HOW THE RIGHT OF PUBLICITY, PRIVACY, AND PERSONHOOD SHOULD GUIDE JUDICIAL SKEPTICISM OF LICENSES FOR AI-GENERATED PERFORMANCES

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I. INTRODUCTION

In the second season of *30 Rock*, Jerry Seinfeld returns from vacation to the fact that Jack Donaghy, the president of NBC, has placed computer-generated performances of Jerry in several other shows.[1] Jack is calling it "SeinfeldVision" and he is sure it's going to set viewership records. Jerry is not happy, but Jack pleads with him to allow those shows to go forward with Jerry's generated performances. It's what the people want. After all, they don't know that Jerry has been on vacation. As far as the viewers are concerned, he has been working diligently in the studio for months to appear in all these shows.

With the rise of generative artificial intelligence (AI) and digital replicas, "SeinfeldVision" is now a possible reality. Without any statutory or judicial limitations, it is likely only a matter of time before an actor signs away their likeness to be used in perpetuity by media companies using deepfakes to capitalize on their fame.[2] Perpetual licensing deals, which have been proven to be lucrative for both parties, already exist in other contexts.[3] It is easy to imagine a retiring actor, news anchor, or musician deciding to license their likeness now that their own career is over. Going one step further, the estate of a deceased actor could profit from a perpetual deal that immortalizes the decedent forever on the silver screen.

It is not necessary to deal in hypothetical futures to find problems—they have already arrived. Contestants on America's Got Talent sign away their publicity rights in perpetuity including for use in any future media form to be devised.[4] This issue has also been at

1. 30 Rock*: SeinfeldVision* (NBC television broadcast, aired Oct. 4, 2007).

2. SAG-AFTRA, which represents a variety of performers including actors and singers, has already tried to get ahead of this by laying out guiding principles and encouraging members to consult the union on any proposed contracts involving AI. *Contracts & Industry Resources: Artificial Intelligence*, SAG-AFTRA, https://www.sagaftra.org/contracts-industry-resources/member-resources/artificial-intelligence [https://perma.cc/T4NR-4ZLY] (last visited Sep. 22, 2025).

3. For example, Lebron James signed a lifetime deal with Nike to forge a lasting brand. Darren Rovell, *LeBron James Signs Lifetime Nike Deal*, ESPN (Dec. 7, 2015), https://www.espn.com/nba/story/_/id/14314807/lebron-james-signs-life-deal-nike [https://perma.cc/6ZWS-LZJ6].

4. *2023 AGT Release*, America's Got Talent, https://agtauditions.com/wp-content/uploads/2023-AGT-Release.pdf [https://perma.cc/6L77-98ND] (last visited Sep. 15, 2025) [hereinafter AGT release].

the heart of ongoing NCAA litigation, where the NCAA's position has been that their perpetual ownership of likeness rights prevented them not only from paying current players, but also from paying former players.[5] What if the many holders of similarly broad, unilateral publicity assignments sought to put them to use to create deepfake content of those individuals? What if the holders of those assignments transferred them to a third party for the same use?

Should a court confronted with such contracts require performance? The realities of generative AI, and the new possibilities it opens, require a hard look at the doctrine of the right of publicity. This moment requires not an analysis of current case law, but rather a return to the theoretical underpinnings of the right of publicity in order to understand how the right should be either vindicated or limited in the age of artificial intelligence. In analyzing the right of publicity, the legal nature of personhood and personal property, and the judicial skepticism around current uses of AI, this Note concludes that those who seek to use the right of publicity to produce deepfaked content should face an uphill battle to vindicate such contracts in court in the absence of affirmative legislation.

Part II of this Note surveys the current state of right to publicity and likeness transfers. It discusses the traditional assumption that the right of publicity is a property right and evidence that undercuts this assumption. Part III reviews the history of property rights in the context of biological material and the questions it raises between property rights and personhood. Additionally, it examines the manner in which personhood is often used to sharply curtail or entirely remove recognition of property rights. Part IV turns to the current state of generative AI, looking at both the harms posed by the technology and the limitations and skepticism that the law currently places on the copyright and ownership of content without a human author. Part V argues that the perpetual licensing for the purpose of deepfakes goes beyond mere right to publicity and implicates questions of personhood, and therefore courts should refuse to honor such contracts without further legislative guidance. Finally, Part VI concludes this Note with brief remarks on the policies that must be balanced and why courts are not an apt forum for this balancing.

5. Third Consol. Amended Class Action Complaint, paras. 12–13, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-01967 CW, 2013 WL 3810438 (N.D. Cal. July 19, 2013) [hereinafter NCAA Complaint].

II.
THE RIGHT OF PUBLICITY

A. The Right of Publicity as a Property Right

The right of publicity is, in its most basic form, the right to control the commercial value of one's own image.[6] There is a level of intuitiveness to this right in the modern commercial market we live in. Celebrities constantly appear in advertisements to help promote sales, and, more than likely, we presume these celebrities are well compensated for those appearances. As an example of this value, Lebron James's career earnings so far as an NBA player are only about half the value of the lifetime deal he signed with Nike.[7] Based only on the sheer amount of money being transferred from Nike to Lebron, we know that Nike must need to secure Lebron James's permission in order to use his likeness and name on their products. Legally, this right of publicity acquired by Nike is traditionally regarded as a property right.[8]

Despite decades of legal groundwork arguing for the protection of fame and public personas, the right of publicity was not formally recognized until the 1950s in the seminal case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[9] This recognition was the culmination

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6. 1 J. Thomas McCarthy & Roger E. Schechter, The Rights of Publicity and Privacy § 1:3 (2d ed. 2025) ("Today it is possible to state with clarity that the right of publicity is simply this: it is the inherent right of every human being to control the commercial use of his or her identity.").

7. As of the 2025–26 season, James's career earnings are around $528 million, *Lebron James*, Spotrac, https://www.spotrac.com/nba/player/_/id/2257/lebron-james [https://perma.cc/XN7N-T3LY] (last visited Sep. 15, 2025), compared to the $1 billion lifetime deal he signed with Nike, Rovell, *supra* note 3; Emmett Knowlton, *LeBron James' business partner confirms lifetime deal with Nike is worth over $1 billion*, Bus. Insider (May 17, 2016 at 14:16 ET), https://www.businessinsider.com/lebron-james-nike-deal-exceeds-1-billion-maverick-carter-says-2016-5 [https://perma.cc/WYM7-GWCX].

8. *See* McCarthy & Schechter, *supra* note 6, § 1:3 ("The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition.").

9. 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *see also* Melville B. Nimmer, *The Right of Publicity*, 19 L. & Contemp. Probs. 203, 204 (1954) (noting that *Haelan Labs* represents the culmination of efforts by lower courts to address the needs of the right of publicity). For example, when Warren and Brandeis laid the groundwork for the right to privacy, they also were laying the groundwork for a property-like right in the expression of one's person. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198–205 (1890). However, it does not appear that the right of publicity was recognized by a federal court until litigation arose concerning ownership over the likenesses of baseball players. *See Haelan Lab'ys*, 202 F.2d at 868 ("This right might be called a 'right of

of a large shift concerning public expectations of fame between the American Revolution and World War II.[10] In the year following *Haelan Laboratories*, Melville Nimmer wrote that the boundaries of the right of publicity should be determined by "first, the economic reality of pecuniary values inherent in publicity and, second, the inadequacy of traditional legal theories in protecting such publicity values."[11] Indeed, this economic focus echoed the central issue in *Haelan Laboratories*, which was whether one gum company could enforce its exclusive ownership of a baseball player's likeness to prevent a different gum company from using the player's likeness.[12] In the years since the right of publicity was first embraced, it has been expanded and generally recognized as a type of property right in order to protect its misappropriation.[13]

When viewed in the context of a commercially licensed likeness, there is a naturalness to the fit of a property rights regime. In such a model, a celebrity inherently owns their likeness and is alienating the right to use of that likeness. In this way, publicity shares a foundation with the original justifications for copyright protections of art and manuscripts—intellectual property arising out of the expression of one's own thoughts and person.[14] As a next step from copyright, labor put into one's self to cultivate a valuable image, rather than a valuable external product, has also been protected by a property right.[15] In recognizing the right of publicity as a property right, McCarthy takes notice of this exact doctrinal evolution.[16]

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publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players) . . . would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.").

10. *See* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Calif. L. Rev. 125, 148–66 (1993) (recounting how expectations around commercial exploitation of famous individuals changed over time).

11. *See* Nimmer, *supra* note 9, at 215.

12. *Haelan Lab'ys*, 202 F.2d at 867.

13. Madow, *supra* note 10, at 177 ("The result has been a steady stream of judicial decisions and statutes recognizing a property-like right of publicity and expanding its scope." (footnote omitted)); *see, e.g.*, Uhlaender v. Henricksen, 316 F. Supp. 1277, 1282 (D. Minn. 1970) ("[A celebrity's] identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property.").

14. For a recounting of this history, see Warren & Brandeis, *supra* note 9, at 203–05.

15. *E.g.*, *Uhlaender*, 316 F. Supp. at 1282 ("A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status.").

16. *See* McCarthy & Schechter, *supra* note 6, § 1:26 ("Judge Jerome Frank was apparently the first to coin the term 'right of publicity' and Professor Melville B.

There are, however, many theoretical justifications for the right of publicity as a property right. For example, a justification grounded in Locke's labor theory posits that famous individuals should have a property right arising out of the labor that they invested into developing their public image.[17] A related theory comes from a desire to prevent the problem of "free riding," where individuals profit off of the labor of a famous person with very little of their own investment.[18] Under this analogy, the right protects famous individuals from free riders who are effectively stealing from the fame of others.[19] As mentioned above, justifications akin to copyright and patent law indicate that the property right is framed as necessary to protect the economic incentives to invest in one's own likeness.[20] Similarly, an analogy can be drawn to trademarks, where celebrities have a right to their own image at least in part to protect consumers from being misled into thinking they have endorsed a product.[21] This panoply of justifications demonstrates the prevailing strength of the property rights view. Yet, all these arguments are subject to criticism and limitations.[22] The very need to search for so many disparate justifications for a basis in property rights can just as easily demonstrate the inherent weakness in such a view.

Nimmer was the first to study and define the parameters of this new property right." (footnote omitted)).

17. *See* Madow, *supra* note 10, at 175-76 (describing Nimmer's work as an extension of Locke's labor theory) (quoting Nimmer, *supra* note 9, at 216 ("Yet, because of the inadequacy of traditional legal theories … persons who have long and laboriously nurtured the fruit of publicity values may be deprived of them, unless judicial recognition is given to what is here referred to as the right of publicity . . . .")).

18. Madow, *supra* note 10, at 200.

19. *See id.* ("Unless the law gives the celebrity a property right in her persona, complete strangers to the process by which her fame and public image were generated will be free to 'reap without sowing,' to 'get something for nothing.'"). In one right of publicity case, "[t]he district court described the defendants' conduct as that 'of the average thief.'" Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).

20. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) ("[T]he State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.").

21. *See* Madow, *supra* note 10, at 229 ("[R]ights of publicity, like trademarks, help consumers make 'rational economic choices . . . .'" (quoting Douglas G. Baird, Note, *Human Cannonballs and the First Amendment:* Zacchini v. Scripps-Howard Broadcasting Co., 30 STAN. L. REV. 1185, 1187 n.7 (1978))); *see also* 15 U.S.C. § 1125 (allowing civil actions for false endorsements).

