

# A FEDERAL RIGHT OF PUBLICITY TO NAVIGATE THE WILD WEST OF GENERATIVE AI CONTENT

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## I. INTRODUCTION

“Start spreading the news, AI has something to say!”<sup>1</sup> In April of 2023, artificial intelligence (“AI”) sparked controversy when artist “Ghostwriter977” uploaded the track “Heart of My Sleeve” to streaming services.<sup>2</sup> The song went viral when fans assumed the track was an unreleased song by two major artists, Drake and The Weeknd.<sup>3</sup> The track, instead, was created using an AI tool that

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<sup>1</sup> Chloe Veltman, *Thousands of Authors Urge AI Companies to Stop Using Work Without Permission*, HOUSTON PUB. MEDIA (July 17, 2023, 5:10 AM), <https://www.houstonpublicmedia.org/npr/2023/07/17/1187523435/thousands-of-authors-urge-ai-companies-to-stop-using-work-without-permission/> (“AI-GENERATED VOICE: (As Frank Sinatra, singing) Start spreading the news. AI’s got something to say. It’s coding it its own way, learning the rules today.”); *see also* Andrew Karpan, *Sens. Ponder if Federal Publicity Law Could Curb Deepfakes*, LAW360 (July 12, 2023, 9:44 PM), <https://www.law360.com/articles/1697155/sens-ponder-if-federal-publicity-law-could-curb-deepfakes>

“Start spreading the news, AI’s got something to say,” a modulated, yet recognizable version of Sinatra’s dulcet tones could be heard singing early in the Senate Judiciary Committee’s intellectual property subcommittee’s second hearing so far on the overall impact that developments in AI technology have had on intellectual property protections.

*Id.*

<sup>2</sup> *See* Rachel Reed, *AI Created a Song Mimicking the Work of Drake and The Weeknd. What Does That Mean for Copyright Law?*, HARV. L. TODAY (May 2, 2023), <https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/> (noting how artist Ghostwriter977 uploaded the tune “Heart on My Sleeve” on TikTok and Spotify and the song “quickly spread like wildfire across the internet”); *see also* Moises Mendez II, *The Drake AI Song is Just The Tip of the Iceberg*, TIME (Apr. 20, 2023, 4:41 PM), <https://time.com/6273529/drake-the-weeknd-ai-song/> (noting how the song “Heart on My Sleeve” accumulated millions of streams within just one week after being released on several major streaming platforms).

<sup>3</sup> *See* Reed, *supra* note 2 (noting the excitement among hip hop fans when the track dropped); *see also* Chloe Veltman, *When You Realize Your Favorite New Song was Written and Performed by . . . AI*, NPR (Apr. 21, 2023, 5:00 AM), <https://www.npr.org/2023/04/21/1171032649/ai-music-heart->

replicates the voice of the artist.<sup>4</sup> Although the track was removed from all streaming platforms, the legal implications have lingered—causing debate over whether such a song should be legally protected.<sup>5</sup>

AI stands as one of the most influential technologies in our era, with extensive and diverse applications.<sup>6</sup> As AI technology continues to evolve exponentially, the applicability of copyright law to generative AI content must be considered.<sup>7</sup> Generative AI refers to AI that is trained with both public domain or copyrighted material such as songs and movies, and generates outputs such as text, visuals, or sounds based on, or influenced by, the original inputs.<sup>8</sup> Examples of generative AI content range from creating covers of popular songs using the voices of known artists, to creating films shot in the style of known film directors.<sup>9</sup> While the voice or style of certain artists are generally unprotected

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on-my-sleeve-drake-the-weeknd (“Music fans responded with disbelief this week to the release on streaming and social media platforms of the viral song ‘Heart on My Sleeve.’”).

<sup>4</sup> See Reed, *supra* note 2 (“Instead, the tune had been created using artificial intelligence by TikTok user Ghostwriter977, who had trained AI on Drake and The Weeknd’s works and generated the new song, which impeccably mimicked the artists’ voices, lyrics, and musical styles.”); see also Joe Coscarelli, *An A.I. Hit of Fake ‘Drake’ and ‘The Weeknd’ Rattles the Music World*, N.Y. TIMES, <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html> (Apr. 24, 2023) (noting how the track used AI versions of Drake and The Weeknd “to create a passable mimicry”).

<sup>5</sup> See Isaiah Poritz, *AI-Faked Drake, The Weeknd Song Amps Music Industry’s IP Alarm*, BLOOMBERG L. (May 2, 2023, 4:50 AM), <https://news.bloomberglaw.com/ip-law/ai-faked-drake-the-weeknd-song-amps-music-industrys-ip-alarm> (“[The track] sparked outcry and intrigue in an industry already leery of unregulated AI music, which has driven a wedge through multiple intellectual property rights.”); see also *AI Copyright in Spotlight After Platforms Pull ‘fake Drake’ Song*, AXIOS (Apr. 18, 2023), <https://www.axios.com/2023/04/19/ai-fake-drake-weeknd-song-streaming-services-removed> (“While there are intellectual property issues, [it is] not really clear whether the label or Drake and The Weeknd have a claim under traditional copyright law, given that the song in question [is not] something the artists ever wrote or sang.”).

<sup>6</sup> See Darrell M. West & John R. Allen, *How Artificial Intelligence is Transforming the World*, BROOKINGS (Apr. 24, 2018), <https://www.brookings.edu/articles/how-artificial-intelligence-is-transforming-the-world/> (“AI is a technology that is transforming every walk of life. It is a wide-ranging tool that enables people to rethink how we integrate information, analyze data, and use the resulting insights to improve decision making.”); see also Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence*, HARV. BUS. REV. (July 18, 2017), <https://hbr.org/2017/07/the-business-of-artificial-intelligence> (“The most important general-purpose technology of our era is artificial intelligence . . .”).

<sup>7</sup> See *Copyright and Artificial Intelligence*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/ai/> (last visited April 10, 2024) (noting how the Copyright Office is examining copyright issues raised by AI technology and has published an official notice of inquiry in the Federal Register in August 2023); see also Andres Guadamuz, *Artificial Intelligence and Copyright*, WIPO MAG. (Oct. 2017), [https://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html) (“Creating works using artificial intelligence could have very important implications for copyright law.”).

<sup>8</sup> See Kim Martineau, *What is Generative AI?*, IBM RSCH. BLOG (Apr. 20, 2023), <https://research.ibm.com/blog/what-is-generative-ai> (“Generative AI refers to deep-learning models that can generate high-quality text, images, and other content based on the data they were trained on.”); see also Nick Routley, *What is Generative AI? An AI Explains*, WORLD ECON. F. (Feb. 6, 2023), <https://www.weforum.org/agenda/2023/02/generative-ai-explain-algorithms-work/> (explaining how generative AI is able to “generate new outputs based on the data they have been trained on” and create “new content in the form of images, text, [or] audio”).

<sup>9</sup> See Coscarelli, *supra* note 4 (“A.I. Rihanna singing a Beyoncé song or A.I. Kanye West doing

under traditional copyright law, copyright law and rationale may still play a vital role within the rapidly growing wave of generated AI content.<sup>10</sup>

A potential solution artists have against generative AI content is the right of publicity, which protects the commercial use of an individual's name or likeness.<sup>11</sup> The right of publicity is protected by common or state statutory law; only about half the states have distinctly recognized it.<sup>12</sup> As a result, artists seeking publicity protection against generative AI content may not have a federal claim under the Copyright Act.<sup>13</sup>

The tension between federal copyright infringement claims and state right of publicity claims has created a circuit split among several federal appeal courts.<sup>14</sup> For example, the Second, Eighth, and Ninth United States Circuit

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'Hey There Delilah . . . .'); *see also* Rebecca Jennings, *AI Art Freaks Me Out. So I Tried To Make Some.*, VOX (Apr. 12, 2023 8:00 AM), <https://www.vox.com/culture/23678708/ai-art-balenciaga-harry-potter-midjourney-eleven-labs> (showing the capability of recreating a Lord of the Rings movie in the style of Wes Anderson).

<sup>10</sup> *See* Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988) (noting that a voice generally does not qualify as copyrightable because the sounds are not fixed in a tangible medium); *see also* Karyna Pukaniuk, *Generative AI May Shift IP and Copyright Protection Needs*, LAW360 (Apr. 28, 2023, 4:07 PM), <https://www.law360.com/articles/1601622/generative-ai-may-shift-ip-and-copyright-protection-needs> ("We might need to modify our views on what merits protection under IP and copyright laws as a result of the ease with which [artificial intelligence] makes imitation and reproduction possible.").

<sup>11</sup> *See* Riddhi Setty, *AI Imitating Artist 'Style' Drives Call to Rethink Copyright Law*, BLOOMBERG L. (May 31, 2023, 5:15 AM), <https://news.bloomberglaw.com/ip-law/ai-imitating-artist-style-drives-call-to-rethink-copyright-law> ("Artists might argue that AI-generated works in their style infringe on their right of publicity."); *see also* Right of Publicity, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/right-publicity> (last visited Apr. 10, 2024) ("The right of publicity is an offshoot of state privacy law that gives a person the right to limit the public use of her name, likeness, or identity for commercial purposes.").

<sup>12</sup> *See Concise History of the Right of Publicity*, RIGHT OF PUBLICITY (Jan. 4, 2024), <https://rightofpublicity.com/brief-history-of-rop> ("As of this writing, half the states in the U.S. recognize the Right of Publicity in some capacity via statute."); *see also* Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, AM. BAR ASS'N (Sept. 16, 2020), [https://www.americanbar.org/groups/intellectual\\_property\\_publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/](https://www.americanbar.org/groups/intellectual_property_publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/) ("[C]urrently [thirty-five] states recognize the right of publicity, with [twenty-four] of these states recognizing the right via statute, [twenty-two] by common law, and [thirteen] by some combination of the two.").

<sup>13</sup> *See* Reed, *supra* note 2 (noting how artists would have to file a state claim and "go through a typically slower process" to get a generative AI song taken down); *see also* Perry Jackson, *Hey, That's My Voice! – The Significance of the Right of Publicity in the Age of Generative AI*, PUB. KNOWLEDGE (Aug. 14, 2023), <https://publicknowledge.org/hey-thats-my-voice/> (noting that generative AI presents a challenge to the right of publicity as there is no federal legislation that regulates or recognizes it).

<sup>14</sup> *See* Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 202 (2002) (discussing how the copyright and right of publicity come into the serious conflict); *see also* Jonathan Goins, *Second Circuit Sets Precedent in 50 Cent Right of Publicity Case*, BLOOMBERG L. (Oct. 16, 2020, 4:00 AM), <https://news.bloomberglaw.com/ip-law/second-circuit-sets-precedent-in-50-cent-right-of-publicity-case> ("A circuit split is taking shape on this issue, and additional circuits will likely grapple with the right of publicity-copyright tension in future cases.").

