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## **Lights! Camera! Artificial Intelligence!: Resolving the Problem of AI Generated Content Created Without an Actor's Consent**

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## **I. INTRODUCTION**

Artificial intelligence (“AI”) has been present in the entertainment industry since the early 2000s.<sup>1</sup> Since then, AI has only improved and been utilized in more advanced and personal ways in the industry. Currently, AI is used in almost every single production that evolves from the entertainment industry and the impact is immense. According to Grand View Research, the global AI in the media industry reached a valuation of USD 10.87 billion in 2021.<sup>2</sup> This thriving sector is set for major expansion, with a projected compound annual growth rate of 26.9% anticipated from the year 2022 through 2030.<sup>3</sup> With such a thriving market potential, this area is in need of improved and updated legislation on both a federal and state level.

AI is being used in the entertainment industry to impersonate celebrities without their consent. This is often referred to as “deepfake” in many instances. The term “deepfake” refers to an AI-based technique that synthesizes media – including superimposing human features on another person’s body, and sounds, in order to generate a more realistic human experience.<sup>4</sup> Celebrities are being deepfaked without their knowledge or consent, often targeting females in the entertainment industry. However, celebrities have a “right of publicity”. A right of publicity prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspect of one’s persona. Using AI to impersonate an actor’s name, image, voice, etc., may be seen to violate their right of publicity. However, although celebrities currently have

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<sup>1</sup> Neil Chase Film, *Artificial Intelligence in Film: Impact & Influence for 2023+* (2023), <https://neilchasefilm.com/artificial-intelligence-in-film/#:~:text=Filmmakers%20have%20used%20AI%20tools,their%20fantastical%20stories%20to%20life.>

<sup>2</sup> Grand View Research, *AI in Media & Entertainment Market Size, Share & Trends Analysis Report by Solution, by Application, and Segment Forecasts* (2021), <https://www.grandviewresearch.com/industry-analysis/artificial-intelligence-ai-media-entertainment-market-report>.

<sup>3</sup> *Id.*

<sup>4</sup> Eric Kocsis, *Deepfakes, Shallowfakes, and the Need for a Private Right of Action*, Dickinson Law Review (2022), <https://1.next.westlaw.com/Document/I662adef6d03211ec9f24ec7b211d8087/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0.>

a right of publicity in place, it is not a sufficient enough protection for this developing area of AI technology in the entertainment industry. Current law is lacking protections, including deepfake legislation and regulation, and this must be fixed in order to protect celebrities' own interests. It is necessary that both federal and state governments include a private right of action for these targeted persons and build a legal route for them to take if they decide to file suit.

Hollywood actors have even recently gone on strike for the first time in 43 years, causing the American television industry to come to a halt with huge fears over the impact of AI.<sup>5</sup> The Screen Actors Guild ("SAG-AFTRA") actors' union warned that, "artificial intelligence poses an existential threat to creative professionals".<sup>6</sup> It is evident that the advances of AI has actors worried enough to go on strike and take a stance on this issue.<sup>7</sup> There should be no unauthorized use of a celebrity's likeness without first gaining consent, or there will be consequences to follow if they decide not to do so.

This paper argues that due to the increasing use of AI technology and deepfakes in the entertainment industry, more legislation on both a state level and federal level is needed in order to provide greater protections to celebrities and AI generated content being created without their consent.

Part II of this paper will analyze the advantages and concerns of AI use in the entertainment industry. Part III explores the existing legal protections and defenses available. Lastly, part IV will discuss the current legislation, both on a state and federal level, followed by proposed legislation to provide greater protections for celebrities and the use of AI generated content within the entertainment industry.

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<sup>5</sup> BBC News, *The Black Mirror Plot about AI that Worries Actors* (2023), <https://www.bbc.com/news/technology-66200334>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

## **II. ADVANTAGES & CONCERNS OF AI GENERATED USE IN THE ENTERTAINMENT INDUSTRY**

### **A. Advantages of AI Use in the Entertainment Industry**

With the increasing use of AI in the entertainment industry, celebrities are constantly worried that their image or likeness will be used in areas that they do not want it to be used in, or simply in general, without their consent and without being compensated for that publicity. Although the entire entertainment industry is increasingly concerned over the use of AI in this sense, there still stands many advantages to using AI in television and movie production.

#### **1. Efficiency and Established Working Field Through AI**

First, there is efficiency and establishing a fast-paced working field. Traditional film making requires a lot of time and money, and the use of AI has led to increased efficiency and less money to be spent on production in this field.<sup>8</sup> AI is able to streamline processes like postproduction work, which helps to save time and also allows producers to keep costs low. AI tools, such as facial recognition, allow for editors to have more precise and accurate retouching and editing of people, backgrounds, etc., and eliminates that monotonous, tedious work they would have to do in the past. In addition to AI use in visuals, AI also assists with tasks such as writing stories, writing scripts, and being able to predict audience preferences and what should or should not happen next according to the audiences liking.<sup>9</sup> AI is able to help humans with automating tedious aspects of production like budgeting, scheduling, and archiving, allowing filmmakers to spend less time on those areas, and more time on the actual production process. For example, in 2016, IBM Watson, an AI and data created platform, was used to create the

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<sup>8</sup> Neil Chase Film, *Artificial Intelligence in Film: Impact & Influence for 2023+ (2023)*, <https://neilchasefilm.com/artificial-intelligence-in-film/#:~:text=Filmmakers%20have%20used%20AI%20tools,their%20fantastical%20stories%20to%20life.>

<sup>9</sup> *Id.*

world's first-ever movie trailer for Fox's *Morgan*.<sup>10</sup> Fox wanted to “wow” their audience and keep them on the edge of their seats with a suspenseful and frightening trailer made with the power of AI – and they succeeded. This trailer was seen as a milestone in AI use in the entertainment industry and was the beginning of production companies using AI to enhance both their trailers and movies right in front of the audiences' eyes. Although it seems as though AI is conquering production, and many people question why we would even need humans with all that AI can now do, it majorly assists with streamlining processes and keeping costs low.

