# MITIGATING THE MACHINE: BALANCING INNOVATION WITH OVERSIGHT IN THE DIGITAL AGE

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"By far the greatest danger of Artificial Intelligence is that people conclude too early that they understand it." – Eliezer Yudlowsky[1]

## INTRODUCTION

Imagine a politician delivering a speech they never gave, or students in a classroom engaging in a virtual Q&A session with a long-lost historical figure. Better yet, what if a celebrity could sign autographs in New York while simultaneously shooting a commercial in Tokyo? Is it possible to be in two places at once? It's a terrifying yet intriguing hypothetical, reflective of a paradox made possible by artificial intelligence ("AI") and machine learning ("ML"). The emergence of AI and ML algorithms has revolutionized technological advancement and societal production, enabling business and industry alike to enhance marketability and improve operational strategy.[2] It is a force capable of astonishing innovation and realistic manipulation—while AI has reshaped the boundaries of productivity by streamlining the creative process, ethical considerations persist regarding the misuse of this technology by those with malintent.[3]

1.    Devansh Lala, *Artificial Intelligence: Understanding the Hype*, MEDIUM (July 23, 2017), https://towardsdatascience.com/artificial-intelligence-understanding-the-hype-daee0df04695.

2.    Elysse Bell, *How to Use AI in Business Planning*, INVESTOPEDIA (Mar. 22, 2024), https://www.investopedia.com/how-to-use-ai-in-business-planning-8610190.

3.    Rick Spair, *Breaking Boundaries: How Generative AI is Reshaping the Media Landscape*, DX TODAY BLOG (Jan. 1, 2025),

For every beneficial use that AI has to offer comes with it the potential for it to be weaponized to undermine privacy, security, and even the very fabric of democracy.[4] A sobering realization in light of emerging technologies has been the inability of existing legal frameworks to maintain pace. The teetering nature of AI and ML technology presents a challenge in that there are mixed beliefs regarding the best way to address it.[5] If AI is to be considered a spectrum, then on one end are those who believe that any regulation is unwarranted because it is still emerging, while on the other end are those who believe immediate action is needed before it becomes too advanced to control.[6] This comment seeks to establish a middle ground by examining these concerns through the lens of intellectual property ("IP") and right-of-publicity doctrines. Part one of this comment provides an overview of different kinds of AI and ML, with a particular emphasis on deepfakes and the implications thereof. Part two focuses on the right of publicity in Louisiana and compares it with that of other jurisdictions. Part three evaluates how the right of publicity has inspired the recent introduction of federal legislation, and recommends steps that can and should be taken to balance protection with progress.

## I.     ARTIFICIAL INTELLIGENCE (AI) AND MACHINE LEARNING (ML)

Broadly speaking, AI "[r]efers to the ability of machines to perform tasks that typically require human intelligence. . . ."[7] Devices equipped with AI technology are capable of simulating human learning in such a manner so as to circumvent the need for human intervention.[8] Although all AI systems are designed to

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https://www.rickspairdx.com/2025/01/breaking-boundaries-how-generative-ai.html.

4.     *Id.*

5.     Interview with Henry Hays, CEO, DisruptREADY, in Baton Rouge, La. (Oct. 7, 2024).

6.     *Id.*

7.     *Generative AI vs Machine Learning vs Deep Learning Differences*, REDBLINK TECH. (Mar. 16, 2023), https://redblink.com/generative-ai-vs-machine-learning-vs-deep-learning/#Generative_AI_Vs_Machine_Learning_Vs_Deep_Learning.

8.     *What Is Artificial Intelligence (AI)?*, IBM (Aug. 9, 2024), https://www.ibm.com/topics/artificial-intelligence.

improve efficiency through self-learning, within the field of AI exists several categories and subcategories that each differ in application.[9] The main subcategory of AI, machine learning ("ML"), utilizes algorithmic models to promulgate machine self-learning "[w]ithout explicit programming."[10] This is accomplished by use of three separate techniques: supervised learning, unsupervised learning, and reinforcement learning.[11] Supervised learning involves the use of labeled datasets wherein the algorithm identifies labeling patterns and uses them to predict new outputs of unseen data.[12] Unsupervised learning differs in that the algorithm is exposed to unlabeled data pairs and is tasked with structuring its own output predictions.[13] Reinforcement learning is a technique often seen in self-driving cars wherein the algorithm is "[r]ewarded or punished based on its actions in an environment," encouraging the algorithm to gradually improve its decision making over time.[14]

Another branch of ML, deep learning ("DL"), utilizes artificial neural networks capable of processing large quantities of complex data, similar to that of the human brain.[15] This subcategory differs from traditional ML in that DL algorithms "[a]utomatically learn representations from data" without the need for any human intervention.[16] DL employs a form of reinforcement learning wherein the neural networks are "trained" to produce a desirable output.[17] Within this branch exists yet

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9.     *What is (AI) Artificial Intelligence?*, UNIV. OF ILL. CHIC., https://meng.uic.edu/news-stories/ai-artificial-intelligence-what-is-the-definition-of-ai-and-how-does-ai-work/ (last modified May 7, 2024).