Court of Appeals favored applying the copyright preemption doctrine, while the Third, Fifth, Seventh, and Tenth Circuits rejected applying the doctrine in right of publicity claims.<sup>15</sup> While this circuit split does not address AI, resolving it in favor of the Third, Fifth, Seventh, and Tenth Circuits would allow copyright claims and right of publicity claims to remain separate causes of action.<sup>16</sup> Accordingly, such a distinction would further allow for the right of publicity to be elevated, as opposed to preempted, as a federal framework for regulating generative AI content—providing artists with a federal cause of action.<sup>17</sup>

This Comment analyzes how generative AI content must be limited by the right of publicity and how such a right should be federally protected.<sup>18</sup> Part II, Section A, discusses the history of federal copyright law in relation to state publicity laws.<sup>19</sup> Part II, Section B, discusses the current circuit split regarding copyright preemption and advocates against preemption to allow for a federal right of publicity.<sup>20</sup> Part III, Section A, discusses the advantages of using generative AI as a tool.<sup>21</sup> Part III, Section B, discusses the current legal implications of generative AI content.<sup>22</sup> Part III, Section C, discusses First Amendment considerations in relation to generative AI content.<sup>23</sup> Part IV offers the right to publicity as a solution to federally regulating generative AI through a balancing test with First Amendment considerations, such as fair use, parody, and commercial use.<sup>24</sup> Lastly, Part V concludes with a brief overview of the proposed solution and how it will protect artists' publicity rights in this new era of generative AI content.<sup>25</sup>

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<sup>15</sup> See Leah Guzick, Comment, *Stop The Music: How 50 Cent and Rick Ross Joined The Narrative For Right of Publicity Preemption*, 127 PENN ST. L. REV. 873, 880 (2023) (discussing the current circuit split regarding the copyright preemption doctrine); see also Goins, *supra* note 14 (examining the circuit split between the Second, Eighth and Ninth Circuits opposed to the Third, Fifth, Seventh, and Tenth Circuits).

<sup>16</sup> See Guzick, *supra* note 15, at 882–84 (noting how when a defendant exploits a plaintiff's commercial value of their identity and voice, the right of publicity claim is distinguishable from the copyright claim); see also Caitlyn Slater, Comment, *The "Sad Michigan Fan": What Accidentally Becoming An Internet Celebrity Means In Terms of Right of Publicity and Copyright*, 2017 MICH. ST. L. REV. 865, 897–98 (2017) (noting how when a plaintiff's name and likenesses was not preempted by the Copyright Act, the plaintiff's right of publicity claim could prevail).

<sup>17</sup> See Steve Brachmann, *Senate IP Subcommittee Mulls Federal Right of Publicity at AI and Copyright Hearing*, IPWATCHDOG (July 13, 2023, 3:15 PM), <https://ipwatchdog.com/2023/07/13/senate-ip-subcommittee-mulls-federal-right-publicity-ai-copyright-hearing/> (“The creation of a federal right of publicity or an anti-impersonation right was discussed as a solution to concerns that generative AI could mimic artistic styles.”); see also Reed, *supra* note 2 (proposing that Drake and The Weeknd's best argument against the track made with generative AI to sound like them would be a right of publicity argument).

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> See *infra* Part II.A.

<sup>20</sup> See *infra* Part II.B.

<sup>21</sup> See *infra* Part III.A.

<sup>22</sup> See *infra* Part III.B.

<sup>23</sup> See *infra* Part III.C.

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> See *infra* Part V.

## II. BACKGROUND

### A. RIGHT OF PUBLICITY AND COPYRIGHT LAW

Copyright law and protections are rooted in Article I, Section 8 of the United States Constitution.<sup>26</sup> The first federal Copyright Act was signed into law in 1790 and the latest Act providing Copyright protections was signed into law in 1976, making it almost fifty years since the Copyright Act has been exhaustively reformed.<sup>27</sup> The right of publicity, on the other hand, is relatively new and was first enacted in 1903 under New York state law as a right of privacy, not publicity.<sup>28</sup> Unlike the comprehensiveness of copyright law, the right of publicity varies from state to state and often results in inconsistent applications.<sup>29</sup>

In 1953, the term “right of publicity” was first coined in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, when the Second Circuit described the right as economic protection for one’s image and public exposure of one’s likenesses.<sup>30</sup> By 1977, the Supreme Court of the United States first addressed the right of publicity in *Zacchini v. Scripps-Howard Broad. Co.*, finding that protecting the right of publicity is rooted in the rationale of preventing unjust enrichment and “appropriation of the very activity by which the entertainer acquired his reputation in the first place.”<sup>31</sup> Since an entertainer’s reputation is

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<sup>26</sup> See US. CONST. art. I, § 8, cl. 8 (“The Congress shall have 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.”); see also *Copyright at MIT*, MASS. INST. OF TECH., <http://web.mit.edu/copyright/laws.html> (last visited Apr. 10, 2024) (“Copyright law has its roots in the United States Constitution.”).

<sup>27</sup> See Rachel Kim, *Celebrating President’s Day: A Presidential History of Copyright*, COPYRIGHT ALL. (Feb. 18, 2019), <https://copyrightalliance.org/presidents-day-history-copyright/> (explaining the development of the Copyright Act); see also *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RSCH. LIBRS, <https://www.arl.org/copyright-timeline/> (last visited Apr. 10, 2024) (noting the history of copyright in the United States).

<sup>28</sup> See *Concise History of the Right of Publicity*, *supra* note 12 (“New York was the first state to enact a publicity law with the New York Civil Right Law in 1903.”); see also Guzick, *supra* note 15, at 879 (noting how the right of publicity was “[f]irst recognized judicially in 1953 [when] the Second Circuit separated the right of privacy from the right of publicity”).

<sup>29</sup> See W. Woods Drinkwater, Note, *Personality Beyond Borders: The Case For A Federal Right of Publicity*, 3 MISS. SPORTS L. REV. 115, 116 (2021) (noting the “broad diversity among states in their recognition of [the right of publicity]”); see also Kevin Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMM’N L. (AM. BAR ASS’N), Aug. 2011, at 15 (“Although there is a trend toward more states recognizing a right of publicity, there is a dramatic lack of uniformity concerning the scope and substance of the rights of publicity recognized by different states.”).

<sup>30</sup> See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953) (coining the term “right of publicity” as an exclusive right of publishing one’s image as an economic incentive); see also Vick & Jassy, *supra* note 29, at 14 (describing how the *Haelan* decision coined the term right of publicity as an economic right “based on the commercial value of one’s name or likeness”).

<sup>31</sup> See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977) (noting unjust enrichment and appropriation as strong reasoning in support of protecting the right of publicity); see also Courtney Kim, Comment, *Analyzing The Circuit Split Over CDA Section 230(E)(2): Whether State*

primarily earned through their creation of copyrighted material, such as a song, it is clear that their right of publicity may overstep into copyright territory.<sup>32</sup>

Since its enactment in 1976, the Copyright Act serves to protect all original expressions fixed in any tangible medium.<sup>33</sup> The duration of this protection has developed to include the life of the author plus seventy years.<sup>34</sup> As technology has advanced, and creative processes have evolved with it, federal copyright law has expanded to protect more creative works on a variety of tangible mediums.<sup>35</sup> Consider how copyright law could not protect photographs without the invention of the camera first.<sup>36</sup> Accordingly, as AI usage continues to become more pertinent than ever, copyright law must adapt to deal with its legal implications while still leaving space for potential right of publicity claims.<sup>37</sup> For example, while a record company might possess the copyright for an artist's music catalog, this should not grant it the ability to exploit the artist using generative AI tools in the future.<sup>38</sup> A separate federal right of publicity seeks to

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*Protections For The Right Of Publicity Should Be Barred*, 96 S. CAL. L. REV. 449, 456 (2022) (“In 1977, the U.S. Supreme Court recognized the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, the first and only Supreme Court case to address the right of publicity.”).

<sup>32</sup> See *Zacchini*, 433 U.S. at 576 (noting that right of publicity protection provides similar consideration under copyright laws); see also Marc J. Apfelbaum, Note, *Copyright and the Right of Publicity: One Pea in Two Pods?*, 71 GEO. L. J. 1567, 1576 (1983) (“The incentives for creativity embodied in copyright law and the incentives for fame embodied in the right of publicity conflict when creative individuals use the personal attributes of others in their works.”).

<sup>33</sup> See 17 U.S.C. § 102 (2023) (describing the subject matter of copyright as “original works of authorship fixed in any tangible medium of expression”); see also *Copyright Law*, SALINA AREA TECH. COLL., <https://www.salinatech.edu/learning-resources/copyright-law/> (last visited Apr. 10, 2024) (“Copyright protection begins from the moment a work is started and some aspect of it has been fixed in a tangible medium.”).

<sup>34</sup> See 17 U.S.C. § 302 (2023) (describing the duration of such copyright as “a term consisting of the life of the author and [seventy] years after the author’s death”); see also Slater, *supra* note 16, at 892 (“Today, copyright allows protection of all original expressions fixed in a tangible medium for the life of the author plus an additional seventy years.”).

<sup>35</sup> See Slater, *supra* note 16, at 890 (“As copyright law developed, it was expanded to protect more creative works.”); see also *The 18th Century*, U.S. COPYRIGHT OFF., [http://www.copyright.gov/timeline/timeline\\_18th\\_century.html](http://www.copyright.gov/timeline/timeline_18th_century.html) (last visited Apr. 10, 2024) (showing a timeline of the expansion of copyrightable works).

<sup>36</sup> See *What Photographers Need to Know About Copyright Law*, COPYRIGHT ALL., <https://copyrightalliance.org/education/industry/photographers/> (last visited Apr. 10, 2024) (“After the camera was invented . . . the U.S. Supreme Court held that photographs should be protected by copyright law because they contained human authorship.”); see also *The Evolution of Copyright*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/history/copyright-exhibit/evolution/> (last visited Apr. 10, 2024) (noting how copyright law used to only protect books, charts, and maps, but the law has continued to expand to encompass more categories over time).

<sup>37</sup> See Annelise Gilbert, *Copyright Office Seeks Public Input on AI Protections, Liability*, BLOOMBERG L. (Aug. 29, 2023, 4:24 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X8B58B7C000000> (noting how the U.S. Copyright Office is starting to examine the legal status of AI-generated works); see also Jennifer Kennedy & Jordan Rutledge, *Death By A Thousand Cuts: Right of Publicity in the Age of AI*, JDSUPRA (May 31, 2023), <https://www.jdsupra.com/legalnews/death-by-a-thousand-cuts-right-of-8578503/> (“Courts are already grappling with claims of copyright infringement involving OpenAI’s products, and it is only a matter of time before defamation and right to publicity lawsuits arise.”).