## **2. Enhanced AI Visuals**

Second, the enhanced overall visuals through AI are a significant advantage for filmmakers. AI has now allowed film makers and creators to create never before seen, complex worlds and visuals that have never been created before.<sup>11</sup> Filmmakers are no longer forced to rely on regular film resources and computer animation that has been used for years, because of the creation of AI. They are now able to bring an entirely new world to the big screen for consumers. Not only are the visuals different and new, but they are entirely enhanced and have increased quality.<sup>12</sup> AI allows for backgrounds, sets, worlds, etc. to look more real than what some people truly see right in front of their own eyes. Deepfake technology is used here to enhance visuals and to generate life-like images and videos shown on the screen that are not actually there. This allows for filmmakers to express their creativity further and create worlds and sets that they were unable to create before. For example, AI can even be used to readjust mouth movements, allowing for other languages to look like they are truly being spoken by the actor, when in

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<sup>10</sup> Orient, *What Are the Applications of AI in Entertainment & Media* (2022), <https://www.orientsoftware.com/blog/ai-in-entertainment/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

reality, they are not speaking that language.<sup>13</sup> It will no longer look like actors are speaking one language when their mouth movements clearly do not match the pronunciations of the words the audience is hearing. AI is giving viewers a more “real” experience than ever before.

### **3. AI Use of Currently Unavailable Celebrities**

Third, another vital, and controversial, advantage is using AI to present actors on the screen that are unable to actually be present, due to location, timing, age, and death. One recent and popular example of this was when singer and rapper, Drake, used AI in his recent music tour to bring his younger self back to life. Essentially, Drake begins the concert by sitting on a couch with his “younger self” and is even shown interacting with him. It turned out that not only was this young boy a “younger Drake look alike”, but they also used AI to put Drake’s younger face on top of the real face of this young boy, for the screens at the concert to portray an amazingly true looking version of young Drake.<sup>14</sup> It shocked everybody that Drake and his team were able to create this, something that has never been done so widely in the music industry before using AI, impressing everyone in the industry as well as his fans.

AI is also able to now bring “back to life” digital clones of deceased actors to be in movies today. American film actor, James Dean, who passed away in 1955 just after starring in three highly watched films, is now being brought back through AI to cast as the star in a new, upcoming movie called “Back to Eden”.<sup>15</sup> A digital clone of the actor, created using AI and deepfakes, will be able to walk, talk, and even interact on screen with other actors in the film.<sup>16</sup> It will truly feel like he is physically in the movie. The digital cloning of actor James Dean not only

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<sup>13</sup> *Id.*

<sup>14</sup> This Song is Sick, *Drake Creates Illusion with AI During Live Show* (2023), <https://thissongissick.com/post/drake-creates-illusion-with-artificial-intelligence-during-live-show/#:~:text=The%20video%20recording%20shows%20Drake,Drake%20lookalike%20and%20AI%20technology>

<sup>15</sup> BBC, *How AI is Bringing Film Stars Back from the Dead*, <https://www.bbc.com/future/article/20230718-how-ai-is-bringing-film-stars-back-from-the-dead>.

<sup>16</sup> *Id.*

shows that AI is able to bring an actor back to life, but it also proves that the AI version of him will be able to engage with audiences on interactive platforms, including augmented reality, virtual reality, and gaming. This is only the start of AI bringing deceased people back from the entertainment industry and allowing them to interact with humans in real life today.<sup>17</sup>

Overall, AI holds many advantages in the film and entertainment industry. It allows for film makers to expand their ideas further and creates new opportunities one thought would never exist.

## **B. Concerns of AI Use in the Entertainment Industry**

With the many advantages of using AI in the entertainment industry comes a copious number of concerns along with it too. Actors are increasingly worried of the power that AI holds and will continue to hold as it only becomes more advanced and powerful.

### **1. Nonconsensual AI Generated Content of Celebrities**

First, a large disadvantage noticed by many is the use of AI with celebrities without their consent. Whether this be in movies, television shows, commercials, advertisements, or in malicious ways such as pornography, this is a constant worry held in their heads. There is an extremely interesting and insightful Black Mirror episode that alludes to all of this in their newest season called “Joan is Awful”. In this episode, actress Salma Hayek plays a fictionalized version of herself and signs away her image to a production company.<sup>18</sup> This production company is then able to use her face, image, voice, and sound to do, simply, whatever they want her to do. The deal she signed allows them to use an AI deepfake version of her, and all that she does and says in the episode is controlled by a computer – it is not really her. The consequences

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<sup>17</sup> *Id.*

<sup>18</sup> BBC News, *Why Some Celebrities are Embracing AI Deepfakes* (2023), <https://www.bbc.com/news/business-65995089>.



of what they have her do in the show portrays her in a very negative light. Although this is a fictional episode, it alludes to what is to truly come with AI and production companies. Actors are signing away their image, without quite realizing, the power that these companies will hold with that, allowing them to portray these actors in any way they choose to and without the actor's fully given permission.

Within this area of creating AI without gaining the actor's consent, there is, first, the issue of exploitation of celebrities for commercial advertising. AI has made it very easy to imitate a celebrity's image or voice in a myriad of ways.<sup>19</sup> Two famous celebrities, Gayle King and Tom Hanks, are the latest to announce their disapproval of unapproved, AI generated videos of them promoting products that are scams and also, not true to their persona.<sup>20</sup> AI versions of those two actors, as well as people like Elon Musk and Tom Brady, were seen promoting a weight loss product, a dental plan, an investment opportunity, and a stand-up comedy show during the past year.<sup>21</sup> They have all denounced these clips as inauthentic AI and a misrepresentation of themselves.<sup>22</sup> In most of these deepfake video situations, the celebrities have not agreed to participate in these advertisements and are not even on notice of them until they go viral online. These videos are generated showing the subject saying and doing whatever the creator wants them to do, and this is a dangerous crossover in the media industry. It exploits celebrities in a way that they have never been exploited before.