10.     *Id.*

11.     *See Generative AI vs Machine Learning vs Deep Learning Differences*, *supra* note 7.

12.     *What Is Artificial Intelligence (AI)?*, *supra* note 8.

13.     *Generative AI vs Machine Learning vs Deep Learning Differences*, *supra* note 7.

14.     *Id.*

15.     *What Is Artificial Intelligence (AI)?*, *supra* note 8.

16.     *Deep       Learning*,     NVIDIA,     https://www.nvidia.com/en-us/glossary/deep-learning/. *See also id.*

17.     Jessica Ice, *Defamatory Political Deepfakes and the First Amendment*, 70 CASE W. RES. L. REV. 417, 421 (2019) https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4854&context=caselrev (Quoting Alan Zucconi, *An Introduction to Neural Networks and*

another subset of AI known as generative AI, which utilizes a combination of ML and DL to recognize trends presented by the input data and create a unique output.[18] It is within the latter two branches that deepfakes are created.

### A. Deepfakes

Deepfakes are "any of various media…[t]hat has been digitally manipulated to replace one person's likeness convincingly with that of another, often used maliciously to show someone doing something that he or she did not do."[19] There are a variety of ways in which deepfakes can be created, one of which is by use of an autoencoder.[20] Autoencoders are capable of learning latent representations in data sets, which in turn can be used to promulgate face swapping.[21] An autoencoder is a self-supervised[22] neural network that "[c]ompress[es] (or encode[s]) input data…[to] then accurately reconstruct (or decode) [the] original input."[23] Through an iterative training process, the encoder network compresses the input (original imagery) through a "bottleneck" layer in the network's architecture, capturing the input's essential features.[24] The decoder then reconstructs the original input,[25] the goal being to minimize reconstruction error and mimic the input

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*Autoencoders*, ALAN ZUCCONI BLOG (Mar. 14, 2018), https://www.alanzucconi.com/2018/03/14/an-introduction-to-autoencoders/).

18. *What Is Artificial Intelligence (AI)?*, *supra* note 8.

19. *Deepfake*, OXFORD ENGLISH DICTIONARY https://www.oed.com/dictionary/deepfake_n?tab=meaning_and_use#1345352340 (last visited Sep. 28, 2024).

20. *What is a Variational Autoencoder?*, IBM (June 12, 2024), https://www.ibm.com/think/topics/variational-autoencoder.

21. Alakananda Mitra, et al., *The World of Generative AI: Deepfakes and Large Language Models*, ARXIV 3 (Feb 8, 2024), https://arxiv.org/pdf/2402.04373v1.

22. "self-supervised" in this instance refers to the aforementioned "unsupervised learning" technique wherein the system is self-learning without the need for human input or supervision. *What is self-supervised learning?*, IBM (Dec. 5, 2023), https://www.ibm.com/topics/self-supervised-learning.

23. *What is a Variational Autoencoder?*, *supra* note 20.

24. *Id.* "Bottleneck" in this context "[i]s both the output layer of the encoder network and the input layer of the decoder network." *See What is an Autoencoder?*, IBM (Nov. 23, 2023), https://www.ibm.com/topics/autoencoder.

25. *Id.*

"[a]s closely as possible."[26] By training the networks separately, the process results in the decoder seamlessly imbedding a swapped facial structure onto the original imagery input.[27]

Another way deepfakes are created is through a DL technique in which existing images are superimposed onto the source material through generative adversarial networks ("GAN").[28] There are two neural networks within GANs—generators and discriminators.[29] The generator creates new images inspired by the input source material and the discriminator evaluates the authenticity of the output.[30] The networks learn by continuously working against one another—each time the discriminator detects a falsified image, the generator creates a more authentic output, and the process repeats until the discriminator believes the output is a part of the original dataset.[31] GANs serve as the most popular way in which deepfakes are created because the networks are capable of producing realistic images with a higher degree of accuracy than that of traditional autoencoders.[32]

No matter how they are created, much of the concern surrounding deepfakes stems from the fact that they can be so convincing that they appear authentic to the ordinary observer.[33] Indeed, this technology in the hands of those with malintent can have heinous consequences, such as an individual's likeness being used to create pornographic material or make it appear as if they

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26. Mohammad Al-Marie, *Exploring Neural Network Architectures: Autoencoders, Encoder-Decoders, and Transformers*, MEDIUM (Apr. 3, 2023), https://medium.com/@mohd.meri/exploring-neural-network-architectures-autoencoders-encoder-decoders-and-transformers-c0d3d6bc31d8.

