NAME THAT TUNE: HOW THE RAPID DEVELOPMENT OF ARTIFICIAL INTELLIGENCE IS HARMING VOCALISTS AND VOICE ACTORS' RIGHT OF PUBLICITY

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INTRODUCTION

Picture this: you are the award-winning, international music sensation, Taylor Alison Swift. You have spent much of your life tirelessly developing a unique sound to share with the world. This sound has flourished into a ten-album portfolio beloved by an empire of fans from every corner of the planet. Every household knows your name, and, more importantly, every listening ear can recognize your sound.

Fans and other artists have always covered your wildly popular songs. People try to match your pitch, breath, and accent, but they are not fooling anyone. No *human* can match your skill and replicate your distinctive voice quite exactly.

Your fans jump at any opportunity to hear your new music. Some are not so patient as to wait until your album is formally released. They scour the internet searching for a hidden "easter egg" that reveals a leaked clip of an unreleased song. They do not need you to confirm it is your song, they will know within a single note if the voice they hear is yours. You get word of headlines buzzing, claiming another Swiftie has hit the jackpot and found an unreleased Taylor Swift song online. You are skeptical, so you give this "leaked song" a listen. The lyrics are different from any song you have ever written, but the singing sounds *exactly* like you. How is this possible?

You learn someone has used artificial intelligence (AI) to create and perform an original song and posted it to gain traction on social media. The song is not yours, but the voice surely is. You are unsure what steps to take next. Your manager is blowing up your phone asking how the song got leaked. Your music producer is mind-boggled as to when you created a song without them. Fans are asking for an official release date and when the next album is dropping. To make matters worse, you do not like the song. You know you do not want this to contribute to the reputation you have spent so much time and effort delicately constructing. What can you do? They have not stolen any of your copyrighted music, but you feel like you have lost a piece of your creative identity.

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Taylor Swift is one of the many artists facing unparalleled levels of vocal replication through the development of AI technology.[1] In addition to musicians, voice actors known for voicing cartoons, movies, audiobooks, and the like are being replaced by technology that can perform their job at twice the speed at little to no cost.[2] While the concept of AI has been present since the 1950s, vast developments have occurred in the last three decades.[3] Today, we exist in a world where both humans and computers are consuming data and information at unprecedented rates.[4] AI technology has become critically intertwined in most jobs, the arts, the sciences, and everyday conveniences.[5] While many see AI as a positive contribution to their everyday lives, artists are suffering as their work is quickly replicated for commercial gain, without any form of credit or financial compensation.[6]

This Note brings to light the unique harms faced by voice actors and vocalists as they endure a market that has become saturated with AI-generated works. Duplicative technology has deprived the creative masses of their specialized artistic character that contributes to a sense of personal and professional identity. This Note argues for the creation of a federally recognized right of publicity to explicitly protect artists like voice actors and vocalists from the exploitations of AI technology.

Part I provides a foundational understanding of applicable law for replicated art forms. Further, Section IA relays a brief timeline of the development of AI technology and highlights the innovations specifically relevant to voice actors and vocalists. This knowledge is critical to understanding the inadequacies of existing law. Part IB educates readers on the importance of legal protection in this industry before explaining why the current presiding protections are insufficient. This Note will touch on federal copyright law, the U.S. Supreme Court case holding a voice is not copyrightable, and the booming of a specialized right of publicity through state name, image, and likeness (NIL) laws.

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[1] *See* Brian Contreras, *Tougher AI Policies Could Protect Taylor Swift—And Everyone Else—From Deepfakes*, SCI. AM. (Feb. 8, 2024), https://www.scientificamerican.com/article/tougher-ai-policies-could-protect-taylor-swift-and-everyone-else-from-deepfakes/ [https://perma.cc/J3MR-JBNF]; *see also* Jeannie Marie Paterson, *'Picture to Burn': The Law Probably Won't Protect Taylor (Or Other Women) From Deepfakes*, PURSUIT (Feb. 8, 2024), https://pursuit.unimelb.edu.au/articles/picture-to-burn-the-law-probably-won-t-protect-taylor-or-other-women-from-deepfakes [https://perma.cc/ZJ85-4WHM].

[2] *See generally* Zach Sharf, *Stephen Fry Shocked to Discover AI Stole His Voice From 'Harry Potter' Audiobooks and Replicated It Without Consent, Says His Agents 'Went Ballistic'*, VARIETY (Sept. 19, 2023), https://variety.com/2023/film/news/stephen-fry-ai-stole-voice-harry-potter-audiobooks-1235727795/ [https://perma.cc/TFE7-PJSY].

[3] Rockwell Anyoha, *The History of Artificial Intelligence,* SPECIAL EDITION ON A.I. (Aug. 28, 2017), https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/ [https://perma.cc/D2VL-AGRU].

[4] *Id.*

[5] *See id.*

[6] *See* Joseph Wakelee-Lynch, *AI's Impact on Artists*, LOY. MARYMOUNT UNIV. MAG. (Apr. 26, 2023), https://magazine.lmu.edu/articles/mimic-master/ [https://perma.cc/QH26-98P5].

Part II of this Note asserts that current protections of art and intellectual property fail to adequately address the ever-changing possibilities of AI and demonstrates why a federal right of publicity will address these concerns. This section considers technological changes in the vocal arts that have impacted the replication of vocal works. Next, this portion examines what constitutes an "identity" as it is protected under state right of publicity laws and informs the reader on the historically recognized vocal identity. Lastly, follows a discussion of the critical concepts addressed in state right of publicity statutes and common law that would be vital to a federal right of publicity legislation.

Part III of this Note elaborates on how a federal statutory right of publicity resolves current AI concerns and misappropriations of identity. After analyzing various states' right of publicity and NIL laws, this section will establish a list of critical elements for a federal right of publicity legislation. This section will conclude by explaining how a federal right of publicity standard will bring unified protections to voice actors and artists, along with numerous other creatives and celebrities, and the impact of regulation on creative freedoms and commercial creativity.

This Note concludes by emphasizing the imminent need for legal protection against the use and implementation of AI in the art space. AI has clearly established its presence in the modern world, and it is the duty of the federal government to rein in its power to protect the artists and citizens of the past, present, and future from its misuse. This Note will analyze the current impact of AI creative works and argue for greater protection of voice actors and vocalists by recognizing voice as a component of identity under a federal right of publicity.

I. BACKGROUND

To understand the strength and impact of the harms created by AI in the arts, one must first comprehend how and why AI was developed. The method of AI improvement through generative or "machine learning" is largely problematic for artists seeking to protect their work and unique skill sets. Moreover, to understand why AI vocal replication presents such a distinct problem for vocal artists, one must know how vocal works were traditionally protected through copyright law and differentiate the protection afforded to a song versus the tool that created it: the voice. To close, this Note will review the development of the right of publicity which serves as a likely means of legal protection for artists and individuals seeking to protect the skills, traits, and characteristics that build their commercially recognizable identity.

A. AI Technology Through the Ages

Computer scientists created AI technology to imitate human "learning," but it now goes so far as to replicate innately human skills and characteristics.[7] To understand why recent AI developments play such an influential role in vocal appropriation, it is critical to recognize why and how AI was designed to interact with data and information.

1. A Brief Timeline of the Development of AI

Many can be credited for the vast developments in computer science, but there is one person who specifically worked towards the use of computer information systems to create technical intelligence.[8] In 1936, Alan Turing developed the concept of what would become a Turing Machine.[9] Turing programmed this machine to compute answers to human questions under the "Turing Test," in which "a human asks questions through a computer screen [and] if the human cannot decide whether a human or a machine is responding . . . the machine would be deemed *intelligent*."[10]

Years later, Professor John McCarthy of Stanford University coined the phrase "artificial intelligence," and it was officially deemed "the science and engineering of making intelligent machines."[11] McCarthy dreamt that computers would someday be able to mimic autonomous thinking and physical movement, only limited by human-curated programming.[12]

Machine and computer capacity experienced massive breakthroughs between the late 1950s and early 1970s.[13] Rather than being merely programmed to think, humans "trained" machines to process information through algorithm-fed data to perceive differences in images and wording and learn from their mistakes.[14]

The 1980s saw development stimulated by Edward Feigenbaum, who developed expert systems that could replicate how a field expert would respond to a specific situation or question, so AI could provide advanced

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[7] *See id.*

[8] Daryl Lim, *AI & IP: Innovation & Creativity in an Age of Accelerated Change*, 52 AKRON L. REV. 813, 819 (2018).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 820 (citing Beatriz Guillen Tores, *The True Father of Artificial Intelligence*, OPENMIND (Sept. 4, 2016), https://www.bbvaopenmind.com/en/the-true-father-of-artificial-intelligence/) [https://perma.cc/5BR9-5RDL].

[12] *Id.*

[13] *Id.*

[14] *Id.* at 822.

guidance for ordinary users.[15] This development dramatically increased the skill level of computer intelligence, as computer scientists continued to dream of seamless machine logic programming and information processing.[16]

Computer scientists reached several AI milestones in the 1990s and early 2000s.[17] Many remember the first time a computer beat a world-renowned chess champion in 1997, but few realize this was a result of the vast improvements in AI decision-making.[18] Since then, memory and speed capabilities in computer programming have allowed AI to reach new depths in nearly every aspect of life that inspire convenience, ethical concerns, and legal questions.[19]

Today, AI is used in a vast array of industries through machines that replicate human-like movements and thought processes.[20] For example, AI is frequently used in assembly lines, particularly in food manufacturing.[21] A food processing machine can be programmed to slice produce with unparalleled precision, accuracy, and speed to match an image or shape, nearly eliminating human error and inconsistency.[22] In the medical field, AI has been used to review radiology imaging to detect tumors and diseases.[23] Cities are also testing AI for crime surveillance by using facial recognition technology and behavior pattern prediction to anticipate crimes before they happen.[24]

AI has successfully mastered physical movements and thought patterns as exhibited by the ordinary person, but the last decade has proven AI can master skills once thought to be unique to individual persons largely in the arts:[25]

> In 2016, Next Rembrandt, a group of museums and researchers in the Netherlands, unveiled a painting created by AI that mimicked the subject matter and style of the artist almost indistinguishably. It analyzed thousands of works by a 17th century Dutch artist and broke them down into 168,263 fragments before using them to create the painting. Similarly, computer scientists in Tübingen, Germany, trained an AI robot to paint in Picasso's signature style. French computer

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[15] *See* Anyoha, *supra* note 3.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] Lim, *supra* note 8, at 820.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 824.

> scientists wrote an algorithm using Bach's style to compose music so well that half of the over 1,200 people who listened to it believed that it was composed by Bach himself.[26]

While it may seem impressive that humans have developed a way for computers to replicate innately human skills, it is important to understand exactly how machines are learning these skills and styles of expression.[27] AI requires the input of examples and contextual explanations to develop its intelligence.[28] AI artwork of any kind requires the technology to consume and "study" examples from real people who spent enormous amounts of time and effort to craft their artwork and style.[29] Often, human-made works are legally protected through copyright laws,[30] but they are also informally protected by the ordinary person's inability to replicate their art or the work of another.[31] These protections are irrelevant when a computer can be programmed to analyze every detail of an artist's distinctive style and generate a completely "original" piece using predictive technology that narrowly avoids the artist's copyright defenses.[32] This learning style is increasingly problematic socially, morally, and legally.