Second, there is the issue of celebrities being deepfaked into pornography settings. Celebrities like Scarlett Johansson and Gal Gadot have found their faces deepfaked into

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<sup>19</sup> Forbes, *Can the Law Prevent AI from Duplicating Actors? It's Complicated* (2023), <https://www.forbes.com/sites/schuylermoore/2023/07/13/protecting-celebrities-including-all-actors-from-ai-with-the-right-of-publicity/?sh=a56e0f459ec2>.

<sup>20</sup> Today, *What is a Deepfake and Why are Celebrities Speaking Out About It?* (2023), <https://www.today.com/popculture/news/what-is-a-deepfake-ai-trend-rcna118993>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

pornography movies.<sup>23</sup> Not only is this a specific deepfake issue targeting the entertainment industry as a whole, but it is an issue primarily targeting the female celebrities.<sup>24</sup> It is almost always female actors whose images are being manipulated and used in malicious ways, like in pornography settings.<sup>25</sup> Having this situated as a gender-based issue makes it all the more complicated in attempting to fix, and that is because certain people are going to care about the consequences more than others will.

Third, as mentioned before, there is the issue of unauthorized use of deceased celebrities. Production companies are bringing back deceased celebrities and actors, and putting them in movies, films, songs, etc., without first obtaining consent to use their likeness. Since they are not alive, companies merely assume that they can use their likeness freely, however, legal issues may arise as they are not first gaining consent. Whether that consent be needed from their heirs or their estate, freely using someone's likeness without permission is not allowed. Film productions may abuse this in ways where that celebrities' heirs or estate would object for reason of dignity or money. This may occur if the production companies do not first gain permission or consent. As previously mentioned, American film actor, James Dean, is being brought back through AI to cast in the new upcoming movie called "Back to Eden".<sup>26</sup> The production company would have had to first gain consent from his heirs or estate to use his image and sound in the movie to prevent from them potentially taking legal action.

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<sup>23</sup> The Conversation, *Actors are Really Worried About the use of AI by Movie Studios – They May have a Point* (2023), <https://theconversation.com/actors-are-really-worried-about-the-use-of-ai-by-movie-studios-they-may-have-a-point-210034>.

<sup>24</sup> Dunn, *Women, Not Politicians, Are Targeted Most Often by Deepfake Videos*, CIGI, (2021), <https://www.cigionline.org/articles/women-not-politicians-are-targeted-most-often-deepfake-videos/>.

<sup>25</sup> *Id.*

<sup>26</sup> BBC, *How AI is Bringing Film Stars Back from the Dead*, <https://www.bbc.com/future/article/20230718-how-ai-is-bringing-film-stars-back-from-the-dead>.

Fourth, there is the use of AI generated songs using singers' voices that they are not actually singing themselves. Recently, two of the most popular musicians, Drake and the Weeknd, had their voices put onto an AI song called "Heart on My Sleeve". This is a developing music genre of AI generated music that can conjure familiar sounds and be passed off as authentic.<sup>27</sup> Universal Music Group, home of both of these popular singers, has flagged such content to its streaming partners, citing intellectual property concerns.<sup>28</sup> This type of AI generated work makes it confusing for fans to know if this is truly the artist singing, or if it is just their voice computerized with AI to create a song. This poses a major threat to music creators because AI could have them sing songs that they would not typically choose to sing, or songs that they did not consent to sing and create. Not only is this confusing for people to understand, but the idea of AI voice generated songs and deepfake videos invokes fear in people who truly believe what they are seeing in front of their eyes, when in reality, it is fake. Many companies say that what we are seeing now with AI and deepfake videos is only the beginning, worrying celebrities of what is to come in the future.

## **2. Celebrities Losing Jobs to AI**

A second overall concern seen by many with the use of AI in the entertainment industry is the issue of celebrities losing jobs due to AI. An example of this is with an Argentinian actor Alejandro Graue. He was working on a large project with a company, one that he was so focused on that he turned down other opportunities to devote himself fully to, and things headed south for him very quickly.<sup>29</sup> While he was watching a YouTube video, he noticed the company had posted

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<sup>27</sup> NY Times, *An AI Hit of Fake Drake and The Weeknd Rattles the Music World* (2023), <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html>.

<sup>28</sup> *Id.*

<sup>29</sup> Euro News, *The Argentinian Actor Who Lost his Job to AI: 'I Fear for my Future'* (2023), <https://www.euronews.com/culture/2023/04/28/the-argentinian-actor-who-lost-his-job-to-ai-i-fear-for-my-future>.

a new video in Spanish. When he opened the video, he was completely shocked by what he heard: a voice that had been generated by AI. He stated, “it was an automated voice, it had no richness, no nuance, no rhythm. The pronunciation was totally mechanical.”<sup>30</sup> When he reached out to the company, they informed him that they no longer needed him on the project, as they used AI to complete what they previously needed him to do. Within just a year, AI has completely shaken up the industry with this, and it worries actors that they will be out of a job, and a source of income, as they feel they are not physically needed anymore. Film maker Justine Bateman even stated that she doesn’t think there is a thriving future for actors in filmed entertainment as we know it [because of AI].<sup>31</sup> She believes that AI will suck the creative marrow out of Hollywood.<sup>32</sup> As previously mentioned, the SAG-AFTRA strike is an ongoing strike over labor disputes to AI. The issues were predominantly with the displacement of writers in favors of generative AI and the rights of creatives to their own work.<sup>33</sup> Many productions were halted due to this strike, which involved famous filmmakers, actors, and others present in the entertainment industry. Those on strike are afraid of what is to come here with AI, and the fear that it will take over the rights of creators and celebrities, while also taking those jobs away from them.