27. Ice, *supra* note 17, at 421-22.

28. Sarah H. Jodka, *Manipulating reality: the intersection of deepfakes and the law*, REUTERS (Feb. 1, 2024), https://www.reuters.com/legal/legalindustry/manipulating-reality-intersection-deepfakes-law-2024-02-01/#:~:text=The%20consent%20further%20requires%20companies,used%20to%20train%20generative%20AI.

29. *Id.*

30. Danielle C. Breen, *Silent No More: How Deepfakes Will Force Courts to Reconsider Video Admission Standards*, 21 J. High Tech. L. 122, 138-39 (2021).

31. *Id.* at 139-40.

32. Ice, *supra* note 17, at 422.

33. *Id.*

are committing a crime.[34] Moreover, the dispersion of such imagery on the internet is capable of inflicting irreversible reputational harm, as it is virtually impossible to remove deepfake content once it is disseminated online.[35] This creates consequences that transcend mere reputational damage,[36] and although negative connotations persist, this lack of regulation has only exacerbated the technology's use. Indeed, while our ability to detect deepfakes at their inception is ever-evolving and improves daily, the vastness of the internet renders an outright ban on deepfakes unfeasible.[37] Big Tech companies have begun leading initiatives to combat harmful deepfakes at the source, but once the content that slips through the cracks makes its way onto the internet, "[t]he genie is [already] out of the bottle."[38] There is also a prevailing sentiment that because the technology is still emerging and not yet fully understood, there is reason to believe that any regulation thereof presents serious First Amendment concerns, especially as it pertains to political advertisements and freedom of the press.[39] These concerns are largely predicated on fair use exceptions that are embedded throughout federal copyright law and state right-of-publicity doctrines.[40]

An additional justification warranting the hesitancy to enact regulation is that although deepfake content is often viewed in a malicious context, there are actually some beneficial uses of DL technology that frequently go unrecognized. For instance, DL and

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34.    *Id.*

35.    *See* Donna Etemadi, *The Deepfake Dilemma*, 112 Ill. B.J. 38, 39 (2024).

36.    *E.g.,* Heather Chen & Kathleen Magramo, *Finance worker pays out $25 million after video call with deepfake 'chief financial officer,'* CNN (Feb. 4, 2024, 2:31 AM), https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html.

37.    *Id.*

38.    *Id.*

39.    *See, e.g.,* Letter from Jeff Landry, Louisiana Governor (June 20, 2024), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1382553 (citing First Amendment concerns as reasoning for veto of political deepfake bill in Louisiana).

40.    Sasha Rosenthal-Larrea, et. al, *AI Deepfakes: Unauthorized Depictions and Protection of Property Rights to Name, Image and Likeness*, ALM N.Y.L.J. (June 3, 2024), https://www.law.com/newyorklawjournal/2024/06/03/ai-deepfakes-unauthorized-depictions-and-protection-of-property-rights-to-name-image-and-likeness/.

the methods of predictive learning therein are capable of bettering surgical procedures and training mechanisms for rare illnesses.[41] Studies have shown that DL algorithms can be trained to locate cancerous tumors with a high degree of accuracy and avoid noncancerous changes.[42] Some models' methods of predictive learning are so advanced that they are capable of predicting whether or not cancerous regions have spread,[43] oftentimes much better than that of computed tomography alone.[44]

These benefits extend further beyond the scope of medicinal application. When viewed in an educational context, deepfake imagery can be utilized to develop AI tutors coded to provide support specific to individual students.[45] AI tutor applications can be "[l]everage[d]…to create immersive learning experiences," thereby providing an effective way in which students retain information.[46] Moreover, audio and video data can be utilized to create accurate depictions of prominent historical figures, enabling future generations to experience their stories through holographic representations.[47] The fact that the potential benefits of this technology are emerging alongside its harms gives rise to further questions about the constitutionality of any laws seeking to regulate it.[48]

When viewing the pros and cons of deepfake technology in conjunction with one another, it follows that the lack of governance

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41.	Nagothu, et al., *Deterring Deepfake Attacks with an Electrical Network Frequency Fingerprints Approach*, FUTURE INTERNET (Apr. 21, 2022). https://www.mdpi.com/1999-5903/14/5/125.

42.	*See generally* Nadia Jaber, *Can Artificial Intelligence Help See Cancer in New, and Better, Ways?*, NAT. CANCER INST. (Mar. 22, 2022), https://www.cancer.gov/news-events/cancer-currents-blog/2022/artificial-intelligence-cancer-imaging.

43.	*See id.* (Citing Stephanie Harmon, et al., *Multiresolution Application of Artificial Intelligence in Digital Pathology for Prediction of Positive Lymph Nodes From Primary Tumors in Bladder Cancer*, JCO CLIN. CANCER INOFRM. (Apr. 24, 2020), https://pmc.ncbi.nlm.nih.gov/articles/PMC7259877/.

44.	*Id.*

45.	Dan Patterson, *Deepfakes for good? How synthetic media is transforming business*, TECH INFORMED (Oct. 5, 2023), https://techinformed.com/deepfakes-for-good-how-synthetic-media-is-transforming-business/.