<sup>38</sup> See Chris Saunders, *The End is Nigh: Top Record Labels are Reportedly Creating AI-Generated*

empower individuals whose publicity rights have been exploited, as opposed to protecting large corporations.<sup>39</sup>

#### B. CURRENT CIRCUIT SPLIT: COPYRIGHT PREEMPTION DOCTRINE

The expansion of the Copyright Act has also established the two-prong preemption test set under Section 301 of the Copyright Act, which is used to determine whether federal copyright law preempts state law, namely the right of publicity.<sup>40</sup> This may be referred to as the copyright preemption doctrine. Under the doctrine, preemption occurs when the state laws are equivalent to rights provided in the Copyright Act and when the work at issue falls within the scope of copyright protection.<sup>41</sup> While this test may seem clear, its application is inconsistent because there is no consensus between courts on what exactly an equivalent right is and when certain subject matter falls within the scope of copyright.<sup>42</sup> This lack of uniformity regarding the right of publicity further proves the difficulty in applying the copyright preemption doctrine, which sets the stage for the current circuit split.<sup>43</sup>

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*Music*, HUNGER (Aug. 10, 2023), <https://www.hungertv.com/editorial/the-end-is-nigh-top-record-labels-are-reportedly-creating-ai-generated-music/> (“According to reports, Google and Universal Music Group are exploring the idea of licensing artist’s voices and melodies for AI-generated music.”); see also David Savage, *Paramount’s Claim for Character Ownership in ‘Cheers’ Case Rejected*, LOS ANGELES TIMES (Oct. 3, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-oct-03-mn-30335-story.html> (explaining the case of *Wendt v. Host International, Inc.*, where the “U.S. Ninth Circuit Court of Appeals . . . ruled that the actor’s image is a ‘personal property right’ owned by the actor and is separate from the copyright to the original character”).

<sup>39</sup> See *Digital Image Rights & Right of Publicity*, SAG-AFTRA, <https://www.sagaftra.org/get-involved/government-affairs-public-policy/digital-image-rights-right-publicity> (last visited Apr. 10, 2024) (“But the current status of [right of publicity] law is antiquated in light of new technologies that enable unprecedented exploitation of your likeness.”).

<sup>40</sup> See 17 U.S.C. § 301 (2023) (describing the requirements for preemption under the Copyright Act); see also Rothman, *supra* note 14, at 207 (“When courts have considered whether copyright law preempts the right of publicity, they have relied primarily on Section 301 of the Copyright Act.”).

<sup>41</sup> See 17 U.S.C. § 301 (2023) (“[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title.”); see also Apfelbaum, *supra* note 32, at 1577 (“[S]ection 301 requires two conditions to be met for preemption: [t]he grant of an equivalent right and the presence of a fixed work of authorship.”).

<sup>42</sup> See Slater, *supra* note 16, at 894 (“There is no consensus between courts, both within the same state and between states, on what exactly an ‘equivalent right’ is.”); see also James M. Chadwick & Roxana Vatanparast, *The Copyright Act’s Preemption of Right of Publicity Claims*, COMM’N L. (Am. Bar Ass’n), July 2008, at 1 (“However, because the Copyright Act does not define equivalent rights, there is ambiguity with respect to when the Copyright Act preempts state right of publicity claims.”).

<sup>43</sup> See Guzick, *supra* note 15, at 879 (noting how interpreting preemption concepts of copyright law and the right of publicity is at issue in the circuit split); see also Chadwick & Vatanparast, *supra* note 42, at 2 (“Courts have reached differing conclusions with respect to whether right of publicity claims are preempted by copyright law.”).

On one side of the split, the Second, Eighth, and Ninth Circuits favored applying the copyright preemption doctrine in certain right of publicity cases.<sup>44</sup> Most recently, in *Jackson v. Roberts*, the Second Circuit found that reproduction of a copyrighted work manifesting a plaintiff's voice satisfied the copyright preemption doctrine.<sup>45</sup> Likewise, the Ninth and Eighth Circuits have applied the copyright preemption doctrine, finding that a plaintiff's voice or image could not be separated from the tangible form in which it was fixed, and that the plaintiff's rights equaled those covered by copyright law.<sup>46</sup> The decisions in these circuits bars plaintiffs who seek right of publicity claims under the defense of federal copyright preemption.<sup>47</sup>

On the other side of the split, the Third, Fifth, Seventh, and Tenth Circuits denied the application of copyright preemption doctrine in right of publicity cases.<sup>48</sup> The Third and Fifth Circuits found that a plaintiff's voice and identity remained separate from a fixed medium of expression and thus, were not in the scope of copyright.<sup>49</sup> With regards to equivalent rights, these circuits

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<sup>44</sup> See Guzick, *supra* note 15, at 884 (“The Eighth and Ninth Circuits, with the Second Circuit joining in 2020, argue that federal copyright law should preempt right of publicity claims, even though the copyrighted work produced a profit, except in circumstances of endorsement.”); see also Goins, *supra* note 14 (“[The Second Circuit] now joins the Eighth and Ninth Circuits in adopting the copyright preemption doctrine to right of publicity claims in the entertainment context.”).

<sup>45</sup> See *Jackson v. Roberts*, 972 F.3d 25, 53–54 (2d Cir. 2020) (“Accordingly, we conclude that, to the extent that Jackson’s right of publicity claim is based on the reproduction of a copyrighted work (‘In Da Club’) embodying Jackson’s voice, that claim is preempted by § 301 because . . . its focus is Roberts’s use of a work that falls within the ‘subject matter of copyright . . .’”); see also Robert W. Clarida & Robert J. Bernstein, *Copyright Preemption and the Right of Publicity*, N. Y. L. J. (Nov. 19, 2020, 12:30 PM), <https://www.law.com/newyorklawjournal/2020/11/19/copyright-preemption-and-the-right-of-publicity/> (“Although some courts have held that an individual’s . . . voice and likeness are not within the subject matter of copyright under the first prong, [the court] found . . . that the claim was an attack on Roberts’ use of the recording, and not primarily an effort to protect Jackson’s identity.”).

<sup>46</sup> See *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1141 (9th Cir. 2006) (“[I]t is clear that federal copyright law preempts a claim alleging misappropriation of one’s voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium.”); see also Guzick, *supra* note 15, at 886–87 (“The Eighth and Ninth Circuits each held that the Copyright Act expressly preempted a right of publicity claim, primarily because a person’s likeness or image could not be separated from the copyrighted form in which it was fixed.”).

<sup>47</sup> See Meryl Gordon, *Right of Publicity*, REUTERS: PRAC. L. (Oct. 1, 2023), <https://www.reuters.com/practical-law-the-journal/litigation/right-publicity-2023-10-02/> (“Defendants in right of publicity actions occasionally assert a federal copyright preemption defense.”); see also Jennifer E. Rothman, *The Right of Publicity’s Intellectual Property Turn*, 42 COLUM. J. L. & ARTS 277, 318 (2019) (emphasis added) (supporting a position that “copyright preemption should offer *more robust defenses* against publicity claims than they often do today”).

<sup>48</sup> See Guzick, *supra* note 15, at 880 (“The Third, Fifth, Seventh, and Tenth Circuits . . . have all found circumstances against applying the preemption doctrine, arguing for a more restricted view of what should pass the preemption tests . . .”); see also Goins, *supra* note 14 (“Conversely, the Third, Fifth, Seventh, and Tenth Circuits have found, in limited circumstances, against applying the copyright preemption doctrine to right of publicity claims, especially when commercial or advertising uses are involved.”).

<sup>49</sup> See *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1027–28 (3d Cir. 2008) (finding that “[o]ne can fix Facenda’s voice in a tangible medium by recording it, but one cannot divorce his distinctive



emphasized that the “commercial value” element, a key element in right of publicity cases, is not equivalent to any right protected by copyright law.<sup>50</sup> Since the copyright preemption doctrine was not satisfied in cases under these circuits, plaintiffs were permitted to assert their right of publicity claims against defendants exploiting their voice, identity, or persona.<sup>51</sup> Looking into the future, this circuit split may present a problem when assessing the possible causes of actions, and potential defenses in cases where generative AI content is at issue.<sup>52</sup> If copyright preemption is favored, the proposed federal right of publicity would lack support and make it more difficult to adequately regulate generative AI.<sup>53</sup> Instead, in resolving this split, the Supreme Court must align with the Third, Fifth, Seventh, and Tenth Circuits in rejecting copyright preemption in publicity cases, which would support a federal right of publicity coexisting with federal copyright law.<sup>54</sup>

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voice itself from the *Facenda* identity (or persona)” and that his voice is “outside the subject matter of copyright”); *see also* Guzik, *supra* note 15, at 882 (“The Fifth Circuit, in *Brown v. Ames*, came to a similar conclusion, holding that an identity was separate from a fixed medium of expression.”).

<sup>50</sup> *See* Guzik, *supra* note 15, at 883–84 (noting how the Third, Fifth, Seventh, and Tenth Circuits concluded that “[w]hen a party was benefiting from the identity of another within the copyrighted work,” such an economic right is sufficient to separate copyright claims from publicity claims); *see also* PLC Intellectual Property & Technology, *Expert Q&A on the Copyright Preemption and Right of Publicity Claims Conflict in Entertainment*, REUTERS: PRACTICAL L. (Dec. 28, 2020), <https://1.next.westlaw.com/w-028-1060> (“Courts that have not applied copyright preemption to bar right of publicity claims have based their decisions largely on a ‘commercial use’ exception.”).

<sup>51</sup> *See* Guzik, *supra* note 15, 882–84 (noting how when a defendant exploits a plaintiff’s commercial value of their identity and voice, the right of publicity claim is distinguishable from the copyright claim); *see also* Slater, *supra* note 16, 897–98 (noting how the plaintiff’s right of publicity claim could prevail when a plaintiff’s name and likenesses was not preempted by the Copyright Act).

<sup>52</sup> *See* Pukaniuk, *supra* note 10 (explaining that using copyrighted data to produce generative AI content, especially for commercial purposes, may be infringing); *see also* Chadwick & Vatanparast, *supra* note 42, at 4 (noting how “inconsistent and unpredictable application of federal preemption creates uncertainty” in future litigation cases because “those who use copyrighted works cannot predict the consequences of a particular course of conduct”).

<sup>53</sup> *See* David E. Shipley, *Publicity Never Dies; It Just Fades Away: The Right of Publicity and Federal Preemption*, 66 CORNELL L. REV. 673, 707 (1981) (“[A]lthough section 301 may have no preemptive effects on state law privacy rights, it may limit the right of publicity.”). *See generally* Alyssa J. Devine, *Why You Should Care About a Federal Right of Publicity*, IPWATCHDOG (Dec. 15, 2023, 8:15 AM), <https://ipwatchdog.com/2023/12/15/why-you-should-care-about-a-federal-right-of-publicity/id=170583/> (“In fact, most scholars, judges, and attorneys still consider publicity rights to be ‘complex and confusing,’ primarily due to the absence of a federal statute.”).

<sup>54</sup> *See generally* Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should Be a Federal Law*, 20 UCLA ENT. L. REV. 190, 233 (2013) (“Federal regulation will allow right of publicity and copyright laws to coexist for the betterment of society.”).