2. How Today's Artificial Intelligence is Used for Vocal Appropriation

The development of AI has come so far as to replicate skills and characteristics seamlessly that once belonged to the irreplaceable individual, including one's voice.[33] Whether speaking or singing, AI can "mimic individual speech patterns and cadence via exposure to recordings of human speech."[34] This requires little effort on behalf of programmers, who merely upload audio data and provide factual context as to who is speaking, what emotions are present, the purpose of the communication, among other circumstantial characteristics.[35] In conjunction with AI predictive machine

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[26] *Id.* at 824–25.

[27] *Id.*

[28] *See generally*, Zachary Small, *Sarah Silverman Sues OpenAI and Meta Over Copyright Infringement*, N.Y. TIMES, July 12, 2023, at C3.

[29] *Id.*

[30] *See* Bryn Wells-Edwards, *What's in a Voice the Legal Implications of Voice Cloning*, 64 ARIZ. L. REV. 1213, 1216 (2022).

[31] *Id.*

[32] *Id.*

[33] Wells-Edwards, *supra* note 30, at 1214.

[34] *Id.*

[35] *Id.*

learning, this information allows AI to formulate "new" speech that sounds exactly as if the original voice had said it.[36]

This ability opens the door to many potential uses, some not so well intended.[37] Voices of celebrities and politicians have been widely used to generate "deepfake" content, which is a real audio or video recording that has been manipulated using AI technology to appear as highly convincing "proof" that a real person said or did something they did not.[38] To the ordinary eye or ear, it is increasingly more difficult to differentiate false creations from authentic recordings.[39] For example, Taylor Swift is one of the latest victims of AI used to create sexually explicit, eerily real-looking, deepfake content that has circulated the dark corners of the global, pornographic web.[40] While she possesses some of the greatest legal and technological resources to locate the creator and handle the matter privately, many people, famed or not, lack any resource or legal remedy to overcome such a widespread, personal violation.[41] Legal scholars across the world are demanding the implementation of AI regulation to prevent other violative uses of image, voice, and identity.[42]

In the creative realm, the same vocal replication can generate new content from a person's favorite singer or voice actor.[43] "AI-generated music platforms are synthesizers that use generative artificial intelligence to self-compose and produce music. It is trained on powerful machine learning algorithms fed with large volumes of music data [from widely known streaming services] like vocals, chords, strums, and other elements to create new songs."[44] This merely requires a textual prompt from the ordinary user that will direct AI as to where it should seek inspiration.[45] For example, if someone were to type in "happy, upbeat, love song, in the voice of Taylor Swift," the technology would analyze the bubbly sounds and joyful lyrics found in the latest and greatest Taylor Swift love song and would emulate her style to create a heavily-inspired, "new" ballad.[46] This AI-generated song creates a new tune to the sound of a known voice and can be shared on streaming services or social media platforms that generate profit with each listen.[47] Similarly, the stylistic accent of a voice actor can be "newly curated"

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[36] *Id.* at 1214–15.
[37] *Id.*
[38] *Id.*
[39] *See* Contreras, *supra* note 1; *see also* Paterson, *supra* note 1.
[40] Contreras, *supra* note 1; Paterson, *supra* note 1.
[41] Contreras, *supra* note 1; Paterson, *supra* note 1.
[42] Contreras, *supra* note 1; Paterson, *supra* note 1.
[43] *See* Shreya Mattoo, *What is AI Generated Music? Best Music Tools for 2023*, G2 (July 7, 2023), https://www.g2.com/articles/ai-generated-music [https://perma.cc/QJY8-5W2J?type=image].
[44] *Id.*
[45] *Id.*
[46] *See id.*
[47] *Id.*

through a simple request.[48] Something like, "read the U.S. Constitution in the soothing voice of David Attenborough" will spark an AI investigation into all of Attenborough's previous narrations to emulate his uniquely charming cadence and British accent.[49]

Put simply, now AI can replicate voices in a way that most humans cannot.[50] This development creates large concerns for those whose voices are being used to create new sounds and leaves many seeking legal guidance to protect their professional opportunities and personal sense of identity. Much of the sought protection is simply to shield the artist's choice of either a) avoiding affiliation with an unappealing use of their voice and vocal identity, or b) pursuing the ability to get paid for the performance and use of their vocal talents.[51] Unfortunately, there is scarce legal protection for victims of AI vocal appropriation because voice as a medium is excluded from existing copyright protections unless accompanied by something more tangible or permanently orchestrated.[52]

B. Legal Protections for Voice Work

As they currently stand, federal copyright laws traditionally used for voice work fail to extend protections to one's voice when it is used as an identifying, expressive means of identity.[53] While the specific words communicated through the voice may be copyrighted, such as a song or audiobook, the voice as a general vessel carrying the protected material remains vulnerable to use by others to create new content.[54] Specifically, voice remains vulnerable to AI consumption through generative learning because it does not directly replicate copyrighted work by creating something "new" yet "heavily inspired."[55] This section will discuss the applicable, insufficient federal law and the promising components of pre-existing state rights of publicity.

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[48] *See* Paterson, *supra* note 1; Wells-Edwards, *supra* note 30, at 1214-15, 1223.

[49] *See* Paterson, *supra* note 1; Wells-Edwards, *supra* note 30, at 1214-15.

[50] *See* Mattoo, *supra* note 43 ("Whether simulating lyrics, vocals, or instrumental sequences, AI's efficiency has outshined traditional music-making processes.").

[51] *See generally* Wells-Edwards, *supra* note 30, at 1218; Brian Jackson, *Voice Actors Fear AI is Coming for Their Jobs. This Canadian Company Puts Artists in Control*, THE LOGIC (Sept. 13, 2024), https://thelogic.co/news/the-big-read/canada-voice-actors-ai-jobs/ [https://perma.cc/5DL2-WQYF].

[52] Wells-Edwards, *supra* note 30, at 1216–17.

[53] *Id.*

[54] *Id.*

[55] *See id.* at 1217.

1. Federal Copyright Law

Copyright law has maintained a large presence throughout the history of the United States and has only expanded over time.[56] This realm of legal protection is enumerated in the Constitution as it "grants Congress the power to enact laws to 'promote the Progress of Science and useful Arts.'"[57] Congress has explicitly codified copyright law under Title 17 of the U.S. Code, and further explained the scope of its protections under the Copyright Act:[58]

> The Copyright Act gives the [copyright] owner the following exclusive rights: (1) make copies of the work; (2) create derivative works based on the copyrighted work; (3) distribute copies of the work; and (4) perform and display the work publicly. Copyright protection applies to: (1) literary works; (2) musical works; (3) dramatic works; (4) choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Copyright protection cannot be applied to ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries.[59]

While this provision is inclusive of several creative mediums, it does not include voice or sound that exists outside of a recording.[60] Copyright law does, however, provide an extensive amount of time for legal protection. Copyrights generally last "for the life of the author [or copyright holder] plus an additional seventy years."[61]

Copyright protection has proven vital for artists throughout the nation to obtain exclusive rights to their unique designs and creations, which allows them to benefit professionally and financially from the distribution and public enjoyment of their works.[62] Many creatives and legal scholars believe the expansion of copyright law has promoted creativity, and the continual development of the commercialization of art as financial compensation for legally protected works rewards the creative individual to keep creating and

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[56] Raymond Shih Ray Ku, Jiayang Sun, & Yiying Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1669, 1670–71 (2009).

[57] Jack Naqvi, *Artificial Intelligence, Copyright, and Copyright Infringement,* 24 MARQ. INTELL. PROP. L. REV. 15, 21 (2020) (citing U.S. CONST. amend. I, § 8, cl. 8).

[58] Naqvi, *supra* note 57, at 21 (citing 17 U.S.C. § 102).

[59] Naqvi, *supra* note 57, at 21 (citing 17 U.S.C. § 102).

[60] Naqvi, *supra* note 57, at 21 (citing 17 U.S.C. § 102); *see* Ku et al., *supra* note 56, at 1670–71.

[61] Ku et al., *supra* note 56, at 1671.

[62] *Id.*

pursuing individuality.[63] During this expansion, "Congress has consistently given copyright owners control over additional uses of their works and has increased the length of time during which they might exercise such control."[64]

While it sounds like copyright law is a legal safe haven for artists, the limitation as to who may seek copyrights and what original mediums may be copyrighted has proven to be problematic because technology has revolutionized the process and definition of creating a new, one-of-a-kind piece.[65] To obtain copyright protection, one must provide an *original* work of authorship that is *fixed* in a *tangible* form.[66] This requirement is often broken up into three components and assessed individually.[67]

First, an original piece of work is one that was developed independently and requires only a minimal level of creativity or unique thought, such that most applicable works meet this standard.[68] Second, an author under the Copyright Act is a *human* creator of a copyrightable work, prohibiting both animals and AI systems from applying for a copyright.[69] Third and last, a "tangible medium of expression" triggers the strongest bar for voice actors and vocalists. This medium is broadly defined as a work deemed "'sufficiently stable to be perceived reproduced or communicated for a period of more than transitory duration'" and requires a fixed or permanent product.[70] This definition has been held to exclude something so idiosyncratic and intangible as a person's voice, to be explained in the following section.[71]

If a work provides originality, valid proof of human authorship, and a tangible medium of expression, it may be protected against copyright infringement.[72] Infringement occurs when "a party violates a copyright owner's exclusive right."[73] The party alleging infringement must demonstrate their work was reproduced with substantial similarity and may seek legal remedies, including injunctions, money damages, and attorney's fees upon a finding of infringement.[74] Unfortunately, tangibility places a greater limit on protected mediums than one might expect.[75] A voice used as

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[63] *Id.*
[64] *Id.* at 1676.
[65] *See* Naqvi, *supra* note 57, at 22.
[66] *Id.* (emphasis added).
[67] *Id.* at 22–23.
[68] *Id.*
[69] *Id.* at 23–24.
[70] *Id.* at 23 (citing 17 U.S.C. §101 (2018)).
[71] *Id.* at 43.
[72] *Id.* at 25.
[73] *Id.*
[74] *Id.*
[75] *See id.* at 43–44 (explaining that "a voice cannot be fixed onto a tangible medium," so it is not copyrightable).

a non-fixed means of expression is not copyrightable under existing copyright laws and is vulnerable to harmful misuse of AI technology.[76]

2. A Voice Is Not Copyrightable

Courts have debated what art forms are included in the vague definition of "tangible medium of expressions" on several occasions.[77] In the landmark case *Midler v. Ford Motor Co.*, the Ninth Circuit held that while a song and its lyrics may obtain copyright protection, the voice serving as an instrument to the song creates a sound that is not afforded the same protection under federal copyright law.[78]

For context, Bette Midler was one of the first artists to fight for legal protection of her distinctive singing style.[79] In the 1980s, Ford Motor Company asked Midler to record one of her songs to be used in a Ford commercial.[80] After Midler turned down the opportunity, Ford sought out a vocalist who could replicate Midler's singing voice and hired one of her long-time backup singers after she had submitted a recording of her Midler impression.[81] Once the commercial aired, numerous close friends and colleagues contacted Midler as they were absolutely convinced she had re-recorded her song for the advertisement.[82] This would have come as a surprise to them because Midler notoriously turned down commercials as she believed them to be below her professional caliber.[83]

In response, Midler sued Ford for intentional vocal replication.[84] Her claim was the first of its kind, noting that the company did not use her name or picture and held a license from the copyright holder to use the song.[85] The district court condemned the company's "thief mentality" despite granting summary judgment in the defendant's favor.[86] Midler appealed, arguing she was not preempted by federal copyright law.[87] The appellate court stated, "[C]opyright protects 'original works of authorship fixed in any tangible medium of expression.' A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectable here is more personal than any work of authorship."[88] The court held that, while federal copyright law was

