A Grammy for Fake Drake? A Federal Right of Publicity in Professional Singers' Voices to Protect Vocal Artists from Generative AI

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ABSTRACT: Artificial intelligence is an increasing presence in our society. There are currently no adequate protections against generative artificial intelligence creating a digital replica of a singer's voice. Working through the history of the right of publicity, specifically the right of publicity in an individual's voice, this Note argues that the federal government should enact a federal right of publicity for professional singers in their voice. Understanding who is protected by this right, how long they are protected, and what remedies should be available leads to proposed language that allows for generative artificial intelligence to be used but protects professional singers from being replaced.

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Introduction

In April 2023, fans of the artist Drake were pleasantly surprised when a new song called "Heart on My Sleeve" appeared on streaming services.[1] The song featured vocals that sounded like Drake and The Weeknd, with the Metro Boomin production tag at the beginning of the song.[2] The song gained numerous streams on Spotify, millions of views on TikTok, and hundreds of thousands of views on YouTube.[3] The song, however, was not posted by Drake or The Weeknd; it was posted by Ghostwriter977.[4] After causing a flurry of interest, the song was removed from streaming services because of possible copyright infringement of the Metro Boomin production tag that appeared at the beginning of the song.[5] The lyrics were not copied from Drake;

1. Nitish Pahwa, *How Two Music Legends Found Themselves at Some Anonymous TikTokker's Mercy*, SLATE (Apr. 17, 2023, 5:40 PM), https://slate.com/technology/2023/04/drake-weeknd-ai-single-ghostwriter-tiktok-heart-on-my-sleeve.html [https://perma.cc/5MGM-LSHV].

2. Larisha Paul & Ethan Millman, *Viral Drake and The Weeknd AI Collaboration Pulled from Apple, Spotify*, ROLLING STONE (Apr. 17, 2023), https://www.rollingstone.com/music/music-news/viral-drake-and-the-weeknd-collaboration-is-completely-ai-generated-1234716154 [https://perma.cc/8H56-S7US].

3. Bill Donahue, *Fake Drake & The Weeknd Song — Made with AI — Pulled from Streaming After Going Viral*, BILLBOARD PRO (Apr. 17, 2023), https://www.billboard.com/pro/fake-ai-drake-the-weeknd-song-pulled-streaming (on file with the *Iowa Law Review*).

4. *Id.*

5. Rachel Reed, *AI Created a Song Mimicking the Work of Drake and The Weeknd. What Does That Mean for Copyright Law?*, HARV. L. TODAY (May 2, 2023), https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law [https://perma.cc/KWV9-6FX9].

Ghostwriter977 wrote the lyrics themselves.[6] Nor was it because the underlying beat was copied, that too was created by Ghostwriter977.[7] Without the possible infringement of the Metro Boomin production tag, the Drake-like song might have stayed on streaming platforms.

It is a common occurrence for works to be pulled off of YouTube and other streaming services for violating copyrights. In the second half of 2022, YouTube had over eight-hundred million requests to take down content for violating copyrights.[8] Companies and artists know how to handle copyright infringement, but what happens when the content posted features original lyrics, original music production, no copyrighted production tag, and vocals that sound like a famous artist? What protections are available then?

This Note argues for the establishment of a federal right of publicity, designed to protect professional signers from unauthorized mimicking of their voices by artificial intelligence ("AI"). Part I provides an overview of how AI works, how it has spread throughout the music industry, and how the right of publicity has evolved.[9] Part II examines why the current copyright and state right of publicity protections are inadequate to provide protection for singers.[10] Part III proposes that the United States should have a federal right of publicity for professional singers' voices and provides possible statutory language for the proposal.[11]

6. Mia Sato & Richard Lawler, *What's Really Going on with 'Ghostwriter' and the AI Drake Song*, VERGE (Apr. 19, 2023, 2:08 PM), https://www.theverge.com/2023/4/18/23688141/ai-drake-song-ghostwriter-copyright-umg-the-weeknd [https://perma.cc/J5LP-4PVA].

7. Kristin Robinson, *Ghostwriter, the Mastermind Behind the Viral Drake AI Song, Speaks for the First Time*, BILLBOARD (Oct. 11, 2023), https://www.billboard.com/music/pop/ghostwriter-heart-on-my sleeve-drake-ai-grammy-exclusive-interview-1235434099 [https://perma.cc/R2S5-PSQ5].

8. YOUTUBE, COPYRIGHT TRANSPARENCY REPORT H2, at 10 (2022), https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-7-1_2022-12-31_en_v1.pdf [https://perma.cc/J6Z5-9LMT].

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

I. AI, GENERATED MUSIC, AND THE RIGHT OF PUBLICITY

AI is everywhere. It is on our phones as Siri,[12] it takes notes,[13] it sorts and drafts our emails,[14] and it produces music.[15] Figuring out how to protect vocal artists first requires understanding this vast and undefined field.[16] Section I.A gives a primer on the history and workings of AI, Section I.B discusses how generative AI is being used to create music, and Section I.C examines the history of the right of publicity.

A. AI

AI is a field of "computer science that studies the properties of intelligence by synthesizing intelligence."[17] AI came to prominence in 1950 when Alan Turing asked, "Can machines think?"[18] This question led to decades of research into AI that could perform intellectual tasks like humans.[19] This research stalled due to limitations of technology at the time, but because of technological advancements in the 1980s, machine learning gained steam.[20] Machine learning is the area of AI focused on enabling machines to improve their performance on the task they were designed for each time they complete it.[21]

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12. COMM. ON TECH., EXEC. OFF. OF THE PRESIDENT, PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE 5–6 (2016) [hereinafter PREPARING FOR THE FUTURE OF AI], https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf [https://perma.cc/BG3V-6EHJ].

13. *Explainer: What Is Generative AI, the Technology Behind OpenAI's ChatGPT?*, REUTERS (Mar. 17, 2023, 5:07 PM), https://www.reuters.com/technology/what-is-generative-ai-technology-behind-openais-chatgpt-2023-03-17 [https://perma.cc/VJU7-T455].

14. *See* LAURIE A. HARRIS, CONG. RSCH. CTR., R46795, ARTIFICIAL INTELLIGENCE: BACKGROUND, SELECTED ISSUES, AND POLICY CONSIDERATIONS 2 (2021), https://crsreports.congress.gov/product/pdf/R/R46795 [https://perma.cc/N5FC-UHPY]; Sherin Shibu, *Google's AI Is Now Appearing in Gmail and Docs*, ENTREPRENEUR (June 25, 2024), https://www.entrepreneur.com/business-news/google-adds-gemini-ai-to-gmail-docs-sheets-slides-drive/476106 [https://perma.cc/BD95-KP5Q].

15. Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 24, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html (on file with the *Iowa Law Review*).

16. *See generally* PETER STONE ET AL., STAN. UNIV., ARTIFICIAL INTELLIGENCE AND LIFE IN 2030 (2016), https://ai100.stanford.edu/sites/g/files/sbiybj18871/files/media/file/ai100report10032016fnl_singles.pdf [https://perma.cc/YXZ8-HMVF] (investigating and detailing the impact of AI in various industries).

17. *Id.* at 13.