## III. DISCUSSION

## A. BENEFITS OF GENERATIVE AI CONTENT

The term “Artificial Intelligence” was coined by John McCarthy in 1955.<sup>55</sup> Since then, AI has experienced rapid growth from basic machine learning, such as a computer playing chess, to the introduction of ChatGPT, an AI that generates human-like responses based on immense data.<sup>56</sup> For the regular user, the advantages of using AI tools, mainly ChatGPT, are primarily in their ability to perform routine tasks.<sup>57</sup> For more sophisticated users, namely corporations, generative AI tools are changing the way in which business is conducted.<sup>58</sup> For instance, these tools are able to automate complex processes, examine data analytics, and engage directly with consumers.<sup>59</sup> Specifically for lawyers, and even law students, generative AI tools have gained immense interest in its capability to conduct research and produce documents in a more efficient manner.<sup>60</sup> This increased efficiency is invaluable, not only for lawyers, but for

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<sup>55</sup> See Rockwell Anyoha, *The History of Artificial Intelligence*, HARV. MED. SCH.: SCI. IN THE NEWS (Aug. 28, 2017), <https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/> (noting that John McCarthy coined the term “artificial intelligence” at the Dartmouth Summer Research Project on Artificial Intelligence (DSRPAD)); see also Gil Press, *A Very Short History Of Artificial Intelligence (AI)*, FORBES (Dec. 30, 2016, 9:09 AM), <https://www.forbes.com/sites/gilpress/2016/12/30/a-very-short-history-of-artificial-intelligence-ai/> (noting that in 1955, “[t]he term ‘artificial intelligence’ is coined in a proposal . . . submitted by John McCarthy”).

<sup>56</sup> See Press, *supra* note 55 (providing a timeline of AI evolution and noting that the early AI programs were taught to play chess); see also *Chat GPT: What is it?*, UNIV. OF CENT. ARK., <https://uca.edu/cetal/chat-gpt/> (last visited Apr. 10, 2024) (describing ChatGPT as a “high-capable chatbot uses machine learning algorithms to process and analyze large amounts of data to generate responses to user inquiries.”).

<sup>57</sup> See Ina Fried, *Generative AI Can Help With Mundane Tasks Too*, AXIOS (Apr. 17, 2023), <https://www.axios.com/2023/04/17/generative-ai-adobe-tasks-efficiency> (“[S]ome of the most valuable initial uses of this wave of generative AI lie in automating the steps of complex processes.”); see also *How Can We Use Chat GPT?*, ABC WISN 12 (Apr. 24, 2023, 2:59 PM), <https://www.wisn.com/article/how-can-we-use-chat-gpt/43688875> (listing ways people may use ChatGPT, which includes: writing emails, providing recipes, and giving relationship advice).

<sup>58</sup> See *What is Generative AI?*, ACCENTURE, <https://www.accenture.com/us-en/insights/generative-ai> (last visited Apr. 10, 2024) (noting the ability of generative AI systems to perform “a wide range of downstream tasks without needing task-specific training” for businesses); see also Kevin Delany, *How Generative AI Will Change All Knowledge Work*, TIME (Dec. 18, 2022, 7:30 AM), <https://time.com/charter/6242075/how-generative-ai-will-change-all-knowledge-work/> (“[T]he recent acceleration of applications around so-called generative AI is showing us how quickly and broadly our work will change.”).

<sup>59</sup> See Anthony Abbatiello, *Generative AI Is Coming to Your Office. Here’s How to Prepare*, BLOOMBERG L. (Aug. 28, 2023, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/generative-ai-is-coming-to-your-office-heres-how-to-prepare> (noting how the workforce impact of “[g]enerative AI is supplementing and aiding various jobs and freeing workers from time-consuming, repetitive tasks”); see also Thomas Davenport & Rajeev Ronanki, *Artificial Intelligence For The Real World*, HARV. BUS. REV. (Jan. 2018), <https://hbr.org/2018/01/artificial-intelligence-for-the-real-world> (“Broadly speaking, AI can support three important business needs: automating business processes, gaining insight through data analysis, and engaging with customers and employees.”).

<sup>60</sup> See *Guide Helps Legal Professionals Use Generative AI to Advance Their Practice*, THOMSON

others seeking to automate time-consuming and mundane tasks.<sup>61</sup> Notably, it has already been proven that generative AI can boost highly skilled workers' productivity.<sup>62</sup>

In the creative realm, generative AI content has undoubtedly been used as a tool, even as an instrument, for artists.<sup>63</sup> Artists may choose to use generative AI content in creating new visual and auditory landscapes.<sup>64</sup> Widespread access to generative AI tools empowers society, fueling creativity and innovation, enabling everyone to explore the depths of their curiosity.<sup>65</sup> Accordingly, the positive influence of generative AI ripples across both corporate strategies and creative pursuits and it is imperative for society to wholeheartedly adopt this technology in turn.<sup>66</sup>

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REUTERS (Sept. 12, 2023), <https://legal.thomsonreuters.com/blog/use-generative-ai-to-advance-legal-practice/> (discussing how generative AI will be used in legal work); *see also* Tanguy Chau, *Unlocking The 10x Lawyer: How Generative AI Can Transform The Legal Landscape*, FORBES (Aug. 16, 2023, 6:30 AM), <https://www.forbes.com/sites/forbestechcouncil/2023/08/16/unlocking-the-10x-lawyer-how-generative-ai-can-transform-the-legal-landscape/?sh=32f93c45401c> (noting how generative AI can enable lawyers to be ten times more productive when used to assist in tasks such as legal research and brief drafting).

<sup>61</sup> *See* Fried, *supra* note 57 (“Generative AI can take on many roles, and one of the most powerful is as a time-saver. Even creative types who fear their jobs are threatened by AI may find the same technology can help with some of their most tedious and time-consuming tasks.”); *see also* Delany, *supra* note 58 (“Theoretically, generative AI tools could streamline our work so that we can work fewer hours and reduce our burnout.”).

<sup>62</sup> *See* Meredith Somers, *How Generative AI Can Boost Highly Skilled Workers' Productivity*, MASS. INST. OF TECH. SLOAN. (Oct. 19, 2023), <https://mitsloan.mit.edu/ideas-made-to-matter/how-generative-ai-can-boost-highly-skilled-workers-productivity> (“A new study on the impact of generative AI on highly skilled workers finds that when artificial intelligence is used within the boundary of its capabilities, it can improve a worker's performance by as much as 40% compared with workers who [do not] use it.”); *see also* Bernard Marr, *Boost Your Productivity with Generative AI*, HARV. BUS. REV. (June 27, 2023), <https://hbr.org/2023/06/boost-your-productivity-with-generative-ai> (“In a study conducted by the National Bureau of Economic Research (NBER), it was found that customer support agents using a generative pre-trained transformer (GPT) AI tool saw a nearly 14% increase in their productivity.”).

<sup>63</sup> *See* Angela Luna, *Copyright in the Era of Generative AI*, BIPARTISAN POL'Y CTR. (Aug. 10, 2023), <https://bipartisanpolicy.org/blog/copyright-in-the-era-of-generative-ai/> (“Now, anyone can use generative AI to produce creative works, such as literary, artistic, or musical. Existing artists are also using AI to amplify their creative abilities.”); *see also* Ira Belsky, *How Generative AI Is Changing Creative Work*, FORBES (May 26, 2023, 7:45 AM), <https://www.forbes.com/sites/forbestechcouncil/2023/05/26/how-generative-ai-is-changing-creative-work/> (discussing how generative AI tools can empower creators).

<sup>64</sup> *See* Refik Anadol & Pelin Kivrak, *How AI-Human Collaborations in Art Deepen Audience Engagement*, AI BUS. (Oct. 24, 2023), <https://aibusiness.com/ml/how-ai-human-collaborations-in-art-deepen-audience-engagement> (noting how artists have developed “hybrid forms of AI-based art-making”); *see also* Vishal Siram, *Generative AI For Digital Art and Design*, STATUSNEO (July 2, 2023), <https://statusneo.com/generative-ai-for-digital-art-and-design/> (discussing the various ways in which generative AI techniques are used in digital media and design).

<sup>65</sup> *See* Sheena Iyengar, *AI Could Help Free Human Creativity*, TIME (June 23, 2023, 6:00 AM), <https://time.com/6289278/ai-affect-human-creativity/> (“If used properly, AI will ultimately help us seed far greater innovation throughout our society.”); *see also* Belsky, *supra* note 63 (“Generative AI opens us up to an even greater world of creative possibilities . . .”).

<sup>66</sup> *See* Ketan Makwana, *Generative AI: How Businesses Can Boost Productivity Through Adopting Artificial Intelligence*, ELITE BUS. (June 22, 2023),

## B. LEGALITIES OF GENERATIVE AI CONTENT

It is crucial to acknowledge that the boundless potential of generative AI content is not without its distinct legal constraints and ethical concerns.<sup>67</sup> As the foundation for these concerns, it is important to note that these generative AI tools frequently make mistakes.<sup>68</sup> Often referred to as “hallucinations,” the AI will sometimes feed the user incorrect information or make up information itself.<sup>69</sup> As such, despite its benefits, there is good reason to be cautious utilizing AI tools.<sup>70</sup>

A growing infamous trend concerning generative AI is the formation of “deepfakes,” which is media content that seems authentic but is manipulated or altered with AI.<sup>71</sup> Deepfakes pose significant concerns from threats to

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<https://elitebusinessmagazine.co.uk/technology/item/generative-ai-how-businesses-can-boost-productivity-through-adopting-artificial-intelligence> (“The power and potential of generative AI is boundless as it will continue to grow and learn the more it is adopted and used.”); *see also* Azamat Abdoullaev, *Why We Should Embrace AI Instead of Fearing It*, BBN TIMES (Nov. 8, 2023), <https://www.bbntimes.com/society/why-we-should-embrace-ai-instead-of-fearing-it> (“Instead of fearing AI, [it is] time to embrace it. Artificial Intelligence is making significant strides in many industries, from healthcare to finance and beyond.”).

<sup>67</sup> *See* Edwin B. Smith, *News You Can Use: Pros and Cons of Using AI*, UNIV. OF MISS. COLL. OF LIB. ARTS (Aug. 24, 2023), <https://libarts.olemiss.edu/news-you-can-use-pros-and-cons-of-using-ai/> (“As artificial intelligence continues its global spread, two . . . experts advise the public to be aware of both the benefits and liabilities of this trendy technology.”); *see also* Gil Appel et al., *Generative AI Has an Intellectual Property Problem*, HARV. BUS. REV. (Apr. 7, 2023), <https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem> (discussing how generative AI tools and processes come with significant legal risks, specifically in the intellectual property world).

<sup>68</sup> *See* Catherine Thorbecke, *AI Tools Make Things Up a Lot, And That’s a Huge Problem*, CNN BUS. (Aug. 29, 2023, 2:35 PM), <https://www.cnn.com/2023/08/29/tech/ai-chatbot-hallucinations/index.html> (describing the pitfalls of when AI makes things up); *see also* Conor Cawley, *AI Mistakes May Be Unfixable, According to Experts*, TECH.CO (Aug. 2, 2023), <https://tech.co/news/ai-mistakes-unfixable-experts> (“Artificial intelligence (AI) may be just as fallible as actual intelligence, with experts are starting to realize that AI mistakes, or ‘hallucinations,’ could be a feature rather than a bug.”).