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[76] *Id.* at 42–44.
[77] *See generally* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
[78] *Id.* at 462.
[79] Wells-Edwards, *supra* note 30, at 1216 (citing *Midler*, 849 F.2d at 461).
[80] *Midler*, 849 F.2d at 461.
[81] *Id.*
[82] *Id.* at 461–62.
[83] *Id.* at 462.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* (citing 17 U.S.C. § 102(a)).

inapplicable to Midler's case, a tort in the state of California has been committed when "a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product."[89] Midler was able to achieve some level of state remedy, but she continued to advocate for the federal legal protection of one's unique voice despite its lack of fixed tangibility.[90]

While Midler's case failed to create federal precedent, it incited some of the first discussions of protecting a voice for the sake of its unique existence and value.[91] "In holding that the right of publicity may be infringed by the appropriation of a voice, it set[s a] valuable precedent for voice plaintiffs" who protectively view their voice as part of their personal and professional identity.[92] This holding can provide guidance in understanding the insufficient protections of current federal copyright law before assessing other legal alternatives that can supply the needed protection for vocal artists.[93]

3. The Right of Publicity and the Development of Name, Image, and Likeness Laws

"The right of publicity is an intellectual property right that protects against the misappropriation of a person's name, likeness, or other indicia of personal identity—such as nickname, pseudonym, voice, signature, likeness, or photograph—for commercial benefit."[94] This right provides promise for those looking to legally protect the traits, characteristics, and skillsets that create their unique image and identity from AI misappropriation.[95] This modern form of legal protection spurs from privacy concerns and allows a person to legally recover for the nonconsensual use of their name, image, and likeness (NIL), particularly when an identifying feature is commercially used and valued.[96] Violating one's right of publicity can lead to the recovery of both economic and non-economic damages that are caused by the exploitation of one's image, such as the deprivation of commercial

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[89] *Id.* at 463–64.

[90] *Id.*

[91] *Id.*

[92] Leonard A. Wohl, *The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes.*, 57 FORDHAM L. REV. 445, 456–57 (1988) (citing *Midler*, 849 F.2d at 463).

[93] *Id.* at 457.

[94] *Right of Publicity*, INTERNATIONAL TRADEMARK ASSOCIATION, https://www.inta.org/topics/right-of-publicity [https://perma.cc/C4Z3-537N].

[95] Caitlyn Slater, *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, 873.

[96] *Id.*

opportunities to use their own likeness or the inducement of emotional distress.[97]

In the late 1800s, Supreme Court Justice Louis D. Brandeis advocated for the federal recognition of the right to privacy so citizens could protect the publicized or personal interest of their individual identity.[98] Justice Brandeis believed "the right of privacy was the vehicle for the protection of an internal interest, the feelings of one who involuntarily had been publicly used."[99] Many of his Supreme Court opinions emphasize the importance of controlling the possession and distribution of personal information and creating privacy in intimate areas of life, as desired.[100] Justice Brandeis fought for the federal "right of determining, ordinarily, to what extent [your own] thoughts, sentiments, and emotions shall be communicated to others."[101] Through its development, the right of publicity grew to be applied in *addition* to the federally recognized right of privacy that Justice Brandeis so earnestly advocated.[102]

Early application of the right of publicity was largely associated with celebrities hoping to gain a sense of control over the commercial use of their remarkably identifiable traits.[103] These personal traits included features like facial markings, fashion statements, and hairstyles commonly associated with an identity.[104] In *White v. Samsung Electronics*, Vanna White, well known for her role on the hit television show *Wheel of Fortune*, sued Samsung over an advertisement.[105] Samsung aired a commercial that featured a robot acting and dressing as Vanna White in her capacity on *Wheel of Fortune* without her knowledge or consent.[106] The Ninth Circuit held that under California's statutory protection of the right of publicity, an identity, particularly that of a celebrity, has profitable value upon exploitation.[107] *White* contributed to the increasingly popular belief that an individual should

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[97] *Id.*

[98] *Id.* at 874.

[99] *Id.* (citing Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1204 (1986)).

[100] Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 29–30 (1979) (arguing for greater protection from search and seizure); Boyd v. United States, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense [of privacy]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property.").

[101] Glancy, *supra* note 100, at 30–31 (citing Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890)).

[102] Slater, *supra* note 95, at 874. Any further issues with constitutionality are outside the scope of this Note, aside from the brief First Amendment discussion in the Proposed Resolution section.

[103] *Id.* at 875.

[104] *Id.*

[105] *Id.* at 875–76 (citing White v. Samsung Elecs. Am., Inc., No. 90-55840, 1992 U.S. App. LEXIS 19253, at *13 (9th Cir. Aug. 19, 1992)).

[106] *Id.*

[107] *Id.*

be able to control how their image and identity are shared publicly or commercially.[108]

In the last fifty years, states across the country have similarly protected individual identity from commercial exploitation or disfavored uses.[109] "The right of publicity is analogous to state law protections for misappropriation, and policy considerations are equivalent to those that underlie federal copyright law. As of 2014, forty-one states recognize a statutory or common law right of publicity protection."[110] Unfortunately, the right of publicity lacks federal recognition and exists through state statutes or common law.[111] Because of the patchwork of state law, there is an immediate need for federal regulation to create uniform protection as more people seek to protect elements of their identity in a time of rapid technological development.[112]

Some legal scholars fear that federal copyright law could preempt right of publicity regulation, for both concepts seek to protect valued components of individuality.[113] Fundamentally, copyright law seeks to protect unique *property*, which can be largely associated with the identity of its creator, where the right of publicity is more broadly applicable to the abstract characteristics, traits, or skills of the individual.[114] As illustrated, copyright law protects a voice when it is affixed to a specific production of a song, but the right of publicity protects the voice in its abstract form when it is not used in a specific construction.[115] For example, copyright law protects Stephen Fry's voice as he narrates the Harry Potter series but fails to protect his identifiable sound as a concept from replication or unconsented use unless it is specifically associated with copyrightable content like a script or lyrics.

Presently, the right of publicity remains a state issue that has been addressed by statutes in twenty-five states and by common law in several others.[116] Over the last few years, Congress has attempted to federally introduce the right of publicity through NIL regulation.[117] NIL laws have been drafted to protect the name, image, and likeness of college athletes, allowing a new genre of famed individuals to protect or profit from commercial association with their identity, particularly via name, physical

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[108] *Id.*
[109] *Id.* at 876.
[110] *Id.* at 876–78.
[111] *Id.*
[112] *Id.* at 887.
[113] *Id.* at 888.
[114] *Id.* (emphasis added).
[115] *Id.*
[116] *Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [https://perma.cc/L5AB-VJRZ].
[117] Kristi Dosh, *4 New Federal NIL Bills Have Been Introduced in Congress*, FORBES (Jul. 29, 2023), https://www.forbes.com/sites/kristidosh/2023/07/29/4-new-federal-nil-bills-that-have-been-introduced-in-congress/?sh=5bd90c6b4d46 [https://perma.cc/K8ND-93CC].

image, or likeness.[118] These regulations exemplify a narrow application of the right of publicity because of their limited consideration of a name, image, and likeness for one type of individual—the famous athlete.[119] NIL laws are a widely successful tool to protect expressions of identity and are used in this Note to highlight similarities between individuals famous for their unique, non-fixed, intangible skills like the human voice. Recent NIL laws involving the National Collegiate Athletic Association (NCAA) recognize athletic skill as a means of protectable, commercially and personally valuable identity, where a federal right of publicity can allow a broader lens.[120] This Note specifically highlights vocal talent as a means of legally protectable, commercially and personally valuable identity that is non-fixed in nature and argues for a broader recognition of skills that contribute to identity and are vulnerable to misappropriation by AI technology.

While NIL regulation is a step in the right direction towards a federal right of publicity law, NIL laws are an incredibly niche application of the right of publicity that impacts only a small amount of famed people seeking security in today's heavily commercialized and exploitive world. Unfortunately, recent federal bills have not obtained committee approval to move forward and the desire for federal identity protection under the right of publicity only increases.[121]

II. ANALYSIS

The lack of a federal right of publicity calls for an evaluation of differing state right of publicity protections; specifically, how such state laws can be used to formulate a uniform federal statute that encompasses the characteristics that create one's identity, including, but not limited to, fixed expressions, like a name or image, and non-fixed expressions, like a voice or physical skill. This section will divulge voice actors' and vocalists' need for protection from AI vocal misappropriation and establish the vital components of federal legislation needed to adequately address these harms.

A. Understanding the Need for Legal Protection for Voice Actors and Vocalists from AI Misappropriation

Some say, "imitation is the greatest form of flattery," but many artists would disagree. By nature, voice actors and vocalists are frequently subject

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

to impersonations.[122] Music fans and creatives alike express their admiration of an artist through covers or works inspired by what they hear or see.[123] Historically, digital replication of voice and music was limited by the technology available.[124] Before common recording devices and streaming platforms, you had to venture out to hear a cover band or performer in person.[125] You saw them perform in broad daylight, and, unless they were wearing spectacular makeup and costumes, there was generally no confusion that the cover artist was not the "real deal."[126]

In the 1990s, the music industry suffered as the technology to illegally download and distribute songs became widely accessible.[127] Technology is once again interfering with the rightful compensation and control of artists over their artistry as AI makes it easier than ever to closely imitate a once unique skill.[128] The line between inspiration, originality, and infringement has become paper thin, and what makes vocal replication through AI distinct is its ability to take a vocal portfolio and create an "original" piece that is indistinguishable from an existing vocal identity.[129] Vocal imitation has long been done transparently, as cover artists market themselves as "sound alikes" without promising to be the "real thing."[130] Further, creative works like remixes and songs with sampled segments still provide blatant credit to the rightful artist under the processes ruled by copyright law.[131] AI generative learning removes transparency in vocal replication by depriving artists of rightful credit, compensation, and control by creating widespread confusion of source and a nonconsensual impact on identity. As this section will discuss, an identity is delicate and often intentionally crafted for personal or commercial reasons. Nonconsensual impacts on identity, like AI creations, generate harms that may go unnoticed by many but are felt deeply by those who intentionally curate their sense of identity. Modern technology like AI has encouraged and simplified the misappropriation of identity, particularly through misuses of voice.

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[122] *See* Carl Wilson *Is the Cover Making a Recovery?*, SLATE (Oct. 18, 2018), https://slate.com/culture/2018/10/cover-song-history-future-weezer-toto-africa.html [https://perma.cc/XB7Y-6ETC].

[123] *See generally id.*

[124] *See generally id.*

[125] *See generally id.*

[126] *See generally id.*

[127] Geoff Mayfield & Jem Adwad, *AI vs. the Music Industry: With the Internet Full of Fake Drakes and Eminems, Who Gets Paid?*, VARIETY (May 3, 2023), https://variety.com/2023/music/news/ai-vs-music-industry-fake-drake-eminem-who-gets-paid-1235601494/ [https://perma.cc/B8B3-Z3PP].

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *See generally Sampling – How Does It Work Legally?*, BEATCHAIN (Oct. 19, 2020), https://beatchain.com/blog/sampling-how-does-it-work-legally [https://perma.cc/BC5P-TGFE].