18. PREPARING FOR THE FUTURE OF AI, *supra* note 12, at 5 (quoting A.M. Turing, *Computing Machinery and Intelligence*, 49 MIND 433, 433 (1950)).

19. M. Tim Jones, *A Beginner's Guide to Artificial Intelligence and Machine Learning*, IBM DEV. (May 20, 2021), https://developer.ibm.com/articles/cc-beginner-guide-machine-learning-ai-cognitive [https://perma.cc/3LWC-HWS6].

20. *Id.*; *see also* Eric Sunray, Note, *Sounds of Science: Copyright Infringement in AI Music Generator Outputs*, 29 CATH. U. J.L. & TECH. 185, 189 (2021) (discussing the growth of machine learning in the 1980s along with the use of digital sampling in music).

21. *See* Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 405 (2017).

Machine learning uses statistics and large sets of data to categorize each data point or predict new data points that would fit into the set.[22]

One form of machine learning is neural networks.[23] Neural networks are structured like a brain and have many layers of neurons.[24] The first layer of neurons receives the user's input, and the last layer gives the user an output.[25] Each intermediate layer finds a pattern in the data it receives from the previous layer.[26] Two types of neural networks have been incredibly effective at generative AI: (1) generative adversarial networks, and (2) variational autoencoders.[27]

Generative adversarial networks use two neural networks, a generator network and a discriminator network, that are pitted against each other in the framework.[28] The generator network creates data points it believes falls within the data set,[29] while the discriminator network receives both the fake data points of the generator network and real data points with the goal of determining which is real and which is generated.[30] This adversarial process continues numerous times until the generator network's output is indistinguishable from the data set, which results in highly detailed generated outputs.[31]

The second type of neural network that has proven effective in generative AI is the autoencoder, particularly variational autoencoders.[32] Autoencoders are neural networks trained on the data set and are comprised of two sections:

22. PREPARING FOR THE FUTURE OF AI, *supra* note 12, at 8; *see also* Chris V. Nicholson, *A.I. Wiki: A Beginner's Guide to Generative AI*, PATHMIND (2023), https://wiki.pathmind.com/generative-adversarial-network-gan [https://perma.cc/YWU2-TSMP] (describing the difference between discriminative algorithms, which take the data and provide a label for it, and generative algorithms, which takes the labels and generates the features of data that would fit into that set). The example used by Nicholson is illustrative: A spam folder determining if an email is spam or not is a discriminative algorithm. A generative algorithm based on spam or not spam email would be creating an email that has the features of a spam email based on the data set. *Id.*

23. Jones, *supra* note 19.

24. Adam Pasick, *Artificial Intelligence Glossary: Neural Networks and Other Terms Explained*, N.Y. TIMES (Mar. 27, 2023), https://www.nytimes.com/article/ai-artificial-intelligence-glossary.html (on file with the *Iowa Law Review*); *see also* PREPARING FOR THE FUTURE OF AI, *supra* note 12, at 9 (explaining how each layer of the neural network "combines a set of input values to produce an output value, which in turn is passed on to other neurons downstream").

25. Pasick, *supra* note 24.

26. *Id.*

27. Nicholson, *supra* note 22.

28. HARRIS, *supra* note 14, at 4.

29. *Id.*; Nicholson, *supra* note 22.

30. HARRIS, *supra* note 14, at 4; *see also* Nicholson, *supra* note 22 (providing a helpful illustration to understand generative adversarial networks: "think of a [generative adversarial network] as the opposition of a counterfeiter and a cop in a game of cat and mouse, where the counterfeiter is learning to pass false notes, and the cop is learning to detect them").

31. *See supra* note 22 and accompanying text.

32. *Id.*

an encoding section and a decoding section.[33] The encoding section takes the input data, with each neural layer taking only the most "significant and representative features" from the previous layer and generates an output to the decoding section that is representative of the input data.[34] The decoding section uses that output and attempts to recreate the input data.[35] Variational autoencoders build on the idea of an autoencoder by adding the step of statistically analyzing the representative output before the decoding section attempts to recreate the input data from that statistical representation.[36]

Because they are so effective at generating high quality outputs, it is likely that generative adversarial networks and variational autoencoders are the technology behind generative AI-created music.[37] To generate output that imitates a singer's voice, the program's creator must provide the encoding section or generator network with a data set of the singer's voice, like previously released songs.[38] In the generative adversarial network, the generator network uses the layers of neurons to find a pattern in the singer's voice and creates outputs that it believes sounds like the singer. The discriminator network compares the generator network's output and the singer's actual voice to determine which is real and which is generated. This process repeats until the generated voice cannot be differentiated from the singer's actual voice. In a variational autoencoder, the singer's existing songs and voice are given to the encoding section, and each subsequent neuron layer takes the most representative characteristics to create an output that is analyzed statistically. The decoding section attempts to recreate the singer's voice from the statistical representation of the output from the encoding section. The only things needed to create generated music is a generative AI program and access to the singer's

33. AlindGupta, *Autoencoders-Machine Learning*, GEEKS FOR GEEKS (Dec. 6, 2023), https://www.geeksforgeeks.org/auto-encoders [https://perma.cc/AQ2D-P63A]. A helpful illustration of an autoencoder can be seen on this webpage. *Id.*

34. *Id.*; *see also* Nicholson, *supra* note 22 (explaining data input for generative adversarial networks).

35. AlindGupta, *supra* note 33.

36. Pawangfg, *Variational AutoEncoders*, GEEKS FOR GEEKS (Dec. 6, 2023), https://www.geeksforgeeks.org/variational-autoencoders [https://perma.cc/VH84-UCJ7]; *see also* Nicholson, *supra* note 22 (explaining the differences between regular autoencoders and variational autoencoders).

37. Amal Tyagi, *How to Turn Your Voice into Any Celebrity's (so-vits-svc 4.0)*, MEDIUM (May 17, 2023), https://medium.com/@amaltyagi/how-to-turn-your-voice-into-any-celebritys-so-vits-svc-4-0-e92222a287e2 [https://perma.cc/J3Y5-DVLN].

38. The implications of training AI programs with copyrighted material are currently being litigated in numerous cases, in various stages, with plaintiffs arguing that it is copyright infringement. *See, e.g.*, Andersen v. Stability AI Ltd., No. 23-cv-00201, 2024 WL 3823234, at *21 (N.D. Cal. Aug. 12, 2024) (denying defendant's motion to dismiss copyright and trademark claims); Complaint at 23–26, Getty Images (US) Inc. v. Stability AI, Inc., No. 23-cv-00135 (D. Del. Feb. 3, 2023); Tremblay v. OpenAI, Inc., No. 23-cv-03223-AMO, 2024 WL 3640501, at *2–3 (N.D. Cal. July 30, 2024) (dismissing the plaintiff's claim for unfair competition as preempted by the Copyright Act); Concord Music Grp., Inc. v. Anthropic PBC, No. 23-cv-01092, 2024 WL 3101098, at *11 (M.D. Tenn. June 24, 2024) (transferring the case from Tennessee to the Northern District of California).

music. The next Section will discuss how music created by generative AI has proliferated throughout the music industry recently.