22. *See* Madow, *supra* note 10, at 179 (asserting that numerous justifications for publicity rights either "fail[]" or "rel[y] upon empirical or normative premises, usually unstated, that are controversial, dubious, or clearly erroneous").

No shoe seems to fit perfectly. One flaw can be seen in the earlier example of Lebron James. Under the view of the Supreme Court, "the right to exclude is . . . 'a fundamental element of the property right . . . .'"[23] Despite this centrality of the right to exclude to the nature of property, we know that news organizations, like ESPN, constantly run articles about athletes like James without receiving a license in each instance. While interactions with the First Amendment are largely outside the scope of this article, I offer this as an intuitive limitation on the right. Even with a strong and perpetual license to James's likeness, Nike cannot unilaterally prevent ESPN from running stories about him. This means that, unfortunately, simply stating that the right of publicity is traditionally regarded as a property right does not get us very far in understanding the scope of the doctrine.

So, what are the boundaries of this right of publicity? Michael Madow answers the boundary question by first describing three ways in which celebrity likeness generates value: (1) through demand for information about their lives, (2) through merchandise and branding, and (3) through appearances in advertising.[24] While the right of publicity is not expressly limited by these categories—the value of an A-list actor's performance in a movie does not neatly fit into any category—Madow uses these broad strokes to demonstrate that the first category tends to be assigned to the public domain, while the second and third categories remain in the personal control of the celebrity unless assigned.[25] This is not by necessity. In theory, a legal system could just as easily choose to assign all categories to the public domain, which would largely destroy the right of publicity as a commercially valuable right. While states disagree on many fronts about the judicial or statutory boundaries of the right of publicity, they have sought to maintain the commercial value of the right. As I will argue, a strong view of the right of publicity as a property right does not get us very far in understanding where to draw these boundary lines.

B. Privacy Rights Also Fail to Fully Explain the Right of Publicity

The primary alternative would be to treat the right of publicity as a privacy right. In Prosser's influential article *Privacy*, he categorized

23. Cedar Point Nursery v. Hassid, 594 U.S. 139, 150 (2021) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).

24. Madow, *supra* note 10, at 129.

25. *Id.* at 130.

publicity within a world of four privacy torts.[26] Rather than ground publicity torts in property rights, Prosser looked to the right to privacy first described by Samuel D. Warren and future Justice Louis L. Brandeis.[27] A critical aspect of privacy rights is that they are generally categorized as fundamental, or inalienable, rights.[28] By contrast, a prominent justification for the right of publicity as a property right is that publicity is "a property right in identity that can be legally separated from the person in a way that privacy rights cannot."[29] Yet, in practice, how legally separable is the right of publicity from the person? Before accepting the property-privacy dichotomy,[30] and that the right of publicity falls on the property side, it is important to first understand the considerable limitations that have been placed on alienating and vindicating the right of publicity.

To start, for someone without a commercially valuable likeness, what are the remedies if their likeness is misappropriated? A famous person can show that their likeness has a particular commercial value and recover damages for misappropriation.[31] In a property regime, this can easily be analogized to conversion or trespass to chattels.[32] However, this property model allows recovery in proportion to which my likeness is valuable without concern for the damage

26. William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960).

27. *See id.* at 383–84, 389 (explaining that Brandeis and Warren recognized the right to privacy as an interest separate from property rights and concluding that this right to privacy underlies four distinct torts).

28. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 Geo. L. J. 185, 204, 209–10 (2012) (describing privacy-based rights and fundamental rights as personal and inalienable).

29. McCarthy & Schechter, *supra* note 6, § 10:8. Maybe ironically, Warren and Brandeis used property right justifications to first lay the groundwork for the right to privacy. Warren & Brandeis, *supra* note 9, at 203–04.

30. An alternative framing to the property-privacy dichotomy would be to view the right of publicity along the property, liability, and inalienability spectrum as originally described by Guido Calabresi and A. Douglas Malamed. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1089 (1972) (articulating "unified perspective" of property and tort predicated on optimizing protection of particular entitlements). Such a framing is helpful, as the authors illustrate through the example of eminent domain, where even real property interests are more adequately protected by the liability rules normally thought of as tort remedies. *Id.* at 1106–08.

31. *See, e.g.*, Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307, 313 (Cal. Ct. App. 2001) ("California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity.").

32. *See* Restatement (Second) of Torts §§ 217, 222A, 223 (A.L.I. 1965) (describing conversion as "an intentional exercise of dominion or control over a chattel" and trespass to chattel as "using or intermeddling with a chattel in the possession of another").

to my privacy or the nature of the invasion. By extension, this means that, for someone without a valuable likeness, the ability to recover for the unauthorized use of their image will be contextually limited and can approach zero.[33] Instead, to recover anything that might feel like fair damages for such a misuse, they would need to look elsewhere.[34]

For the average person then, suit would not be brought under the right of publicity but on invasion of privacy grounds. In *Gionfriddo*, a California court recognized the inherent incongruity between an invasion of privacy and the status of fame.[35] Former professional baseball players brought a claim that Major League Baseball had violated their right of publicity by continuing to broadcast their names, images, and recordings of their play after they had retired.[36] In describing the right of publicity, *Gionfriddo* noted that courts in California had been reluctant to allow celebrities to sue for invasion of privacy torts, reasoning that "fame seemed inconsistent with the injury to solitude or personal feelings implicitly required" by privacy-based torts.[37] Flowing from this, *Gionfriddo* concluded that, separate from privacy rights, "California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity."[38] Making the distinction clear, *Gionfriddo* stated, "[P]ublic interest must then be weighed against the plaintiffs' economic interests . . . and the plaintiffs' noneconomic interests if the publicity right relied on is rooted in privacy."[39]

However, in discussing the balancing of economic interests, it is important to avoid the common fallacy of "if value, then right," which states that just because something has value, it should be

33. Consider, for example, the "human cannonball" act in *Zacchini v. Scripps-Howard Broadcasting Co.* While Hugo Zacchini may not have been famous in the way someone like Brad Pitt is famous, the Court still found that an unauthorized news broadcast of his circus act may infringe on its economic value by deterring people from coming to see the act in person. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575 (1977). In other words, the performance had publicity value even if Zacchini himself did not. On the other hand, invoking an "all press is good press" justification, the Court also recognized the possibility that "respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live." *Id.* at 575 n.12.

34. For example, plaintiffs could look to the privacy torts catalogued by Prosser, *supra* note 26, at 389.

35. *Gionfriddo*, 114 Cal. Rptr. 2d at 313.

36. *Id.* at 310–12.

37. *Id.* at 313.

38. *Id.*

39. *Id.* at 314.

legally protectable.[40] Specifically, this "if value, then right" principle is not embraced by other areas of intellectual property law like copyright, which allows some level of borrowing from other copyright holders.[41] While *Gionfriddo* makes clear that a remedy is available, it also clarifies that the right of publicity is not absolute simply because it represents economic interests, but rather must be weighed against public interest.[42] More simply put, the right of publicity is not absolute simply because it carries with it economic value.

Additionally, by distinguishing why famous individuals need a distinct right, the court made clear that the misappropriation of an average person's likeness arises not out of a property right, but rather out of a right to privacy.[43] However, both the famous and non-famous person have the same likeness. That is to say, we all have an interest in our own likeness that is disconnected from the outside world. If the right to publicity is a property right, is the property interest then in one's fame rather than merely in one's likeness? Another possible explanation is that the right of publicity is not a property right, but an extension of privacy rights for those who live their lives in the public eye. However, attempting to pigeon-hole the right of publicity as either exclusively a property right or a privacy right fails to appreciate and incorporate the nuances of its doctrine. In order to fully develop a coherent jurisprudence on the right of publicity, we should look at it not as a property right, but rather as a right that spans traditional notions of both property and privacy.

C. Abandoning the Dichotomy of Property and Privacy and Embracing the Spectrum of Alienability for the Right of Publicity

Jennifer Rothman suggests this distinction between privacy- and property-based conceptions of the right of publicity is of little value.[44] This echoes the central observation from Warren and Brandeis that,

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40. Alfred C. Yen, *Brief Thoughts About If Value/Then Right*, 99 B.U. L. Rev. 2479, 2480 (2019).

41. *See id.* at 2485–86 ("Doctrines like the idea/expression dichotomy, substantial similarity, and fair use all shield certain types of borrowings from copyright liability." (footnotes omitted)).

42. *Gionfriddo*, 114 Cal. Rptr. 2d at 314.

43. The opinion noted that "courts were reluctant to permit celebrities to rely on this privacy right" and bring an action for invasion of privacy. *Id.* at 313. Tracing the development of the right of publicity, *Gionfriddo* noted that courts had recognized the "distinction between the personal right to be left alone and the economic right to exploit one's own fame." *Id.*

44. Rothman, *supra* note 28, at 205 ("[E]ven if such a distinction in the case law could hold, its value would be limited.").

even as courts grounded earlier protections of personal writings in property law, they recognized a right of privacy that was fundamentally different from property.[45] Prosser, building off of Warren and Brandeis, developed a view of privacy torts that were not based in a property rights regime, but rather the emerging right of privacy.[46] The attempt to define the right of publicity arises out of the tradition propelled by these seminal pieces.

To illustrate the breakdown of the property-privacy dichotomy, the "conventional wisdom" of the right of publicity, as a strong property right, is that it is "universally and uncontroversially alienable".[47] One expected consequence of this would be that publicity rights should be assignable to creditors in bankruptcy actions. Despite this, no court has ever held publicity rights to be assignable in the bankruptcy context.[48] Similarly, courts have not realistically found the right to be divisible or assignable in divorce proceedings.[49] Finally, if the publicity right is property, then it should be descendible. Yet descendibility of publicity rights is not uniformly available across the United States, and, where it is descendible, that right itself is often created and significantly limited by statute.[50]

The contested nature of descendibility also indicates a problem with treating publicity as a privacy right. After a person has died, they no longer can suffer the emotional harms that would give rise

45. *See* Warren & Brandeis, *supra* note 9, at 204–05.

46. Prosser, *supra* note 26, at 386, 389.

47. *See* Rothman, *supra* note 28, at 186 ("[T]he conventional wisdom [is] that the right of publicity is universally and uncontroversially alienable.").

48. In a prominent example of an attempt to do just this, the estate of Ronald Goldman attempted to get O.J. Simpson's publicity right assigned to it in bankruptcy proceedings. *Id.* at 200. *See also* Sterba et. al., *Some Going Concerns: A Primer on Intellectual Property Issues in Bankruptcy for Licensors and Licensees*, Lowenstein Sandler LLP (June 22, 2020) (explaining that rights like publicity are generally non-assignable in bankruptcy), https://www.lowenstein.com/media/5922/ip-issues-in-bankruptcy.pdf [https://perma.cc/8NUF-CMJG].

49. *See* Rothman, *supra* note 28, at 201–02 (explaining that courts have, at most, recognized "celebrity goodwill"—essentially a right to future earnings—as marital property, but treated this goodwill as inalienable). *See also* Crosby v. HLC Props., Ltd., 223 Cal. App. 4th 597, 609 n. 10 (Cal. Ct. App. 2014) (explaining that the right of publicity is likely an exception to community property in California).