1. Vocal Identity

A voice carries significance that is unique to the ear of the beholder. Whether the value of a voice is entirely sentimental or objectively profitable, there is an overwhelmingly intimate connection between our voices and our sense of self.[132] For those who dedicate their life's work and expression to using their voice, the connection to identity is undeniable. Humans used to believe that, unless you were cursed by an unsightly sea witch, no one could steal your voice, but time and technological advancement have proven otherwise.[133]

Copyright law is an insufficient means of vocal protection because it focuses on the content conveyed through someone's voice as a vessel and gives little regard to the vessel itself.[134] A voice is part of the overall commercialized identity, whereas a copyrighted song is merely the fixed product of that identity.[135] This distinction is vital to understanding the imminent need for a federal right of publicity to protect against identity misappropriation through non-fixed mediums like a voice. Voice actors and vocalists are hired for the personal flare they add to the message they are speaking or singing, and they often spend years developing a sound that is uniquely marketable.[136] The law should work to aid development of the arts and innovation and protect those dedicated to crafting their innately human abilities.

The right of publicity must encompass voice so individuals can control their use of identity in a technologically sophisticated world.[137] Vocal appropriation cases like *Midler* have drawn from *Motschenbacher v. R.J. Reynolds Tobacco Co.*, in which a well-known race car driver successfully sued over the unconsented use of his race car features in a tobacco advertisement.[138] Motschenbacher consistently partook in commercial advertisements and was concerned the tobacco ad would give the false impression of his endorsement.[139] The court held that the ad's use of distinctive characteristics associated with his famously known identity caused consumers to think he had endorsed smoking.[140] This harmed his

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[132] *See* Bryan Lufkin, *The Enduring Magic of the Voice Actor*, BBC (Jun. 11, 2018), https://www.bbc.com/worklife/article/20180611-the-durable-magic-of-the-voice-actor [https://perma.cc/FC3E-WKYV].

[133] *See generally* THE LITTLE MERMAID (Walt Disney Pictures 1989).

[134] *See generally* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1100 (9th Cir. 1992).

[135] *Id.*

[136] *See id.*; Lufkin, *supra* note 132.

[137] Wohl, *supra* note 92, at 457.

[138] *Id.* at 456 (citing Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822–23 (9th Cir. 1974)).

[139] *Motschenbacher*, 498 F.2d at 822–23.

[140] *Id.*

reputation, or at minimum, was a misappropriation of his intentionally crafted, professional identity.[141] This holding has been applied to vocal appropriation cases because the use of distinctive sounds, accents, and inflections can similarly contribute to a professional identity and reputation.[142]

> Common to both [*Motschenbacher* and *Midler*] was the significance each placed on the stolen attribute's ability to identify the respective plaintiffs and extract their endorsement value. Notwithstanding that link, Midler easily remained within the far-reaching implications of Motschenbacher because a car is not a personal characteristic but the "human voice is one of the most palpable ways identity is manifested." . . . In holding that the right of publicity may be infringed by the appropriation of a voice, it set valuable precedent for voice plaintiffs. In addition, [*Motschenbacher*] fortified the notion that identification of the plaintiff by any means is the key to right of publicity infringements.[143]

Following *Midler*, in *Waits v. Frito-Lay, Inc.*, the award-winning singer Tom Waits "sued the snack food manufacturer and its advertising agency for voice misappropriation and false endorsement following the broadcast of a radio commercial for SalsaRio Doritos which featured a vocal performance imitating Waits' raspy singing voice."[144] Like Bette Midler, Tom Waits did not record commercials to protect the "artistic integrity" of his artform and to create a prestigious reputation.[145] Knowing this, Frito-Lay hired a professional Tom Waits imitator specifically for the singer's ability to mimic that distinctly swanky, gravelly voice.[146] A jury found that Frito-Lay "had violated Waits' right of publicity by broadcasting a commercial which featured a deliberate imitation of Waits' voice.[147] In doing so, the jury determined that Waits has a distinctive voice which is widely known."[148] Tom Waits avoided particular commercial uses of his voice to increase the value of his performances and recordings, and his right of publicity was violated upon its commercial replication.[149]

Waits and *Midler* speak to the naturally occurring and intentionally curated relationship between the use of a voice and one's personal and

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[141] *Id.*
[142] Wohl, *supra* note 92, at 456.
[143] *Id.* at 456–57 (citing Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988)).
[144] Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096 (9th Cir. 1992).
[145] *Id.* at 1097.
[146] *Id.* at 1097–99.
[147] *Id.* at 1098.
[148] *Id.* at 1098–99.
[149] *Id.*

professional identity.[150] This important relationship bears as much weight as a name or photo on one's identity, and it demands the protection afforded by a federal right of publicity. An artist should be able to control the use and prevalence of their unique skill in its non-fixed form to maintain their reputation and marketable value, further preventing misuse of identity.

2. Brand Dilution, Loss of Opportunity, and Confusion of Identity

The role of technology is continuously changing, and with new capabilities come new harms and legal challenges. While famous celebrities and artists may not be the most sympathetic plaintiffs, it is important to understand the harmful impact technology like AI has on those in the public eye and on the creative industries they work in.[151]

The right of publicity has traditionally been used to protect the value and integrity of a famed identity.[152] An identity is a delicate culmination of life experiences and work, and for those who are known for and profit off their widely known persona, it is incredibly important to prevent "false endorsements, misrepresentations, or infringements on their privacy" from altering the identity they famously display to the world.[153]

Brand dilution, loss of opportunity, and confusion of product or identity are just a few of the harms faced by artists and famed identities in today's AI-ridden world.[154] These harms are large public policy reasons that support a greater control over expressive ideas and mediums that build one's identity with or without their knowledge and consent.[155] Generative AI technology can rapidly consume images, videos, and sound to produce a high-quality, near identical replica or "new" piece of art "heavily inspired" by the content it was fed.[156] These replicas can serve as a "near perfect substitute for an author's persona" and "right of publicity laws provide [much needed] protection for the artist."[157]

Voice actors and vocalists are no stranger to imitation and covers, but the use of AI has made it more difficult to distinguish between an impersonation

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[150] *See infra* Section II.B.1.

[151] This is not to discredit the immense harm ordinary citizens can be subjected to by the misuse of AI. While just as exploitive, deprecating, and violative, the misappropriation of identity experienced by non-famed individuals generally does not occur on the same scale compared to those with immense fame and in the brutal reality of a global spotlight.

[152] 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/#:~:text=The%20right%20of%20publicity%20grants,merchandising%2C%20or%20other%20promotional%20activities [https://perma.cc/AQ7D-KETW].

[153] *Id.*

[154] Wakelee-Lynch, *supra* note 6.

[155] *See id.*

[156] *See supra* Section I.A.2.

[157] Jackson, *supra* note 152.

and the real artist.[158] One of the most famous cases to bring light to the harms of vocal imitation is *Lahr v. Adell Chemical Co.*, featuring a claim brought by Bert Lahr, a voice actor known for his "distinctive and original combination of pitch, inflection, accent, and comic sounds has caused him to become 'widely known and readily recognized as a unique ant extraordinary comic character.'"[159] Lahr brought a claim after Adell hired a voice actor who specifically concentrated in Bert Lahr imitations to serve as the voice of a cartoon duck in an advertisement.[160] Like Bette Midler and Tom Waits, the injury lies in not being able to control the use of a largely identifying skill and the harmful associations or perceptions that occur as a result.[161] Further, the simple concept of supply and demand reveals that the more rare something is, the more value it holds.[162] This means replication has a potentially deathly financial impact on artists of all kinds.[163] In Lahr's case, the association of his voice with a random, chemical commercial harmed the scarcity value of his professional appearances and diluted his vocal brand.[164] The vocal misappropriation injured Lahr's reputable brand "because it cheapened [him] to indicate that he was reduced to giving anonymous television commercials and because the imitation, although recognizable, was inferior in quality and suggested that [his voice acting] abilities had deteriorated."[165]

Brand dilution occurs when a brand or commercial identity diminishes in value after releasing or associating with a product or service that does not align with the usual quality, objective, or values.[166] Lahr argued the unauthorized replication of his voice injured his reputation because it indicated that he was accepting inferior professional opportunities and providing lower-quality services.[167] Injury to reputation is a grave concern for many famed identities, particularly those who receive injury from events or creations that are outside of their control—like AI-generated works that are distributed to the masses online.[168] Further, Lahr contended that vocal

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[158] *See generally Sampling – How Does It Work Legally?*, *supra* note 131.

[159] Lahr v. Adell Chemical Co., 300 F.2d 256, 257 (1st Cir. 1962).

[160] *Id.*

[161] *See infra* Section II.B.1.

[162] James Masterson, *The Four Forms of Value*, MEDIUM (Aug. 23, 2017), https://medium.com/@iamjared/the-four-forms-of-value-be69c2fddf2a#:~:text=Rare%20value%20is%20simply%20a,to%20decrease%20access%20to%20it [https://perma.cc/2SMN-TMT5].

[163] *Id.*

[164] *Id.*; *Lahr*, 300 F.2d at 257.

[165] *Lahr*, 300 F.2d at 257–58.

[166] Indeed Editorial Team, *What is Brand Dilution? (With Definition and Example)*, INDEED (Aug. 15, 2024), https://www.indeed.com/career-advice/career-development/brand-dilution#:~:text=Brand%20dilution%2C%20also%20known%20as,shoes%20to%20be%20brand%20dilution [https://perma.cc/7UKK-DFPQ].

[167] *Lahr*, 300 F.2d at 258.

[168] *See* Wakelee-Lynch, *supra* note 6.

replication caused a serious mistake in identity that is critically impactful when your voice is used to secure employment in the realm of voice acting.[169] The court discussed confusion as to the source of the product, the product being the voice, and ultimately concluded the company's replication could result in saturation of the voice acting market, curtailing interest in Lahr's vocal services.[170] *Lahr* is a perfect example of brand dilution and identity or product confusion because the general public honestly believed the Adell commercial featured low-quality vocal work performed by Lahr.[171]

More recently, Stephen Fry provides a unique example of loss of opportunity.[172] Fry is well-known for his narration of the Harry Potter audiobooks, where he exhibits a distinctively mystical and charming British accent.[173] He recently revealed at a technology festival that AI has been used to reproduce his voice to generate other communications and narrations at little to no cost.[174] At the festival, Fry played a clip of an upcoming history documentary and explained that he did not record or receive compensation for a single word of the narration.[175] Because of Fry's extensive experience in voice work and narration, AI was able to study massive amounts of samples of his work to create a nearly identical replication.[176]

> 'They used my reading of the seven volumes of the *Harry Potter* books, and from that dataset an AI of my voice was created, and it made that new narration. . . . This is from a flexible artificial voice, where the words are modulated to fit the meaning of each sentence,' Fry added. 'It could therefore have me read anything from a call to storm Parliament to hard porn, all without my knowledge and without my permission.'[177]

Fry, among many others, is concerned his voice could be used for abhorrent deepfakes that an ordinary person will believe are real.[178] He also fears the need for voice actors will diminish because creative studios can implement AI software to essentially replace their once irreplaceable talent.[179] The history documentary is a perfect example of the latter issue—

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[169] *Lahr*, 300 F.2d at 259.
[170] *Id.*
[171] *Id.* at 257–58.
[172] Sharf, *supra* note 2.
[173] *Id.*
[174] *Id.*
[175] Dan Cooper, *Stephen Fry Claims His Voice Was Stolen Using AI to Narrate Film*, FILM STORIES (Sept. 18, 2023), https://filmstories.co.uk/news/stephen-fry-claims-his-voice-was-stolen-using-ai-to-narrate-film/ [https://perma.cc/57VR-VZXN].
[176] Sharf, *supra* note 2.
[177] *Id.*
[178] *Id.*
[179] *Id.*

the substitution of human artists for a cheaper, deceitful product.[180] The narration of documentaries is a sought-after opportunity for voice workers like Stephen Fry, whose livelihood is fundamentally based on such opportunities. Not only was he deprived of the professional experience and financial compensation to narrate the film, but he was also deprived of the *choice* to associate with the production. The simple ability to *choose* how one constructs their reputation is what makes this injury so intimately related to identity, both personally and professionally.