Overall, AI presents many disadvantages, by utilizing AI and celebrities without their formal consent in various aspects within the entertainment industry, and the loss of jobs for many

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<sup>30</sup> *Id.*

<sup>31</sup> Variety, ‘This is an Existential Threat’: Will AI Really Eliminate Actors and Ruin Hollywood? Insiders Sound Off, <https://variety.com/2023/digital/features/hollywood-ai-crisis-artificial-intelligence-eliminate-acting-jobs-1235697167/>.

<sup>32</sup> *Id.*

<sup>33</sup> Pictory, *The Pros and Cons of Using AI Technology in the TV and Film Industry* (2023), <https://pictory.ai/blog/pros-and-cons-ai-technology-tv-and-film-industry?el=0100&htrafficsource=pictoryblog&hcategory=video>.

actors. This paper will now move on to discuss the existing legal protections, current AI legislation on both a federal and state level, and the overall proposed legislation needed.

### **III. EXISTING LEGAL PROTECTIONS**

#### **A. Who May be Held Liable for AI Generated Content?**

As AI advances, celebrities want to know who would be held liable for using their name, image, voice, or likeness without first having their consent. In October 2023, a bipartisan bill was introduced in the Senate that aimed to address exactly this, AI concerns around name, image, and likeness.<sup>34</sup> Michelle Miller, the co-founder and former co-executive of Coworker.org, an early-stage worker organizing group, said there is a difference between an “individual goofing around on the internet” and a “full-on corporate entity or shadowy entity creating something to establish a pattern of disinformation or profit off somebody’s own creative intellectual property.”<sup>35</sup> With this being said, it seems as though there is a vital difference between those intentionally creating the AI content to deceive, and those creating it “for fun.” However, either way, if it personally affects the targeted person, they can be held liable. Actors will be able to hold both the actual creator of the AI liable, as well as hold the person or entity who chose to use the AI to impersonate the actor in that way, liable too. This means that an actor will be able to sue the specific developer of the AI that was used to impersonate them without their consent, and also sue the specific individual or company that produced that AI generated work with the impersonated celebrity.

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<sup>34</sup> The Hill, *Why Actors are Fighting for AI Protections* (2023), <https://thehill.com/policy/technology/4267345-why-actors-are-fighting-for-ai-protections/#:~:text=The%20Nurture%20Originals%2C%20Foster%20Art,of%20individuals%20in%20a%20performance.>

<sup>35</sup> *Id.*

Alison Schary, a partner at the law firm of Davis Wright Tremaine, stated that, “you have to have a *person* to sue...if somebody is going to bring a case [for AI generated content], they’re going to sue the person who distributed the speech, or the person or the entity that takes ownership of, or develops, the AI system.”<sup>36</sup> This is very important information to be informed of because actors need to know who they have the right to sue or the right to hold liable for using their name, image, or likeness without their consent. They need to feel a sense of protection in this new and developing AI generated content area. As it is now seen that they can hold these certain individuals or companies liable, they next need to know what causes of action are available for them to bring against these people or entities.

## **B. Causes of Action Available to Celebrities**

In this situation, there are multiple causes of action available for actors to use if they wish to pursue legal action. These causes of action also may differ if the celebrity is dead or alive during the time of use. However, the overall most important cause of action available to them is the right of publicity.

### **1. The Right of Publicity**

The first cause of action is the right of publicity. As previously mentioned, the right of publicity prevents the unauthorized commercial use of an individual’s name, likeness, or other recognizable aspect of one’s persona. The right of publicity is about identity, and depending on who you are, your identity could be worth millions of dollars, therefore you assume the right to protect that from being used without your consent.<sup>37</sup> If a filmmaker were to use a celebrity’s name, voice, or likeness with AI, without first obtaining consent, there could very well be a

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<sup>36</sup> Fire, *Artificial Intelligence, Free Speech, and the First Amendment*, <https://www.thefire.org/research-learn/artificial-intelligence-free-speech-and-first-amendment>.

<sup>37</sup> Higgs, Fletcher, Mack, *Celebrities Sue Over Unauthorized use of Identity*, <https://higgslaw.com/celebrities-sue-over-unauthorized-use-of-identity/>.

violation of their right of publicity, and they may prevail in a lawsuit. The elements of a right of publicity claim include (1) the defendant used the plaintiff's identity; (2) such appropriation was for the defendant's advantage, commercial, or otherwise; (3) the plaintiff did not consent to the use of the plaintiff's identity; and (4) the appropriation is likely to cause injury to the plaintiff.<sup>38</sup> Analyzing this in light of a celebrity using the right of publicity for an AI claim, an example may be Tom Hanks filing suit against the company that used AI to have him promote a dental plan. First, the company used Hanks' identity in the advertisement. Second, this appropriation of Hanks was used for the defendant's advantage and commercial use because he is a famous celebrity, and this company used that to their advantage to gain customers trust, and ultimately increase profits for their dental plan. Third, Hanks did not consent to this use of his identity for this advertisement. And fourth, this caused injury to Hanks because it showed him endorsing a dental plan that he did not consent to endorsing and did not properly reflect his values. This is an illustrated example of how a celebrity may succeed in a right of publicity claim, through the use of a company impersonating a celebrity using AI without their consent.