46.	*Id.*

47.	Nagothu et al., *supra* note 41.

48.	Ice, *supra* note 17, at 428.

thereof is not without rhyme or reason. However, these factors alone should not serve as an insurmountable barrier to regulation. Indeed, the principles of fair use are essential not only to balance the rights of individual creators against the societal interest of free expression,[49] but also to incentivize technological advancement. Nevertheless, there are mechanisms at our disposal whereby we can maintain these principles while safeguarding against the harms this technology imposes. For instance, there are indeed laws currently in effect that criminalize the creation deepfake pornography[50] and target identity theft, and some have even suggested verifying the authenticity of deepfakes at the source via digital watermarking.[51]Admittedly, however, these mechanisms only go so far— while our ability to detect deepfake content is gradually improving, so is the ability of those with malintent to circumvent these efforts.[52]

## B. Deepfakes and the First Amendment

Recent studies have shown that 63.8% of the world's population uses social media,[53] and that approximately one-in-five American adults regularly receive their news from social media influencers.[54] Albeit while online platforms have responded to increased user-bases by implementing safeguards to screen out the spread of manipulated content, such attempts are oftentimes futile due to the speed at which the content is disseminated on the internet.[55] Moreover, due to the lack of meaningful incentives for

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49.     Christian Marks, *"Southern Fights": A Battle to Expand Rights of Publicity in Louisiana Under the Allen Toussaint Legacy Act*, 70 LOY. L. REV. FOR. at        8        (Nov.        27,        2023), https://loynolawreview.org/theforum/2j4gsqpzdegx94helyh3tg3fvtzfqm25112023 .

50.     *See, e.g.,* LA. STAT. ANN. § 14:73.14 (2024) (criminalizing the unlawful creation and dissemination of deepfake pornography).

51.     *See, e.g.,* Etemadi, *supra* note 35 (Quoting IL H.B. 3285, Artificial Intelligence Consent Act (2023)).

52.     Etemadi, *supra* note 35.

53.     *Global      Social      Media      Statistics*,      KEPIOS, https://datareportal.com/social-media-users (last updated Oct. 2024).

54.     Galen Stocking, et al., *America's News Influencers*, PEW RES. CENT. (Nov. 18, 2024), https://www.pewresearch.org/journalism/2024/11/18/americas-news-influencers/.

55.     Melissa Heikkila, *Bans on deepfakes take us only so far—here's what we      really      need*,      MIT      TECH.      REV.      (Feb.      27,      2024),

social media companies to combat the problem, in combination with the priority these platforms give to virality, the spread of digitally-altered material continues to rise.[56]

In recognition of the fact that social media use and AI generated content is at an all-time high, several states have begun enacting targeted legislation to mitigate some of the harm that deepfakes are capable of inflicting.[57] Much of the regulation at the state level merely extends existing legal frameworks by adding AI generated content to conduct that is already illegal, such as prohibiting nonconsensual deepfake pornography.[58] Digitally-created sexual content deservedly receives the most regulatory attention because it makes up the majority of deepfakes on the internet.[59] However, the proliferation of deepfakes gives rise to additional concerns for our government and national security, particularly as it pertains to manipulated media that targets politicians and public officials.[60] The ability of artificial intelligence to influence our elections has been referred to as a "[serious] threat to the [stability of] our Republic,"[61] with foreign entities leveraging this technology on social media to build artificial personalities and court public opinion.[62] In the absence of federal legislation on the issue, the desire to preserve election integrity has prompted several states to draft legislation

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https://www.technologyreview.com/2024/02/27/1089010/bans-on-deepfakes-take-us-only-so-far-heres-what-we-really-need/.

56.    Kavyasri Nagumotu, *Deepfakes are Taking Over Social Media: Can the Law Keep Up?*, 62 IDEA 102, 118 (2022).

57.    Michelle Graham, *Deepfakes: Federal and state regulation aims to curb a growing threat*, REUTERS (June 26, 2024), https://www.thomsonreuters.com/en-us/posts/government/deepfakes-federal-state-regulation/.

58.    *See generally* Bill Kramer, *Most States Have Enacted Sexual Deepfake Laws*, MULTISTATE,    https://www.multistate.ai/updates/vol-32 (last updated June 28, 2024).

59.    *Increasing Threat of Deepfake Identities,* DHS.GOV 17 (2021), https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf.

60.    Ice, *supra* note 17, at 418.

61.    *Id.* at 429 (Quoting Senator Marco Rubio, Keystone Remarks at The Heritage Foundation's Homeland Security Event on Deep Fakes (July 19, 2018)).

62.    DHS, *supra* note 59, at 16. *See also* Nagumotu, *supra* note 56, at 137 ("[i]intelligence agencies confirmed Russian meddling on social media during the 2016 U.S. presidential election").

pertaining to political deepfakes.[63] Nevertheless, so persists a fine line between this desire and the potential for  government overreach.