Another source of AI-related consumer confusion stems from new methods of advertising used by vocal artists. Recent trends in advertising add to identity and source confusion.[181] Today's artists consider a more elusive approach to advertising their upcoming works, whether it is to build fan excitement, industry anticipation, or add a sense of mystery to a very public reputation.[182] Major artists like Taylor Swift share what the Swifties call "easter eggs" that are hidden clues about upcoming releases.[183] Other artists have allegedly self-leaked their upcoming songs under secret or low-profile accounts online.[184] Thanks to large, fan-based websites like Reddit, Tumblr, and TikTok, this has become a known form of advertising among popular artists.[185] This means the general public has grown to expect a certain level of elusiveness surrounding the production of new vocal works and will seek out unconventional sources in hopes of discovering an authentic work. Consequently, when AI-generated works are shared online without context or disclaimer, many fans believe it is an authentic piece of work created by an established artist. This makes distinguishing between AI-generated songs and new, authentic songs from an original artist nearly impossible.

It is important to understand both the value of identity and the harms created by AI technology to recognize the increasingly imminent need for a federal right of publicity. Vocal identity is a court recognized,[186] personally and commercially valuable concept that must be federally protected to retain its integrity and individual significance. An identity can be altered without the knowledge or consent of the person through AI-generated productions that can replicate authentic sounds or visuals. These AI-generated works are not defeated with existing copyright protections and continue to cause

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[180] *Id.*

[181] *See* Madeline Merinuk, *How Taylor Swift Turned Fandom into a Scavenger Hunt of Clues*, TODAY (Oct. 21, 2022), https://www.today.com/popculture/music/taylor-swift-easter-eggs-hidden-messages-rcna51887 [https://perma.cc/9GYB-YW5B].

[182] *Id.*

[183] *Id.*

[184] *See* Mala Mortensa, *10 Times Musicians Leaked Their Own Songs Ahead of the Release Date*, ALT. PRESS (Feb. 2, 2021), https://www.altpress.com/times-artists-leaked-their-own-music/ [https://perma.cc/S7K9-2P27].

[185] *Id.*

[186] *See generally* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992).

intimate and professional harm.[187] Brand dilution, loss of opportunity, and confusion of identity are at the forefront of the injuries experienced by those in the vocal art space and these harms extend to artists of other non-fixed mediums and methods.[188] A federal right of publicity would adequately address nonconsensual, harmful contributions to identity and can be modeled after existing state right of publicity statutes.

B. State Protection of Identity Through the Right of Publicity and NIL Laws

The right of publicity currently exists through a patchwork of state statutes and common law.[189] Despite variations between states, the intentions behind any case law or statute generally remain the same—to maintain the integrity and commercial value of one's identity and the characteristics that compose it.[190] This Note argues for an explicit inclusion of characteristics, skills, and abilities in the protections afforded to identity, specifically through the right of publicity. The monetization of identity has incentivized "public figures to protect their persona while simultaneously creating opportunities for others to appropriate, capture, and manipulate the value of another person's identity."[191] While some states have sought out broad right of publicity legislation to cover reputation and "recognizable features that can be easily attributed to an individual," some have catered identity protections to a specific genre of fame—such as athletes through NIL regulation—others have done both or neither.[192] A federal right of publicity law can encompass the protections possessed by many narrowly defined NIL state provisions, while unifying broad legislation for a general right of publicity. To determine the essential components of a federal right of publicity standard, it is important to consider the impactful components of existing state law.

1. State Variation of the Right of Publicity

States vary as to what protections are specifically afforded by right of publicity statutes and common law rules, but there are a few commonly addressed topics.[193] In creating a right of publicity, states and courts establish: a) what aspects, skills, or characteristics of a person define their

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[187] Contreras, *supra* note 1; Paterson, *supra* note 1.
[188] Paterson, *supra* note 1.
[189] Jackson, *supra* note 152.
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *See* CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV. LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 1, 1 (2024).

"protected identity;" b) whether the protected identity must be of commercial value to assert the right; c) how long the right will survive someone's death, if at all; and d) what actions constitute a legally recognized, actionable misuse of identity.[194]

a. What is an Identity Under the Right of Publicity?

Under the right of publicity, the essence of an identity has a broader connotation and application than under copyright law.[195] The right of publicity holds a wider lens because its intention is to safeguard non-fixed, conceptual means of identity like a personality or skill, whereas copyright more narrowly focuses on one specific use of identity in relation to a set medium, like a song, design, or script.[196] A "fixed" product is a copyrighted work that captures an abstract skill within a legally protectable vessel.[197] To illustrate, a song is a "fixed" use of a non-fixed medium—a voice—because it apprehends a specific use of the tool or skill, as it performs a unique work of art: a song.[198] Think of a fixed medium as a piece of one's skill that is frozen in time. This stationary state allows copyright law to protect that specific use of an identifying skill, where the identity as an abstract concept remains vulnerable. Because of the more concrete, "fixed" nature of a name, image, and likeness, these characteristics can be considered the floor of right of publicity law and have been more easily implemented in NIL regulation.[199] States are choosing to extend this right to more abstract displays of identity that exist in the form of professional reputation and personal identity, particularly in states widely known for their population of famous citizens.[200] For example, California has paved a promising path for voice actors and vocalists, as their right of publicity statute explicitly includes a "personality's name, *voice*, signature, photograph, or likeness" beneath its umbrella of identity protection under the right of publicity.[201] This means the state has recognized both fixed and non-fixed forms of identity by including voice in this list, which current federal copyright law fails to do.[202]

Alternatively, New York's initial legislation recognized a right of *privacy*

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[194] *Id.* at 5.

[195] *See supra* Section I.B.1.

[196] *See* Naqvi, *supra* note 57, at 22.

[197] *See id.*

[198] *See id.*

[199] *See generally* Kristin Bria Hopkins, *When I Die Put My Money in the Grave: Creating a Federally Protected Post-Mortem Right of Publicity*, AM. BAR ASS'N (Apr. 28, 2023), https://www.americanbar.org/groups/entertainment_sports/publications/entertainment-sports-lawyer/esl-39-01-spring-23/when-i-die-put-my-money-the-grave-creating-federally-protected-postmortem-right-publicity [https://perma.cc/35QG-67Z4].

[200] *Id.*

[201] CAL. CIV. CODE § 3344.1(a) (emphasis added).

[202] *Id.*; Hopkins, *supra* note 199.

surrounding the "name, portrait or picture of any living person" but recently expanded this right to include the right of *publicity* in 2020.[203] The amendment replicates California's list of protected displays of identity but makes New York the first state to invoke legal protection against digital replicas of a famed individual.[204] This addition is critical to a federal right of publicity legislation to properly address the misappropriation of identity through AI technology:

> A 'digital replica' is defined as a newly created, original, *computer-generated*, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual *did not actually perform*, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.[205]

The New York amendment was a result of extensive collaboration with various artists and organizations, primarily actors and filmmakers, out of a growing concern that technological developments in AI recording and filming will deprive them of professional opportunities and infringe on their commercially valuable identity.[206] Digital replicas often serve as a "direct substitute for [an artist]'s performance" and are increasingly common as AI technology advances, ultimately inspiring the global SAG-AFTRA strike in 2023.[207] The strike sought to prevent production companies from scanning performers once, paying them for one day of work, and then using their image and likeness for the "rest of eternity, on any project they want, with no consent and no compensation."[208] This is just one example of a highly disfavored use of digital replicas, but for now, it is critical to recognize that by including digital replicas in their right of publicity statute, New York formally recognized digital replicas as a vessel of expression that contributes to identity with or without the consent of those featured in the replica production.[209]

Missouri, among other states, has a right of publicity that derives from its

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[203] N.Y. CIV. RIGHTS LAW § 50 (Consol. 2000); N.Y. CIV. RIGHTS LAW § 50-f (Consol. 2020).

[204] N.Y. CIV. RIGHTS LAW § 50-f. It should be noted, however, that the legal protection against digital replicas is limited to the deceased. For further discussion, see Section II.B.1.c.

[205] Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 176–77 (2023) (emphasis added).

[206] *Id.*

[207] *Id.* ("(SAG-AFTRA), the union that represents screen actors, went on strike on July 14, 2023, over concerns of how technology such as streaming and artificial intelligence affects actors' legal rights and compensation.").

[208] *Id.* at 162.

[209] *Id.* at 176–77.

common law.[210] In order to have a claim, a plaintiff must prove the defendant used the plaintiff's name, without their consent, as a representation of their identity to obtain a commercial advantage or benefit.[211] However, caselaw has proven identity extends beyond the literal use of a name and includes other identifying characteristics commonly associated with a well-known person.[212] For example, in *Doe v. TCI Cablevision*, a Missouri court upheld the right of publicity for a professional hockey player whose identity was portrayed without his consent in a commercially published comic book.[213] The court held that the use of the hockey player's name in association with big muscles and a "tough guy" personality—both traits he was commonly known for—were misappropriations of his identity for the comic book's commercial benefit.[214]

Whether the right of publicity comes from legislation or common law, one can likely expect protection of fixed associations with identity, like a name, signature, or photograph.[215] But as technology and creative mediums develop, non-fixed forms of identity like a voice, style, or personality have become legally recognized for their value and risk of exploitation.[216] The 2020 statutory amendment in New York has taken an important step in recognizing the expressive capacity of AI technology and its common misuse through digital replicas that harm the control over personal and professional identity and should play a large role in a federally legislated right of publicity.[217]

b. Measuring Commercial Value

Most states agree that to invoke your right of publicity your identity must be of commercial value.[218] California's statute applies to both living and "deceased personalit[ies]" and goes on to define a personality as someone who used or uses their "name, voice, signature, photograph, or likeness" in a commercialized, revenue-raising manner during their natural life.[219] This requires finding that their identifying characteristics were used for "products, merchandise, or goods, or for purposes of advertising or selling, or

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[210] *See* C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818, 822 (8th Cir. 2007).

[211] *Id.* (citing Doe v. TCI Cablevision, 110 S.W.3d 363, 369 (Mo. 2003)).

[212] *See generally* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1101 (9th Cir. 1992); *see Doe*, 110 S.W.3d at 363.

[213] *See Doe*, 110 S.W.3d at 363.

[214] *Id.*

[215] *See generally* Hopkins, *supra* note 199.

[216] *See generally id.*

[217] *See* N.Y. CIV. RIGHTS LAW § 50-f (Consol. 2020).

[218] *See* Zirpoli, *supra* note 193.