B. GENERATED MUSIC AND ITS PLACE IN THE INDUSTRY

AI has become increasingly present in the music industry recently: Spotify introduced an AI DJ,[39] Capital Records had a short-lived AI rapper,[40] Paul McCartney released a final Beatles song using AI,[41] and that is all on top of the existing use of AI in the industry.[42] One recent development has been generative AI's ability to create songs that could pass for a new Drake song,[43] a new Travis Scott and 21 Savage collaboration,[44] Rihanna performing "Cuff It,"[45] or even Donald Duck singing Beyoncé.[46] While it is difficult to determine the exact number of songs created by generative AI, the number is substantial; one platform boasts that its users have generated over twenty million songs.[47] Numerous other platforms exist, and open source systems are available to people hoping to create music—all using AI.[48] The influx of successful AI-generated songs has prompted the music industry to respond.

1. Responses to Generated Music Through Copyright

Certain outputs of generative AI are easier to handle than others. When a generative AI user creates a version of a song sung by a different artist, the

39. *Spotify Debuts a New AI DJ, Right in Your Pocket*, SPOTIFY (Feb. 22, 2023), https://newsroom.spotify.com/2023-02-22/spotify-debuts-a-new-ai-dj-right-in-your-pocket [https://perma.cc/D8A5-N5CX].

40. Joe Coscarelli, *Capitol Drops 'Virtual Rapper' FN Meka After Backlash over Stereotypes*, N.Y. TIMES (Aug. 23, 2022), https://www.nytimes.com/2022/08/23/arts/music/fn-meka-dropped-capitol-records.html (on file with the *Iowa Law Review*).

41. Mark Savage, *Sir Paul McCartney Says Artificial Intelligence Has Enabled a 'Final' Beatles Song*, BBC (June 13, 2023), https://www.bbc.com/news/entertainment-arts-65881813 [https://perma.cc/GR83-5XLW].

42. *See* Ludovic Hunter-Tilney, *AI in the Music Industry*, FIN. TIMES (July 19, 2023), https://www.ft.com/content/2c1c2016-69b7-48aa-b333-4c1380bb9102 [https://perma.cc/5QMB-T642] (describing the use of AI in music production, playlist creation, and song writing).

43. Coscarelli, *supra* note 15.

44. Joe Coscarelli, *Ghostwriter Returns with an A.I. Travis Scott Song, and Industry Allies*, N.Y. TIMES (Sept. 5, 2023), https://www.nytimes.com/2023/09/05/arts/music/ghostwriter-whiplash-travis-scott-21-savage.html (on file with the *Iowa Law Review*).

45. Rihanna Facts (@Nevernyny), X (Apr. 13, 2023, 12:50 PM), https://twitter.com/Nevernyny/status/1646571616267059200 [https://perma.cc/WG7K-TX2C].

46. Pop Donald, *Pop Donald – Alien Superstar*, YOUTUBE (Feb. 27, 2023), https://www.youtube.com/watch?v=a1Jgu6yobqY [https://perma.cc/6H3L-SQMU].

47. BOOMY, https://boomy.com [https://perma.cc/C576-HXR3].

48. *See, e.g.*, SHUTTERSTOCK, https://www.shutterstock.com/music [https://perma.cc/98JH-9TZV]; AIVA, https://www.aiva.ai [https://perma.cc/C6GQ-RFWB]; *see also* Tyagi, *supra* note 37 (discussing "so-vits-svc 4.0" as "an open-source project which provides access to a deep learning voice changing model").

underlying lyrics and music are protected by copyrights.[49] Because the lyrics and music are protected by copyrights, the owner of the copyright could pursue legal action against the user or get the content removed from the service like YouTube or Spotify through a Digital Millennium Copyright Act ("DMCA") takedown.[50] Music companies frequently use DMCA takedowns to protect their copyrights.[51]

With use of AI in the music industry evolving, one music company has chosen to sue a software company with a generative AI program, claiming the generative AI infringes on the copyrights of the music when the music is used to train the AI.[52] In addition to using the copyrighted music to train the program, the music company alleges that the software company's program reproduces the lyrics from copyrighted songs as answers to prompts from users, thereby infringing the copyright owner's exclusive right to reproduce the work.[53] The music company alleges that the software company violated their exclusive right to reproduce, distribute, display, or prepare derivative works of their copyrighted songs.[54] Both of these responses concern the copyrighted elements of the songs, but do not extend to the mimicking of artist's voices.

2. Other Responses to Generated Music

Outside of copyrights, the music industry is attempting to adjust to AI-generated music in other ways. The Recording Academy, responsible for the Grammy Awards, recently added a rule that "[o]nly human creators are eligible to be submitted for consideration for, nominated for, or win a GRAMMY Award."[55] The CEO of the Recording Academy clarified this rule further, explaining that generated music could be submitted, but only the "human performer" would be awarded.[56] In other spaces, record companies are trying to get ahead of the curve and work with the generative AI platforms. Record companies are hoping to license their music to the generative AI platforms so

49. *What Musicians Should Know About Copyright*, U.S. COPYRIGHT OFF., https://www.copyright.gov/engage/musicians [https://perma.cc/2U3N-ZYNJ].

50. *See* 17 U.S.C. § 512 (2018); *see also The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/dmca [https://perma.cc/7SU2-UBAJ] (providing an overview of the DMCA).

51. *See* YOUTUBE, *supra* note 8, at 10–11.

52. *See* Complaint at 49–57, Concord Music Grp., Inc. v. Anthropic PBC, No. 23-cv-01092 (M.D. Tenn. Oct. 18, 2023) (describing the four counts alleged by the plaintiffs).

53. *See id.* at 19–39.

54. *Id.* at 49.

55. RECORDING ACAD., 67TH GRAMMY AWARDS RULES & GUIDELINES 12 (2023), https://nara s.a.bigcontent.io/v1/static/67_Rulebook_06.26 [https://perma.cc/5HSB-AZTD].

56. Morgan Enos, *Recording Academy CEO Harvey Mason Jr. on How the New Awards Rules and Guidelines Will Make the 2024 GRAMMYs More Fair, Transparent & Accurate*, GRAMMY AWARDS (June 16, 2023, 7:24 PM), https://www.grammy.com/news/recording-academy-ceo-harvey-mason-jr-discusses-2024-grammys-new-rules-guidelines [https://perma.cc/G3G8-SWQE].

that the platform can be trained on copyrighted music, the copyright owner is compensated, and the generated music does not infringe any copyrights.[57]

The music industry has also responded by proposing at congressional hearings that a federal right of publicity should be enacted.[58] This proposal looks beyond the copyrighted elements of a song to the singer's identity. While this idea is not new, it is worth revisiting in response to this increasing issue of generated music. The following Section discusses that idea with the purpose of protecting a singer's voice. Section I.C starts with an overview of the history of the right of publicity and closes with an analysis of the current protections available to singers to safeguard their voices from imitation.