AI generated content necessarily implicates First Amendment scrutiny in that it is sometimes viewed as nothing more than a satirical expression protected thereunder.[64] The First Amendment of the United States Constitution prevents the government from infringing upon an individual's right to freedom of speech, religion, the press, and assembly.[65] Whether deepfakes bear artistic or informational purpose, and regardless of their veracity, free speech law confers upon all citizens the right to create and share such content online.[66] Well-settled in First Amendment jurisprudence is the principle that false statements concerning public officials that are made in the absence of "actual malice" are not actionable.[67] With falsities being the exact type of speech the First Amendment is designed to protect, this precedent has been modernized and held to be presumptively applicable as it pertains to digital replicas.[68] Nevertheless, the Constitution does not afford the same protections to all speech equally.[69] Because deepfakes oftentimes extend beyond the kind of expression to which the First Amendment applies,[70] the use of this technology to defame or commercialize another's identity without their consent can indeed give rise to an actionable offense.[71] As deepfakes continue to become more sophisticated, the burden rests

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63.     *See, e.g.,* Graham, *supra* note 57.

64.     *See* UNITED STATES COPYRIGHT OFFICE, *Copyright and Artificial Intelligence, Part 1 Digital Replicas Report* 43 (July 31, 2024), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf.

65.     U.S. CONST. amend. I.

66.     Marc Jonathan Blitz, *Deepfakes and Other Non-Testimonial Falsehoods: When Is Belief Manipulation (Not) First Amendment Speech?*, 23 Yale J. of L. & Tech. 160, 173 (2020).

67.     New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). *See also* Garrison v. State of La., 379 U.S. 64, 73 (1964) (reasoning that the principles of free expression in the Constitution "preclude attaching adverse consequences to any [false utterances]" in the absence of actual malice).

68.     *See* Kohls v. Bonta, No. 2:24-CV-02527 JAM-CKD, 2024 WL 4374134, at *4 (E.D. Cal. Oct. 2, 2024).

69.     UNITED STATES COPYRIGHT OFFICE, *supra* note 64.

70.     Blitz, *supra* note 66, at 170.

71.     UNITED STATES COPYRIGHT OFFICE, *supra* note 64.

on policymakers to balance the desire to deter bad actors against the First Amendment in order to ensure that the effort to safeguard against this technology's harms does not restrict the right to creativity or free expression.

The United States Copyright Office ("USCO") has echoed the sentiment that the advancement of generative AI warrants new federal legislation.[72] In July of 2024, the USCO issued part one of its forthcoming series of Reports analyzing the intersection of AI and existing copyright law.[73] Therein, the USCO highlights why existing federal legislation is too narrowly tailored to properly account for the harm that deepfakes are capable of creating.[74] For example, using preexisting copyrighted works to procure digital replicas may indeed violate the Copyright Act if the individual depicted bears the rights to the underlying input.[75] However, the Copyright Act does not in and of itself establish a proprietary interest in one's identity, meaning that the mere replication of one's likeness is not enough to constitute an infringement.[76] Moreover, because the Copyright Act only protects creative works authored by humans, traditional copyright law in the United States falls short of adequately protecting against identity exploitation.[77] To address this issue, the USCO recommends the adoption of federal protections similar to that of state right of publicity laws.[78] In doing so, Congress will not only be able to fill the gaps of protection left by traditional copyright law, but also

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72.    UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 7.

73.    *Copyright and Artificial Intelligence*, COPYRIGHT.GOV (2024), https://www.copyright.gov/ai/ (Part 1 of the Report addresses deepfakes and digital replicas).

74.    UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 24.

75.    *Id.* at 17.

76.    *Id.* (Citing Downing v. Abercrombie & Fitch, 265 F.3d 994, 1004 (9th Cir. 2001)).

77.    Katherine Klosek, *A Federal Right of Publicity May Address AI-generated Deepfakes While Protecting Free Expression*, ASS'N OF RESEARCH LIBRARIES    2    (Jan.    16,    2024),    https://www.arl.org/wp-content/uploads/2023/07/Federal-Right-of-Publicity.pdf (describing how an individual's likeness is not the kind of original works that the Copyright Act is designed to protect).