## **2. Limitations on the Right of Publicity**

There are, however, limitations on the right of publicity. The first limitation is First Amendment considerations when the issue of free speech or expression are at issue, especially in situations with the use of a deceased celebrity.<sup>39</sup> The First Amendment provides vital protections for the use of a deceased celebrity's name, voice, or likeness in a piece of work, without the consent of their heirs or estate. Also, the use of a digital replica that appears to "resurrect" a dead celebrity may very well fall outside the scope of existing, narrow state laws recognizing post-

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<sup>38</sup> Restatement (Third) of Unfair Competition, § 46-49 (2006).

<sup>39</sup> *Id.*

mortem rights of publicity in certain situations.<sup>40</sup> For example, the state of Virginia has a postmortem right of publicity that is set for 20 years after death.<sup>41</sup> Therefore, if someone in the state of Virginia uses a deceased celebrity in an advertisement or commercial after they have been deceased for 20 years, the heirs or estate will no longer have standing because the statute of limitations has passed and the person who created this advertisement or commercial will not be held liable for any wrongdoing. However, even if permission is not required, it is still smart to obtain it for reasons including free access to this celebrity's likeness and avoiding possible future litigations.<sup>42</sup> One California court has even noted that, "many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits."<sup>43</sup>

A second limitation on a right of publicity claim is that the right of publicity is not recognized in all states and there is not always a private right of action available in all states for celebrities. The right of publicity is currently recognized in roughly twenty-five states, and those states have passed statutes regulating these rights for celebrities.<sup>44</sup> However, for the states that do not currently have a right of publicity statute, targeted celebrities will be unable to file suit in those states, making it difficult for them to hold the defendant liable. Also, with no right of publicity recognition in a state's laws, there comes no private right of action for celebrities to file

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<sup>40</sup> IDA, *Raising the Dead: Understanding Post-Mortem Rights of Publicity* (2022),

<https://www.documentary.org/column/raising-dead-understanding-post-mortem-rights-publicity#:~:text=In%20sum%2C%20the%20First%20Amendment,the%20deceased's%20heirs%20or%20estate.>

<sup>41</sup> Nova Estate Lawyers, *What is Post-Mortem Right of Publicity* (2022), <https://www.novaestatelawyers.com/post-mortem-right-of-publicity/#:~:text=Under%20the%20postmortem%20right%20of,commercial%20use%20without%20prior%20consent.>

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Right of Publicity, *Right of Publicity Statutes & Interactive Map*, <https://rightofpublicity.com/statutes#:~:text=Currently%2C%2025%20states%20have%20some,Monroe%20cases%2C%20the%20author%20of.>



suit. For example, if a celebrity in New Jersey were to try and file suit against a New Jersey company that used AI generated content to replicate that celebrity without first obtaining their consent, that celebrity would not be able to claim a right of publicity in the state because New Jersey does not recognize it in their state laws.

### **3. Fraud or Misrepresentation**

The second cause of action available here is a claim for fraud or misrepresentation. If an AI impersonation is used for deceptive or fraudulent purposes, the actor may have legal recourse available here. A common situation that may be relevant within this area is the use of AI to impersonate celebrities using deepfake in pornography videos, images, or other various malicious uses. Another relevant situation here is using AI to have an actor endorse a product or service that they are not actually promoting themselves and did not agree to promote. Since the actor did not agree to this, this may be seen as fraud or misrepresentation. This would typically be a tort claim and could likely win in court if the facts prove the elements that they did not consent to this, this was not truly them in the video or endorsement, and they are able to provide evidence relevant to that. A claim here would likely fall under the Federal Trade Commission (FTC) jurisdiction to prevent deceptive practices. In March of 2023, the FTC even released a blog post advising companies to consider the potentially deceptive or unfair use of AI tools to generate synthetic media.<sup>45</sup>

There are various other claims worth mentioning including defamation or libel if the AI generated content is used to portray the actor in a false light, and a claim of a privacy violation if the actor could prove that their privacy has been violated by AI and that it has intruded upon their

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<sup>45</sup> Wilmer Hale, *FTC Warns Companies of the Potentially Deceptive Uses of AI Tools* (2023), <https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20230406-ftc-warns-companies-of-the-potentially-deceptive-uses-of-ai-tools>.

private life. While there are evidently various other claims that exist, including fraud and misrepresentation, the most important cause of action available is the right of publicity.

### **C. Defenses Available to the Causes of Action**

While there are various causes of action present in the law and available to actors who may choose to sue an individual or company for using AI to impersonate them without their consent, there are defenses to these claims. The most important and most potentially used defense is the First Amendment.

#### **1. First Amendment Right as a Defense**

The most prominent defense available here is the defense of the First Amendment right. The defendant may be able to argue that the use of AI to create impersonations of a celebrity falls under freedom of speech or expression, especially in situations in which the content may be used for parody, satire, commentary, or transformative means. An example of this would be when StateFarm and ESPN aired a commercial featuring SportsCenter anchor Kenny Mayne digitally manipulated through AI to appear younger.<sup>46</sup> ESPN claimed that they attempted to make the joke as clear as possible to viewers, to ensure that they were not tricking anyone and to prove that this was clearly intended to be parodic.<sup>47</sup> If Kenny Mayne were to file suit against StateFarm and ESPN for this, they may use the defense of the First Amendment Right under freedom of expression and deepfake creation used for parodic means.

Content created by generative AI has free speech protections because it is considered “speech”, created out of the raw material of human speech, and created from a code made by

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<sup>46</sup> Quentin J. Ullrich, *Is This Video Real? The Principal Mischief of Deepfakes and How the Lanham Act Can Address it*, 55 Colum. J.L. & Soc. Probs. 1,9 (2021).