<sup>69</sup> *See* *What Are AI Hallucinations?*, IBM, <https://www.ibm.com/topics/ai-hallucinations> (last visited Apr. 10, 2024) (“AI hallucination is a phenomenon wherein . . . a generative AI chatbot or computer vision tool . . . creat[es] outputs that are nonsensical or altogether inaccurate.”); *see also* Tim Keary, *AI Hallucination*, TECHOPEDIA, <https://www.techopedia.com/definition/ai-hallucination> (last visited Apr. 10, 2024) (“Generative AI-driven chatbots can fabricate any factual information, from names, dates, and historical events to quotes or even code.”).

<sup>70</sup> *See* Amanda Lapato, Nick Lauren & Kelly Riggs, *Generative AI in the Workplace: Proceed with Caution*, JDSUPRA (July 13, 2023), <https://www.jdsupra.com/legalnews/generative-ai-in-the-workplace-proceed-4317831/> (“[E]mployers should, therefore, proceed with caution with respect to Generative AI in the workplace, and consider implementing or updating internal policies and practices to address the same.”); *see also* Breck Dumas, *AI Tools Such as ChatGPT Are The Hottest New Trend for Companies, But Experts Urge Caution*, FOX BUS. (Apr. 18, 2023, 6:00 AM), <https://www.foxbusiness.com/technology/ai-powered-tools-chatgpt-hottest-trend-companies-experts-caution> (discussing how “AI is not completely accurate” and that users should proceed with caution due to its inability to replace expertise and the fact that it fabricates information).

<sup>71</sup> *See* Bernard Marr, *Fake Or Fact? The Disturbing Future Of AI-Generated Realities*, FORBES (July 27, 2023, 1:31 AM), <https://www.forbes.com/sites/bernardmarr/2023/07/27/fake-or-fact-the-disturbing-future-of-ai-generated-realities/> (“Deepfakes are certainly one of the most concerning

individual privacy, specifically where one's image is altered in a deceptive manner, to the spread of misinformation.<sup>72</sup> In response, nine states have already enacted laws to regulate deepfakes with other states following in their footsteps.<sup>73</sup>

Furthermore, the growing ethical concerns surrounding generative AI content are alarming.<sup>74</sup> Not only is the AI process susceptible to bias and discrimination in the workplace, but in today's internet meme culture, it can seriously impact people in their everyday life.<sup>75</sup> Once someone's image or voice goes viral, there is no stopping what others may do with it in the context of using it with AI to create new meme content that often invades an individual's privacy.<sup>76</sup>

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products of the generative AI revolution.”); *see also* *Combatting Online Harms Through Innovation*, F.T.C. 1, 12 (June 16, 2022) (“Deepfakes are video, photo, text, or audio recordings that seem real but have been manipulated with AI.”).

<sup>72</sup> *See* Meredith Somers, *Deepfakes, Explained*, MASS. INST. OF TECH. SLOAN SCH. OF MGMT. (July 21, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained> (explaining how “a deepfake can wreak havoc on someone’s personal and professional life” due to the swapping of people’s likeness); *see also* Bart van der Sloot & Yvette Wagenveld, *Deepfakes: Regulatory Challenges for the Synthetic Society*, 46 COMPUT. L. & SEC. REV. 1, 1 (Sept. 2022), <https://www.sciencedirect.com/science/article/> (“Deepfakes can be used to spread fake news, influence elections, introduce highly realistic fake evidence in courts and make fake porno movies.”).

<sup>73</sup> *See* Isaiah Poritz, *States Are Rushing to Regulate Deepfakes as AI Goes Mainstream*, BLOOMBERG (June 20, 2023, 5:01 AM), <https://www.bloomberg.com/news/articles/2023-06-20/deepfake-porn-political-ads-push-states-to-curb-rampant-ai-use> (“Nine states have enacted laws that regulate deepfakes, mostly in the context of pornography and elections influence, and at least four other states have bills at various stages of the legislative process.”); *see also* Ali Swenson, *FEC Moves Toward Potentially Regulating AI Deepfakes In Campaign Ads*, PBS (Aug. 10, 2023, 6:37 PM), <https://www.pbs.org/newshour/politics/fec-moves-toward-potentially-regulating-ai-deepfakes-in-campaign-ads> (“Several states also have discussed or passed legislation related to deepfake technology.”).

<sup>74</sup> *See* Somdip Dey, *Which Ethical Implications Of Generative AI Should Companies Focus On?*, FORBES (Oct. 17, 2023, 7:30 AM), <https://www.forbes.com/sites/forbestechcouncil/2023/10/17/which-ethical-implications-of-generative-ai-should-companies-focus-on/> (“While the allure of generating novel content such as text, images and music is tantalizing, we must remain acutely aware of the ethical considerations at play.”); *see also* Mordechai Rorvig, *AI Is Getting Powerful. But Can Researchers Make It Principled?*, SCI. AM. (Apr. 4, 2023), <https://www.scientificamerican.com/article/ai-is-getting-powerful-but-can-researchers-make-it-principled/> (“Even though today’s AI is only capable of automating certain specific tasks, it is already raising significant concerns.”).

<sup>75</sup> *See Council Post: Exploring the Ethical Implications of Generative AI – Bias, Deepfakes, and Misinformation*, AIM RSCH. (Aug. 11, 2023), <https://aimresearch.co/2023/08/11/exploring-the-ethical-implications-of-generative-ai-bias-deepfakes-and-misinformation/> (“Generative AI models learn from vast datasets, which can inadvertently perpetuate societal biases present in the data. This can lead to biased outputs in image, text, and video generation, reinforcing harmful stereotypes and discriminatory content.”); *see also* Christina Pazzanese, *Great Promise But Potential for Peril*, THE HARV. GAZETTE (Oct. 26, 2020), <https://news.harvard.edu/gazette/story/2020/10/ethical-concerns-mount-as-ai-takes-bigger-decision-making-role/> (“AI presents three major areas of ethical concern for society: privacy and surveillance, bias and discrimination, and perhaps the deepest, most difficult philosophical question of the era, the role of human judgment.”).

<sup>76</sup> *See* Jonathan Kemper, *Body-Shaming “AI Meme Maker” On TikTok is a Prime Example of Unaligned AI*, THE DECODER (Oct. 24, 2023), <https://the-decoder.com/body-shaming-ai-meme-maker-on-tiktok-is-a-prime-example-of-unaligned-ai/> (describing how a generative AI meme maker quickly became offensive by reinforcing stereotypes); *see also* Melissa Heikkila, *AI Models Spit*

In the realm of intellectual property law, patents, copyrights, and trademarks have recently begun sensing.<sup>77</sup> In 2022, the Federal Circuit Court ruled that only humans can be named inventors on U.S. patents, and thus, an AI would be prevented from being named as an inventor.<sup>78</sup> Even attempting to patent an AI software, algorithm, or process also proves difficult.<sup>79</sup> Similarly, in *Thaler v. Perlmutter*, the United States District Court for the District of Columbia held that “[h]uman authorship is a bedrock requirement of copyright,” despite the fact that the Copyright Act specifically never defines the word “author.”<sup>80</sup> As a result, absent human involvement, an AI alone cannot be claimed as an author of copyrighted work.<sup>81</sup>

With famous people and strong marks in trademark law, there is also a significant risk of the likelihood of confusion with generated AI content.<sup>82</sup> The

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*Out Photos of Real People and Copyrighted Images*, MASS. INST. OF TECH.: TECH REV. (Feb. 3, 2023), <https://www.technologyreview.com/2023/02/03/1067786/ai-models-spit-out-photos-of-real-people-and-copyrighted-images/> (“Popular image generation models can be prompted to produce identifiable photos of real people, potentially threatening their privacy, according to new research.”).

<sup>77</sup> See Emmanuel Ramos, *Navigating The Generative AI Intellectual Property Landscape*, FORBES (Oct. 10, 2023, 6:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2023/10/10/navigating-the-generative-ai-intellectual-property-landscape/> (“Courts are wrestling with how to apply intellectual property laws to generative AI.”).

<sup>78</sup> See *Thaler v. Vidal*, 43 F.4th 1207, 1213 (Fed. Cir. 2022) (finding that under the Patent Act, “only a natural person can be an inventor, so AI cannot be”); see also John Villasenor, *Patents and AI Inventions: Recent Court Rulings and Broader Policy Questions*, BROOKINGS (Aug. 25, 2022), <https://www.brookings.edu/articles/patents-and-ai-inventions-recent-court-rulings-and-broader-policy-questions/> (“Can an artificial intelligence (AI) system be a named inventor on a United States patent? No, says a federal appeals court in a decision issued earlier this month.”).

<sup>79</sup> See Sean Flood, *Patents in the AI Era: Navigating the Complexities of AI Inventorship*, ICE MILLER LEGAL COUNS. (Mar. 10, 2023), <https://arapackelaw.com/patents/the-ai-patent-boom/> (“[S]uccessfully filing an AI algorithm patent application is a time-consuming, complex process riddled with technical and legal nuances.”).

<sup>80</sup> *Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823, at \*11 (D.D.C. Aug. 18, 2023) (“Human authorship is a bedrock requirement of copyright.”); see Adam Lidgett, *Copyright Decision On AI-Generated Art Is Just The Beginning*, LAW360 (Aug. 23, 2023, 8:21 PM), <https://www.law360.com/articles/1714390/copyright-decision-on-ai-generated-art-is-just-the-beginning> (examining the human authorship requirement finding in *Thaler v. Perlmutter*).

<sup>81</sup> See Kaitlyn Garvin, *United States: No Human Involvement? No Copyright*, MONDAQ (Oct. 25, 2023), <https://www.mondaq.com/unitedstates/copyright/1381650/no-human-involvement-no-copyright> (“[A] federal judge issued the United States’ first opinion that AI content generated autonomously without human involvement is not copyrightable under United States copyright law.”); see also Annelise Gilbert, *Copyright Review Affirms Denial of Another AI Art Registration*, BLOOMBERG L. (Sept. 6, 2023, 5:09 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news> (“The [U.S.] Copyright Office’s review board affirmed the refusal to register a two-dimensional piece of artwork that ‘contains more than a de minimis amount of content generated by artificial intelligence.’”).