78.    UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 57.

resolve the jurisdiction-dependent disparities found in state right of publicity laws.[79]

## II.     RIGHT OF PUBLICITY

The law has long recognized the right of an individual's interest in their own identity.[80] This principle stems from the realization that the nonconsensual use of someone's identity can have injurious effects on their commercial and individual interests.[81] The law confers two broad categories of identity rights—the "right of publicity," which refers to a protected commercial interest, and the "right of privacy," which refers to the protection of personal interests.[82] While each category is rooted in protecting an individual's interests, they differ in application.[83] Right to privacy is designed to safeguard an individual's personal interest in their identity, while right of publicity is similar to copyright law in that it confers an actual property right in one's identity.[84] In most cases, liability is imposed in cases whereby an individual's identity is utilized for a tortfeasor's "use or benefit."[85] The difficulty of this interpretation lies in the fact that it prohibits tortious conduct without identifying the damage it seeks to alleviate.[86] Whether or not a violation is one of privacy or publicity denotes a different measure of liability, and ultimately depends on the specific harm suffered by the individual.[87] As such, in the event that a violation of one's publicity rights occurs, the measure of redressability is jurisdictionally dependent—an individual in one

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79.     *See generally* Klosek, *supra* note 77.

80.     *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. a (AM. L. INST. 1995).

81.     *See id.*

82.     *Id.*

83.     John R. Vile, *Right of Publicity*, FREE SPEECH CENTER AT MTSU, https://firstamendment.mtsu.edu/article/right-of-publicity/#:~:text=Whereas%20the%20right%20to%20privacy,has%20cultivated%20in%20becoming%20a (last updated July 2, 2024).

84.     *Id.*

85.     Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 89 (2020) (Citing RESTATEMENT (SECOND) OF TORTS § 652(C) (AM. L. INST. 1977)).

86.     *Id.* at 90.

87.     RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 122, § 46 cmt. b.

state may need to establish a commercial value in their identity, while in others the individual need only establish injuries to personal reputation.[88] In Louisiana, the Allen-Toussaint Legacy Act encompasses the former measure, however it was not until recently that this became the standard.

## A. Right of Publicity in Louisiana – the History

Prior to enacting the Allen-Toussaint Legacy Act, Louisiana did not recognize a property right in in one's identity.[89] Instead of adopting the common law principle that an individual's identity was proprietary, courts frequently viewed an identity right as one of privacy.[90] For example, in the case of *Tatum v. New Orleans Aviation Bd.*, Louisiana's Fourth Circuit Court of Appeal held that the right to privacy was a strictly personal right different from that of a "real right" over property.[91] Therein, the plaintiff filed suit on behalf of his late mother, alleging that the nonconsensual use of her imagery on an airport mural constituted an invasion of privacy.[92] The court rejected these arguments, holding that Louisiana law, whether "statutor[y] or jurisprudentia[l]" provided no basis upon which the plaintiff could assert a right belonging only to the decedent.[93] Six years later, deferring to the reasoning set forth in *Tatum*, the Louisiana First Circuit held that claims predicated on privacy intrusions are not heritable and extinguish upon the decedent's death.[94] The court noted further that to establish a commercial right of publicity in one's identity "[w]ould constitute an unwarranted intrusion into an area in which the legislature has not seen fit to act."[95] As these cases reflect, the refusal to jurisprudentially recognize a commercial value in an individual's identity was largely due to legislative inaction.

88. *Id.*
89. *See, e.g.,* Tatum v. New Orleans Aviation Bd., 2011-1431 (La. Ct. App. 4th Cir. 4/11/12), 102 So. 3d 144, 147, *writ denied*, 2012-1847 (La. 11/9/12), 100 So. 3d 838.
90. *Id.*
91. *Id.* at 147.
92. *Id.*
93. *Id.*
94. *See* Frigon v. Universal Pictures, Inc., 2017-0993 (La. Ct. App. 1 Cir. 6/21/18), 255 So. 3d 591, 599, *writ denied*, 2018-1868 (La. 1/18/19), 262 So. 3d 896.
95. *Id.* at 598.

However, while a commercial right in one's identity had yet to be codified in Louisiana, precedent did indeed confer personal privacy rights thereof.[96] Relief in privacy tort for the appropriation of one's likeness still exists in instances whereby the appropriation is so unreasonable such that it "[s]eriously interfere[s] with another's privacy interest"[97] for the tortfeasor's benefit.[98]

While the elements constituting violations of privacy and publicity are largely the same,[99] recovery for misappropriation of identity under traditional privacy mechanisms is inherently difficult.[100] Determining whether or not a misappropriation qualifies as an "unreasonable" invasion of privacy requires a balancing of the plaintiff's interests with the defendant's motives.[101] The balancing test is ultimately circumstantial—while the plaintiff need not prove malicious intent on behalf of the defendant, a slight invasion of one's privacy does not rise to the level so as to violate the plaintiff's interests if the invasion is "[a]uthorized or justified by the circumstances."[102] Even in the event that all elements of a privacy claim are satisfied, privacy law in Louisiana does not recognize post-mortem rights, precluding a decedent's beneficiaries from recovery thereunder.[103] These limitations to recovery under traditional privacy law ultimately served as the spark behind the existing right of publicity framework in Louisiana.

### B. *Allen-Toussaint Legacy Act*

In Louisiana, citizens are now afforded a commercial right in their identity as codified by the Allen-Toussaint Legacy Act ("the Act").[104] Enacted in 2022, the Act confers a property right in one's identity, including that produced through digital replicas,

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96.     *E.g.,* Tatum, 102 So. 3d at 146 (Citing Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1389 (La. 1979)).