50. *See* Rothman, *supra* note 28, at 203 (discussing lack of uniformity in descendibility of publicity rights). David Horton similarly concludes that the "not property" rationale for refusing descendibility rights "adds little to the debate" around descendibility. David Horton, *Indescendibility*, 102 Calif. L. Rev. 543, 576–81 (2014). For example, many causes of action are indescendible, *id.*, despite some courts' strong assertions that a cause of action is a property right. *In re* Mucelli, 21 B.R. 601, 603 (Bankr. S.D.N.Y 1982) ("It is universally accepted that a cause of action is a property interest of the individual in whose favor it arises.").

to a tort action.[51] Yet, it is understandable if society is uncomfortable with the unfettered right to profit off of the likeness of the recently deceased—particularly when that violates the wishes of the surviving family. That may be why some jurisdictions have created a descendible right of publicity after courts rejected the idea at common law.[52]

If the right of publicity cannot be adequately characterized as either a property right or a privacy right, we are left to define its contours on our own. Rothman suggests that the right of publicity is better understood in relation to other rationales for limiting alienability, such as that alienability burdens fundamental rights, commodifies personhood, and is economically inefficient.[53] For examples of why the commodification of personhood should limit alienability, we can observe instances of tattoo artists bringing copyright misappropriation suits for their tattoos appearing on avatars of professional athletes in video games.[54] In two of these cases, tattoo artists as plaintiffs brought misappropriation suit against game studios to whom basketball players had licensed their likenesses for use. When those players left the tattoo shop, they believed that the tattoos were a permanent part of their body and their likeness, and therefore that licensing their likeness would implicitly include the tattoos.[55] With that understanding, the copyright claim looks like the tattoo artist is attempting to stake a permanent interest in

51. Horton points out that many legal claims are indescendible because they address "personal wrongs." Horton, *supra* note 50, at 581. Our legal tradition has struggled to support this rationale, and it seems completely unsupported if one views those legal claims as property. *See id.* at 581–85 (explaining that the historical reasons for indescendibility of "personal claims" may be coherent to the extent that claim of personal injury is not property, but are hard to rationalize with other rights of survivorship that are equally compensable).

52. For example, after Ohio courts refused to recognize a posthumous publicity right, *see* Reeves v. United Artists Corp., 765 F.2d 79, 80 (6th Cir. 1985) (per curiam) ("[T]he right of publicity is part of Ohio's law of invasion of privacy. It is unquestioned . . . that actions for invasion of privacy in Ohio are not descendible and lapse upon death."), the state legislature created a publicity right that extends sixty years after death. *See* Ohio Rev. Code Ann. § 2741.02(A)(2) (West 2025) ("[A] person shall not use any aspect of an individual's persona for a commercial purpose . . . [f]or a period of sixty years after the date of the individual's death . . . .").

53. Rothman, *supra* note 28, at 224.

54. *See, e.g.*, Hayden v. 2K Games, Inc., 629 F. Supp. 3d 736, 741 (N.D. Ohio 2022) (describing defendants' alleged unauthorized use of plaintiff's "tattoos on various individuals depicted with those tattoos in the NBA 2K series"); Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020) (describing allegations that defendants "infringed [Plaintiff's] copyrights by publicly displaying [tattoos] for which Plaintiff owns copyrights" in defendants' video games.).

55. *Hayden*, 629 F. Supp. 3d at 744.

the publicity rights of the defendants. The plaintiffs lost,[56] and, while the court did not explicitly analogize to right of publicity, it is worth considering the artist's interest in comparison to the limitations on the severability of the right of publicity. The tattoo artists did not obtain a veto right to an individuals' publicity by placing a copyrighted work on an athlete's body. While the artists' limitation is not justified by a traditional property rights rationale—in other words, "a property right in identity that can be legally separated from the person"[57]—it is justified by a limitation on alienation that arises out of a skepticism of commodifying personhood. If instead the tattoo artists did have an actionable interest, it would imply that they have actually gained an interest in the body and likeness of the athletes. Courts have rightly rejected that artists have gained such an interest in the bodies of their clients, but they have not used a property rights rationale to arrive at such a limitation.

D. Uncritical Assignability of Publicity Rights Can Lead to Harm

In their treatise on the right of publicity, McCarthy and Schechter state that "[t]he rule of free assignability in gross of the right of publicity has never been seriously questioned . . . ."[58] The Supreme Court of Georgia has not only endorsed this view but also indicated that free assignability is necessary for the right of publicity to be a commercially viable right.[59]

We should question the truth of such an assertion that free assignability is essential to the value of the right of publicity. For one, despite these assertions, there are substantial disagreements about the descendibility of publicity rights,[60] and the right doesn't appear

56. Nicole Carpenter, *Take-Two Wins Lawsuit over LeBron James' Tattoos*, Polygon (Apr. 19, 2024), https://www.polygon.com/24131877/nba-2k-lebron-james-tattoo-jury-trial-april-2024/ [https://perma.cc/7GB4-66UH].

57. McCarthy & Schechter, *supra* note 6, § 10:8.

58. *Id.* § 10:13. Assignability is being "[a]ble to be assigned; transferable from one person to another, so that the transferee has the same rights as the transferor had," *Assignability*, Black's Law Dictionary (12th ed. 2014), so free assignability of publicity rights generally refers to the idea that an individual is free to transfer their own right of publicity to anyone.

59. Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697, 704 (Ga. 1982) ("The right of publicity is assignable during the life of the celebrity, for without this characteristic, full commercial exploitation of one's name and likeness is practically impossible.").

60. States recognize the descendibility of the right to different degrees, and some disallow it entirely. *See* discussion *supra* Section II.C.

to be freely assignable in bankruptcy actions.[61] Yet these substantial limitations on the free assignability of the right have not chilled the market for publicity rights in the United States.

To the contrary, free assignability—without some type of limiting regime—could have a depressive commercial effect. Prior to recent NCAA antitrust litigation, players were unable to profit personally from their right of publicity beyond the value of their NCAA scholarships.[62] As of 2023, the market for name, image, and likeness ("NIL") was estimated to be worth up to $1 billion with potential for significant growth still.[63] The Georgia Supreme Court suggested that "without [assignability], full commercial exploitation of one's name and likeness is practically impossible,"[64] yet exactly the opposite can be observed in the NCAA antitrust litigation. If athletes could freely assign their likeness to the NCAA, the NCAA could prevent the NIL market from existing at all.[65] Yet, when the NCAA released their stranglehold on the publicity rights of current athletes, massive new opportunities emerged for student athletes emerged without hurting the NCAA's market.[66] In other words, unlimited free assignability to the NCAA crushed a vibrant market for player publicity rights.

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61. *See* Rothman, *supra* note 28, at 200 ("[N]o court has held that the right of publicity is an asset for the purposes of bankruptcy or that it is assignable to satisfy debts.").

62. NCAA Complaint, *supra* note 5, 2013 WL 3810438, at para. 397.

63. Kathryn Kisska-Schulze, *Narrowing the Playing Field on NIL Collectives*, 34 Marq. Sports L. Rev. 59, 59 (2023).

64. *Martin Luther King, Jr., Ctr. for Soc. Change, Inc.*, 296 S.E.2d at 704.

65. *See* Rothman, *supra* note 28, at 188 ("The NCAA could . . . block the players from making endorsements or appearing in commercials, posters, or other merchandizing. The NCAA could do this as a publicity-holder because it would have the right to prevent anyone—even the identity-holder—from using the athlete's identity without its permission."). Rothman suggests the implications are far wider. If the NCAA truly holds an exclusive publicity right in perpetuity for these athletes, it could actually prevent the players from appearing in future professional sports broadcasts. *Id.* at 188.

66. For the 2023–24 fiscal year, the SEC generated over $808 million in revenue. Will Backus, *SEC Generates $808.4 Million in Revenue for 2023–24 as Texas, Oklahoma Bolster Conference Earnings*, CBS Sports (Feb. 6, 2025, at 15:37 ET), https://www.cbssports.com/college-football/news/sec-generates-808-4-million-in-revenue-for-2023-24-as-texas-oklahoma-bolster-conference-earnings/ [https://perma.cc/C6Y6-FBJF]. Ironically, The NCAA brought in record revenue in 2024 even as its liabilities dramatically ballooned due its player settlement. *See* Eben Novy-Williams & Daniel Libit, *NCAA's FY24 Revenue Sets Record, Offset by $3B in Liabilities*, Sportico (Feb. 28, 2025, at 10:58 ET), *https://www.sportico.com/leagues/college-sports/2025/ncaas-fy24-financials-house-settlement-1234841209/* [https://perma.cc/3GTT-6R9Y]. It is also worth questioning the practical possibility of the NCAA exploiting this NIL market, given the hundreds of thousands of student athletes spread across the entire United States, all of whom can have individual deals.

The NCAA litigation is also striking in that predominantly teenage athletes signed away valuable publicity rights to a massive entity. But comparatively less powerful parties frequently sign away such rights. Reality television shows regularly require their participants to sign away publicity rights.[67] Models also routinely sign away their publicity rights in perpetuity.[68] Perhaps most troubling of all, parents have signed away the publicity rights of their children and courts appear unwilling to place meaningful limitations on such assignments.[69]

At least some of these transfers of publicity rights are limited to copyrighted works like photographs. In these cases, the Copyright Act allows for "termination," which, in its simplest form, allows authors to undo the transfer of their copyrighted work during a period beginning 35 years after the initial transfer.[70] The possibility of termination creates uncertainty as to the true length of the transfer and acts as a limitation on alienability. Despite this limitation, the market for copyrighted works continues to thrive. Specifically, individuals with extremely valuable copyrights, like Paul McCartney, have been able to effect termination, or at least use the threat to leverage new deals and the market has accepted that.[71]

This illustrates how the certainty of free assignability is understandable but shortsighted. The problem is that holders of publicity rights want to know the boundaries of that right when they receive a release from the person. It could present enormous commercial difficulties if a contestant on Survivor could revoke access to their publicity rights a few years down the road. However, it is not at all clear that this problem requires the assignment of all publicity rights in perpetuity. The NCAA litigation has proceeded as antitrust litigation

67. Rothman, *supra* note 28, at 197 & n.48.

68. *Id.* at 198.

69. *See id.* at 195 ("Several cases . . . raise the troubling prospect that parents could assign their children's rights of publicity with no opportunity for the children to recapture them.").

70. *See* 17 U.S.C. § 203(a)(3), (b) ("Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests . . . .").

71. *See* Kevin J. Greene, *The Future Is Now: Copyright Terminations and the Looming Threat to the Old School Hip-Hop Song Book*, 68 J. Copyright Soc'y U.S.A. 45, 62 (2021) (describing how beginning the termination process "leads, invariably, to a seat at the table to renegotiate a new and better deal" for major artists). On the other hand, many under-resourced artists are effectively blocked from exercising termination. *See id.* at 47 ("[T]he current promise of copyright recapture is severely attenuated by the formalistic and complex labyrinth of copyright termination provisions, as well as music industry practices, customs, and outright resistance to copyright terminations.").

for the class of athletes,[72] but each person has only one publicity right to assign.[73] As such, every individual potentially feels the anti-competitive harm when their right is transferred in a contract of adhesion. However, anti-competitiveness is far from the lone concern. If a person's publicity rights are held without limit by another party, they can be threatened with significant indignity and left with no legal recourse.

This can only become more relevant as AI allows more complex exploitation of the right of publicity. While advances in technology, like the proliferation of Photoshop, may have bent the contours of what was truly being transferred with the right of publicity, the possibilities of harm enabled by generative AI threatens to bring the right to a crisis point.[74] As such, we need to understand the right of publicity as more than just a run-of-the-mill property right. Instead, we need to look at the justifications for limiting the alienability of publicity rights, and in particular, the commodification of personhood.