<sup>82</sup> See Sara Fischer & Alison Snyder, *AI’s Hidden Toll On Our Brains*, AXIOS (June 10, 2023), <https://www.axios.com/2023/06/10/ai-mental-health-risks-misinformation> (showing examples of how “AI-generated misinformation is already causing confusion”); see also Alex Sherman & Lillian Rizzo, *A.I. Poses New Threats To Newsrooms, and They’re Taking Action*, CNBC (Jun 6, 2023, 8:49 AM), <https://www.cnn.com/2023/06/06/news-organizations-ai-disinformation.html> (“More advanced fakes could create even more confusion and cause unnecessary panic. They could

likelihood of confusion analysis generally follows a multi-factor test that compares two marks: the original and a possible infringer.<sup>83</sup> While artists may seek trademark redress from AI using their trademarked name, nicknames, or popular lyrics as a part of their brand, trademark does not account for the creative expression output of the artist.<sup>84</sup> Adopting from trademark principles, generative AI must be regulated to avoid consumer confusion as to the true source of specific content.<sup>85</sup> For instance, when the generated AI content sounds like a popular singer or looks like a famous painting style, people may not be able to tell whether such content is real or fake.<sup>86</sup> In these blurred lines, famous people may be incorrectly affiliated with a piece of work, defamed, or exploited.<sup>87</sup> In response, individuals who seek to support their favorite artists or brands may be deceived into supporting mere imitations.<sup>88</sup>

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also damage brands.”).

<sup>83</sup> See Gregory Gulia & Vanessa Hew, *Trademark Litigation: Likelihood of Confusion*, REUTERS: PRACTICAL L. (Mar. 1, 2023), <https://www.reuters.com/practical-law-the-journal/litigation/trademark-litigation-likelihood-confusion-2023-03-01/> (“To evaluate the likelihood of confusion, a court applies the multi-factor likelihood of confusion test for its circuit.”).

<sup>84</sup> See Jessica Meiselman, *Can Artists Stop Brands from Using Their Lyrics?*, VICE (Nov. 16, 2016, 1:01 PM), <https://www.vice.com/en/article/nne9dz/can-artists-stop-brands-from-using-their-lyrics> (noting how artists like Young M.A., Beyoncé, and Lil Jon may have legal disputes involving trademark ownership in their names and lyrics).

<sup>85</sup> See Mark McKenna & Mark A. Lemley, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 414 (2010) (“Trademark law centers its analysis on consumer confusion.”). See generally *Understanding Generative AI and Trademark Infringement Risks*, CBLAW, <https://www.cblaw.com/generative-ai-and-trademark-infringement-risks> (last visited Apr. 10, 2024) (“In a real world setting, outside the generative AI environment, trademark infringement risks are somewhat more predictable. This is especially true if using AI-generated content is likely to result in consumer confusion—a textbook example of trademark infringement.”).

<sup>86</sup> See Emily Poler, *What’s Real, What’s Fake: The Right of Publicity and Generative AI*, AM. BAR ASS’N (Aug. 7, 2023), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2023-august/whats-real-whats-fake-the-right-of-publicity/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-august/whats-real-whats-fake-the-right-of-publicity/) (“The challenge with generative AI is that it makes the creation of a credible simulacrum of a celebrity much, much easier. In the past, this would have required finding a real person who could sound like a celebrity or be done up like a celebrity. Generative AI allows users to skip this.”); see also Ben Beaumont-Thomas, *We Soon Won’t Tell The Difference Between AI and Human Music – So Can Pop Survive?*, THE GUARDIAN (Apr. 19, 2023, 8:25 PM), <https://www.theguardian.com/music/2023/apr/19/ai-human-music-pop-drake-kanye-west-the-weeknd> (referring to AI generated content, this “tech will continue to improve to the point where the differences become indistinguishable”).

<sup>87</sup> See Noah Bialos et al., *Generative AI: How Existing Regulation May Apply to AI-Generated Harmful Content*, PERKINS COIE: PERKINS ON PRIV. (Oct. 17, 2023), <https://www.perkinsonprivacy.com/2023/10/generative-ai-how-existing-regulation-may-apply-to-ai-generated-harmful-content/> (“[P]roviders of generative AI tools should be aware that hallucinations may lead to defamation claims, particularly if the model’s false statements arguably result in harm to an individual’s reputation.”); see also Beatrice Nolan, *Artists Say AI Image Generators Are Copying Their Style to Make Thousands of New Images — And It’s Completely Out of Their Control*, BUS. INSIDER (Oct. 17, 2022, 9:22 AM), <https://www.businessinsider.com/ai-image-generators-artists-copying-style-thousands-images-2022-10> (“So if an AI is copying an artist’s style and a company can just get an image generated [that is] similar to a popular artist’s style without actually going to artists to pay them for that work, that could become an issue.”).

<sup>88</sup> See *BBB Scam Alert: Celebrity Impersonations Get More Sophisticated with AI Technology*, BETTER BUS. BUREAU (Apr. 7, 2023), <https://www.bbb.org/article/scams/18549-scam-alert->

Consequently, despite the lack of case law, many have addressed the right of publicity as a sufficient remedy for those harmed by generative AI content.<sup>89</sup> While the right of publicity varies from state to state, it is generally the advantageous use of an individual's likeness without their consent.<sup>90</sup> However, as a state right, the right of publicity remains inconsistent, where some states require commercial use or may allow the right to survive posthumously or even allow the right to be assignable or inheritable.<sup>91</sup>

### C. FIRST AMENDMENT CONSIDERATIONS

When considering the regulation of generative AI content, many First Amendment issues arise.<sup>92</sup> Generative AI, with its ability to autonomously produce text, images, and audio, has ushered in a new era of creative expression.<sup>93</sup>

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celebrity-impersonations-get-more-sophisticated-with-ai-technology (describing an example where a consumer purchased keto gummy bear supplements after seeing a phony Oprah Winfrey endorsement and further noting that “[w]ith the rise in deepfake scams and ever-improving AI technology, these phony endorsements are more convincing than ever”); *see also* Stylianos Kampakis, *Fake AI Ads: How To Stay Vigilant When Being Persuaded By Your Favourite Celebs*, THE DATA SCIENTIST, <https://thedata scientist.com/fake-ai-ads-how-to-stay-vigilant-when-being-persuaded-by-your-favourite-celebs/> (last visited Apr. 10, 2024) (“[Scammers] will also use artificial intelligence to create video footage of the AI-generated celebrity. [Scammers] will also use the voices of these celebrities, making it almost impossible to identify that the advert is legitimate.”).

<sup>89</sup> *See* Kennedy & Rutledge, *supra* note 37 (“Cases involving the utilization of generative AI to create content that heavily borrows from an individual's persona can seamlessly fit into this existing framework.”); *see also* Poler, *supra* note 86 (“Practitioners representing entities that make and use generative AI need to be aware of the contours of the right of publicity so they can minimize risk of such claims or appropriately address them when they arise.”).

<sup>90</sup> *See* *What is the “Right of Publicity”?*, ADLI L., <https://adlilaw.com/what-is-the-right-of-publicity/> (last visited Apr. 10, 2024) (“To state a claim for common law misappropriation of your right to publicity, you must allege that the defendant used your identity for some advantage (whether commercial or not) without your consent, resulting in injury to you.”); *see also* Enrico Shaefer, *What is Right of Publicity? Protect Your Name and Likeness*, TRAVERSE LEGAL (Feb. 1, 2017), <https://www.traverselegal.com/blog/what-is-right-of-publicity/> (“Generally, Right of Publicity requires three elements: (1) Use of an individual's name or likeness; (2) for commercial purposes; (3) without Plaintiff's consent.”).

<sup>91</sup> *See* *Right of Publicity*, INT'L TRADEMARK ASS'N, <https://www.inta.org/topics/right-of-publicity/> (last visited Apr. 10, 2024) (“States diverge on whether the right survives posthumously and, if so, for how long, and also on whether the right of publicity is inheritable or assignable.”); *see also* Carrie Brown, *Influencing IP: How The Right Of Publicity Should Adapt to the Influencer Age*, N.Y.U. J. OF INTELL. PROP. AND ENT. L.: THE BLOG, (Dec. 14, 2020), <https://jipel.law.nyu.edu/influencing-ip-how-the-right-of-publicity-should-adapt-to-the-influencer-age/> (“Currently, the right of publicity is vastly inconsistent within the United States . . . . The required elements vary by jurisdiction; in fact, ‘many of its critical elements remain either disputed or undeveloped.’”).

<sup>92</sup> *See* Esha Bhandari, *Regulation of Generative AI Must Protect Freedom of Expression*, OPENGLOBALRIGHTS (June 2, 2023), <https://www.openglobalrights.org/regulation-generative-ai-protect-freedom-expression/> (“Any attempts to regulate the content produced by generative AI, including large language models, run the risk of operating broadly to restrict protected expression.”); *see also* Richard Stengal, *The Case for Protecting AI-Generated Speech With the First Amendment*, TIME (May 9, 2023, 12:03 PM), <https://time.com/6278220/protecting-ai-generated-speech-first-amendment/> (discussing the First Amendment implications in relation to generative AI and free speech protections).

<sup>93</sup> *See* James Huston, *AI and the Creative Process: Part One*, JSTOR DAILY (Oct. 24, 2023),



As such, most generative AI content will generally be protected under the First Amendment as freedom of speech and expression.<sup>94</sup> However, as with any form of expression, it is not immune to misuse or abuse, which is where the challenge of regulation arises.<sup>95</sup>

Freedom of speech issues may arise as generative AI produces content that can be characterized as inciting violence or obscenity.<sup>96</sup> Specifically, one of the primary risks is defamation.<sup>97</sup> As noted earlier, the development of deepfakes

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<https://daily.jstor.org/ai-and-the-creative-process-part-one/> (discussing how generative AI “opens up new possibilities for creativity by extending the capabilities of the human artist. With AI, artists can experiment with novel forms and techniques that would have been difficult or impossible to achieve with traditional tools and methods.”); *see also* Stephen Wolfson, *This is Not A Bicycle: Human Creativity And Generative AI*, CREATIVE COMMONS, <https://creativecommons.org/2023/02/21/this-is-not-a-bicycle-human-creativity-and-generative-ai/> (last visited Apr. 10, 2024) (noting how generative AI “can create all kinds of things, including images, music, speech, computer programs, and text, and can either work as stand-alone tools or can be incorporated into other creative tools”).

<sup>94</sup> *See* Peter Henderson, *Who Is Liable When Generative AI Says Something Harmful?*, STAN. UNIV.: HUMAN-CENTERED A.I. (Oct. 11, 2023), <https://hai.stanford.edu/news/who-liable-when-generative-ai-says-something-harmful> (noting how “scholars believe much of generative AI will be protected by the First Amendment” and that those seeking to impose liability on AI creators “will generally be constrained by the First Amendment”); *see also* Archer Amon, *Rights and Regulation: The Future of Generative AI Under the First Amendment*, SKYNET TODAY (May 1, 2023), <https://www.skynettoday.com/overviews/gen-ai-first-amendment> (“Free speech law will become increasingly relevant to the growth of generative AI. Legal precedent may allow the First Amendment to protect AI-generated speech . . .”).