C. RIGHT OF PUBLICITY

The right of publicity is a right granted by the states that has been defined as the "inherent right of every human being to control the commercial use of [their] identity."[59] The right of publicity has been seen as any of the following: (1) a property right, (2) a protection against unfair competition, or (3) a species of intellectual property.[60] When a person asserts their right of publicity, they must show that they have an enforceable right—that the defendant used a piece of their identity without their consent and "in such a way that plaintiff is identifiable from defendant's use," and that the use "cause[d] damage to the commercial value of [the plaintiff]."[61] The right of publicity is not limited to celebrities or those with public personas; it is an "inherent right of every human being."[62] The following Section will provide an overview of the history of the right of publicity followed by a discussion of the current protections for an individual's right of publicity in their voice.

1. History of the Right of Publicity

The right of publicity derives from the right of privacy and was first recognized by the Second Circuit in the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, where the use of a picture of a baseball player had been contracted to two different companies.[63] The Second Circuit agreed with the parties that without the contracts, using the baseball player's picture

57. Anna Nicolaou & Madhumita Murgia, *Google and Universal Music Negotiate Deal over AI 'Deepfakes*,'FIN. TIMES (Aug. 8, 2023), https://www.ft.com/content/6f022306-2f83-4da7-8066-51386e8fe63b (on file with the *Iowa Law Review*).

58. *Artificial Intelligence and Intellectual Property – Part II: Copyright Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. 4 (2023) (statement of Jeff Harleston, Gen. Couns. & Exec. Vice President of Bus. & Legal Affs., Universal Music Grp.).

59. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2022) (Apr. 2024 update).

60. *Id.* § 3:1.

61. *Id.* § 3:2.

62. *Id.* §§ 1:3, 4:16.

63. Haelan Lab'ys, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 59, § 1:26 (providing the facts and background for the case).

would violate his right of publicity.[64] Judges met this new right with caution, and during the 1960s, the right of publicity was not held out as a viable cause of action for plaintiffs; rather, the plaintiff's publicity was protected by an action for invasion of privacy by appropriation.[65] The invasion of privacy by appropriation cause of action was first defined by Dean of U.C. Berkeley School of Law William Prosser in his influential article on privacy torts in American law[66] as the "unpermitted use . . . of plaintiff's identity, with damage to plaintiff's dignitary interests and peace of mind."[67] This cause of action protected anyone whose identity, like name, likeness, or other attributes, was used without authorization and the use resulted in a harm to the person's reputation or well-being.[68] While this cause of action worked well for plaintiffs that did not have a public persona, it fell short for celebrity plaintiffs because courts did not see how someone with notoriety had any privacy left to be invaded when they were already widely known.[69] In the decades after *Haelan Laboratories*, the right of publicity was sporadically protected.[70] It was not until 1977 that the U.S. Supreme Court finally weighed in on the right to publicity, holding that it was a right distinct from the right to privacy and did not have to be protected through invasion of privacy by appropriation.[71] The right of publicity can cover various different characteristics of a person including: name, likeness, and voice.[72] The next Section will discuss the evolution of the protection given to one's voice.

2. Right of Publicity in One's Voice

For the first twenty-five years after the Second Circuit recognized the right of publicity in *Haelan Laboratories*, plaintiffs were generally unsuccessful in protecting their voice through the right of publicity.[73] In *Lahr v. Adell Chemical Co.*, comedian Bert Lahr brought an action for invasion of privacy, unfair competition, and defamation against a chemical company that had imitated his

64. *Haelan Lab'ys*, 202 F.2d at 868.

65. 1 MCCARTHY & SCHECHTER, *supra* note 59, §§ 1:29, 1:30.

66. *Id.* § 1:19; *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 401–07 (1960) (differentiating appropriation from other publicity-related causes of action).

67. 1 MCCARTHY & SCHECHTER, *supra* note 59, § 1:23.

68. *Id.*

69. *Id.* § 1:25 (discussing the developments of the invasion of privacy by appropriation tort and how courts handled celebrity's claims).

70. *Id.* §§ 1:29, 1:30, 1:32 (detailing the developments of the right of publicity between *Haelan Lab'ys* and *Zacchini*).

71. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 572–73 (1977); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 59, § 1:33 (providing an explanation of the *Zacchini* case and its limitations).

72. *See* 1 MCCARTHY & SCHECHTER, *supra* note 59, § 6:6 (providing an overview table of the state laws and what characteristics are protected).

73. *See, e.g.*, Lahr v. Adell Chem. Co, 300 F.2d 256, 260 (1st Cir. 1962); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 718 (9th Cir. 1970).

voice in their commercial.[74] Lahr's invasion of privacy action rested on the New York right of privacy law, which at the time only protected "name, portrait or picture" from unauthorized commercial use.[75] Lahr argued that his voice was part of his name and identity, but the court was not persuaded by this argument; the First Circuit upheld the district court's decision, agreeing that the right of publicity did not offer Lahr a remedy.[76] The First Circuit was more receptive, however, to the idea that Adell Chemical Co. had unfairly competed with Lahr because "[n]o performer has an unlimited demand," and by imitating Lahr, Adell had potentially misappropriated something "peculiar" and "unique in a far broader sense" to Lahr.[77] The First Circuit remanded Lahr's case to consider the unfair competition claim.[78]

Nancy Sinatra was also unsuccessful in her attempt to bring an action for unfair competition and passing off against Goodyear, who used an imitation of Sinatra's voice singing her famous "These Boots Are Made For Walking."[79] Goodyear had obtained permission to use the song from the copyright owners, so there was no copyright infringement action.[80] The Ninth Circuit held that Sinatra's claim for unfair competition was flawed because "[t]here [was] no competition between Nancy Sinatra and Goodyear Tire Company."[81] The Ninth Circuit compared Sinatra's claim to Lahr's, distinguishing the claims because Lahr's claim focused on his "individual vocal characteristics" while Sinatra's claim was centered on her voice solely in connection with that particular song.[82] The Ninth Circuit affirmed the district court's grant of summary judgment for the defendant.[83]

Celebrities seeking to protect their distinctive voices gained a victory in 1988 when Bette Midler successfully sued Ford Motor Company for imitating

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74. *Lahr*, 300 F.2d at 257–58; *see also* 1 MCCARTHY & SCHECHTER, *supra* note 59, § 4:77.

75. *Lahr*, 300 F.2d at 258 (quoting N.Y. CIV. RIGHTS LAW § 51 (McKinney 1948)). This law was amended in 1995 to protect voice, but prior to that voice was not protected. Act of Aug. 9, 1995, ch. 674, 1995 N.Y. Laws 3642.

76. *Lahr*, 300 F.2d at 258 ("If the legislature intended that whenever an anonymous speaker extolled a commercial product a cause of action arose . . . if anyone could claim the voice was mistaken as his, it should have used a phrase of more general import.").

77. *Id.* at 259.

78. *Id.* at 260.

79. Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 712, 718 (9th Cir. 1970). "Passing off" is a term used in unfair competition actions to describe the defendant attempting to use the good will of the plaintiff and confuse consumers to purchase their product. *See* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:1 (5th ed. 2023) (May 2024 update). In this case, Sinatra was arguing that Goodyear was trying to use her notoriety to sell their tires, which the court did not agree with. *Sinatra*, 435 F.2d at 713.

80. *Sinatra*, 435 F.2d at 713.

81. *Id.* at 714 (highlighting that Goodyear is not a professional singer so Sinatra was not their competitor).

82. *Id.* at 716.