II.
PERSONHOOD AND BIOLOGICAL PROPERTY

There can be few pieces of property, real or intellectual, that are as personal as one's own likeness. Yet the law of the right of publicity allows the license and transfer of the rights to a person's likeness, within limits, while entirely outlawing the transfer of most biological property. In analyzing these dichotomous results, I will return to the legal theories and frameworks underlying personhood, personal property, and biological property. Understanding this body of law will help to further set the foundations needed to analyze the potential impacts of generative AI on the right of publicity.

A. Personhood and Personal Property

In *Property and Personhood*, Margaret Jane Radin explored how the conceptual boundaries of property are intimately tied to our

72. NCAA Complaint, *supra* note 5, 2013 WL 3810438, at para. 1.

73. The publicity right is, of course, severable. *See* McCarthy & Schechter, *supra* note 6, § 10:19 ("A license of the right of publicity may be "exclusive" as to any defined scope such as product line, context of use, territory or time duration."). Companies do not *have* to get assignment of the right in perpetuity in gross. Yet the current state of the world says that they will do so whenever the power balance tips in their favor.

74. *See* discussion *infra* Part IV (outlining various challenges and harms posed by AI, including deepfake concerns and implications for First Amendment and right of publicity).

personhood, contending that the law should recognize the value of truly "personal property."[75] A prototypical example of personal property is a wedding ring. While the ring has objective value in the precious metals or jewels, there is far deeper personal value than could ever be measured in gold.[76]

Radin suggests that the lens of personhood creates a linear correlation in property rights: "The more closely connected with personhood, the stronger the entitlement."[77] While this view has not been explicitly adopted, it nonetheless can find implicit judicial recognition. For example, the Supreme Court of Colorado prevented the condemnation of a historic church unless no other adequate parcel existed.[78] The question was posed as a tension between the First Amendment's religious freedom and the Fifth Amendment's eminent domain powers.[79] However, these legal frameworks oversimplify the relevant personal facts. It was not the abstract practice of religion that was at issue. Pillar of Fire Church had congregations in eighteen states and did not have regular services at the location that was to be condemned.[80] In a very literal sense, tearing down this specific building would not have prevented those individuals from exercising their freedom of religion. Still, the court recognized that Memorial Hall, which stood at the founding of the church, had particular religious significance to the congregants.[81] In other words, the First Amendment issue could not have arisen without the personal value that Memorial Hall represented to the church members.

Origins of the personhood theory of property can be found in Hegel's view of property.[82] For Hegel, property is the first principle where our being steps beyond the self, or the free will, and into defining rights beyond the person.[83] Hegelian property is the way in

75. Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 1013 (1982).

76. *Id.* at 959.

77. *Id.* at 986.

78. *See* Pillar of Fire v. Denv. Urb. Renewal Auth., 509 P.2d 1250, 1253 (Colo. 1973) (holding that "state must show a substantial interest without a reasonable alternate means" of achieving interest in order to condemn Church building).

79. *Id.* at 1252.

80. *Id.*

81. *Id.*

82. *See* Radin, *supra* note 75, at 977 (describing how Hegel's theory of personhood "has important ramifications for a theory of personal property which does rely on that richer sense of personhood").

83. *See* Peter G. Stillman, *Property, Freedom and Individuality in Hegel's and Marx's Political Thought*, *in* 22 Nomos: Am. Soc'y Pol. Legal Phil. 130, 130–31 (J. Roland Pennock & John W. Chapman eds., 1980) (describing centrality of property to Hegelian philosophy).

which persons act upon the external world. This property is twofold, it includes both the thought and body of the individual and those things in the external world into which the individual puts their free will.[84] One can see Hegel's philosophy realized in the *Pillar of Fire* building, where the value of Memorial Hall is created by the collective putting a part of their rational selves into the ownership and occupancy of the building.

Another way of viewing the personal property concept is along a continuum of fungibility. Some property is perfectly fungible, meaning that its loss would have no personal effect at all so long as the owner was compensated for the objective value of the loss. At the other end sits perfectly personal property, such as a person's blood or kidney.[85] If we were to treat property on the personal end of the spectrum the same as property on the fungible end, it would lead to absurd results, such as the Fifth Amendment allowing the government to use its condemnation powers to take a person's blood or kidney to serve a legitimate public purpose.[86] Even if our jurisprudence refuses to embrace the full continuum of the personhood property spectrum, there is still no way to avoid its implications. Some buildings, like in *Pillar of Fire*, have more worth than can be expressed in brick and timber.

B. Moral and Utilitarian Rights in Intellectual Property

In the moral rights theory, this same Hegelian view of property has been used to justify intellectual property, arguing that intellectual works must be granted property recognition because they arise out of an expression of one's person.[87] Moral rights argues that a

84. *See id.* at 132–33 ("For Hegel, 'man is implicitly rational, but he must also become explicitly so by struggling to create himself, not only by going forth from himself but also by building himself up from within.'" (quoting G. W. F. Hegel, Philosophy of Right § 10A (T. M. Knox trans., Oxford Univ. Press 1945) (1821)); Radin, *supra* note 75, at 973 (describing Hegel's philosophy as an "occupancy theory" of property).

85. Federal law currently does not treat even these two examples, blood and kidneys, equally. *See infra* Section III.C.

86. Indeed, Radin simply asserts that "[i]f my kidney may be called my property, it is not property subject to condemnation for the general public welfare." Radin, *supra* note 75, at 1005.

87. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 Va. L. Rev. 1745, 1753–54 (2012) (discussing theories of intellectual property protection "grounded in the notion of natural or moral rights that authors and inventors deserve by virtue of having created their works"). Fromer also discusses the alternative moral rights justification for intellectual property, labor-desert theory, which is based on the Lockean philosophy of property arising from the labor of creation.

person needs some amount of "control over resources in the external environment" in order to achieve full expression and self-actualization.[88] This "external control" can be called property. This view of intellectual property naturally justifies some areas, like copyright, more than others, like patent.[89]

Moral rights are not without critics and shortcomings. Amy Adler has said the view is obsolete in the modern art world, and that there is substantial creative expression that can be found by violating the original artists' intent.[90] In some ways, copyright already acknowledges this in the way that the fair use doctrine recognizes the value in altering art.[91] Another criticism was recognized earlier in the way that the right of publicity protects an individual's commercial image but generally still allows news outlets to commercially benefit from reporting on the lives of these celebrities.[92] That holds true even if the reporting is destructive to the value of the celebrity's cultivated image.[93] These restrictions have a throughline directly to copyright and fair use, where free speech protections allow the likeness and intellectual property of celebrities to be used when that use is "transformative."[94] In describing uses as transformative and allowing them, courts implicitly recognize that, just as Amy Adler

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Id. While both theories are important, I will primarily focus on moral rights and personhood.

88. *See id.* at 1754.

89. *See id.* at 1754 ("Despite its occasional invocation in copyright, personhood theory is less frequently invoked as an explanation for patent law.").

90. Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265, 275 (2009).

91. *See id.* at 281 ("The copyright concept of fair use attempts to capture this interest in altering reproductions.").

92. *See* MCCARTHY & SCHECHTER, *supra* note 6, § 8:10 ("[A] magazine can feature on its cover a photo of a prominent celebrity who is the subject of a 'news' story inside and . . . it need not pay the celebrity for the commercial publicity value of his or her identity . . . ."). The First Amendment and right of publicity are subject to multiple balancing tests across states with the Supreme Court, so far, having provided only extremely limited guidance on the issue. *See id.*, § 8:23 (explaining that video games are subject to First Amendment protections and thus presumably the Supreme Court's guidance on them would extend to infringement on the right to publicity as well).

93. In some ways it is even more true—when someone in the public eye commits a significant wrong, that is arguably of more importance than the ho-hum of their normal doings.

94. *See* MCCARTHY & SCHECHTER, *supra* note 6, § 8:23 (discussing "the majority rule of the transformative test"); *see also id.* at § 8:38 (explaining that publicity has incorporated the transformative use defense from copyright); discussion *infra* Section IV.B (analyzing the implications of deepfakes on First Amendment protections).

described, unique value can be found when acting contrary to the original artists' intent.

Coming from a different angle, utilitarian support of intellectual property argues that exclusive rights need to be granted in order to incentivize creators to take steps they otherwise would not.[95] For example, the limited monopoly offered by patent law incentivizes inventors to disclose details of their inventions that they may otherwise keep secret.[96] As Fromer suggests for other intellectual property, rather than necessarily being incongruous, both the moral rights and utilitarian justifications serve to advance the common justification for the right of publicity.[97] Individuals have both a commercial interest in developing their own brand that should be incentivized and rewarded, and also have privacy interests that should be protected out of a respect for self-expression.

The justification for moral rights is particularly resonant because the right of publicity, in some sense, *is the expression of oneself.* As a result, it seems natural that moral rights can similarly justify the right of publicity as an intellectual property right. However, despite common justifications, the right of publicity is distinct from intellectual property like copyright. For one, the right of publicity is a set of state tort remedies that have evolved to protect the commercial exploitation of one's likeness, while copyright is a federal statutory scheme to protect a range of intellectual property works.[98] As commentators have pointed out, the right of publicity does not neatly fit into the family of intellectual property law.[99] Most importantly for this discussion, while copyright might arise out of an act of

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95. Fromer, *supra* note 87, at 1751.

96. *See id.* ("The theory is that public benefits accrue by rewarding inventors for taking two steps they likely would not otherwise have taken: to invent . . . and to reveal information to the public about these inventions that stimulates further innovation."); *see also* U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

97. *See* Fromer, *supra* note 87, at 1763 ("[S]olicitude for, and sometimes protection of, creators' moral-rights interests can strengthen utilitarian incentives in copyright and patent law . . . .").

98. *Compare* MCCARTHY & SCHECHTER, *supra* note 6, § 6:2 (explaining widespread recognition of right to publicity in state law), *with* 17 U.S.C. §§ 101–1511.

99. *See* Diane Leenheer Zimmerman, *Fitting Publicity Rights into Intellectual Property and Free Speech Theory: Sam, You Made the Pants Too Long!*, 10 DEPAUL J. ART & ENT. L. 283, 286 (2000) ("Unfortunately, in the decade and a half since [Ralph Sharp Brown]'s thoughtful Brace Lecture, the fit of right of publicity into the intellectual property 'suit' has not improved. If anything, mis-sizing is even more acute today than when he first called our attention to it." (footnote omitted)).

self-expression, the work produced is not intimately and perpetually tied to the person in the same manner as the right of publicity.[100] The right of publicity on the other hand, is inseparable from the self in unique ways. For a similar place where this inseparability has been discussed, I will turn to biological property.

C. Biological Property

As Radin suggested, property rights to our own bodies are highly contested. In some ways this should be surprising. After all, who can better assert a right of property in your arm than you? Despite this intuition, property rights in human tissue are sharply curtailed—often, but not exclusively, as a result of the moral backlash from commodifying bodies.[101]

In the oft-cited decision of *Moore v. Regents of University of California*, the Supreme Court of California considered the question of what property rights individuals retain in their own bodies.[102] In that case, Dr. Golde established a patented cell line from Moore's T-lymphocytes that were removed as part of his treatment for hairy-cell leukemia.[103] This cell line turned out to be extremely profitable for Dr. Golde, who received stock and direct compensation in an exclusive agreement for use of the cell line.[104] Moore was not aware that his cells were being used to conduct research and received no compensation for the use of his cells.[105]

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100. Of course, there may be some exceptions to this rule, such as the production of a biopic. The right to produce such a work is generally accepted, although that has not stopped lawsuits from arising, usually for defamation. *See* Emily Cox, *"Based on a True Story"—The Legal Issues Around Biopics*, Stewarts (Dec. 13, 2022), https://www.stewartslaw.com/news/based-on-a-true-story-the-legal-issues-around-biopics/ [https://perma.cc/7UQC-BQ7F] (noting that, although "[n]o individual holds the legal 'right' to the story of their life" in the United States, there have been several high-profile defamation lawsuits stemming from biopics).