97.     *Id.*

98.     *See* Slocum v. Sears Roebuck & Co., 542 So. 2d 777, 779 (La. Ct. App. 3d Cir. 1989). *See also* Post & Rothman, *supra* note 127.

99.     Post & Rothman, *supra* note 85, at 93.

100.    Marks, *supra* note 49, at 6.

101.    Tatum, 102 So. 3d at 146

102.    *Id.* at 146-47.

103.    *Id.* at 147.

104.    LA. STAT. ANN. § 51:470.3 (2022).

that may be licensed or transferred with the express consent of the individual or, if the individual is deceased, by the legatees thereof.[105] The express language of the statute defines "individual[s]" subject to the protections therein as natural persons "domiciled in Louisiana or a deceased natural person who was domiciled in Louisiana at the time of the individual's death."[106] Furthermore, the Act defines identity rights as identifiable traits particular to the individual, including their "name, voice, signature, photograph, image, likeness, or digital replica."[107] Similar to other states, the Act contains fair use exemptions wherein an individual's identity may be utilized in certain instances insofar as said use is consistent with federal Copyright law.[108] Audiovisual works are also encompassed in these exemptions; however, they do not extend to digital replicas of professional performers if the performer did not participate in the original work.[109] By prohibiting the nonconsensual replication of one's identity through digital means, the Act provides a layer of reputational protection against those reproductions that are "indistinguishable from the actual likeness or voice of a professional performer."[110]

While the Act's purpose of protecting an individual's likeness is well-founded, its restrictive scope is inherently limiting. For instance, in applying these protections only to that of Louisiana domiciliaries, individuals who spent most of their life in Louisiana but maintained a separate domicile when they died are not afforded the same protections thereunder.[111] Additionally, notwithstanding the fact that the prohibition of nonconsensual replicas provides crucial protections to one's identity in light of emerging technologies, the restrictive application to that of only professional performers is overly confining. Amending the Act

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105.   *Id.*

106.   *Id.*

107.   LA. STAT. ANN. § 51:470.2 (2022).

108.   *See* LA. STAT. ANN. § 51:470.5(A) (2022) (stating that the Act "does not affect rights and privileges recognized under other state or federal laws, including those privileges afforded under the 'fair use' factors in the United States Copyright Act of 1976.").

109.   UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 16.

110.   LA. STAT. ANN. § 51:470.2 (2022).

111.   Marks, *supra* note 49, at 7.

such that all individuals in Louisiana are afforded the same protections against nonconsensual digital replicas would not only promote business efficiency[112] and technological investment, it would also follow a multi-jurisdictional trend in further safeguarding against the harms of identity exploitation.

### C. Right of Publicity in Other States

In recent years, several states have amended or enacted new right of publicity laws to modernize protections in accordance with emerging technologies.[113] For instance, the state of Tennessee expanded its right of publicity statute in July of 2024 as to extend beyond the previous restriction of commercial use and also include protections against unauthorized voice simulations.[114] Additionally, California's Governor Gavin Newsom recently signed a bill into law detailing watermark and labeling requirements for digitally-created advertisements.[115]

An Illinois bill that was signed into law in September of 2024 serves to amend Illinois's Right of Publicity Act.[116] To take effect in January of 2025, the law establishes a commercial right in one's identity and prohibits the unauthorized use thereof.[117] While the protections and application established by the Illinois statute are largely the same as the Act in Louisiana, a notable difference pertains to the scope of those affected. The Illinois statute makes no mention of a domiciliary requirement, instead conferring the right upon all natural or juridical persons (individuals) that reside in the state.[118] Furthermore, while both laws are restricted in scope to commercial use, Illinois's law does not limit the digital replica prohibitions solely to professional performers.[119] These

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112.     *Id.* at 21.
113.     UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 15.
114.     *Id.* (Citing the Ensuring Likeness, Voice and Image Security "ELVIS" Act of 2024, Tenn. Pub. Acts ch. 588). ELVIS provides fair use exceptions similar to that of the Act in Louisiana and federal Copyright law. The expansion thereof now encompasses unauthorized digital replicas that are made available to the public.
115.     *See* Cal. Assemb. J., Reg. Sess., No. 2355 (2024).
116.     IL H.B. 4875, Amends the Right of Publicity Act (2024).
117.     *Id.*
118.     *Id.*
119.     *See generally id.*

differences, albeit while subtle, represent notable changes Louisiana should make to its right of publicity law. Repealing the domiciliary requirement and holding the protections of the Act applicable to all individuals in Louisiana would procure demonstrable benefits—it would effectively provide all residents with the peace of mind that the proprietary interest in their identity is protected from misuse.[120] Furthermore, the change would provide this same sense of protection for those that currently reside out-of-state, incentivizing those involved in athletics or entertainment to conduct business in Louisiana[121] and contribute to the state's economic growth.