[219] CAL. CIV. CODE § 3344.1(h) (2024).

solicitation of purchase of, products, merchandise, goods, or services," giving association with their identity an inherently commercial value.[220]

Expanding the meaning of commercial value, New York's right of publicity statute finds the identity of deceased *performers* holds commercial value, in addition to "deceased personalities."[221] "Deceased performers" are people who "regularly engaged in acting, singing, dancing, or playing a musical instrument" for financial gain or livelihood during their lives.[222] This distinction is important as it explicitly finds value outside of a name to protect fame associated with a performance or talent that is uniquely and intimately tied to a specific person, where a "personality" may be famous for something outside of a commercialized skill.[223]

Common law interpretations of "commercial value" are more related to the actions and results of an infringing third party.[224] In Missouri, commercial value can be measured by the commercial benefit incurred when selling a product or service associated with a famous person.[225] For example, the *Doe* court explained that the hockey player's identity held commercial value and financially benefited the comic book seller because his identity specifically attracted consumer attention to the comic.[226] Fans of the athlete purchased the comic book and related paraphernalia because of the uncanny similarities between the comic book character and the hockey player.[227] In fact, the hockey player only became aware of the infringement when fans started bringing the comic book and its trading cards to the athlete for his signature.[228] As a result, the seller drew in additional sales and commercially benefited from the unconsented use of and association with the famous athlete's identity, as if the comic book was an extension of the professional athlete's own merchandise.[229]

While commercial value may be measured differently across the country, states have largely focused on two perspectives: 1) a successfully commercialized identity deserving of protection as evidenced by the famous individual's profiting off their own identity; or 2) if wrongful association with a known identity has generated profits for an infringing party.[230] Evidentiary standards are clearly different for each perspective, but each

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[220] *Id.*
[221] N.Y. CIV. RIGHTS LAW § 50-f(1).
[222] *Id.* § 50-f(1)(a).
[223] *See id.* § 50-f(1).
[224] *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 370–71 (Mo. 2003).
[225] *Id.*
[226] *Id.* at 371–72.
[227] *Id.* at 367.
[228] *Id.*
[229] *See id.*
[230] *See generally id.*; *see* CAL. CIV. CODE § 3344.1(h) (2024).

method allows the famed person to prove their identity holds commercial significance.[231]

c. Post-Mortem Right of Publicity

California was one of the first states to recognize a right of publicity "that extends beyond an individual's lifetime . . . that is also transferable to heirs and third parties, a unique feature available in a minority of states."[232] The statute explicitly permits a famed individual to designate their right of publicity to a person or entity, and if they do not appoint an heir, the statute can delegate a recipient.[233] The heir will hold the famed person's right of publicity, subject to additional filing obligations, and may further transfer the right upon their own demise until its expiration, seventy years after the death of the famed person.[234]

New York's 2020 amendment features similar language in designating a post-mortem right of publicity but extinguishes the right forty years after the death of the famous identity.[235] Additionally, New York aims to protect against the use of digital replicas but grants this right exclusively to the deceased.[236] This means the heirs of a famous person are the only ones who can invoke a claim for misappropriation of identity through a digital replica and can only do so during the forty years following their death.[237] This restraint wrongfully assumes the living have effective legal defenses against digital replicas, which is increasingly more difficult the more realistic digital replicas become.[238]

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[231] This Note is geared towards *public* misuses of identity, so limiting right of publicity claims to just those uses of commercially valuable identity is a key part of preventing overbroad legislation. This follows from the belief that if your identity is commercially valuable, you should have more control over its use, whether it be for professional or personal reasons because it is more likely that a famed person uses their reputation and identity to support their livelihood. Ordinary citizens obviously hold immense personal value for their sense of identity, but they are less likely to face the detrimental financial and opportunistic impacts of misuse of their identity, and they *generally* experience exploitation on a smaller scale. The harms of identity misuse faced by non-famed individuals are not to be discredited but are outside the scope of this resolution to avoid over inclusivity and create a workable solution. *See infra* Part III.

[232] Jackson, *supra* note 152.

[233] CAL. CIV. CODE § 3344.1(b)-(g) (2024).

[234] *Id.*

[235] N.Y. CIV. RIGHTS LAW § 50-f(8) (Consol. 2020).

[236] Curren, *supra* note 205, at 178.

[237] *See generally id.* (discussing the protections the New York statute provides deceased performers and their family members); N.Y. CIV. RIGHTS LAW § 50-f(8) (Consol. 2020).

[238] *See generally id.* There is one particular case fighting for a post-mortem right of publicity that goes down in history. Shaw Family Archives Ltd. v. CMG Worldwide, Inc., 486 F.Supp.2d 309 (S.D.N.Y. 2007). Following the death of Marylin Monroe, her estate sought to prevent the replication and sale of merchandise featuring Marilyn's widely popular image. *Id.* at 312-13. New York and California, the two states that could have been construed as her domicile at her time of death, had yet to establish a state recognized right of publicity. *Id.* at 314. Her estate was unable to prevent the exploitation of their deceased loved one or financially benefit from the appropriation of her identity. *Id.* at 319-20. This case brought national attention to the lack of identity protection for both the living and deceased.

While both New York and California recognize a post-mortem right, only half of the states that recognize the right of publicity extend protections after death.[239] However, this may not be a deliberate choice for all states. It is likely that states with a common law right of publicity have not addressed the question in court and, therefore, have no established rule. Where a post-mortem right is established, the largest variance lies in the number of years the right exists and is largely "predicated on whether celebrities or major companies are domiciled in a particular state."[240]

d. Protection Through Prohibited Uses of Identity

With the recognition of new creative mediums and relevant technologies, there are discrepancies in what uses of identity remain vulnerable or are adequately protected by a right of publicity regulation.[241] Some legislation specifies whether the right "applies broadly to all commercial uses of [name, image, and likeness] or only to specific uses" such as advertising, merchandising, and/or performances.[242] The California statute holds those liable who use a famed identity "in products, merchandise, or goods, for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services" without consent.[243] However, if an identity is used in "a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement" for the purpose of fictional or loosely-based, nonfictional entertainment, then there is no violation under California law.[244] Some states feature these types of provisions that essentially "carve out" an exemption for creative works that are inspired by famous individuals, but these states emphasize the fictionality associated with such creations:[245]

> For example, this carve-out [exemption] enables the multitude of movies and television series depicting fictionalized versions of real people and real events. If everyone had a right of publicity claim against expressive works, popular shows like The Crown, Dahmer-Monster: The Jeffrey Dahmer Story, and Inventing Anna, all depicting fictionalized versions of real people's lives, would be subject to right of publicity suits. The carve-out allows creative works like these

[239] Hopkins, *supra* note 199.
[240] *Id.*
[241] *See* Zirpoli, *supra* note 193, at 1–2.
[242] *Id.* at 5.
[243] CAL. CIV. CODE § 3344.1(a)(1)(A) (2024).
[244] *Id.* at § 3344.1(a)(1)(B)(ii) (2024).
[245] Curren, *supra* note 205, at 169.

> television shows to use individuals' names and have actors imitate appearances, voices, and mannerisms without risking a right of publicity suit.[246]

The works permitted under the creative carve-out exemption use explicit disclaimers to emphasize the dramatization of real events for entertainment purposes.[247] This is to be distinguished from modern applications of AI that intentionally result in depictions that are not so clearly fictional or exaggerated.[248] For example, AI-generated songs and deepfakes are used to gain online traction and digital compensation by intentionally deceiving consumers of the content into believing they are authentic.[249] The risk of perceiving a false creation or storyline as true is exponentially lower in mainstream creations like movies and television shows because of their frequent use of explicit disclaimers highlighting a lack of truth or authenticity.[250]

Like California and many other states, New York prohibits the unconsented use of a famous identity in largely commercial settings.[251] As noted, New York also uniquely prohibits the use of a deceased person's digital replica.[252] While this is an important step in artist protection from the intensive technological advancements of AI, this protection is too limited because it fails to consider those more vulnerable and capable of taking action—the living.[253] The New York statute prohibits "digital replica[s] in a scripted audiovisual work as a fictional character or for the live performance of a musical work . . . if the use is likely to deceive the public into thinking it was authorized by the person or persons."[254] The disclaimer exception under the New York statute is even more limited because it allows the creator of a digital replica to provide a "disclaimer in the credits of the scripted audiovisual work, and in any related advertisement in which the digital

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[246] *Id.*

[247] *See id.* at 178.

[248] Vejay Lalla et al., *Artificial Intelligence: Deepfakes in the Entertainment Industry*, WIPO MAG. (June 19, 2022), https://www.wipo.int/web/wipo-magazine/articles/artificial-intelligence-deepfakes-in-the-entertainment-industry-42620 [https://perma.cc/DE33-778Q].

[249] *See id.*

[250] *E.g.,* Siladitya Ray, *'Fictional Dramatization': Netflix Adds Disclaimer to 'The Crown' Season 5 Trailer After Weeks of Pressure*, FORBES (Oct. 21, 2022), https://www.forbes.com/sites/siladityaray/2022/10/21/fictional-dramatization-netflix-adds-disclaimer-to-the-crown-season-5-trailer-after-weeks-of-pressure/?sh=4c2c8afb13db [https://perma.cc/E8T9-E244] (Netflix decided to add a disclaimer to *The Crown* to address "concerns about the show's potentially negative portrayal" of the royal family. The disclaimer prevents misunderstandings of authenticity and accuracy by stating, "[i]nspired by real events, this fictional dramatization tells the story of Queen Elizabeth II and the political and personal events that shaped her reign.").

[251] N.Y. CIV. RIGHTS LAW § 50-f(2)(b) (Consol. 2020).

[252] *Id.*

[253] *See id.*

[254] *Id.*

replica appears, stating that the use of the digital replica . . . has not been authorized by the person or persons" to avoid liability.[255] This means living celebrities remain vulnerable to exploitation via digital replica, and deceased celebrities remain defenseless so long as the creator provides a disclaimer, evident or not, or uses the famous identity forty years after their death.[256] While this was a positive addition for a select few, this narrow protection unfortunately does not apply to the *living* artists who could be negatively impacted by the use of their identity in AI works like digital replicas, whether the creation be commercial or purely for entertainment.[257]

Like statutory laws, states with a common law right of publicity intend to prevent exploitive uses of identity for commercial gain.[258] This intention is often tailored by case law as claims arise. For example, in *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, L.P.*, the Eighth Circuit cited Missouri common law in finding the right of publicity seeks to prohibit a "defendant's intent or purpose to obtain a commercial benefit from use of the plaintiff's identity."[259] The court in *C.B.C.* held that the use of baseball players' names and statistics in a fantasy baseball game was a clear misuse of famous identities for the purpose of increased consumer attention and profit.[260] This case allowed a common law right of publicity to specifically protect against misappropriations of non-traditional identity markers by holding that a collection of statistics serves as part of a famous person's identity.[261]

In summary, states most commonly prohibit unconsented commercial uses of an identity, like merchandising, advertising, and solicitation.[262] A third-party's use of an identity to gain attention and profits is considered an appropriation of identity under the right of publicity.[263] A carve-out exception can be used to drastically narrow the right of publicity, to allow fictionalized, creative uses of identity, like a television series.[264] New York has bravely addressed a specific use of AI—the digital replica—and is one of the first states to prohibit AI creations that are confusingly similar to real pieces of work or identities and may not always be commercial in nature.[265] Federal legislation should protect against commercial uses to prevent unjust

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[255] *Id.*

[256] *See id.*

[257] *See id.*

[258] *See supra* Section II.A.1.

[259] C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P., 505 F.3d 818, 822–23 (8th Cir. 2007) (citing Doe v. TCI Cablevision, 110 S.W.3d 363, 370–71 (Mo. 2003)).

[260] *Id.*

[261] *See id.*

[262] *See* CAL. CIV. CODE § 3344.1(a).

[263] *See generally id.*; *C.B.C. Distrib. & Mktg.*, 505 F.3d at 822–23 (citing *Doe*, 110 S.W.3d at 370–71); N.Y. CIV. RIGHTS LAW § 50-f(2) (Consol. 2020).