83. *Id.* at 718.

her voice in a commercial.[84] Midler had won a Grammy, an Academy Award, and was "a nationally known actress and singer."[85] Ford wanted to have Midler sing her song "Do You Want To Dance" in their commercial, but she declined.[86] As a result, Ford hired one of Midler's backup singers to "sound like Bette Midler's recording of ['Do You Want to Dance']."[87] Ford, through its advertising agency, also received a license to use the song, so copyright infringement was, once again, not at issue in the case.[88] The commercial was a success—the backup singer's performance sounded like Midler. When Midler sued Ford, the district court "believed there was no legal principle preventing imitation of Midler's voice" and granted Ford's motion for summary judgement.[89] However, the Ninth Circuit had a different view of the case; it found that Midler was seeking to protect something "more personal than any work of authorship."[90]

The court found that California's statute, though it did explicitly protect voice, did not provide a remedy for Midler because the commercial did not actually use her voice.[91] The remedy for Midler was provided by the common law right of publicity, which protected individuals from "an appropriation of the attributes of one's identity."[92] The Ninth Circuit reasoned that the "voice is as distinctive and personal as a face" and, therefore, was worthy of protecting.[93] While not allowing every instance of voice imitation to give rise to a cause of action, the Ninth Circuit recognized that a famous singer was injured when their voice was "deliberately imitated" for commercial use.[94]

After *Midler*, the Ninth Circuit further fleshed out the idea that imitating a voice could lead to infringement of the right of publicity in another case of a singer and a commercial.[95] Tom Waits was a singer with significant notoriety, and Waits had publicly stated that he would not do commercials.[96] So when a Frito-Lay commercial aired on the radio featuring a script sung in a way that made even Waits think it sounded like him, Waits sued for voice

84. Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988).

85. *Id.* at 461.

86. *Id.*

87. *Id.* (alteration in original).

88. *Id.* at 462.

89. *Id.*

90. *Id.*

91. *Id.* at 463.

92. *Id.* (quoting Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 (9th Cir. 1974)). The *Motschenbacher* case dealt with a famous racer's car being used in an advertisement; the Ninth Circuit found that the racer's "proprietary interest" in their identity had been appropriated. *Motschenbacher*, 498 F.2d at 825.

93. *Midler*, 849 F.2d at 463.

94. *Id.* Midler was awarded $400,000 in damages on remand. *See generally* Midler v. Young & Rubicam Inc., 944 F.2d 909 (9th Cir. 1991) (unpublished table decision) (affirming district court award of damages).

95. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098 (9th Cir. 1992).

96. *Id.* at 1097.

misappropriation.[97] After finding that *Midler* was still good law, the Ninth Circuit approved the elements of the misappropriation tort, as outlined in jury instructions of the case: "the deliberate misappropriation for commercial purposes of (1) a voice, that is (2) distinctive and (3) widely known."[98] The court noted that the tort was limited to voice and did not include style, focusing on whether the imitation was "so good that 'people who were familiar with [the] plaintiff's voice who heard the [imitation] *believed* [the] *plaintiff performed it*'" rather than whether the imitation reminded the listener of the plaintiff.[99] The next Part analyzes the current legal protections available for people who have had their voice imitated by computers.

II. CURRENT PROTECTIONS AGAINST VOICE IMITATIONS AND THEIR SHORTCOMINGS

There are currently no federal protections for the right of publicity.[100] While copyright and trademark protections are available to protect writing and marks used in commerce, these avenues are not suited to protect against computer imitations of voices. Copyright law protects an author's expression, but an artist's voice is not considered their expression; it is their identity.[101] Along those lines, copyright protections in sound recordings do not extend to "independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[102] This statutory limitation prohibits reproductions of songs that artists have recorded but allows for cover bands to attempt to sound exactly like the original artist.[103]

Trademarks are also not a comprehensive avenue to protect against voice imitations because marks, which can include sounds, must be used on a good or service in commerce in a way that signifies a source of goods or

97. *Id.* at 1098. Waits's voice is described as having "a raspy, gravelly singing voice." *Id.* at 1097. A fan added a colorful description of Waits's voice: "[H]ow you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades . . . ." *Id.*

98. *Id.* at 1099–100, 1102.

99. *Id.* at 1001 (quoting the jury instructions).

100. 1 MCCARTHY & SCHECHTER, *supra* note 59, § 6:145.

101. Midler v. Ford Motor Co., 849 F.2d 460, 462 (9th Cir. 1988).

102. 17 U.S.C. § 114(b). This section of copyright law is why cover bands are allowed.

103. A recent and prominent example of this is Yung Gravy's song "Betty (Get Money)," which had authorization to use the underlying melody of Rick Astley's "Never Gonna Give You Up" but did not have authorization to use the exact recording of Astley singing. *See* Complaint for Violation of Right of Publicity; Violation of the Lantham Act (False Designation of Origin; False Endorsement); Unfair Competition; Violation of Statute; & Damages at 2 n.1, Astley v. Hauri, 23SMCV00351 (Cal. Super. Ct., L.A. Cnty. Jan. 26, 2023). This case settled outside of court, but commentators suspect that 17 U.S.C. § 114(b) would have precluded Astley from succeeding. *See* Peter. R. Afrasiabi, *Nancy Sinatra, Bette Midler, and Rick Astley: Where State Right of Publicity Voice Protections Collide with the Federal Intellectual Property Laws*, ORANGE CNTY. LAW., May 2023, at 42, 44–45.

services to be protected.[104] That is not a requirement for the right of publicity. Protections against false attribution in federal law can be an avenue for artists seeking to protect their name, but as the discussion below will show, this protection is limited and would not apply to all computer-generated songs, such as "Heart on My Sleeve," which sounded like Drake but was not attributed to him.[105]

A. FEDERAL ATTRIBUTION PROTECTIONS

One possible protection for artists against the use of generated music mimicking their voice could be established through trademark law. The Lanham Act provides that anyone who causes consumer confusion by using a mark, failing to use a mark, or using a false mark is liable to the person harmed.[106] This avenue of protection could be relevant in instances where a user of generative AI creates a song and releases it under the name of an artist, like if Ghostwriter977 released "Heart on My Sleeve" under Drake's name. In that case, Ghostwriter977 could possibly be liable for trademark infringement because of the false attribution.[107] These types of protections are not widespread; after a 2003 Supreme Court case, which held that misattribution applied only to the tangible product not the underlying work, courts are less likely to provide these attribution protections for expressive works.[108] Accordingly, when a song is created by a user of generative AI and is released under their name, it does not implicate the attribution protections in trademark law because there is no false attribution to the imitated singer.

Another possible federal protection is through the Copyright Act. The Copyright Act has a section that provides that no one can "provide copyright management information that is false."[109] "[C]opyright management information" includes the title of the work, the name of the author, the performer of the work, and other various pieces of information.[110] This protection would be incredibly useful in instances where a creator of AI-generated music lists the mimicked artist as the performer of the song, but it does not provide protection for the artist whose voice was mimicked on a song with accurate copyright management information.

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104. 15 U.S.C. § 1127 ("'[T]rademark' includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce . . . .").

105. *See infra* Section II.A.

106. *See* 15 U.S.C. § 1125(a).