<sup>47</sup> *Id.*

humans.<sup>48</sup> However, the same exceptions that apply to the First Amendment will apply in the AI context as they would in any other media context.<sup>49</sup> This defense may not prevail if the actor can prove that the content was used for commercial or financial gain, it damages the celebrity's reputation or image, or it harms them in another way. The courts will likely weigh the person's right to free speech or expression against other compelling interests, such as privacy rights and negative personal harm. The First Amendment overall, however, provides major protections for expressive work and could be a defense used in these situations, especially against the claim of a violation of a right of publicity.<sup>50</sup>

Other defenses worth mentioning are the defense of fair use, if the company can prove that they first obtained consent or authorization, or if the company can prove that they had no commercial gain. With the rapid growth of AI, and currently little case law to go by, the defenses known are limited, but that does not mean that they are not present or that more will not surface as AI generated content continues to be produced. However, the most prominent defense standing at this current time is the First Amendment right.

#### **IV. LEGISLATION ON AI GENERATED CONTENT**

##### **A. Current AI Legislation**

Looking at what legislation currently exists in the area of AI generated content, there is little present on both a federal and state level, but this section will cover what legislation exists at this moment in time. Currently, only some states have laws regulating deepfakes and only some states recognize a right of publicity as well. On a federal level, there is currently no deepfake

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<sup>48</sup> TIME, *The Case for Protecting AI-Generated Speech with the First Amendment* (2023), <https://time.com/6278220/protecting-ai-generated-speech-first-amendment/>.

<sup>49</sup> Fire, *Artificial Intelligence, Free Speech, and the First Amendment*, <https://www.thefire.org/research-learn/artificial-intelligence-free-speech-and-first-amendment>.

<sup>50</sup> *Id.*

legislation enacted, however, two acts have been proposed that look toward a hopeful future for AI federal legislation.

## **1. Current State AI Legislation**

Many states are in the process of creating legislation on AI generated content and deepfakes due to the fast-paced development of AI, especially in the entertainment and film industry. So far, nine states have enacted laws regulating deepfakes including Washington, California, Wyoming, Texas, Minnesota, New York, Georgia, Virginia, and Hawaii.<sup>51</sup> At least four other states have bills at various stages of the legislative process including Illinois, Louisiana, Massachusetts, and New Jersey. The definition of “deepfake” varies among states; some states like Texas directly reference “artificial intelligence”, while other states only use language such as “computer generated image” or “digitalization”.<sup>52</sup> Also, some states impose criminal violations while other states allow victims to bring civil suits. The specific language within implemented state AI laws varies.

The deepfake laws available in each state vary and some states laws depend on the extent of malicious use of the AI or deepfake as well, including, malicious deepfake pornography and deepfake created election advertisements. For example, California’s deepfake law focuses on malicious use of deepfake pornography, while Texas’ deepfake law focuses on deepfake videos with the intent to injure a candidate or influence an election process.<sup>53</sup> Virginia’s deepfake law is much more general, using language that makes it illegal to create deepfake videos with intent to “coerce, harass, or intimidate” another.<sup>54</sup> Although each state varies in the specific language used

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<sup>51</sup> Bloomberg, *States are Rushing to Regulate Deepfakes as AI Goes Mainstream* (2023), <https://www.bloomberg.com/news/articles/2023-06-20/deepfake-porn-political-ads-push-states-to-curb-rampant-ai-use?srnd=technology-vp#xj4y7vzkg>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

within their deepfake legislation, all states seem to focus on general or malicious harm to another through nonconsensual deepfake created content.

The deepfake laws in each state also vary on sanctions with some states allowing victims to bring civil suits and not criminal suits, and vice versa. For example, in Hawaii, Texas, Virginia, and Wyoming, nonconsensual deepfakes are a criminal violation, whereas the laws in New York and California only create a private right of action that allows victims to bring civil suits, not criminal.<sup>55</sup> The recent law in Minnesota allows both criminal and civil penalties.<sup>56</sup>

Looking at the right of publicity, currently, it is recognized in over half of the states, either by statute or common law.<sup>57</sup> Many states also recognize a post-mortem right of publicity, ranging from ten years to 100 years.<sup>58</sup> However, most of these states do not extend a person's right of publicity to computer generated likenesses and deepfakes. In 2020, New York signed a path breaking law addressing both a right of publicity and deepfakes with two components.<sup>59</sup> The first component establishes a postmortem right of publicity to protect a celebrity's likeness, including digitally manipulated likenesses, from unauthorized commercial exploitation for 40 years after death.<sup>60</sup> The second component bans nonconsensual computer-generated pornography created by AI.<sup>61</sup> With this two-part law being signed, New York becomes the first state to recognize both the right of publicity and computer generated likeness through AI, together.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Higgs, Fletcher, Mack, *Celebrities Sue Over Unauthorized use of Identity*, <https://higgslaw.com/celebrities-sue-over-unauthorized-use-of-identity/>.

<sup>58</sup> *Id.*

<sup>59</sup> Wilmer Hale, *New York's Right of Publicity and Deepfakes Law Breaks New Ground* (2020), <https://www.wilmerhale.com/insights/client-alerts/20201217-new-yorks-right-to-publicity-and-deepfakes-law-breaks-new-ground>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

In early October 2023, New York Governor also signed Senator Hinchey's bill into law, making it illegal in New York to disseminate AI generated content or deepfakes of a person without first gaining consent.<sup>62</sup> Those who may be found guilty of doing so could face up to a year in jail and a \$1,000 fine.<sup>63</sup> It is evident that the state of New York aims to address the rise of issues with AI, and to implement deepfake legislation to ensure affected persons have a clear legal course. This recent 2023 bill signed into law is the first bill in the United States to advance specific protections surrounding this type of deepfake digitalized content, hoping to pave the way for other states to follow in New York's footsteps and take similar action in their state legislation.