[264] Curren, *supra* note 205, at 169.

[265] N.Y. CIV. RIGHTS LAW § 50-f(2) (Consol. 2020).

enrichment of third parties, in addition to prohibiting nonconsensual digital replicas, whether for commercial purposes or not.

2. The Rise of NIL Regulation

While NIL regulation falls under the umbrella of the right of publicity, recent discussion has primarily concerned the commercialization of college athletes because association with their identity is increasingly being used to sell products and services.[266] "For example, if an athlete's photograph is taken while wearing an athletic brand, and that brand uses the photo to promote their products without the athlete's consent, that athlete could claim the brand is in violation of [their] right of publicity."[267] Just like the individuality of vocal talents, brands are drawn to athletes because they possess unique skill sets and abilities that are not easily replicated by any other person. Athletes have developed fame for their distinctive talents that are unique to their upbringing, physical capability, and appearance, among other factors that make them an individual. For many athletes, physical skills are intertwined with a sense of identity; therefore, the identity of college athletes is being afforded legal protection across a patchwork of states so that brands may not take advantage of young, famous identities to sell their products.[268] This concept is inherently similar to vocal replication because the value of one's identity is based on a particular skill that is prized for being rare and idiosyncratic. These capabilities similarly take natural inclination, in combination with time and efforts that many are not willing to expend. Like athletes, vocal artists, and actors deserve this kind of legal protection for skills that are intimately related to their identity.

Current NIL protection is dependent on state legislation.[269] As of July 2023, there are thirty-one states with active NIL laws;[270] eleven states with proposed legislation (including the District of Columbia);[271] eight states with no existing or proposed legislation;[272] and one state with repealed legislation.[273] In 2021, the U.S. Supreme Court decision *NCAA v. Alston* affirmed the NCAA could not limit the education-based benefits of student-

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[266] *Name, Image, and Likeness (NIL)*, NCSA COLL. RECRUITING, https://www.ncsasports.org/name-image-likeness [https://perma.cc/DFV8-NXZY].

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] Kristi Dosh, *Tracker: Name, Image, and Likeness Legislation by State*, BUS. OF COLL. SPORTS (July 2023), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state [https://perma.cc/6DE3-MFDU].

[271] *Id.*

[272] *Id.*

[273] *Id.*

athletes by prohibiting access to NIL protection and commercialization.[274] This gave a specific kind of famous person, the college athlete, the guaranteed ability to protect and profit from the use of their identity in commercialized contexts.[275] After this decision, the nation saw a booming implementation of state NIL laws, particularly among states with fierce athletic rivalries.[276] This boom demonstrates the growing public desire to protect associations with identity for both personal and commercial uses. Further, the ability to protect and profit from the use of your identity has become a selling point for many American universities recruiting top-performing athletes nationally and internationally.[277]

While many state NIL laws may have been drafted and tailored with athletes in mind, they provide a great, yet niche, example of how the right of publicity positively impacts those with known identities. This recent development can provide a meaningful remedy for famous individuals beyond the athletic realm who similarly profit from the commercialization of their unique talent and identity.[278]

III. PROPOSED RESOLUTION

Technological advancement in the form of AI has changed the way art and identity can be used or misused. As a result, artists of all kinds suffer the harms associated with commercialized or publicized replication through AI technology.[279] Financial loss and interference with a famed identity are among some of the most important and intimate damages suffered by those facing creative identity appropriation.[280] Because AI can replicate innately human skills to create nearly identical images and sounds, artists are facing the effects of brand dilution, confusion of identity, and the loss of opportunity in addition to personal violation.[281]

Specifically, voice actors and vocal artists increasingly fall victim to AI generative learning.[282] By using copyrighted vocal works to learn personal accents, tone, verbiage, inflections, and breathing patterns to create a

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[274] Stella Pratt, *Place Your Bets: An Analysis of Name, Image, and Likeness Deals with Barstool Sports*, 30 JEFFREY S. MOORAD SPORTS L. J. 117, 119 (2023) (citing NCAA v. Alston, 141 S. Ct. 2141 (2021)).

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] Daryl Lim, *Innovation and Artists' Rights in the Age of Generative AI*, GEO. J. INT'L AFF. (July 10, 2024), https://gjia.georgetown.edu/2024/07/10/innovation-and-artists-rights-in-the-age-of-generative-ai [https://perma.cc/L2WC-D9ZV].

[280] Jennifer E. Rothman, *The First Amendment and the Right of Publicity*, 130 YALE L.J. 86, 108 (2020).

[281] *See supra* Section II.B.2.

[282] *See* Wells-Edwards, *supra* note 30, at 1214.

misleadingly "original" song, AI is contributing to the professional identity of famous vocal artists without their consent and depriving them of opportunistic and creative choice. For those who base their livelihood on the commercialized use of the unique skills and traits that compose their identity, the right to protect their use is paramount. The right of publicity has been implemented within state statutes and common law to address appropriations associated with public identities, traditionally for uses of name, image, and likeness.[283] There is an increasing recognition that other identifying characteristics fall under the protective umbrella of the right of publicity.[284] This is because characteristics like a voice or personality are so intimately connected with a personal sense of identity, but they lack copyright protection due to their non-fixed state.[285]

Unfortunately, the harms faced by vocal artists and voice actors can only be remedied in states that grant the right of publicity.[286] The right of publicity is not federally guaranteed and varies among states.[287] To address the harms caused by AI vocal appropriation and unify the existing patchwork protection of identity under the right of publicity, this Note calls for legislation to establish a federal right of publicity.

A. Call to Action for a Federal Right to Publicity

In recognition of the harmful effects of AI vocal appropriation and the inconsistent legal protections afforded across the country, a federal right of publicity is needed to create uniform legal protection. New federal legislation is the ideal vehicle to potentially combine existing state right of publicity and NIL regulations. A federal standard can and should include the most prevalent and up-and-coming themes addressed among the states and *may* go so far as to regulate NIL as well.

As previously explained, the most common components of a state right of publicity statute are a) an explanation of what identifying traits comprise a protectable identity; b) whether the identity must be of commercial value to invoke the right; c) the existence of post-mortem rights; and d) what third party actions are considered appropriations or misuses of a famed identity.[288]

To define what constitutes an identity, the federal standard should explicitly reference frequently used, fixed identifying characteristics, in

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[283] *See supra* Section I.B.2.

[284] Jackson, *supra* note 152.

[285] *See generally* Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003); *see generally* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); *see generally* Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962).

[286] *Cf.* Hopkins, *supra* note 199.

[287] Jackson, *supra* note 152.

[288] *See supra* Section II.A.

addition to more abstract, non-fixed forms of identity, as exemplified by New York, California, and Missouri.[289] This includes but is not limited to, a name, image, likeness, voice, skill, or personality.[290] This list is inclusive of traits already protected by right of publicity statutes and common law and overtly protects the use of voice from misappropriation. Inclusion of "voice" directly prohibits the use of a vocal artist's or voice actors' work to create a confusingly similar "original" piece and can prevent harms like personal exploitation, brand dilution, loss of opportunity, and confusion of identity and product.[291]

In addition, a federal statute should maintain the consensus among states that to invoke a right of publicity, the identity should hold commercial value.[292] This serves as a proper limitation on an expansive, federal right by ensuring the most clearly harmed can claim a right of publicity, recognizing AI misuse largely exploits famous individuals on a global stage, where ordinary citizens may experience this on a drastically smaller scale. Proof of commercial value requires the identity to be successfully used for or associated with revenue raising activities, but it does not require the infringing use to be commercial.[293] To pose a hypothetical example, a deepfake of a known celebrity like Jennifer Aniston being rude to a server at a restaurant that is then posted on a social media account that does *not* generate profit from views or advertisements is not a commercial, infringing use, but the misappropriated identity is commercially valuable because of Jennifer's widespread fame and public career, and may be damaged by the deepfake creation. As expressed, there are various ways one can demonstrate their identity holds commercial value, but two methods seem particularly effective: 1) evidence that a famed individual is profiting off their own identity suggesting they may face immense harm by nonconsensual contributions to identity, or 2) evidence that unconsented association with an identity has resulted in profits for a third-party.[294] These evidentiary expectations provide clear standards for a successful claim and may be more narrowly fitted as desired. For example, Congress could require a minimum amount of profit to be sustained by a third-party before a famed identity can set forth a claim. Alternatively, Congress could require a famed identity to demonstrate they are generally capable of profiting off their identity by

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[289] *See generally* CAL. CIV. CODE § 3344.1(h); N.Y. CIV. RIGHTS LAW § 50-f(1) (Consol. 2020); *Doe*, 110 S.W.3d at 363.

[290] *See generally* § 3344.1(h); § 50-f(1); *Doe*, 110 S.W.3d at 363.

[291] *See supra* Section II.B.2.

[292] *See generally* CAL. CIV. CODE § 3344.1(h); N.Y. CIV. RIGHTS LAW § 50-f(1) (Consol. 2020); *Doe*, 110 S.W.3d at 363.

[293] *See generally* § 3344.1(h); § 50-f(1); *Doe*, 110 S.W.3d at 363.

[294] *See generally* § 3344.1(h); § 50-f(1); *Doe*, 110 S.W.3d at 363.

requiring proof they have made a certain amount of money off of their own efforts.

Next, a federal statute should discuss whether the right of publicity will survive the death of the celebrity and become property of their estate or heirs. The public policy arguments surrounding a post-mortem right of publicity are largely economic.[295] A post-mortem right of publicity benefits the heirs of the famous person—who likely inherit a considerable estate regardless—but wish to control the public, commercialized use of the deceased identity, potentially honoring the decedent's wishes.[296] Conversely, a right of publicity that extinguishes with the death of a celebrity allows ordinary people to benefit from the commercialization of another's identity.[297] Ultimately, what is important is that federal legislation makes clear whether the right does or does not exist post-mortem. If Congress so chooses to extend the right after death, states commonly range between forty and one hundred years.[298] This range may seem arbitrary, but one can conclude this timeframe allows enough time for the immediately succeeding generation to continue pursuing identity protection in their lifetime. Similarly, copyright law fits nicely into this existing range by providing protection for seventy years following the death of the copyright holder.[299]

To effectively address AI vocal appropriation and other identity misuses, a federal statute should recognize commonly disfavored and infringing actions and implement a modified version of New York's digital replica prohibition in addition to commercialized uses of identity.[300] To prevent overbroad legislation, a specified list of prohibited exploitations seems appropriate. This list could include unconsented, commercial uses of identity—as identity is defined within the statute—in acts of unconsented advertising, merchandizing, performances, solicitation, and any non-consensual use of digital replicas. The specific inclusion of digital replicas in this prohibitive list allows a potential creative use "carve-out" provision to stand so as not to impose too broad of a creative infringement but prevents AI creators from developing visual or auditory works that are confusingly similar to the works of those who "inspired" them.[301] It should be explicitly clear that this list of misuses applies to *living* famous identities,[302] and may extend to the deceased only if a post-mortem right is granted.

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[295] Lilian Edwards & Edina Harbinja, *Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World*, 32 CARDOZO ARTS & ENT. L.J. 83, 107 (2013).

[296] *See generally id.*

[297] *See id.*

[298] *See* Curren, *supra* note 205, at 178; Hopkins, *supra* note 199.

[299] Ku et al., *supra* note 56.

[300] N.Y. CIV. RIGHTS LAW § 50-f(2) (Consol. 2020).

[301] *Id.*; *see generally* Curren, *supra* note 205, at 179.

[302] Curren, *supra* note 205, at 179.