### III.   FEDERAL REGULATION

Currently, the United States does not have comprehensive omnibus legislation directly applicable to artificial intelligence.[122] While existing frameworks at the federal level can be utilized to address some of the pertinent issues, each carries its own set of limitations.[123] For instance, digital reproductions of previously copyrighted works are capable of implicating the rights established under federal Copyright law.[124] However, Copyright law does not in and of itself protect against identity misappropriation,[125] and the affected individual may only recover thereunder if they happen to own the copyrights to the underlying input.[126] Similarly, traditional trademark law falls short of

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120.    *See generally* Marks, *supra* note 49, at 21.

121.    *Id.*

122.    *AI Watch: Global regulatory tracker – United States*, WHITE & CASE LLP (Dec. 18, 2024), https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker-united-states#:~:text=As%20noted%20above%2C%20there%20is,or%20deployers%20of%20AI%20systems.

123.    Nagumotu, *supra* note 56, at 137.

124.    UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 17.

125.    *Id.*

126.    Sasha Rosenthal-Larrea, et. al, *AI Deepfakes: Unauthorized Depictions and Protection of Property Rights to Name, Image and Likeness*, ALM N.Y.L.J. (June 3, 2024), https://www.law.com/newyorklawjournal/2024/06/03/ai-deepfakes-unauthorized-depictions-and-protection-of-property-rights-to-name-image-and-likeness/

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protecting individuals who do not use their identity for commercial gain.[127]

The inherent limitation of existing IP and right-of-publicity doctrines to combat this technology persists due to the narrow scope to which they apply, prompting the introduction of new legislation to help bridge some of these gaps. For instance, a bill proposed in early 2024 seeks to establish an IP right in one's likeness by prohibiting the unauthorized creation of digital replicas indistinguishable from that of a person's real identity.[128] Labeled the NO-AI FRAUD Act[129], the bill seeks to establish federal protections synonymous with that of state right of publicity laws, and includes numerous factors to accommodate First Amendment concerns.[130] While the bill represents an encouraging shift towards the issue of AI generated content being addressed on a national scale, its proposal is not without criticism.[131] Particularly, the exemptions contained therein are seen in opposition as limiting the application of First Amendment defenses.[132] Unlike the specifically enumerated fair use exceptions set forth within the Copyright Act,[133] the NO-AI FRAUD Act fails to specify the kind of activity subject to fair use balancing.[134] In the absence of clear exceptions, the proposal risks overextending its reach and inadvertently censoring free expression.[135] Moreover, the right of publicity generally only applies in situations where an individual's identity is being utilized for commercial gain, leaving the harms that arise from non-commercial use largely unaddressed. Despite the fact that the proposal has faced criticism, its introduction aligns with the prevailing sentiment that the right of publicity can serve as an immediate mechanism

127.   *Id.*
128.   UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 26.
129.   H.R. 6943, 118th Cong. (2024).
130.   UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 27.
131.   Rosenthal-Larrea, et. al, *supra* note 178.
132.   Katherine Klosek, *No Frauds, No Fakes…No Fair Use?*, ASS'N OF RESEARCH LIBRARIES (Mar. 1, 2024), https://www.arl.org/blog/nofraudsnofakes/ (last updated Apr. 19, 2024 12:43 PM).
133.   *See generally* 17 U.S.C. § 107.
134.   Rosenthal-Larrea, et. al, *supra* note 126.
135.   Klosek, *supra* note 77.

to combat the harms of digitally-altered media.[136] In order to strike an effective balance between these competing interests, however, it is crucial that such legislation specifies the conduct it seeks to address. Albeit while the right of publicity carries its own limitations,[137] the inclusion of narrowly tailored prohibitions can help it survive constitutional scrutiny, safeguard constitutionally protected expression, and address gaps in existing regulatory frameworks.[138]

## IV.    CONCLUSION

The emergence of AI and ML represents one of the most disruptive technological events of our lifetime. The inevitable pace at which this technology is advancing necessitates proactive regulation to mitigate the harms it is capable of imposing while also ensuring the United States is not left behind in the AI arms race. As this article suggests, the best and most immediate course of action is to establish federal protections that align with traditional IP and right of publicity frameworks. Such an intentional regulatory approach would not only promote technological advancement and maintain the principles of fair use and free expression, but also provide much-needed safeguards that have become apparent in an evolving digital landscape.

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136.    *See generally* UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 57 (USCO recommending that the federal government establish a transferrable right "that protects all individuals during their lifetimes from the knowing distribution of unauthorized digital replicas.").

137.    *E.g.,* Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 807 (Cal. 2001) (holding that the right of publicity can't be used as a means to censor "disagreeable portrayals.").

138.    *See generally* UNITED STATES COPYRIGHT OFFICE, *supra* note 64, at 57.