As more states develop laws on deepfakes, and over half of the states recognize a right of publicity, it is still evident that not all states recognize deepfake laws and right of publicity laws separately, and even less states recognize both of those components of law together. This is a crucial development that is needed as AI deepfake laws and right of publicity laws are only going to further interact with one another as AI content develops.

## **2. Current Federal AI Legislation**

There is currently no federal legislation on deepfakes or a federal recognition of the right of publicity, however legislation has been proposed by senators to implement both a federal right of publicity and federal specific deepfake legislation.

First, a bipartisan group of senators proposed an Act that would prevent a person from producing or distributing an unauthorized AI generated replica of an individual to perform in an audiovisual or sound recording without the consent of the individual being replicated.<sup>64</sup>

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<sup>62</sup> The New York State Senate, *Hinchey Bill to Ban Non-Consensual Deepfake Images Signed into Law* (2023), <https://www.nysenate.gov/newsroom/press-releases/2023/michelle-hinchey/hinchey-bill-ban-non-consensual-deepfake-images#:~:text=KINGSTON%2C%20NY%20%E2%80%93%20Senator%20Michelle%20Hinchey,explicit%20media%20using%20someone's%20likeness.>

<sup>63</sup> *Id.*

<sup>64</sup> The NO FAKES Act of 2023 (2023).

Exclusions are still provided under the First Amendment and are also specifically provided for news documentaries, docudramas, and historical or biographical works.<sup>65</sup> This proposed Act would apply to deceased individuals as well, with the rights exclusive to the executors or heir for 70 years after that persons death.<sup>66</sup> If this Act were to be passed, it would provide many beneficial protections for celebrities, both dead and alive, in the entertainment industry, ensuring that their rights are fully protected, and that their name, image, and likeness are not to be used without gaining their prior consent.

This act would also be the first federally recognized right of publicity as it creates a new digital replication right that would address the celebrity exploitation by allowing those individuals to first authorize the use of their own image, voice, or visual likeness in a digital replica.<sup>67</sup> A federal recognition of a right of publicity is deemed a necessity in this present time as deepfakes and overall, AI, advances.

A second Act that has been proposed by a group of senators focuses primarily on deepfake legislation and holding those individuals liable for deepfake creations as well as protecting those that are negatively affected by it. The Act is intended to provide protections to individuals that have fallen victim to deepfake content.<sup>68</sup> Representative Yvette Clarke noted that the Act would, “provide prosecutors, regulators, and particularly victims with resources, like detection technology, to stand up against the threat of nefarious deepfakes.”<sup>69</sup> If this Act were to

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<sup>65</sup> Deadline, *Senate Legislation Would Outlaw Unauthorized AI Generated Likeness; SAG-AFTRA Lauds “No Fakes Act”* (2023), <https://deadline.com/2023/10/no-fakes-act-ai-limits-senate-1235571538/>.

<sup>66</sup> *Id.*

<sup>67</sup> Venable LLP, *AI Deepfake Bill: Senators Contemplate the First Federal Right of Publicity* (2023), <https://www.venable.com/insights/publications/2023/10/ai-deepfakes-bill-senators-contemplate-the-first#:~:text=The%20proposed%20legislation%20creates%20a,likeness%20in%20a%20digital%20replica.>

<sup>68</sup> DEEPFAKES Accountability Act of 2023, H.B. 5586, 118<sup>th</sup> Cong. § 1-11 (2023).

<sup>69</sup> ABC, *Bill Would Criminalize ‘Extremely Harmful’ Online Deepfakes* (2023), <https://6abc.com/bill-would-criminalize-extremely-harmful-online-deepfakes/13827915/#:~:text=Clarke%20told%20ABC%20News%20that,threat%20posed%20by%20nefarious%20deepfakes.>

be passed, it would require creators to label all deepfakes uploaded online to make it clear that this video or image is not real and has been modified through AI.<sup>70</sup> Failing to do so could result in both civil and criminal violations under federal law. This Act would help protect celebrities from malicious and negative deepfakes portraying them in a light that is not truly accurate to their own values and persona.

It is currently extremely difficult for celebrities to have a valid right of publicity claim under federal law since it is not recognized, and the deepfake federal legislations are only proposed drafts as of this moment in time; there is no current federal deepfake legislation. The below section will now go on to discuss the proposed legislation that will benefit celebrities in this area of the law and ensure them rights to their own image, sound, and likeness both on a state level and federal level.

## **B. Proposed Legislation**

The proposed legislation that is needed here is the demand for both state level and federal level private rights of action for celebrities in order to more easily allow them to file suit when AI generated content is created of them without their obtained consent. A larger focus on a state and federal recognition of deepfake legislation and the right of publicity is needed as well.

### **1. Proposed State AI Legislation**

The first proposed legislation, on a state level, is the need for all states to recognize a right of publicity and to allow for them to have a private right of action if their name, image, and likeness are used in AI generated content without their consent. Currently, only approximately half of the states recognize a right of publicity.<sup>71</sup> All states across the United States should

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<sup>70</sup> *Id.*

<sup>71</sup> Right of Publicity, *Right of Publicity Statutes & Interactive Map*, <https://rightofpublicity.com/statutes#:~:text=Currently%2C%2025%20states%20have%20some,Monroe%20cases%2C%20the%20author%20of.>



recognize the right of publicity in their state laws. If all states were to recognize a right of publicity, it would make it much easier for celebrities to file suit in any state, especially if they are fallen victim to unauthorized AI generated content of themselves in a state that currently does not recognize a right of publicity. Establishing a right of publicity in all states would also provide citizens with a sense of consistency and uniformity. Having the same, consistent legal framework across all states for a right of publicity provides clarity and predictability for celebrities and entities operating in all states.