<sup>95</sup> *See* Kirsten Errick, *FTC Issues Warning About Generative AI Misuse*, NEXTGOV (May 2, 2023), <https://www.nextgov.com/artificial-intelligence/2023/05/issues-warning-about-misuse-generative-ai/385868/> (“Of particular concern for the FTC is the use of AI or generative AI tools to better persuade people and change their behavior. The FTC noted it previously focused on AI-deception, such as making exaggerated or unsubstantiated claims and using generative AI for fraud, as well as AI tools that can be biased or discriminatory.”); *see, e.g.,* *How AI is Being Abused to Create Child Sexual Abuse Imagery*, INTERNET WATCH FOUND., <https://www.iwf.org.uk/about-us/why-we-exist/our-research/how-ai-is-being-abused-to-create-child-sexual-abuse-imagery/> (last visited Apr. 10, 2024) (noting how “artificial intelligence (AI) is increasingly being used to create child sexual abuse imagery online”).

<sup>96</sup> *See* *Generative AI: The New Attack Vector For Trust and Safety*, HELP NET SEC. (May 30, 2023), <https://www.helpnetsecurity.com/2023/05/30/generative-ai-abuse/> (“Researchers detected numerous instances where threat actors have exploited generative AI to create hyper-realistic yet harmful content that incites violence and promotes extremist propaganda.”); *see also* Cecilia Ka Yuk Chan & Wenjie Hu, *Students’ Voices on Generative AI: Perceptions, Benefits, and Challenges in Higher Education*, INT’L J. OF EDUC. TECH. IN HIGHER EDUC. (July 17, 2023), <https://educationaltechnologyjournal.springeropen.com/articles/10.1186/s41239-023-00411-8> (“AI-generated images, for example, may contain nudity or obscenity and can be created for malicious purposes such as deep-fakes[.]”).

<sup>97</sup> *See* Clay Calvert, *Defamation Law and Generative AI: Who Bears Responsibility for Falsities?*, AM. ENTER. INST. (Aug. 22, 2023), <https://www.aei.org/technology-and-innovation/defamation-law-and-generative-ai-who-bears-responsibility-for-falsities/> (“[A]nyone who uses generative AI to produce information about a person and then conveys it to someone else may be legally responsible if it is false and defamatory.”); *see also* Bialos et al., *supra* note 87 (“While the elements of defamation claims vary around the world, providers of generative AI tools should be aware that hallucinations may lead to defamation claims, particularly if the model’s false statements arguably result in harm to an individual’s reputation.”).

has not only caused widespread misinformation, but can seriously defame public figures.<sup>98</sup> When faced with a defamation claim, as governed by state law, the First Amendment would limit false and harmful generative AI content.<sup>99</sup> While a defamation lawsuit may offer suitable remedies in specific cases related to generative AI, the complexity of this technology underscores the need for additional protection.<sup>100</sup>

Furthermore, generative AI content may be defended under copyright law principles. For example, the fair use doctrine was developed to ensure that copyright does not infringe upon the First Amendment.<sup>101</sup> While fair use allows the use of copyright content for purposes such as criticism, news reporting, or research, a balancing test of four factors is further used to determine whether

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<sup>98</sup> See Natalie Elizaroff, *The Rise of Deepfakes: Navigating Legal Challenges in Synthetic Media*, CHI. BAR ASS'N, (May 17, 2023), <https://cbaatthebar.chicagobar.org/2023/05/17/the-rise-of-deep-fakes-navigating-legal-challenges-in-synthetic-media/> (“The rise of deepfakes has raised significant challenges for the legal community, particularly when it comes to determining whether a deepfake video constitutes defamation.”); see also David Greene, *We Don't Need New Laws for Faked Videos, We Already Have Them*, ELEC. FRONTIER FOUND. (Feb. 13, 2018), <https://www.eff.org/deeplinks/2018/02/we-dont-need-new-laws-faked-videos-we-already-have-them> (“[A] plaintiff could sue for defamation if a deepfake has a natural tendency to damage their reputation.”).

<sup>99</sup> See *Artificial Intelligence, Free Speech, and The First Amendment*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/research-learn/artificial-intelligence-free-speech-and-first-amendment> (last visited Apr. 10, 2014) (“[T]he same exceptions to the First Amendment should apply in the artificial intelligence context as they would in any other multimedia context. These exceptions include incitement to imminent lawless action, true threats, fraud, *defamation*, and speech integral to criminal conduct.”) (emphasis added); see also Caroline Quirk, *The High Stakes of Deepfakes: The Growing Necessity of Federal Legislation to Regulate This Rapidly Evolving Technology*, PRINCETON LEGAL J. (June 19, 2023), <https://legaljournal.princeton.edu/the-high-stakes-of-deepfakes-the-growing-necessity-of-federal-legislation-to-regulate-this-rapidly-evolving-technology/> (“Given that deepfakes are technically forms of expression, it would be unconstitutional to ban all of them, but there are exceptions within the First Amendment in which certain speech is no longer protected by the Constitution. These exceptions include libel, written defamation, slander, spoken defamation, and profanity.”).

<sup>100</sup> See Isaiah Portiz, *First ChatGPT Defamation Lawsuit to Test AI's Legal Liability*, BLOOMBERG L. (June 12, 2023, 5:46 AM), <https://news.bloomberglaw.com/ip-law/first-chatgpt-defamation-lawsuit-to-test-ais-legal-liability> (explaining how defamation lawsuits against AI companies may or may not succeed); see also Kristin Rheins, *The Debate Over Liability For AI-Generated Content*, PROGRESSIVE POL'Y INST. (Aug. 8, 2023), <https://www.progressivepolicy.org/blogs/the-debate-over-liability-for-ai-generated-content/> (“Even if each harmful action inflicted by AI is evaluated by its specific facts alone, the amount of creative license that AI has over its output is difficult to measure with reproducible accuracy and precision.”).

<sup>101</sup> See Isaiah Portiz, *Generative AI Debate Braces for Post-Warhol Fair Use Impact*, BLOOMBERG L. (May 30, 2023, 5:05 AM), <https://news.bloomberglaw.com/ip-law/generative-ai-debate-braces-for-post-warhol-fair-use-impact-1> (“The [U.S.] Supreme Court's recent guidance on how courts must evaluate copyright law's fair use doctrine will have major implications on the debate over generative artificial intelligence models that are trained on billions of images, texts, and other copyrighted works.”); see also Geoffrey Hull, *Fair Use*, FREE SPEECH CTR. AT MIDDLE TENN. STATE UNIV. (Jan. 1, 2009), <https://firstamendment.mtsu.edu/article/fair-use/> (“The Supreme Court has portrayed the concept of fair use as a way of preventing copyright protection from running afoul of the First Amendment's guarantees of freedom of speech and press.”).

other types of content meet the fair use defense.<sup>102</sup> Generally, fair use is triggered when the copying is sufficiently transformative.<sup>103</sup> Accordingly, within the bounds of generative AI content, fair use may serve as a First Amendment defense when such content meets this transformative threshold.<sup>104</sup> Fair use and its transformative principles also encompass the parody defense.<sup>105</sup> Suitably, generative AI content will likely be protected if such content is undoubtedly a parody.<sup>106</sup>

<sup>102</sup> See 17 U.S.C. § 107 (2023)

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*; see also *What Is Fair Use?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/what-is-fair-use/> (last visited Apr. 10, 2024) (defining fair use as “permit[ing] a party to use a copyrighted work without the copyright owner’s permission for purposes such as criticism, comment, news reporting, teaching, scholarship, or research” and noting how four factors “must be considered in deciding whether a use constitutes a fair use”).

<sup>103</sup> See Kevin Madigan, *Significant Second Circuit Fair Use Decision Clarifies Transformative Use Analysis*, COPYRIGHT ALL. (Apr. 1, 2021), <https://copyrightalliance.org/fair-use-decision-transformative-use-analysis/> (“[T]o be transformative enough to qualify as fair use[,] a secondary work must be ‘fundamentally different and new’ and embody an ‘entirely different artistic purpose’ so that it ‘stands apart from the raw material.’”); see also Richard Stim, *Fair Use: What Is Transformative?*, NOLO, <https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html> (last visited Apr. 10, 2024) (“A transformative use adds ‘new expression, meaning, or message’ to the original work. [It is] more likely to qualify as fair use than non-transformative copying.”).

<sup>104</sup> See Golriz Chrostowski, *Analysis: Generative AI to Test the Boundaries of Fair Use*, BLOOMBERG L. (Nov. 5, 2023, 9:00 PM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-generative-ai-to-test-the-boundaries-of-fair-use> (“A strong argument can be made that OpenAI’s and Meta’s use of the copyrighted works is highly transformative and [does not] usurp the original copyrighted work.”); see also *The Intersection of Generative AI and Copyright Law: Is it Fair Use?*, FOCUS L. (May 16, 2023), <https://focuslawla.com/generative-ai-copyright-law-fair-use/> (“In the context of generative AI, the use could potentially be seen as transformative, as the AI is producing new content based on the data it has been trained on.”).

<sup>105</sup> See *Copyright Fair Use*, PBS, <https://www.pbs.org/standards/media-law-101/copyright-fair-use/> (last visited Apr. 10, 2024) (“For example, a parody is transformative because it holds the original work up to ridicule.”); see also Alexander McMullan, Comment, *Returning to the Fair Use Standard*, 63 N.Y.L. SCH. L. REV. 359, 364 (2018-2019) (“[P]arody, along with commentary and criticism, was historically protected under fair use; therefore, the Court need not have focused on denominating the use as transformative.”).

<sup>106</sup> See Lawrence Norden, *States Take the Lead on Regulating Artificial Intelligence*, BRENNAN CTR. FOR JUSTICE (Nov. 6, 2023), <https://www.brennancenter.org/our-work/research-reports/states-take-lead-regulating-artificial-intelligence> (noting how states seeking to regulate deceptive media created with AI tools have proposed exemptions for parody work). See generally *Fair Use Principles for User Generated Video Content*, ELEC. FRONTIER FOUND., <https://www.eff.org/pages/fair-use-principles-user-generated-video-content> (last visited Apr. 10, 2024) (discussing how new creators may use “media that makes up our culture” to create new works that comment on, parody, or criticize such media and that these new forms of free expression are protected by the fair use doctrine).

## IV. SOLUTION: FEDERAL RIGHT OF PUBLICITY

The right of publicity should be elevated to the federal level in order to regulate the unceasing creation of generative AI content.<sup>107</sup> In making the right of publicity a federal cause of action, a balancing test must be utilized to synthesize the common law and statutory formulations of the right while adding additional, necessary components, such as First Amendment considerations, and without disturbing copyright territory.<sup>108</sup> Such a balancing test could consist of the following factors, where all factors are weighed under the totality of the circumstances: (1) intent of the generative AI creator; (2) commercial impact of the generative AI content; (3) how transformative the generative AI content is in using an individual's voice, image, or likeness; and (4) consent of the individual whose publicity right is being infringed upon.<sup>109</sup>

The first factor examines intent, where a creator uses AI tools to maliciously ruin an individual's reputation or attempts to misrepresent themselves as a specific individual. This factor would support a finding that the creator violated such an individual's right of publicity.<sup>110</sup> The second factor examines the commercial impact of the content, including the commercial success of the generative AI content and its effect on the potential market.<sup>111</sup> That is the degree to

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<sup>107</sup> See Brachmann, *supra* note 17 (“The creation of a federal right of publicity or an anti-impersonation right was discussed as a solution to concerns that generative AI could mimic artistic styles.”); see also Christian Mammen & Seiko Okada, *Right of Publicity Bill Would Federally Regulate AI-Generated Fakes*, JDSUPRA (Oct. 24, 2023), <https://www.jdsupra.com/legalnews/right-of-publicity-bill-would-federally-4108699/> (“The proposed NO FAKES Act . . . aims to establish the first federal right to protect the image, voice, and visual likeness of individuals in the wake of a flood of AI-generated replicas.”).