107. This hypothetical assumes Drake has trademark protections over his name.

108. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37 (2003). For an extended discussion of the case and its effect on attribution protections for expressive works, see U.S. COPYRIGHT OFF., AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 42–58 (2019), https://www.copyright.gov/policy/moralrights/full-report.pdf [https://perma.cc/N7A4-4QKQ].

109. 17 U.S.C. § 1202(a)(1).

110. *Id.* § 1202(c).

Since federal law does not provide a remedy in the case where a generated song is released under the generative AI user's name, we turn to state law. Currently, thirty-three states protect the right of publicity through statute or common law.[111] The statutory protections and the common law protections will be explained in turn.

B. STATE STATUTORY PROTECTIONS

Only fifteen states have enacted statutes that explicitly protect a person's right of publicity in their voice.[112] Statutory protections against imitations are even more sparse. Many of these statutes do not contemplate imitations of a person's voice and only protect the use of the person's exact voice.[113] On the other hand, some states explicitly allow for imitations under their statutes, except in cases where the imitation is "directly connected with commercial sponsorship."[114] Louisiana and New York discuss a "digital replica" of a person's voice as being an infringement of their right of publicity.[115] Louisiana's statute defines a "digital replica" as "a computer-generated or electronic reproduction of a professional performer's likeness or voice that is so realistic as to be indistinguishable from the actual likeness or voice of the professional performer."[116] New York's statutory definition of the term is:

> [A] newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.[117]

Both statutes add a caveat that a recording that is an "entirely . . . independent fixation of other sounds"[118] is not a "digital replica," "even if such sounds imitate

111. 1 MCCARTHY & SCHECHTER, *supra* note 59, § 6:2.

112. *Id.* § 6:6. The states that do protect voice are: Alabama, Arkansas, California, Hawaii, Illinois, Indiana, Louisiana, Nevada, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, and Washington. *Id.*

113. *See, e.g.*, ARK. CODE ANN. § 4-75-1104 (2023); CAL. CIV. CODE § 3344 (West 2016); HAW. REV. STAT. § 482P-5 (Supp. 2016); IND. CODE ANN. § 32-36-1-7 (West 2013); OHIO REV. CODE ANN. § 2741.01 (West 2019); OKLA. STAT. tit. 12, §§ 1448–49 (2011); S.D. CODIFIED LAWS § 21-64-1(2) (Supp. 2024); TEX. PROP. CODE ANN. § 26.011 (West 2023); WASH. REV. CODE § 63.60.050 (2023).

114. NEV. REV. STAT. § 597.790(2)(d) (2023); *see also* 765 ILL. COMP. STAT. ANN. 1075/35 (West 2017).

115. LA. STAT. ANN. § 51:470.2(4) (2023); N.Y. CIV. RIGHTS LAW § 50-f.1.c. (McKinney Supp. 2024).

116. LA. STAT. ANN. § 51:470.2(4).

117. N.Y. CIV. RIGHTS LAW § 50-f.1.c.

118. LA. STAT. ANN. § 51:470.2(4); N.Y. CIV. RIGHTS LAW § 50-f.1.c.

or simulate the voice of"[119] another individual (New York)[120] or a "professional performer" (Louisiana).[121] The New York statute goes further saying that "[a] digital replica does not include the electronic reproduction, computer generated or other digital remastering of an expressive sound recording or audiovisual work consisting of an individual's original or recorded performance."[122]

Even with an eye on computer-generated imitations, both Louisiana and New York limit when digital replicas become actionable. New York limits when a digital replica infringes the right of publicity to using "a deceased performer's digital replica,"[123] and Louisiana's statute makes it an infringement to use a digital replica only "in a public performance of a scripted audiovisual work, or in a live performance of a dramatic work."[124] Only Pennsylvania explicitly includes protections against imitations, defining name or likeness as "[a]ny attribute of a natural person that serves to identify that natural person to an ordinary, reasonable . . . listener, including, . . . voice or a substantially similar imitation."[125]

C. STATE COMMON LAW PROTECTIONS

The harder question is whether states protect the imitation of a voice through their common law, like California did in *Midler*.[126] Those hoping that the common law protections would be widespread will be disappointed. Although twenty-one states have common law protections for the right of publicity,[127] only courts in California and New Jersey have extended their common law protections to imitations of voices.[128] New Jersey recognized the common law protection in *Prima v. Darden Restaurants, Inc.*, which involved an imitation of Louis Prima singing "Oh Marie" in a commercial for Olive Garden.[129] The district court built off of *Midler* and *Waits* to hold that New Jersey protects against "imitating a celebrity's voice."[130]

With no federal protections for imitations, so few state statutory protections, and even fewer common law protections against voice imitations, artists are

119. N.Y. CIV. RIGHTS LAW § 50-f.1.c. The Louisiana statute is almost identical, "entirely of an independent fixation of other sounds, *even though* the sounds imitate or simulate the voice of *the professional performer*." LA. STAT. ANN. § 51:470.2(4) (emphasis added).

120. N.Y. CIV. RIGHTS LAW § 50-f.1.c.

121. LA. STAT. ANN. § 51:470.2(4).

122. N.Y. CIV. RIGHTS LAW § 50-f.1.c.

123. *Id.* § 50-f.2.b.

124. LA. STAT. ANN. § 51:470.4.C.

125. 42 PA. STAT. AND CONS. STAT. ANN. § 8316(e) (West 2017).

126. Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).

127. 1 MCCARTHY & SCHECHTER, *supra* note 59, § 6:2.

128. *Midler*, 849 F.2d at 462–63; Prima v. Darden Restaurants, Inc., 78 F. Supp. 2d 337, 348–49 (D.N.J. 2000). The District Court of New Jersey cited *Midler* and *Waits* as the leading cases covering imitations of persons' voices. *Prima*, 78 F. Supp. 2d at 349.

129. *Prima*, 78 F. Supp. 2d at 341.

130. *Id.* at 349.

susceptible to being mimicked with no recourse. The next Section explores the gaps in protection, and the previous attempts to fill them.

D. ATTEMPTS TO INCREASE PROTECTIONS

As described above, there is a general lack of protections for people's right of publicity at a federal level, and the state protections are not comprehensive or widespread. This lack has led scholars and professors to suggest the establishment of a federal right of publicity for decades.[131] The American Law Institute has a portion of the *Restatement (Third) of Unfair Competition* dedicated to the right of publicity.[132] These sections recommend protections for the right of publicity against the unauthorized use "of a person's identity for purposes of trade" specifically highlighting a "person's name, likeness, or other indicia of identity" as the protected features.[133] The American Law Institute clarifies that "purposes of trade" is confined to "use[s] in advertising the user's goods or services, . . . place[ment] on merchandise marketed by the user, or . . . use[s] in connection with services rendered by the user."[134] While the Restatement can be a useful template for laws, in reviewing the state statutes, the states have not followed it. Another attempt at harmonizing the myriad laws protecting the right of publicity came from the Uniform Law Commission, which commissioned a study with the goal of drafting a right of publicity for states to pass.[135] The Commission discharged the committee studying the issue before the committee could draft the language.[136]

After going through the various federal protections and the myriad of state protections, the Copyright Office presented the option of a federal right of publicity as a way to harmonize the various protections.[137] While the office did not provide draft language, it did provide certain considerations that should be taken if or when Congress chooses to pursue this option.[138] First,

131. *See generally* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, COMMC'NS L., Aug. 2011, at 14; J. Eugene Salomon, Jr., *The Right of Publicity Run Riot: The Case for a Federal Statute*, 60 S. CAL. L. REV. 1179 (1987).

132. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (AM. L. INST. 1995).

133. *Id.* § 46.

134. *Id.* § 47.

135. *Minutes Midyear Meeting of the Executive Committee*, EXEC. COMM. UNIF. L. COMM'N 6 (Jan. 14, 2017), https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&libraryentry=d9fbodb9-487e-4295-8d4c-d365e538b34f&librarykey=483c8ae8-79d4-4b43-96dc-f16a4a1f60c6&pageindex=3&pagesize=12&search=&sort=most_recent&viewtype=row [https://perma.cc/R8WT-SQBA].

136. *Minutes Annual Meeting of the Executive Committee*, EXEC. COMM UNIF. L. COMM'N 6 (July 23, 2018), https://www.uniformlaws.org/committees/community-home/librarydocuments?attachments=&libraryentry=19191f2f-6d92-4666-8401-2b9689af879b&librarykey=483c8ae8-79d4-4b43-96dc-f16a4a1f60c6&pageindex=1&pagesize=12&search=&sort=most_recent&viewtype=row [https://perma.cc/Z237-XTH6].

137. U.S. COPYRIGHT OFF., *supra* note 108, at 117.

138. *Id.* at 118.

the office highlighted the choice between a federal law that preempts state protections or a federal law "that would serve as a 'floor.'"[139] The federal floor option contemplates a regime like the Lanham Act, which serves as a floor for trademark protections but allows states to provide more protections than federal law.[140] The other option would be a regime similar to the Copyright Act, which explicitly states that it preempts state protections that cover similar subject matter and provide similar exclusive rights.[141] Presented below is an option that would preempt states from providing protections that overlap in subject matter.[142]

The Copyright Office also raised concerns about the lack of uniformity between states regarding whether a federal right should protect only celebrities or both celebrities and "non-famous individuals."[143] Additionally, the Copyright Office raised questions—such as the duration of protection, whether the right is protected beyond the life of the individual, and what exceptions must be provided to avoid First Amendment concerns—that would need to be considered when drafting a federal right of publicity.[144] Another important question is which aspects of a person's identity should be protected, but this Note will focus exclusively on protections covering voice.[145] The following Part will discuss the contours of the proposed statute, and provide suggested language.

III. A FEDERAL RIGHT OF PUBLICITY IN PROFESSIONAL SINGERS' VOICES

With the goal of providing clear standards for plaintiffs attempting to protect their voice from generative AI-created imitations, the federal government should enact a right of publicity statute that protects against digital replicas. As discussed in the preceding Part, the current state protections are limited,[146] and the latest federal protections are inadequate to address the use of generative AI that replicates an artist's voice without infringing on the copyright of the

139. *Id.*

140. The Lanham Act does not preempt states from providing greater protections for trademarks, but rather sets a floor for trademark protections and prohibits states from allowing marks that go against the protections of the Lanham Act. *See* Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 372 & 372 n.3 (1st Cir. 1980).

141. *See* 17 U.S.C. § 301(a). Notably, 17 U.S.C. § 301(b) provides that states are not limited from protecting other rights or subject matter that does not fall within 17 U.S.C. §§ 102, 103, and 106. 17 U.S.C. § 301(b)(1), (3). This subsection is how states are allowed to protect the right of publicity without being preempted by copyright law. *See id.*

142. *See infra* Section III.G.

143. U.S. COPYRIGHT OFF., *supra* note 108, at 118–19.

144. *Id.*

145. This Author believes that providing a federal right of publicity covering other aspects of a person's identity is incredibly important, especially in the era of generative AI and deepfakes. However, to avoid expanding the scope of this Note too broadly, this Author will focus only on voice.

146. *See supra* Sections II.B, II.C.

lyrics or the underlying music.[147] In order to provide these protections, the federal government needs to address: (1) how to define digital replica in a way that addresses generative AI, (2) whether this protection will preempt state law protections or provide a floor, (3) who is protected, (4) the duration of this protection, and whether it extends beyond the life of the individual, (5) what exceptions need to be present to avoid free speech concerns, and (6) the remedies available if there is a violation. This Part will consider these issues and conclude with proposed statutory language for a federal right of publicity in one's voice.

A. SCOPE OF THE RIGHT

As discussed above, there are currently only two states that protect against digital replicas: Louisiana and New York.[148] These states define a digital replica as "computer-generated" sounds that are so similar to the artist's voice that they are "indistinguishable" from the artist[149] or "so realistic that a reasonable observer would believe it is [the artist]".[150] To effectively protect artists against generative AI mimicking their voices, while still allowing for end users of generative AI to create original works, the federal right of publicity in one's voice needs to be clear about what constitutes a violation and what does not.

Looking at the two states that define digital replicas, the definition in the Louisiana statute provides a higher threshold for what is a digital replica than the New York statute. Louisiana provides that the digital replica must be "so realistic as to be indistinguishable from the actual . . . voice,"[151] while New York only requires a digital replica "that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual."[152] For the federal right of publicity in one's voice, Congress should follow the example of Louisiana, to ensure that only the most detailed and convincing digital replicas are actionable because only the most convincing digital replicas would serve as a substitute for the real singer's voice. In determining whether a digital replica is indistinguishable from the actual performer's voice, a fact finder could potentially look at listener confusion, a method similar to trademarks likelihood of confusion,[153] or the fact finder could look at the intent of the end user of the generative AI.[154] For a listener

147. *See supra* Section II.A.

148. *See supra* Section II.B.

149. LA. STAT. ANN. § 51:470.2(4) (2023).

150. N.Y. CIV. RIGHTS LAW § 50-f.1.c (McKinney Supp. 2024).

151. LA. STAT. ANN. § 51:470.2(4).

152. N.Y. CIV. RIGHTS LAW § 50-f.1.c.

153. Each federal circuit has their own list of factors to consider for consumer confusion in trademark infringement cases. *See* 3 MCCARTHY, *supra* note 79, § 23:19.

154. In *Midler v. Ford Motor Co.*, there was listener confusion, where numerous people told Midler that they thought she was the one singing in the advertisement, and there was intent to

confusion test, evidence of actual confusion would be highly probative. Now that the statute has a clear definition of digital replica, the following Sections will provide answers about the procedural elements of the statute.

B. A Federal Right that Preempts State Laws

With the goal of standardizing the protections and ensuring that performers are aware of the protections that they have, Congress should enact a federal right of publicity in one's voice that preempts state protections providing "all legal or equitable rights that are equivalent to" this statute.[155] Modeling the preemption portion of the statute off of copyright law will provide courts with guideposts of how this law would interact with state protections. Additionally, a federal right that preempts state protections would make the analysis simpler for potential defendants because there will only be one statute they have to consult with before releasing generated music.[156] A potential drawback would be that states could not provide more stringent protections, but the issue of generated music and digital replicas is a national problem—having one standard that is applicable everywhere is more beneficial because it allows a mimicked professional singer to sue in any state, rather than navigating multiple different standards and pursuing lawsuits in each individual state. Because the federal statute would preempt state protections, Congress would also need to decide whether the protection extends to all individuals or only celebrities. The next Section discusses that consideration.