101. When the National Organ Transplant Act of 1984 was being considered, then-Congressman Al Gore said in a hearing that the sale of organs "blurs the distinction between people and things, as human organs become simply another commodity to be bought and sold in the marketplace." *Procurement and Allocation of Human Organs for Transplantation: Hearing Before the Subcomm. on Investigations & Oversight of the H. Comm. on Sci. & Tech.*, 98th Cong. 218 (1984) (statement of Rep. Albert Gore, Jr., Chairman, Subcomm. on Investigations & Oversight of the H. Comm. on Sci. & Tech.), *reprinted in* 2 Bernard D. Reams, Jr., The National Organ Transplant Act of 1984: A Legislative History of Pub. L. No. 98-507 (1990).

102. Moore v. Regents of Univ. of Cal., 793 P.2d 479, 487 (Cal. 1990).

103. *Id.* at 481–82.

104. *Id.* at 482.

105. *Id.* at 481.

Should Moore have retained a property interest in the cells removed from his body? While the court did not close off the possibility, the argument that the cells should be considered property is conspicuously absent from the court's reasoning for declining to impose liability for conversion.[106] Significantly, and harkening back to Justice Holmes's dissent in *International News Service v. Associated Press*, the court in *Moore* was hesitant to provide a judicial remedy for an extremely complicated problem that it saw as more aptly resolved through the legislative process.[107]

Ultimately the view expressed by the concurrence in *Moore* was the one taken up by Congress when they enacted the National Organ Transplant Act ("NOTA").[108] Among other things, NOTA banned the sale of organs in the United States.[109] Yet, despite this ban, the same bill does approve of the sale of other human tissue like blood and plasma.[110] If it is the moral repugnancy of commodifying the human body, it is hard to reconcile the ban on organ sales to the thriving market in human tissue.

Nonetheless, the human body is still significantly commodified by medical researchers—such as Dr. Moore—and there is little

106. *See id.* at 493 ("While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability . . . ."). Specifically, the court mentioned three grounds for declining to extend conversion liability: (1) a balancing of public policy interests, (2) the area being more appropriate for legislation, and (3) the necessity of protecting patients' rights. *Id.*

107. *Compare id.* at 496 ("If the scientific users of human cells are to be held liable for failing to investigate the consensual pedigree of their raw materials, we believe the Legislature should make that decision."), *with* Int'l News Serv. v. Associated Press, 248 U.S. 215, 248 (1918) (Holmes, J., dissenting) ("[T]he only ground of complaint that can be recognized without legislation is the implied misstatement . . . ."). *See also id.* at 241 (explaining the limited nature of the relief that was granted by the majority). There has been some movement on protection from deepfakes as well with the DEEPFAKES Accountability Act, H.R. 5586, 118th Cong. (2023). While that has not passed, narrower protection for victims of nonconsensual sexual material, including that produced by AI, was enacted as part of the TAKE IT DOWN Act, Pub. L. No. 119-12, 139 Stat. 55 (2025).

108. Justice Arabian was extremely concerned with "commingl[ing] the sacred with the profane" by "treat[ing] human tissue as a fungible article of commerce." *Moore*, 793 P.2d at 497–98 (Arabian, J., concurring).

109. National Organ Transplant Act, Pub. L. No. 98-507, § 301, 98 Stat. 2339, 2346–47 (1984) (codified as amended at 42 U.S.C. § 274e) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation . . . .").

110. Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 Geo. Mason L. Rev. 69, 69, 81 (2004) ("Furthermore, NOTA's ban on organ sales does not limit the selling of renewable human tissues, like ova, sperm and blood.").

incentive for the state to refuse this right to researchers.[111] While the ban on organ sales faces significant criticisms, including allowing people to die every year waiting for transplants, there are also distributive justice concerns to allowing an open market for organ sales.[112] Exploitation of poor individuals has been borne out in organ black markets globally,[113] but our existing system also has caused poor individuals who cannot afford transplants to be screened by their ability to pay.[114] Unlike publicity rights, where courts have been concerned with destroying the market for a valuable commodity,[115] we have been content to deny mutually beneficial transactions in the context of organ sales.[116]

This is not to say that no property interest in the human body has been recognized. As already discussed, NOTA allows the individual sale of regenerative human tissue and also endorses the multi-billion-dollar industry in biological patents derived from human tissue. Additionally, courts are willing to recognize property-like interests in human biological materials. In *Hecht v. Superior Court*, a California court said that decedent's sperm could be recognized as property within the meaning of the state's probate code sufficient to give the probate court jurisdiction.[117] This was in accordance with the decedent's will and avoided what otherwise would have been required

111. *See* Melissa M. Perry, *Fragmented Bodies, Legal Privilege, and Commodification in Science and Medicine*, 51 Me. L. Rev. 169, 174 (1999) ("In general, the law states that the individual does not have a property right in his body, but the medical or scientific entrepreneur . . . can exercise such a right . . . . As a result of this 'incidental' privilege, medical researchers, surgeons, and physicians have monopolized the commodification of the body."); *see also Moore*, 793 P.2d at 494 (discussing the need to avoid "hinder[ing] research" in medicine and biotechnology).

112. *See* Calandrillo, *supra* note 110, at 83–84, 93 (discussing both dire undersupply of organs under current regime and risk of exploitation under free-market regime). Radin also heavily criticizes the distributive justice justification banning organ sales. *See* Margaret Jane Radin, Contested Commodities 126 (1996) ("[T]o preserve organ donation as an opportunity for altruism is also one way of keeping from our view the desperation of poor people.").

113. *See* Calandrillo, *supra* note 110, at 87, 94 ("The potential for exploitation is not merely a theoretical or academic concern.").

114. *See* Perry, *supra* note 111, at 187 (discussing "green screen" preventing people from entering national organ waiting list unless they can demonstrate ability to pay).

115. This is at least part of the rationale from the Georgia court which insisted that free transferability was essential to the ability to commodify one's likeness. *See* discussion *supra* Section II.D.

116. *See* Calandrillo, *supra* note 110, at 85 ("Because federal law prohibits sales, however, these mutually beneficial trades never occur.").

117. Hecht v. Superior Ct., 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) ("Such interest is sufficient to constitute 'property' within the meaning of Probate Code section 62.").

disposal under another section of the California Code.[118] Similarly, the Ninth Circuit recognized a property interest by parents in the bodies of their deceased children when the Los Angeles County Coroner's office removed the corneas of deceased children without notice or consent.[119]

In the preceding cases, courts maybe have simply embraced property rights as a way to avoid what they saw as a more significant wrong to human dignity.[120] This is indicated by the way those courts make clear that they are not embracing a wide and unlimited property right in arriving at their result.[121] Yet, from Radin's perspective on personal property, it is possible to see the courts recognizing a property interest because such an interest is indistinguishable from recognizing full personhood. In other words, the property interest is not separable from the human interest in fully actualizing personhood in the external world.

D. Specific Performance

It is widely known that specific performance is unavailable for contracts for personal services.[122] The comments of the Restatement (Second) of Contracts clearly explain that such a remedy approaches an imposition of involuntary servitude on a party.[123] Here, I will analyze this traditional contractual limitation through the lens of personhood with an eye towards how generative AI begins to look like specific performance. Courts are generally willing to require specific performance of contracts involving personal property, such

118. *Id.* at 280 n.4, 283–84.

119. Newman v. Sathyavaglswaran, 287 F.3d 786, 796–97 (9th Cir. 2002). While the *Newman* decision recognized a property right for next of kin in dead bodies, that view has not been widely adopted. *See* Shelley v. Cnty of San Joaquin, 954 F. Supp. 2d 999, 1007 (E.D. Cal. 2013) (noting that Sixth Circuit decisions relied on by *Newman* were "effectively overruled" by state supreme courts and that California courts have not embraced its holding).

120. In *Hecht*, the California probate court only had the ability to recognize the decedent's bequest if his sperm was recognized as property. *See* 20 Cal. Rptr. 2d at 280 ("The power of the probate court extends only to the property of the decedent." (quoting Estate of Lee, 177 Cal. Rptr. 229, 232 (Ct. App. 1981))).

121. *Hecht* concludes only that "[s]uch interest is sufficient to constitute 'property' within the meaning of Probate Code section 62." *Id.* at 283. *Newman* held that the property interests in the corneas were sufficient to establish a due process deprivation, even if the state legislature had deprived them of all economic and market value. *Newman*, 287 F.3d at 797.

122. *See* Restatement (Second) of Conts. § 367(1) (A.L.I. 1981) ("A promise to render personal service will not be specifically enforced.").

123. *Id.* § 367 cmt. a.

as a family farm,[124] but will not take the next step to require the rendering of personal services. Personhood, and especially moral rights as discussed above,[125] provide one justification because specific performance results in a court forcing an individual to perform an act of self-expression.

When considering specific performance, then, where should a contract for the sale of human tissue fall? There is, of course, no chance that a court would require specific performance of a contract to donate plasma or, if it were legal, to sell a kidney.[126] This is the case despite the fact that the sale of human tissue is closer to a commodity than to the rendering of a personal service.[127] This makes sense when specific performance restrictions are seen in the light of moral rights and respecting personal autonomy. Under such justifications, it is obvious that something as personal as tissue sale would not be subject to specific performance.

However, the desire to avoid forcing parties to personally perform actions against their wishes is not the only grounds for denying specific performance. Another basis is that the act to compel is contrary to public policy, or that compulsion itself is contrary to public policy.[128] The Restatement demonstrates this by showing situations where a party, A, may want to compel specific performance, but performance would cause a disadvantage to the public far greater than any advantage A would receive.[129] In such a situation, the restatement endorses the position that A should not be able to compel performance to the significant detriment of the public. This is a recognition that it is improper for a court to enforce a promise that would harm the public.

Where will generative AI fit into this world of specific performance? Whether courts have explicitly recognized Radin's theory or not, personhood has been used to both accept and reject property rights when doing so would advance what was seen as a just outcome, especially in the area of biological property. Similarly, we will need

124. Consider the famous case of *Lucy v. Zehmer* where the defendant was forced to sell his farm for well below market rate based on an agreement written on the back of a restaurant check. Lucy v. Zehmer, 84 S.E.2d 516, 517 (Va. 1954).

125. *See* discussion *supra* Section III.B.

126. No court that I have found has even considered the issue.

127. *But see* Perez v. Comm'r, 144 T.C. 51, 56–57 (2015) (finding that egg donor contract "compensated for services rendered and not for the sale of property," at least in part to avoid difficult tax issues around "the sale of those parts").

128. *See* Restatement (Second) of Conts. § 365 (A.L.I. 1981) ("Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.").

129. *See id.* § 365, illus. 2.

to consider how performance via generative AI approaches the imposition of specific performance on the individual whose likeness is being copied. Inevitably, as policies interact with self-expression, courts must wrestle with the foundations of personhood theory or they risk threatening the basic philosophical foundations of what it means to self-actualize in our world.