<sup>108</sup> See Drinkwater, *supra* note 29, at 131 (advocating for a federal right of publicity while noting that “[o]ne argument for appropriation of one’s likeness in a creative setting is First Amendment protection”). See generally Vick & Jassy, *supra* note 29, at 17 (“This article advocates a limited federal right of publicity that would preempt more expansive rights recognized in various states while staying true to the First Amendment.”).

<sup>109</sup> See Dora Georgescu, *Two Test Unite To Resolve The Tension Between The First Amendment and The Right of Publicity*, 83 FORDHAM L. REV. 907, 907 (2014) (“Without guidance from the Supreme Court, lower courts have developed four tests for balancing the right of publicity against the First Amendment: the relatedness test, the predominant purpose test, the transformative use test, and the ad-hoc balancing test.”). See generally Mammen & Okada, *supra* note 107 (describing the proposed federal right of publicity statute as having certain considerations such as a subjective standard for indistinguishable content while failing to include a commercial requirement).

<sup>110</sup> See Adam Hirschfeld, *Celebrity Misrepresentation And The Federal Lanham Act: The Public Fights Back*, 78, ST. JOHNS L. REV. 233, 235 (advocating for “the position that when there has been a false celebrity endorsement, consumers should be entitled to compensatory relief” due to the celebrity’s right of publicity violation). See generally Brette Sember, *Differences Between Defamation, Slander, And Libel*, LEGALZOOM (Feb. 3, 2023), <https://www.legalzoom.com/articles/differences-between-defamation-slander-and-libel> (“A crucial part of a defamation case is that the person makes the false statement with a certain kind of intent.”).

<sup>111</sup> See Martin Redish & Kelsey Shust, *The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech*, 56 WM. & MARY L. REV. 1443, 1443 (2015) (“[R]ight of publicity gives individuals a legally protected interest against commercially motivated communicators’ use of their names or likenesses for purposes of commercial gain.”) (emphasis added). See generally *Publicity Rights Under State Laws*, JUSTIA (July 2023), <https://www.justia.com/entertainment->

which the generative AI content directly competes with content created by the artist whose voice was used.<sup>112</sup> The third factor adopts fair use principles, looking at the transformative use of using a singer's voice in making a generative AI song.<sup>113</sup> For example, where generative AI content is a clear parody, publicity rights have not been violated.<sup>114</sup> Lastly, the fourth factor simply determines whether the individual whose voice was used gave any form of consent.<sup>115</sup> To illustrate, artist Grimes recently tweeted that anyone can use her voice in creating new content with AI tools, which would arguably bar a right of publicity claim under this factor.<sup>116</sup> Overall, in making a federal right of

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law/publicity-rights/ (“Generally, the right of publicity applies only to the sale of products or services. It does not cover non-commercial uses of a name or image, such as photos or video clips that accompany newspaper articles or newscasts.”);

<sup>112</sup> See Corynne McSherry, *A Broad Federal Publicity Right Is a Risky Answer to Generative AI Problems*, ELEC. FRONTIER FOUND. (July 18, 2023), <https://www.eff.org/deeplinks/2023/07/broad-federal-publicity-right-risky-answer-generative-ai-problems> (“As users continue to experiment with generative AI tools, artists are increasingly concerned that use of the tools to mimic their respective ‘styles’ will put them out of business.”); see also Karla Ortiz, Remarks at FTC’s Roundtable Discussion on the Creative Economy and Generative AI (Oct. 4, 2023) (transcript available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/creative-economy-and-generative-ai-transcript-october-4-2023.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/creative-economy-and-generative-ai-transcript-october-4-2023.pdf)) (“[Generative AI companies] took our work and data to train for-profit technologies that then directly compete against us in our own markets using generative media that is meant to mimic us.”).

<sup>113</sup> See Drinkwater, *supra* note 29, at 123 (“For publicity cases, a party may use transformative use as an affirmative defense. The transformative use test asks whether the work has significant transformative elements or if ‘the value of the work does not derive primarily from the celebrity’s fame . . . .’”). See generally Bernard Marr, *Generative AI Is Revolutionizing Music: The Vision For Democratizing Creation*, FORBES (Oct. 5, 2023, 3:19 AM), <https://www.forbes.com/sites/bernard-marr/2023/10/05/generative-ai-is-revolutionizing-music-loudlys-vision-for-democratizing-creation/?sh=1a539d3b775b> (“Generative AI holds transformative potential for the music industry, acting as a catalyst for creativity and innovation.”).

<sup>114</sup> See Eugene Volokh, *District Court Rejects Right of Publicity Claim on “Parody” Grounds*, REASON (Sept. 19, 2022, 10:04 AM), <https://reason.com/volokh/2022/09/19/district-court-rejects-right-of-publicity-claim-on-parody-grounds/> (“Courts are sharply divided on when (especially outside the context of commercial advertising) the First Amendment preempts the ‘right of publicity’ . . . . But there is general agreement that parodic uses are protected.”). See generally Katie Paul, *Meta Bars Political Advertisers From Using Generative AI Ads Tools*, REUTERS (Nov. 7, 2023, 4:21 PM), <https://www.reuters.com/technology/meta-bar-political-advertisers-using-generative-ai-ads-tools-2023-11-06/> (“Meta narrowly bans misleading AI-generated video in all content, including organic non-paid posts, with an exception for parody or satire.”) (emphasis added).

<sup>115</sup> See Peter Singh Jr., *Audience Privacy And Publicity Guidelines*, FOURSORE BUS. L., <https://fourscorelaw.com/audience-privacy-publicity-guidelines/> (last visited Apr. 10, 2024) (“Consent is a complete defense to a legal claim for either misappropriation or violation of the right of publicity.”); see, e.g., Richard Stim, *The Right of Publicity*, NOLO, <https://www.nolo.com/legal-encyclopedia/the-right-publicity.html> (last visited Apr. 10, 2024) (“It is for this reason that all models or persons used in advertisements or endorsements sign consent or release agreements. For a payment the model grants a right to use the image.”).

<sup>116</sup> See Aliza Chasan, *Grimes Invites Artists To Use Her Voice For AI-Generated Songs, Says She’ll Split Royalties*, CBS NEWS (Apr. 24, 2023, 8:50 PM), <https://www.cbsnews.com/news/grimes-ai-music-voice-royalties-artists-copyright/> (“The singer Grimes is inviting artists to produce new music using versions of her voice generated by artificial intelligence. She said . . . that she will split royalties 50-50 with ‘any successful AI generated song that uses my voice.’”); see also Althea Legaspi, *Grimes on AI Songs: ‘Feel Free to Use My Voice Without Penalty,’* ROLLING STONE (Apr.

publicity, all four factors must be viewed under the totality of the circumstances in examining whether such a right has been violated.<sup>117</sup>

## V. CONCLUSION

In conclusion, the right of publicity must be made a federal cause of action.<sup>118</sup> As such, in resolving the circuit split regarding copyright preemption doctrine, the Supreme Court should favor the Third, Fifth, Seventh, and Tenth Circuits and allow the right of publicity to remain its own separate cause of action.<sup>119</sup> As a federal claim, the right of publicity empowers individuals whose voice, image, or likeness has been utilized in the development of generative AI content to seek appropriate redress.<sup>120</sup> Through the application of the proposed balancing test, a federal right of publicity ensures that innovation and freedom of expression can be harmoniously weighed against an individual's rights to their own publicity.<sup>121</sup>

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23, 2023), <https://www.rollingstone.com/music/music-news/grimes-voice-ai-generated-songs-1234722289/> (“Grimes has weighed in on the growing use of artificial intelligence in music creation, saying [she is] all for it.”).

<sup>117</sup> See Cameron Verbeke, *The Right of Publicity's Place in Intellectual Property Law*, CHL-KENT J. OF INTELL. PROP. (July 5, 2023), <https://studentorgs.kentlaw.iit.edu/ckjip/the-right-of-publicitys-place-in-intellectual-property-law/> (noting how different tests across intellectual property law have been used in assessing the right of publicity, supporting the need to a consistent application). See generally Tauya Forst & Richard Forst, *Chapter – Amend. IV: The Rule & The Exceptions To The Rule . . . Not Privacy*, COLL. OF DUPAGE DIGIT. PRESS, <https://cod.pressbooks.pub/usconstitution-alive/chapter/chapter-v-the-fourth-amendment-the-rule-and-the-exceptions-to-conducting-searches-and-seizures-not-privacy/> (last visited Apr. 10, 2024) (“Most courts implore the totality of the circumstances using a case-by-case rule. The totality of the circumstances is based upon all the evidence presented to the judge, not just one factor.”).

<sup>118</sup> See Vick & Jassy, *supra* note 29, at 14 (explaining how “[t]he time has come for a federal right of publicity statute”); see also Drinkwater, *supra* note 29, at 118 (“Using intercollegiate athletics as its lens, this article advocates for the adoption of a federal right of publicity.”).

<sup>119</sup> See Guzick, *supra* note 15, at 882–84 (noting how when a defendant exploits a plaintiff's commercial value of their identity and voice, the right of publicity claim is distinguishable from the copyright claim); see also Slater, *supra* note 16, at 897–98 (noting how when a plaintiff's name and likenesses was not preempted by the Copyright Act, the plaintiff's right of publicity claim could prevail).

<sup>120</sup> See *With the Rise of GenAI, a Federal Right of Publicity is Taking Center Stage*, THE FASHION L. (Oct. 16, 2023), <https://www.thefashionlaw.com/as-generative-ai-takes-off-a-federal-right-of-publicity-is-in-the-works/> (“With generative AI at play, existing ambitions to adopt a statute that establishes a federal right of publicity as a way to protect against unauthorized uses of individuals' likenesses (i.e., their names, voices, photographs, etc.), as well as to artists' signature ‘styles,’ have gained new relevance.”); see also McSherry, *supra* note 112 (“In the generative AI context, publicity rights might be a useful way to deter commercial exploitative ‘impersonation.’”).

<sup>121</sup> See Vick & Jassy, *supra* note 29, at 19 (“The time has come for a federal right of publicity law that adequately protects free speech and press rights.”); see also Gai Sher & Ariela Benchlouch, *The Privacy Paradox With AI*, REUTERS (Oct. 31, 2023, 1:15 PM), <https://www.reuters.com/legal/legalindustry/privacy-paradox-with-ai-2023-10-31/> (“[W]e can harness the potential benefits of AI technology responsibly, while preserving an unwavering commitment to safeguarding the fundamental rights of individuals.”).