who need legislative or judicial protection based. Digital reproduction of an actor’s movements, as intrinsic to a person as her face, will need to be covered by the right of publicity in order to prevent unauthorized ‘recycling’ through digital animation.

Fernandez, supra note 10.

136 See Tehranian, supra note 52, at 50 (addressing how the different areas of intellectual property law have adapted in response to technological developments that amplified circumvention of protected works). For example, in 1998, Congress enacted the Digital Millennium Copyright Act (DMCA) in response to the emerging challenges of regulating digital content. See Lee, supra note 52, at 233 (stating that DMCA was a congressional attempt to update copyright law in order to keep up with the Internet). Around the time DMCA was enacted, the Internet was relatively new and the existing copyright laws did not provide for protection against fast-paced global dissemination of works. Id.

137 See Adkins, supra note 7, at 501–02 (arguing the necessity of a uniform right of publicity statute); Vick & Jassy, supra note 12 (asserting that a uniform right of publicity statute will prevent forum shopping); Simmons & Means, supra note 30 (exploring the vast inconsistencies between state right of publicity laws).

138 See Adkins, supra note 7, at 528 (illustrating an ideal uniform right of publicity statute); see also Simmons & Means, supra note 30 (listing the elements of a well-defined right of publicity statute). A uniform right of publicity statute will necessarily entail: (1) a definition of “personality” that specifies what characteristics are protected, (2) a definition of infringing conduct, (3) a definition of the protected
example of how the right of publicity should be amended, as it equally balances the interests of those subject to right of publicity violations against the interest in protecting free speech. The digital replica provisions of S. 5959B should be given serious consideration by legislators if they are to revisit the right of publicity in the wake of technology outpacing the law.

V. Conclusion

As an area of law with principles dating back to the nineteenth century that has not been amended since its conception, the right of publicity is unfortunately vulnerable to threats posed by advancing technology. Social media’s global reach allows individuals to achieve a large following that enables their identities to be leveraged for economic purposes. In addition, technological advances have facilitated new means of identity misappropriation that are not expressly prohibited by current law. The growing number of individuals with economic value in their likeness coupled with the increasing ease of misappropriating a person’s image implies a future

individuals, (4) enumerated exceptions, (5) whether or not the right is descendible, and (6) available remedies. See Simmons & Means, supra note 30.

139 See S. 5959B, 2019-2020 Leg. Sess. § 4 (N.Y. 2019) (providing an exception for non-commercial uses such as parody, satire, and newsworthy information); see also Beckerman-Rodeau, supra note 2, at 150–51 (acknowledging the “fair use” defenses to infringement in both copyright and trademark law). Parody, artistic expression, and news reporting are among the typical uses permitted in areas of intellectual property such as copyright and trademark law for the purpose of minimizing intrusion upon free speech. See Beckerman-Rodeau, supra note 2, at 150–51, 161. Intellectual property law’s existing intrusions upon free speech have been found constitutional where the intrusion is no greater than necessary in accommodating the competing interests. Id. at 158–59; Hart v. Elec. Arts, Inc., 717 F. 3d 141, 149–50 (3d Cir. 2013). In Hart, the Third Circuit used several tests to balance exclusive intellectual property rights against free speech considerations. 717 F. 3d at 153–70. See also SAG-AFTRA Statement, supra note 77 (opining that the 2017 version of S. 5959B does not interfere with free speech any more than necessary to adequately protect the right of publicity). In terms of the restrictions posed by the bill, the right of publicity holder’s interests justify the minimal degree of intrusion on free speech. Id.

140 See S. 5959B; see also Simmons & Means, supra note 30 (suggesting that amendments to right of publicity laws factor in the recent threats posed by technology); SAG-AFTRA Statement, supra note 77 (arguing that the bill appropriately addresses the issues posed by advancing technology and should be enacted accordingly).
of right of publicity violations that will be difficult to analyze under current law. In conclusion, the proposed amendments in S. 5959B aim to target the new threats posed by technology and should be adopted as part of a uniform federal law in order to provide adequate nationwide protection for the right of publicity.