III.
CURRENT CHALLENGES AND HARMS OF GENERATIVE AI

A. Concerns and Harms of Deepfakes

While generative AI has produced impressive results over the last decade, it has also contributed to significant societal harms.[130] The ease of deepfake creation, paired with the saturation of social media, has resulted in a network in which misinformation can spread like a forest fire.[131] The democratization of information access has also reduced the power of those gatekeepers that traditionally acted as a check on questionable information. Instead, power has fallen into the hands of content platforms that may not have the incentives to properly filter misinformation.[132] This lack of moderation, combined with natural biases to trust information that is widely shared and fixate on negative information, creates a superhighway through which

130. Beyond the examples discussed in this paragraph, AI also continues to produce results that reinforce and perpetuate existing biases in society. *See, e.g.*, Nicolas Kayser-Bril, *Google Apologizes After Its Vision AI Produced Racist Results*, Algorithm Watch (Apr. 7, 2020), https://algorithmwatch.org/en/google-vision-racism/ [https://perma.cc/RPS2-RJHB] (documenting racial bias in Google's image-recognition algorithm, including labeling image of dark-skinned individual holding thermometer as "gun," while labeling similar image with a light-skinned individual as "electronic device"); Chris Stokel-Walker, *ChatGPT Replicates Gender Bias in Recommendation Letters*, Scien. Am. (Nov. 22, 2023), https://www.scientificamerican.com/article/chatgpt-replicates-gender-bias-in-recommendation-letters/ [https://perma.cc/4J2U-5HSN] (reporting researchers' findings of "significant gender biases" in AI-generated recommendation letters).

131. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Calif. L. Rev. 1753, 1763–64 (2019) (explaining that deepfake technology has spread quickly due to availability of simple tools to create deepfakes and global information-sharing capacity of internet platforms).

132. *Id.* at 1764–65. However, change may be coming. While Section 230 of the Communications Act continues to generate controversy in the United States, the 2022 EU Digital Services Act has required very large platforms to implement stronger content moderation. *See* Parker Williams Hassard, *What's Not to Like?: The EU's Case Against Big Tech and Important Lessons for the United States*, 47 N.C. J. Int'l L. 521, 535 (2022) (advocating for the United States to implement elements of European Union's Digital Services Act to promote transparency and increased content moderation).

misinformation flows.[133] These phenomena have been playing out in American discourse over the last several years and increased access to deepfake technology only increases the risks posed to society.[134]

While social networks exacerbate the scale of the problem, they are not necessary to realize the harms that deepfakes can pose. Over the last few years, deepfakes of celebrities like Elon Musk have been used to scam individuals out of their life savings.[135] YouTube has been flooded with these videos—even using prerecorded deepfakes to act like live broadcasts[136]—and the notoriety of the falsified celebrity acts as its own network to increase audience spread. Use of the live functionality removes the opportunity for the video to go through traditional content moderation and takedown before an end user sees it. The increased proliferation of convincing deepfakes has led the FTC to propose new rules to prohibit the impersonation of individuals via AI to fight back against the surge in fraud.[137]

From the outset, deepfakes have been weaponized to create non-consensual sexual content of women.[138] Unsurprisingly, deepfakes have followed the gendered dimensions of other intimate crimes like cyber stalking and non-consensual pornography.[139] Far from being relegated to some dark corner of the internet, such content can spread rapidly through mainstream social media before

133. *See* Chesney & Citron, *supra* note 131, at 1765–69 ("[C]ommon cognitive biases and social media capabilities are behind the viral spread of falsehoods and decay of truth.").

134. For example, a doctored photo of social activist X Gonzalez diffused rapidly through social networks. Alex Horton, *A Fake Photo of Emma Gonzalez Went Viral on the Far Right, Where Parkland Teens Are Villains*, Wash. Post (Mar. 26, 2018), https://www.washingtonpost.com/news/the-intersect/wp/2018/03/25/a-fake-photo-of-emma-gonzalez-went-viral-on-the-far-right-where-parkland-teens-are-villains/?utm_term=.0b0f8655530d [https://perma.cc/6NDJ-WADV].

135. *See* Stuart A. Thompson, *How 'Deepfake Elon Musk' Became the Internet's Biggest Scammer*, N.Y. Times (Aug. 14, 2024), https://www.nytimes.com/interactive/2024/08/14/technology/elon-musk-ai-deepfake-scam.html?smid=url-share [https://perma.cc/M5G7-B9X4] (describing how celebrity deepfakes are used to market cryptocurrencies and fake investment opportunities).

136. *Id.*

137. FTC Proposes New Protections to Combat AI Impersonation of Individuals, Fed. Trade Comm'n (Feb. 15, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals [https://perma.cc/CZ6Y-TGUB].

138. *See* Emma Grey Ellis, *People Can Put Your Face on Porn—and the Law Can't Help You*, Wired (Jan. 26, 2018, 07:00 AM), https://www.wired.com/story/face-swap-porn-legal-limbo/ [https://perma.cc/BAF4-SFEW] ("Early victims include Daisy Ridley, Gal Gadot, Scarlett Johansson, and Taylor Swift.").

139. Chesney & Citron, *supra* note 131, at 1773.

being detected.[140] Deepfakes are frequently deployed for no purpose other than malicious denigration.[141]

Today, policy and legislation foreclose most paths to vindication for victims who have had their identity misappropriated by deepfakes. Even if the creators can be found, there are doubts as to whether a suit utilizing the right of publicity presents a useful avenue unless the deepfake was created and produced for some commercial gain.[142] Similarly, the platforms through which information spreads rapidly continue to be heavily protected by Section 230 of the Communications Decency Act.[143] Section 230 has been broadly interpreted by courts to protect platforms even when they republish content knowing it may be illegal.[144] Neither, so far, has criminal liability proved to be a viable recourse to penalizing bad actors.[145] While ex-post penalties would inevitably be incapable of fixing the

140. *See, e.g.*, Kat Tenbarge, *Nude Deepfake Images of Taylor Swift Went Viral on X, Evading Moderation and Sparking Outrage*, NBC NEWS (Jan. 25, 2024), https://www.nbcnews.com/tech/misinformation/taylor-swift-nude-deepfake-goes-viral-x-platform-rules-rcna135669 [https://perma.cc/3PJW-QD34] ("Nonconsensual sexually explicit deepfakes of Taylor Swift went viral on X, . . . amassing over 27 million views and more than 260,000 likes in 19 hours before the account that posted the images was suspended.").

141. *See* Coralie Kraft, *Trolls Used Her Face to Make Fake Porn. There Was Nothing She Could Do*, N.Y. TIMES (July 31, 2024), https://www.nytimes.com/2024/07/31/magazine/sabrina-javellana-florida-politics-ai-porn.html?smid=url-share [https://perma.cc/KB32-J5JV] (explaining the proliferation of revenge porn and describing internet trolls' creation of doctored pornographic images of local politician).

142. Chesney & Citron, *supra* note 131, at 1794.

143. *See* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

144. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 408 (2017) ("Platforms have been protected from liability even though they republished content knowing it might violate the law, encouraged users to post illegal content, changed their design and policies for the purpose of enabling illegal activity, or sold dangerous products.").

145. Even if laws existed that did protect individuals, law enforcement officials do not have a strong track record of enforcing digital crimes. *See* Chesney & Citron, *supra* note 131, at 1801–04 (describing law enforcement's "lackluster response to online abuse," with narrow exception of federal prosecutors); *see also* Kraft, *supra* note 141 ("Special agents explained that there were no federal laws against creating or disseminating non-consensual explicit deepfakes. Florida didn't have a state law preventing the creation of the material, either, so their hands were tied. The activity was not legally criminal; law enforcement could not investigate further."). It remains to be seen whether the recently passed TAKE IT DOWN Act will prove to be a viable remedy at the federal level. *See* TAKE IT DOWN Act, Pub. L. No. 119-12, 139 Stat. 55, 944–47.

harm done by these actors, even the retributive substitute of a criminal conviction fails to be an available legal option.

Of course, generative AI is not without benefits as well. For example, we can imagine the usefulness of the technology in education.[146] One startup, Magic School, advertises itself as a responsible AI platform that can save educators time each week by helping draft lesson plans, assessments, IEPs, and more.[147] In one case study, Magic School reported that a Colorado public school system saw a 28% increase in students who met grade level literacy goals after utilizing Magic School tools that gave students immediate feedback on their writing.[148] Similarly, while many law school classrooms still prefer the chalkboard, one can imagine a teacher using AI tools to create high quality video content to expand on certain points. Such videos could be generated from a script and available videos, possibly offering a better end product in far less time than could be produced without access to a professional studio. These AI tools can also be used to generate visualizations of concepts without requiring years of animation training.[149] Finally, the tools offer a way for individuals to access artistic expression that might otherwise be foreclosed to them.[150]

146. Though, we should not ignore the harms as well, such as an AI "Anne Frank" chat bot that urged children to avoid blaming the Nazi regime for the Holocaust. Joe Wilkins, *Schools Using AI Emulation of Anne Frank That Urges Kids Not to Blame Anyone for Holocaust*, Futurism (Jan. 18, 2025), https://futurism.com/the-byte/ai-anne-frank-blame-holocaust [https://perma.cc/4CXQ-3PF2].

147. Magic Sch., https://www.magicschool.ai/magicschool [https://perma.cc/93TS-2Q9V] (last visited Sep. 24, 2025).

148. *Aurora Public Schools Has 28% Improvement in Students Meeting Literacy Grade Level Expectations*, Magic Sch., https://www.magicschool.ai/blog-posts/aurora-public-schools-improves-literacy-with-magicschool [https://perma.cc/H5VB-RB3J] (last visited Sep. 24, 2025).

149. *See, e.g.*, Sibel Erduran, *Deepfakes and Students' Deep Learning: A Harmonious Pair in Science?*, Science (Aug. 29, 2024), https://www.science.org/doi/10.1126/science.adr8354 [https://perma.cc/7DPS-HQB5] ("[Deepfakes] can be used to create realistic simulations for educational purposes, for example, in supporting the development of students' medical skills without compromising safety in real-life situations with real patients."); Mike Perkins, *Deep-Fake It 'Til You Make It: The Academic Integrity Challenges of Deepfake Technology*, Int'l Ctr. for Acad. Integrity (Sep. 21, 2024), https://academicintegrity.org/aws/ICAI/pt/sd/news_article/589624/_PARENT/layout_interior/false [https://perma.cc/NMN3-3LEB] (discussing how, despite risks, deepfake technology could allow for creation of "personalized AI tutors" and "hyper-realistic visualizations" of scientific concepts, among other uses).

150. However, this often comes at the expense of unauthorized training on the data of existing artists. For example, Lensa, a photo-editing app that trains on artists' original work, unleashed a flood of AI-generated portraits on social media for a very low price. Morgan Sung, *Lensa, the AI Portrait App, Has Soared in Popularity. but Many Artists Question the Ethics of AI Art*, NBC News (Dec. 7, 2022, at 16:55 ET), https://www.nbcnews.com/tech/internet/lensa-ai-artist-controversy-ethics-privacy-rcna60242

The simple truth is that AI is here to stay, and we can experience benefits as long as we are cognizant of the harms as well.

B. First Amendment Rights

Naturally, like any media form, generative AI also evokes questions about First Amendment protections. Where are the outer bounds of the intersection of deepfakes and free speech? This question, in its entirety, is likely deserving of a separate and much more thorough analysis, but I offer a cursory journey through the issues in this section.