This differs from the New York version, which only grants protection from digital replicas for those already deceased.[303] A famous identity is at its greatest vulnerability when the individual is still alive and seeking commercial use.[304] One could also assume the benefits of protecting your identity are best enjoyed when you are still alive to experience them. The New York statute also allows a digital replica creator to avoid liability through a disclaimer, informing consumers that the replica was not authorized.[305] However, this ability somewhat defeats the purpose of the right of publicity.[306] The right of publicity is incredibly important to artists and famous identities because they financially benefit from the public commercialization of their identity and seek to maintain its value and integrity.[307] Disclaimers are often inconspicuous or plainly ignored, so the reference of a famous individual in a digital replica should be strictly consensual in order to carry out the intention behind the right.

The inclusion of an NIL provision within a federal right of publicity statute presents a unique discussion. As explained, NIL regulations fall under the right of publicity, as they specifically regulate the commercialization of name, image, and likeness of college athletes.[308] NIL laws are a means of protecting the right of publicity for one type of famous identity and serve as a specific example of how the right of publicity can protect and benefit other areas of fame.[309] There are two general paths legislators could consider in relation to this existing regulation: 1) implementing a federal NIL provision within the right of publicity that supersedes state and NCAA regulation, or 2) specifically naming college athletics as a type of identity or fame that shall remain regulated by states through their own NIL law, essentially creating a carve out provision for this pre-existing regulation.

Including an NIL regulation within a federal right of publicity may lead to a never-ending list of fame-specific provisions—which is inconsistent with the intention behind a federal right of publicity—[310] to create broader accessibility to identity protection. Conversely, the NCAA has implemented a uniform policy that addresses students in states with and without NIL laws.[311] The policy allows athletes attending college in states without NIL laws to participate in NIL activities, so the right is already accessible to

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[303] N.Y. CIV. RIGHTS LAW § 50-f(2) (Consol. 2020).

[304] Curren, *supra* note 205, at 178-79 (detailing the "exploitative" effects of digital likeness on living actors).

[305] N.Y. CIV. RIGHTS LAW § 50-f(2)(b) (Consol. 2020).

[306] *Id.*; *see also* Curren, *supra* note 205, at 168.

[307] Jackson, *supra* note 152.

[308] NCSA COLLEGE RECRUITING, *supra* note 266.

[309] *Id.*

[310] Pratt, *supra* note 274, at 121.

[311] NCSA COLLEGE RECRUITING, *supra* note 266.

college athletes across the country.[312] Arguing for or against the inclusion of an NIL provision exceeds the scope of this Note but is considered because it is a timely part of the current right of publicity climate.

A federal statute that defines what constitutes an identity, requires a finding of commercial value, discusses potential post-mortem rights, describes a misuse of identity, and mentions how existing NIL regulations will be impacted will properly address and resolve the harms discussed throughout this Note. More specifically, this resolution will address the damages caused by AI vocal appropriation and suffered by voice actors and vocalists, while unifying the varying right of publicity legislation. This resolution is effective for voice actors and vocalists because existing federal copyright law fails to provide a clear, uniform path of remedy.[313] While the right of publicity may serve to protect some victims of AI vocal appropriation, access to remediation is dependent on your location within the country, which leaves a considerable number of artists and famed identities vulnerable to appropriation.[314] A federal legislation ensuring equal access to the right of publicity will serve to remedy new and existing harms created by the expansion of AI while unifying the current patchwork legislation. In creating a federal right, a brief discussion of the implications on creative freedoms must be considered.

B. Creative Freedom Concerns

A federal right of publicity may effectively limit identity misappropriation and the harmful uses of AI, but some argue it could stunt the "harmless" creativity of others.[315] Legal scholars have voiced the concern that expanding the right of publicity will infringe on creative freedoms and this should prohibit federal legislation.[316] In litigation, some parties have used the First Amendment to defend against right of publicity claims.[317]

In the late 1970s, the Supreme Court discussed First Amendment rights in relation to Ohio's right of publicity.[318] *Zacchini v. Scripps-Howard Broadcasting Co.* featured Hugo Zacchini, a performer famously known for his '"human cannonball' act in which he shot from a cannon into a net some 200 feet away."[319] During one of his regular performances, a free-lance reporter for the Scripps-Howard Broadcasting Company filmed Zacchini's

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[312] *Id.*
[313] Wells-Edwards, *supra* note 30, at 1217.
[314] *See id.*
[315] Curren, *supra* note 205, at 157.
[316] *See* Slater, *supra* note 95, at 882–89.
[317] *Id.* at 882.
[318] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 562 (1977).
[319] *Id.* at 563.

performance after being explicitly told not to.[320] The recording was featured in a segment on the local news station in which the video was played and the news anchors discussed the performance at length.[321]

Zacchini argued the nonconsensual recording and airing of his performance was an "unlawful appropriation of his professional property," while the broadcasting station argued their actions were protected by the First Amendment.[322] Part of Zacchini's allure is created by the fact that he's partaking in such a risky, peculiar activity and fans can only witness his amazing feat *in person*.[323] By airing his performance without his consent, Zacchini argued the broadcasting company commercialized his art and potentially deterred fans from purchasing tickets to see the act in person, a harm similarly faced by vocal performers.[324]

> The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. . . . This act is the product of petitioner's own talents and energy, the end result of much time, effort, and expense. Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act free on television, it will be less willing to pay to see it at the fair. The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. 'The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'[325]

Zacchini possessed a valid cause of action based on the "right to publicity value of his performance," despite the First Amendment rights of the broadcasting company.[326] The Court determined the First Amendment merely protects the simple conversation surrounding Zacchini's performance, but the visual and auditory content aired in conjunction with the anchors' commentary does not receive the same privilege.[327] The Court recognized '"a right of publicity' that gave him 'personal control over

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[320] *Id.* at 564.
[321] *Id.*
[322] *Id.*
[323] *Id.* (emphasis added).
[324] *Id.* (inferring from the holdings of conversion and appropriation).
[325] *Id.* at 575–76.
[326] *See id.* at 567–79.
[327] *Id.* at 569.

commercial display and exploitation of his personality and the exercise of his talents.'"[328]

Further, the Court explained that the general public and Ohio have a valid interest in protecting the right of publicity because it actually *encourages* individuals to create and entertain the masses in exchange for financial benefits that positively impact the economy and expansion of the arts.[329] Similar to copyright law in the field of "science and the useful arts," crediting and compensating inventors and creators for their time, effort, and dedication to their craft is an imperative part of ensuring creativity and innovation continue.[330] "In this case, Ohio has recognized what may be the strongest case for a 'right of publicity.'"[331] The Court chose not to focus on "the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."[332]

This holding can be applied to artists who similarly experience appropriation of their creations and performances and can be used to condemn the First Amendment argument made against the right of publicity.[333] Like voice actors and vocalists, Zacchini was known for a unique skill and sought to control the publication surrounding his performance to protect the financial benefit and personal identity associated with the act.[334] Involuntary publication of identifying skills or traits deprives artists of financial benefits and takes away the personal control in deciding how their unique talent is shared with the world. *Zacchini* can be used to demonstrate that First Amendment rights cannot defeat the need for artists and performers to earn a living through their desired publication and association of their art.[335] Even in light of First Amendment challenges, federal right of publicity legislation is needed to combat the increasingly

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[328] *Id.*

[329] *Id.* at 573 (emphasis added).

[330] *Id.* at 576; U.S. CONST. amend. I, § 8, cl. 8.

[331] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 576 (1977).

[332] *Id.*

[333] *See generally id.*

[334] *See id.*

[335] *Id.* A recent U.S. Supreme Court case reiterates the commercial value in the freedom to associate with concepts or ideas that contribute to your sense of identity. 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023). In *303 Creative LLC v. Elenis*, the 2023 Supreme Court upheld a website designer's decision to refuse service and commercial association with an LGBTQ couple. *Id.* at 2308. Despite her highly disfavored belief, the business owner successfully argued association with clients and their personalized commissions contributed to her sense of identity personally and professionally. *Id.* at 2318-22. She had intentionally curated a reputation that aligned with a specific, religious audience. *Id.* The Court held that forcing her to associate her business with ideals she did not accept was a form of compelled speech that contributed to her professional and personal identity without her consent, particularly because website design is an expressive medium. *Id.* The discriminatory implications of this application of the First Amendment are valid and important concerns that deserve a proper discussion outside of this Note. However, this holding is relevant to a discussion of vocal identity because it shows how the First Amendment can be used to defend greater control over personal and commercial expressions of identity.

exploitive and harmful impact of AI technology on expressions and mediums of identity.

IV. CONCLUSION

In the modern world, artists of all mediums face increasing levels of replication and appropriation as technology advances creative expression. AI generative learning has disparately impacted voice actors and vocal artists because it can be used to seamlessly replicate traits of a voice that *used* to be uniquely human.[336] As a result, AI systems are being used to generate "original" vocal works that are "heavily inspired" by copyrighted vocal portfolios.[337] AI-generated works sound so similar to pre-existing, authentic creations that fans and consumers believe they are genuine productions of the established artist. This widespread misbelief contributes to conceptions of identity and reputation because a voice is intimately related to a personal and professional sense of identity. Misuse of a well-known voice can dilute a professional brand or identity, cause confusion about product and identity, and result in the loss of professional or financial opportunity.[338] Vocal appropriation deprives voice actors and artists of the ability to control how their skill is used and publicized, which is invaluable when your professional identity and reputation are closely connected to your distinctive sound.

Voice actors and vocal artists traditionally protect their work under copyright law, but a voice alone is not copyrightable.[339] Existing law is insufficient because AI-generated works are deemed "original," despite their clear replication of traits unique to copyrighted, famous works.[340] However, a federal right of publicity presents a promising path of remedy for harmed vocal artists. As recognized in courts throughout history, distinguishable, non-fixed traits like a voice are commonly associated with a known persona and are deemed protectable under the right of publicity.[341] A federal right of publicity should be invoked to maintain the integrity and commercial value of a known person who benefits from the marketable use of their identity.[342]

For household names like Bette Midler, Tom Waits, Stephen Fry, David Attenborough, and Taylor Swift, a federal right to protect their renowned voice rewards them for the time and efforts dedicated to mastering and commercializing their craft. In recognition of the rapidly developing harms

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[336] *See* Wells-Edwards, *supra* note 30, at 1214 (emphasis added).
[337] *Id.*
[338] *See supra* Section II.B.2.
[339] *See generally* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
[340] *Id.*; *see also* Wells-Edwards, *supra* note 30, at 1217.
[341] *See generally* Doe v. TCI Cablevision, 110 S.W.3d 363 (Mo. 2003); *see also* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); *see also* Lahr v. Adell Chemical Co., 300 F.2d 256 (1st Cir. 1962).
[342] *See generally* Jackson, *supra* note 152.

faced by voice actors and vocal artists, a federal right of publicity must be enacted and explicitly name voice as a component of legally protectable identity. Only then will artists face equal access to remedies for identity appropriation through AI technology and see a unified and federally accessible right of publicity. Lastly, this Note urges federal legislators to ponder the cautionary wisdom of the individual who recognized the powerful capability of AI from the start, the father of computer science, Alan Turing, who firmly believed "a computer would deserve to be called intelligent [only] if it could deceive a human into believing that it was [one]."[343]

[343] Alberto Romero, *7 Famous AI Quotes Explained*, MEDIUM (June 29, 2021), https://towardsdatascience.com/7-famous-ai-quotes-explained-782dda72d2c5 [https://perma.cc/HTJ2-SYP4].