Second, along with all states recognizing a right of publicity, all states should take a similar action in doing so with establishing a deepfake law within their legislation. Currently, nine states have enacted laws regulating deepfakes and at least four other states have bills at various stages of the legislative deepfake process.<sup>72</sup> For the states that have not yet enacted or started the process of creating deepfake laws for their state, they should do so immediately in order to protect celebrities that are harmed by deepfake creations, and also to prevent potential creation of deepfakes, along with damages and harassment that might arise from them. States should also work to clarify their definition of what a “deepfake” is as each state currently uses different language in their laws to describe what a deepfake is with some states using language such as “computer generated images” and other states explicitly stating “artificial intelligence”.<sup>73</sup> If each state were to enact deepfake legislation, and clarified the language within their law of what a deepfake is, it would further protect celebrities and their overall likeness when it comes to deepfake generated content.

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<sup>72</sup> Bloomberg, *States are Rushing to Regulate Deepfakes as AI Goes Mainstream* (2023), <https://www.bloomberg.com/news/articles/2023-06-20/deepfake-porn-political-ads-push-states-to-curb-rampant-ai-use?srnd=technology-vp#xj4y7vzkg>.

<sup>73</sup> *Id.*

Also, a private right of action is necessary here as well because it would give more choice over the remedy process and allow for celebrities to bring a case more seamlessly against an individual or entity who chooses to violate their right of publicity with the use of AI generated content. A private right of action would give Judges, and the overall legal system, a statutory framework to work with when handling the inevitable rise of deepfake and, overall, the rise of AI cases.<sup>74</sup> States that recognize a private right of action allows for individuals to gain more control over their name, image, and likeness, as well as their overall identity. It gives them the opportunity to exercise control over where their likeness is being used and how it is being used. States implementing a private right of action for celebrities and their right of publicity helps protect their individual rights and makes celebrities feel that they have more power in these situations.

## **2. Proposed Federal AI Legislation**

Within the federal legislation, creating and proposing a brand-new Act primarily focused on deepfakes would help celebrities in gaining control over their name, image, sound, and overall likeness. Such an Act should require people to first gain consent from the individual that the person desires to replicate, before producing or disturbing AI generated content of this individual. This shall include gaining consent before using their image, voice, sound, and or any other related likeness. Such an Act would prevent creators and editors of AI from first and foremost creating the content, and then also prevent them from producing that content without the celebrity's consent. Creating an Act in the federal legislation would also give celebrities a federal route of legal action, as there currently isn't a clear one.

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<sup>74</sup> Eric Kocsis, *Deepfakes, Shallowfakes, and the Need for a Private Right of Action*, Dickinson Law Review (2022), <https://1.next.westlaw.com/Document/I662adef6d03211ec9f24ec7b211d8087/View/FullText.html?listSource=Foldering&originationContext=clientid&transitionType=MyResearchHistoryItem&contextData=%28oc.Search%29&VR=3.0&RS=cblt1.0>.

Also, an Act like this would constitute a need for a federal recognition of the right of publicity because, currently, there is no federal statute that specifically addresses the right of publicity. As each state that currently does recognize a right of publicity, which is approximately half of the states, each state defines their definitions slightly different, and lacks uniformity concerning the scope and substance of the law.<sup>75</sup> Establishing a federal right of publicity would prevent confusion and implement a more consistent definition of what a right of publicity is and how it should be acknowledged in the law, allowing for overall more uniformity. By recognizing a federal right of publicity as AI advances further through time, it would greatly help to address any challenges posed by AI generated content. It would also help to protect a celebrity's overall likeness, on any AI digital media images and videos, that can easily cross state borders through online platforms.

There are many advances that need to be made as AI becomes more intelligent and as it is going to be used more in the entertainment industry. The above proposed legislations would make it easier for celebrities to protect themselves and their overall likeness in the unfair use of AI generated content on both a state level and federal level in the legislation. The current legislation in place is lacking fair protections for a celebrity's name, image, and likeness. All states should recognize a right of publicity, as well as a private right of action for these targeted individuals and the use of AI generated content. All states should enact a clear law regulating deepfakes as well. Lastly, the federal legislation must propose a deepfake focused Act to protect the name, image, and likeness, of celebrities and the use of AI generated content without their consent, while also recognizing a federal right of publicity.

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<sup>75</sup> Vick & Jassy, *Why a Federal Right of Publicity Statute is Necessary*, American Bar (2011), [https://www.americanbar.org/content/dam/aba/publications/communications\\_lawyer/august2011/why\\_federal\\_right\\_publicity\\_statute\\_is\\_necessary\\_comm\\_law\\_28\\_2.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2.authcheckdam.pdf).

## **V. CONCLUSION**

Overall, it is evident that AI is a fast-growing area, especially within the entertainment industry, and it is directly being seen that celebrities are the targeted persons here. As previously mentioned in this paper, AI does hold many advantages in the entertainment industry, however the concerns of AI seem to currently outweigh the advantages present in this area. When it comes to deepfakes, malicious use or general use, the protections are not fully embedded in legislation to give celebrities a clear route for legal action, or to make them feel safe while working in the industry. Current state legislation and federal legislation do not have enough to make celebrities feel protected or give them a clear legal path if their name, image, or likeness are used without their consent through AI generations. That is why it is necessary for both state and federal legislations to enact a right of publicity and private right of action for celebrities targeted by AI generated content, and to have a larger focus on the creation of deepfake legislation. By making these changes to the law, on both levels, it will allow the use of AI to still evolve in the industry, while also keeping celebrities protected and ensuring their safety. It will give clear definitions and direct pathways for what is or isn't allowed in the entertainment industry when it comes to AI generated content used in either general or malicious ways as well. AI is a vital advancement for the entertainment industry, however, without celebrities having a private right of action for their own name, image, and likeness, AI will not be able to evolve in a fair and successful way for those in the industry.