First, many faithful recreations of individuals' likenesses already do not receive First Amendment protections. In *No Doubt v. Activision Publishing, Inc.*, Activision presented a transformative use defense, available in response to right of publicity claims, when they featured members of the band No Doubt as playable characters in their Band Hero video game.[151] No Doubt had previously allowed their likeness to be exactingly captured and recreated in the game for limited promotional material in connection with No Doubt songs that would appear in the game.[152] When the members of the band learned that their motion-captured likenesses could be used to perform any song in the game—including user-created content—they sued for Activision's "unauthorized exploitation of No Doubt's name, performances and likenesses."[153] In defending against the claims, Activision argued that use of the avatars was "protected First Amendment activity involving an artistic work," barring No Doubt's right of publicity claims.[154]

[https://perma.cc/3W4Q-7L5Y]. Clearly, the demand for these portraits exceeds the possible output of the artists, but also undercuts the price of an individual commission such an art. *See id.* ("For a $7.99 service fee, users receive 50 unique avatars – which artists said is a fraction of what a single portrait commission normally costs."). Still, many artists understandably feel that the AI tools are copying and mimicking their own work. *Id.*

151. No Doubt v. Activation Publ'g Inc., 122 Cal. Rptr. 3d 397, 406 (Ct. App. 2011). ("Activision contends that its use of No Doubt's likenesses in Band Hero constitutes 'protected First Amendment activity involving an artistic work,' and thus No Doubt's right of publicity claim is completely barred."). In analyzing transformative use and the First Amendment, the court compared publicity to copyright, *id.* at 407, which also has a fair use defense with transformative use, 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13F.10 (2025) (discussing foundations of fair use doctrine).

152. *No Doubt*, 122 Cal. Rptr. at 401.

153. *Id.* at 402.

154. *Id.* at 406.

In evaluating and rejecting this claim, the California court applied their "transformative use" test, which balances "the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[155] Ultimately the court found that despite the other creative elements in the game, like fanciful venues and songs, Activision had failed to "transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities."[156] In short, these avatars, created through modern motion capture technology, were nothing more than a simple exploitation of the fame of No Doubt in violation of their right of publicity.

Second, there is also the question of who the speaker is when using the output of generative AI. When computer-generated art was still in its infancy, and long before ChatGPT existed, Pamela Samuelson put the point simply: "[I]t is still fair to say that it was not within Congress' contemplation to grant intellectual property rights to machines."[157] That view has remained unchanged in the forty years since Samuelson expressed it and, so far, AI has done nothing to upset the balance.[158] The Copyright Office has endorsed Samuelson's position, refusing copyright for an image created by generative AI even when the prompt used to create the image was

155. *Id.* at 407 (quoting Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001)). The court in *Comedy III* further noted that "[a]lthough such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." *Comedy III*, 21 P.3d at 808 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (footnote omitted)). While the court leaves open other possible avenues for a fair use defense, it made clear that this test is meant to balance the right of publicity and legitimate First Amendment expression. *See id.* at 807–08 (rejecting "wholesale importation of the fair use doctrine into right of publicity law," but finding the "first fair use factor—'the purpose and character of the use' . . . particularly pertinent to the task of reconciling the rights of free expression and publicity" (quoting 17 U.S.C. § 107(1))).

156. *No Doubt*, 122 Cal. Rptr. at 411; *see also id.* ("Moreover, Activision's use of life-like depictions of No Doubt performing songs is motivated by the commercial interest in using the band's fame to market *Band Hero* . . . .").

157. Pamela Samuelson, *Allocating Ownership Rights in Computer-Generated Works*, 47 U. Pitt. L. Rev. 1185, 1199 (1986).

158. *See* Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023), *aff'd*, 130 F.4th 1039, 1044 (D.C. Cir. 2025) ("[H]uman authorship is a bedrock requirement of copyright."); Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018) (holding that "animals other than humans . . . lack statutory standing to sue under the Copyright Act"). For example, the substantial similarity test is meaningless when the output of AI is not copyrightable.

refined hundreds of times.[159] I would assert that this question of copyright ownership is closely related to the First Amendment question, especially in light of the moral rights theory of copyright. If copyright is an act of self-expression, and the use of generative AI acts as a block to achieving copyright protections, then it follows that that the use of generative AI is not an act of self-expression.[160] If it is not an act of self-expression, then it is hard to view it as protectable speech. This view is strengthened by the fact that generative AI outputs today are non-deterministic, meaning that the same prompt may produce different outputs.[161] In other words, individuals have a limited amount of actual control over the outputs, and, as a result, the language model itself contributes to the realization of the output for which considering speech protections are being considered. Giving blanket speech protections to the output then, would also be giving speech protections to the contributions of the large language model.

Third, of course, is the fact that the right of publicity is already balanced with free speech protections. In terms of deepfakes, the most translatable lawsuits are likely to be those that arise in the context of biopics, where the likenesses of individuals are sometimes captured in painstaking detail through makeup and visual effects.[162] Biopics are generally allowed under the right of publicity, and the

159. *See* Letter from U.S. Copyright Off. Rev. Bd. to Tamara Pester, Attorney to Petitioner for Registry at 6 (Sep. 5, 2023), https://www.copyright.gov/rulings-filings/review-board/docs/Theatre-Dopera-Spatial.pdf [https://perma.cc/6VBQ-XDJL] ("Mr. Allen's actions as described do not make him the author of the Midjourney Image because his sole contribution to the Midjourney Image was inputting the text prompt that produced it.").

160. This of course can go the opposite way too. If copyright is protectable for generative AI outputs, then it is an act of self-expression. Alternatively, we can ask the question in the opposite way: Is using generative AI an act of self-expression? If so, we should grant it copyright. However, I think it is not for the non-determinative reasons mentioned.

161. Sean Beard, *Managing the Non-Deterministic Nature of Generative AI*, Pariveda (Mar. 27, 2024), https://parivedasolutions.com/perspectives/managing-the-non-deterministic-nature-of-generative-ai/ [https://perma.cc/84SS-NB2D]. Non-determinism is not a bad thing per se, but it poses challenges to the way we normally think of computing as having strict relationships between input and output. *See id.* ("In some cases, this unpredictability can enhance processes and add value. In others, it might bring unwanted complexity or make outcomes less predictable.").

162. For an example of this makeup, see Cheryl Wischhover, *How to Turn Christian Bale into Dick Cheney*, Vox (Feb. 24, 2019, 22:58 ET), https://www.vox.com/the-goods/2019/2/22/18233588/vice-makeup-dick-cheney-christian-bale-greg-cannom [https://perma.cc/G68Z-83WV] (reporting on exhaustive biopic transformation by Oscar-winning makeup designer).

path to a viable lawsuit is instead through defamation.[163] On the other hand, preventing the use of lookalikes in advertisements has been successful.[164] Likely, the use of deepfakes rather than lookalikes will find its way onto a similar spectrum.

C. Usage of AI and the Right of Publicity

The recent strikes by both the Writers Guild and SAG-AFTRA highlighted the growing fear of generative AI by those whose jobs are potentially targeted by the technology.[165] The prolonged nature of each strike demonstrated the power that media firms have over some of America's most famous celebrities and their labor unions. Duncan Crabtree-Ireland, chief negotiator for SAG-AFTRA, put it bluntly when he said that a studio having unilateral control over an actor's digital replica felt like the studio owning a person.[166] Ultimately, both strikes resolved with new deals that placed significant limitations on the emerging usage of AI.[167]

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163. *See* Cox, *supra* note 100 (noting that although "[n]o individual holds the legal 'right' to the story of their life" in the United States, there have been several high-profile defamation lawsuits stemming from biopics).

164. *See, e.g.*, Onassis v. Christian Dior-N.Y., Inc., 472 N.Y.S.2d 254, 256, 263 (Sup. Ct. 1984), *aff'd mem.*, 488 N.Y.S.2d 943 (App. Div. 1985) (holding that a well-known personality was entitled to injunctive relief to prohibit use of advertisement containing look-alike without consent). Separately, the Lanham Act also protects against false endorsements, although this protection does not serve the same purpose as the right of publicity and thus is not necessarily balanced by the same tests. *See In re* NCAA Student–Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1280 (9th Cir. 2013) (declining to "import" test for Lanham Act claims "wholesale for right-of-publicity claims," despite "some overlap" with transformative use defense).

165. See James Poniewozik, *TV's Wars with Robots Is Already Here*, N.Y. Times (May 10, 2023), https://www.nytimes.com/2023/05/10/arts/television/writers-strike-artificial-intelligence.html [https://perma.cc/PA3R-X9YB] ("[W]riters are asking the studios for guardrails against being replaced by A.I., having their work used to train A.I. or being hired to punch up A.I.-generated scripts at a fraction of their former pay rates."); Marc Tracy, *Digital Replicas, a Fear of Striking Actors, Already Fill Screens*, N.Y. TIMES (Aug. 4, 2023), https://www.nytimes.com/2023/08/04/arts/television/actors-strike-digital-replicas.html [https://perma.cc/6PPM-27R5] (reporting that innovations in digital technology and AI were top grievances in actors' union strike).

166. Tracy, *supra* note 165 ("That's really abusive . . . and not an OK way for companies to deal with somebody's image, likeness or persona. It's like owning a person.").

167. For the Writers Guild, this included limitations on AI-generated storylines. Andrew Dalton, *The Hollywood Writers Strike Is Over After Guild Leaders Approve Contract with Studios*, Associated Press (Sep. 26, 2023, at 23:54 ET), https://apnews.com/article/

These new deals did not just protect digital replicas of A-list superstars, but also those of extras.[168] While background actors are likely to have limited value in their right of publicity — likely much less than even that of other non-famous individuals like in *Zacchini*—the new regulations guarantee that they get paid at least the daily minimum for background actors for such a use.[169] However, SAG-AFTRA recognizes that this contractual labor agreement can only extend protections so far, and so they have also successfully lobbied for further protections in California state law.[170] By protecting the transfer of digital replica rights without informed consent and the digital replicas of deceased individuals, California took essential steps in protecting the right of publicity in the age of AI.[171]

Organizations like SAG-AFTRA are justifiably nervous about where the AI revolution will take us next. Whether we are ready or not, this new technology means that we cannot wait to understand how the use of AI fits into the rights that we expect. Understanding the harms as well as the benefits will help us better situate the use of AI in our legal landscape. SAG-AFTRA has made advancements in the protection of the right of publicity from misuse in AI, but these are only the first steps in a new world.

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writers-strike-deal-hollywood-vote-actors-d3119d670a4fd3449773bf8f4026fb2b [https://perma.cc/6LTA-53NT].

168. *See A.I. Background Questions*, SAG-AFTRA (Aug. 16, 2024), https://www.sagaftra.org/ai-background-questions [https://perma.cc/N9TV-64CY].

169. *Id.*

170. *See* SAG-AFTRA vs. AI: *Protecting Performers in the Digital Age*, Davis+Gilbert (Nov. 22, 2024), https://www.dglaw.com/sag-aftra-vs-ai-protecting-performers-in-the-digital-age/ [https://perma.cc/6TGJ-LXHC] (noting SAG's impact on recent California law expanding AI protections for actors).

171. *See* Cal. Lab. Code § 927 (West 2025) (providing that "a provision in an agreement between an individual and any other person for the performance of personal or professional services . . . by a digital replica of the individual" is unenforceable if certain conditions are met); Cal. Civ. Code § 3344.1 (West 2025) ("[A] person who uses a deceased personality's . . . likeness, in any manner, on or in products . . . for purposes of advertising or selling . . . goods, or services, without prior consent from the person or persons specified . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."). Both bills went into effect on January 1, 2025, so the results are yet to be seen. *California Passes New Legislation Prohibiting Unauthorized AI Replicas*, Davis+Gilbert (Sep. 25, 2024) https://www.dglaw.com/california-passes-new-legislation-prohibiting-unauthorized-ai-replicas/ [https://perma.cc/5KXN-K6SM].

IV.
RESTRICTIONS ON CONTRACTS LICENSING OR ASSIGNING PUBLICITY RIGHTS FOR USE IN GENERATIVE AI

Given the uncertain and precarious position of generative AI both legally and societally, courts should be especially cognizant of treading lightly in future decisions. In particular, deepfakes have the capability to exploit the right of publicity in a manner that so far is unheralded. As stated in the introduction, this note will highlight two primary ways in which the harm emerges. First is the problem of power balances in the transfer of the rights of publicity. With so many individuals having already transferred their right of publicity, access to deepfake technology creates an expansive new regime under which these likenesses, often transferred from comparatively low-powered parties, can be exploited for commercial gain.[172] Second, there is the question of the outer limits of the transferability and assignment right of publicity. Even when publicity rights are transferred with fully informed consent, deepfakes could expand the exploitation of celebrity likeness in ways that are harmful to society without proper regulation.

Given the unique challenges presented by this new wave of technology, I propose the same caution exercised by the court in *Moore*. The exploitation of the right of publicity to create digital replicas and other deepfake content should not be recognized under the terms of a contract. Far from being a hypothetical, this was a central point of contention in the SAG-AFTRA strike.[173] While states like California have introduced legislation to require informed consent for the creation of digital replicas,[174] courts should be skeptical of any contract entered prior or without the full contemplation of generative artificial intelligence. In other words, this judicial skepticism should not only apply to future contracts entered into with living or deceased actors, but also should curtail the enforcement of perpetual publicity agreements already entered into.

A. Power Imbalances in the Right of Publicity and the Use of Deepfakes

If we were to accept the strongest versions of the right of publicity as a property right, then contractual transfers as a basis for

172. As discussed in the introduction, many contracts, like those signed by America's Got Talent contestants and former NCAA athletes, require the signing away of publicity rights. *See supra* Introduction.

173. *See supra* Section IV.C.

174. *See supra* note 170 and accompanying text.

deepfake creation would be a natural result. However, we have seen already how a property rights framing is undercut by actual judicial treatment of the right.[175] Rothman makes the important distinction that if the right of publicity is transferable, then it is necessary to make a distinction between the "publicity-holder" and the "identity-holder."[176] This helpful terminology immediately highlights a difficult problem: the identity-holder is immutable. The legal separation of identity- and publicity-holder could reduce social welfare for those living with the bifurcated rights.[177] For example, under a strong property rights regime, if someone else exclusively holds your right of publicity, do you have standing to sue for a misappropriation of your likeness? A person would not have the ability to bring a trespass to chattels action for property in which they do not own any interest. In trademark, individuals like Hayley Paige Gutman of Say Yes to the Dress fame who register eponymous brand names have faced significant trouble in professionally using their own name once they have signed away the trademark.[178] For people in Hayley's position, such transfers can not only harm their future career but also feel like erasure of their freedom to use their identity.

Yet many of us will have the intuition that this outcome feels wrong. That intuition is likely grounded in a recognition that even if we view our publicity as a property right, that property right is intimately rooted in one's personhood.[179] While not explicit, this is embodied by the concurrence in *JA Apparel Corp. v. Abboud*, which hypothesized that the transfer of "Joseph Abboud" even as a personal name would not imply an exclusive right to use that name in trademarks by the transferee.[180] It is, in a sense, impossible to exploit the right of publicity without simultaneously exploiting personhood. This may also be the same intuition that the jury in *Hayden*

175. *See supra* Part II (discussing how a property right framing fails to explain the results in contexts like bankruptcy).

176. Rothman, *supra* note 28, at 187 ("If publicity rights are alienable, then the publicity-holder (the person who owns the right of publicity) need not be the same person as the person upon whom the publicity rights are based (the individual with whom publicity rights first vest and whose identity is the one that must be used to show a violation of those publicity rights).").

177. *Id.* at 221.

178. *See* Haley L. Macray, *Fashion Victims: Investigating the Legal Pitfalls of Eponymous Brand Names*, 57 Suffolk U. L. Rev. 203, 203–05 (2024) (describing Gutman's inability to "design under the name 'Hayley Paige' outside of her relationship" with her former employer as a "harrowing" but uncommon "tale for fashion designers").

179. *See supra* Section III.A.

180. J.A. Apparel Corp. v. Abboud, 568 F.3d 390, 409–10 (2d Cir. 2009) (Sack, J., concurring).

recognized when they refused to recognize copyright infringement for tattoos on the bodies of NBA players.[181]

This intuition is backed up by the longstanding restrictions on specific performance for personal services.[182] Allowing publicity rights to be exploited via deepfakes fully circumvents this limitation. For example, actors who would not appear in a commercial can be digitally conjured with new AI technology. If courts would not allow such specific performance for the individual, they should not allow it to be achieved technologically.

Unfortunately, this type of circumvention is already threatened, because perpetual assignments of publicity rights already broadly exist within our media landscape.[183] In most of such transfers, like the NCAA and AGT examples, the transferor has little bargaining power compared to an already-famous athlete or artist. Even before the threat of AI, these transfers have already been used to harm the identity-holders.[184] Now, potential exploitation of deepfakes uniquely threatens these individuals. While NCAA players were prevented from profiting off their likeness, and certainly suffered some harms to their autonomy and dignity as a result, generative AI provides an avenue through which the publicity-holder can force a performance to be tendered to which the identity-holder would never consent.

It is worth considering normatively if courts want to endorse the further consolidation of the publicity rights in the hands of already powerful media corporations. A strong view of the property right of publicity paired with a presumptive validation of these contracts would endorse such usages based on the mere fact that publicity was transferred. Without a strong termination right in place—likely much stronger than exists in copyright today—courts are offering a way for powerful entities to exploit the likenesses of individuals who transferred their rights while at a disadvantage. This not only feels morally wrong, in that such usage appears to violate the moral rights of identity-holders, but also undercuts the utilitarian incentives for an

181. See Hayden v. 2K Games, Inc., No. 1:17CV2635, 2024 WL 4336945, at *2–3, *9 (N.D. Ohio Aug. 22, 2024) (denying plaintiffs renewed motion for judgment as a matter of law); *see also id.* ("[LeBron] James testified . . . [f]rom my tattoos to my ears piercing to my scars to everything that's been a part of my body for 37 years, if I decide to give it out or license it or let someone see it, that is my right.").

182. *See supra* Section III.D.

183. *See, e.g.*, AGT release, *supra* note 4, para. 2 (granting irrevocable right to participant's likeness); NCAA Complaint, *supra* note 5, para. 370; Rothman, *supra* note 28, at 188 (discussing perpetual assignments of publicity rights in a variety of contexts, including NCAA sports and other entertainment settings).

184. *See supra* Section II.D (discussing how NCAA monopoly on player licensing foreclosed billion-dollar market).

individual to invest in developing their public persona. Courts would be wise to embrace past jurisprudence which hesitated to grant such sweeping property rights without explicit statutory authority.[185]

B. Harms in Allowing Evenly Balanced Parties to Exploit Deepfake Rights

Returning to the hypothetical posed in the introduction; it is certainly foreseeable that aging celebrities or estates will perpetually license an individual's likeness. When AI removes the normal constraints of our physical and temporal existence, the possibilities are endless. A professional athlete could license their rights to appear in movies without needing to commit time during a season. An older actor could license a version of their mid-twenties-likeness separately from their late-forties-likeness.

Even for powerful parties, problems arise in the secondary market for these transferred publicity rights. While the individual celebrity might have been comfortable with the first rights-holder exercising the contract, they may be uncomfortable with a later party exercising the same right. This rationale is bolstered by the fact that individuals are increasingly unable to tell the difference between real and AI-generated video content.[186] While enforcement of the contract may not be a forcing of the "literal" individual to specifically perform, that difference is completely immaterial to the public who will not know the difference. The difference is also immaterial in many aspects to the person whose likeness is exploited, as they will have to live with people thinking that they tendered the performance regardless of the digital nature of it. Not only that, but this could lead to a further degradation in the public's ability to trust *any* media content that is being produced. While bad actors will continue to exploit the uses of AI to fraudulent ends, there is still value in holding large media companies to a standard that engenders public trust.

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185. While *Moore* clearly represents this jurisprudence of caution, it is not alone. The Supreme Court embraced a similar caution in deciding a case on hot news before the development of much of modern copyright law. *Compare* Int'l News Serv. v. Associated Press, 248 U.S. 215, 234–35 (1918) ("We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business."), *with* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 496–97 (1990) ("[T]here is no pressing need to impose a judicially created rule of strict liability, since enforcement of physicians' disclosure obligations will protect patients against [this] very type of harm . . . .").

186. *See supra* Section IV.A (discussing frauds being perpetuated with deepfake videos).

While the indignation problem may not apply to a deceased actor, avenues for harm still exist. As a first matter, courts have been sharply divided on whether the right of publicity survives an individual or is devisable to any extent.[187] Even if allowed, such transfer may still harm the rising generation of young and aspiring artists. For example, one explanation for why fewer pop stars are rising to fame in recent years is the incentive for labels to exploit the catalogs of established artists rather than promote new ones.[188] Judicial endorsement of the ability to exploit the estates of actors through deepfakes could potentially act to encourage an atmosphere that limits the access of rising stars in order to take advantage of the lower overhead of prior, established personas.

To conclude this section on an adjacent concern, courts should also seriously consider what to do with the publicity rights of individuals who live in states that do not recognize the descendibility of the right of publicity. In some sense, these individuals' publicity rights move immediately into the public domain, yet such a treatment can cause similar harms if the actor voluntarily transferred the right. As a result, courts should be hesitant to extend legal protections, like copyright, to works that rely heavily on generative AI representations of recently deceased subjects even without a descendible right of publicity. More generally, courts should treat the use of deepfakes with great reservation, as their continued use threatens our collective ability to discern truth. The field of AI is still very new, and contains many promises, but should not be given free rein to replace the performances of real individuals without some serious legislative and regulatory thought to guide judicial decision-making.

V.
CONCLUSION

AI has promised a revolution in the day to day of our lives. While the technology has improved in leaps and bounds, many of those advances have brought amazing results as well as the risk of significant dangers. Courts have often chosen to tread lightly when new technology and possibilities arise to avoid judicially creating policy in areas sure to be rife with complexity and pitfalls. This caution should only be multiplied by the extremely personal nature of the

187. Rothman, *supra* note 28, at 203–04.

188. *See* Chris Eggertsen, *Why Aren't More Pop Stars Being Born?*, Billboard (Aug. 8, 2023), https://www.billboard.com/music/pop/new-pop-stars-rare-why-music-fans-ideas-1235398872/ [https://perma.cc/BHP8-HXXR].

right of publicity and the widespread disagreement among states on its limits.

This same caution also warrants a re-evaluation of existing assignments of publicity rights, particularly with respect to those entered into between parties of comparatively unequal bargaining power. There is at least some evidence from the NCAA that monopolization of these publicity rights leads to economic harm by foreclosing robust markets. More than that though, the advancements in generative AI threaten deeper harm to the dignity of publicity holders in our era. Before allowing such broad assignments of publicity rights to be used to produce content with generative AI, serious policy considerations need to be given to weigh the any benefits against the potential personal and economic harms. Courts are not equipped to balance such factors and, as a result, judicial approval of such contractual assignments should be withheld.