C. Protecting Only Professional Singers' Voices

Across the United States, there are various ways to protect the right of publicity: Some states protect the right of publicity of all persons,[157] others focus on the right of publicity in soldiers,[158] while some reserve the protection only for public personalities.[159] Having already suggested that Congress should

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duplicate Midler's voice by the marketing company. Midler v. Ford Motor Co., 849 F.2d 460, 461–62 (9th Cir. 1988).

155. 17 U.S.C. § 301.

156. This is a benefit that the copyright office considered when discussing whether Congress should adopt a statute that preempted state laws or a statute that served as a floor for protections. *See* U.S. COPYRIGHT OFF., *supra* note 108, at 118 n.676.

157. States with right of publicity statutes that protect natural persons are: Alabama, Arkansas, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *See Right of Publicity State of the Law Survey*, INT'L TRADEMARK ASS'N (2020), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/INTA_2019_rop_survey.pdf [https://perma.cc/QR6S-3XAA].

158. ARIZ. REV. STAT. ANN. § 12-761 (2016); *see also* LA. STAT. ANN. § 14:102.21 (2018) (providing explicit protections against the use of a deceased soldier's "name, portrait, or picture" for advertising).

159. S.D. CODIFIED LAWS § 21-64-2 (Supp. 2024). Personality is defined as "a living or deceased natural person who is a citizen of [South Dakota], or who died domiciled in this state whose . . . likeness . . . identifies a specific person and has commercial value." *Id.* § 21-64-1(2); *see also* N.Y. CIV. RIGHTS LAW § 50-f.1.a–b. (McKinney Supp. 2024) (defining "deceased performer"

define digital replica as requiring the generated music to be "indistinguishable" from the actual person's voice,[160] it follows that the person's voice being mimicked must be one that is distinguishable. In Louisiana's statute, which uses the "indistinguishable" language, the digital replica must be of a "professional performer."[161] Louisiana defines "professional performer" as "an individual who, for gain or livelihood, is or was regularly engaged in acting, singing, dancing, playing a musical instrument, or appearing on a news broadcast as an anchor or reporter."[162]

Providing a narrow right of publicity in one's voice to only those that are professional performers leaves the door open for end users of generative AI to create music with voices that are not their own without fear of someone unknown bringing an action against them. The line of who is a professional performer may be tricky to find. For instance, is a TikToker that sings in their posts every week someone who regularly engages in singing for a gain or a livelihood? Those close questions would be very fact-specific and likely need to be determined on a case-by-case basis; however, this definition makes it clear that creating a digital replica of singers like Drake, The Weeknd, or Bette Midler falls within this statute. Now that it is clear who should be protected, the next question is how long they should be protected from generative AI digitally replicating their voice. The next Section will consider the different options Congress has.

D. LIFE OF THE PERFORMER PLUS SEVENTY YEARS

Like many of the issues above, states are divided on how long their protections of the right of publicity should last. Some states protect the right for the duration of the life of the person,[163] others extend protection for one hundred years after the death of the person,[164] and there are states that fall in the middle.[165] Tennessee takes a different approach by not limiting the protection to a specific number of years. In Tennessee, every individual has the right of publicity during their lifetime, and their heirs have the right for "ten . . . years after the death of the individual."[166] After those ten years,

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as someone who "regularly engaged in acting, singing, dancing, or playing a musical instrument," and defining "deceased personality" as someone who had "commercial value at the time of his or her death").

160. *See supra* Section III.A.

161. LA. STAT. ANN. § 51:470.2(4) (2023).

162. *Id.* § 51:470.2(12).

163. MASS. GEN. LAWS ANN. ch. 214, § 3A (2020). The Massachusetts statute does not provide an explicit duration of the protection, but it should be noted that it does not use "living" anywhere to limit the protection. *See also* 1 MCCARTHY & SCHECHTER, *supra* note 59, § 6:6.

164. OKLA. STAT. ANN. tit. 12, § 1448(G) (West 2011).

165. For an easy chart that provides the duration of protection, see 1 MCCARTHY & SCHECHTER, *supra* note 59, § 6:6.

166. TENN. CODE ANN. § 47-25-1104(a) (2013).

the right can be extended to the heirs, as long as they continue to commercially exploit "the name, likeness, or image of [the] individual."[167]

For the federal right of publicity in professional performers' voices, Congress should provide protection for the life of the performer and seventy years after their death. This duration is longer than in some states but not the longest, and there is already precedent for protections lasting for the life of the author plus seventy years.[168] In any discussion of the right of publicity, setting a duration may seem like an arbitrary task.[169] However, from a practical standpoint, seventy years is sufficient to protect potential surviving spouses and decedents. Arguments could be made for a shorter term, but the shorter the term, the more likely it is that the performer's family will still be present. Consider a twenty-year term versus a seventy-year term: In a twenty-year term, anyone would have been able to make a digital replica of John Lennon's voice in 2000, while a seventy-year term would prevent replication until 2050. Forty-three years after the death of John Lennon, the Beatles are using his vocals with the blessing of his estate.[170] A situation like this shows that a longer term should be enacted as opposed to a shorter term.

E. EXCEPTIONS

Understanding the contours of the protection, who is protected, and how long they are protected, Congress will need to consider exceptions to ensure that this law comports with the First Amendment. Congress can turn to the various state statutes that protect the right of publicity to see how exceptions might be structured.[171] The most important exception will allow for fair use. Almost all of the state statutes have exceptions for fair use, which include uses "such as criticism, comment, news reporting, teaching . . . scholarship, or research."[172] Another important exception for the statute will be that it does not affect the ability of others to record songs with the intent to imitate the original performer to the best of their abilities.[173] This distinction will be

167. *Id.* § 47-25-1104(b)(2).

168. *See* 17 U.S.C. § 302(a) (providing that in general the term of a copyright is "the life of the author and [seventy] years after the author's death").

169. *See* 2 MCCARTHY & SCHECHTER, *supra* note 59, § 9:16.

170. Chris Welch, *The Beatles' Final Song Is Now Streaming Thanks to AI*, VERGE (Nov. 2, 2023, 9:30 AM), https://www.theverge.com/2023/11/2/23943290/now-and-then-the-beatles-new-song-ai [https://perma.cc/22UJ-CP6K].

171. *See, e.g.*, LA. STAT. ANN. § 51:470.5 (2023); CAL. CIV. CODE § 3344.1(j) (West 2016); S.D. CODIFIED LAWS § 21-64-6 (Supp. 2024); N.Y. CIV. RIGHTS LAW § 50-f.2.d (McKinney 2019).

172. 17 U.S.C. § 107. For a more in-depth discussion of how right of publicity statutes can balance First Amendment exceptions, see Rachel B. Zingg, Note, *Lights, Camera, Cause of Action: Bringing a Right of Publicity Statute to Iowa that Balances First Amendment Concerns*, 108 IOWA L. REV. 505, 519–26 (2022).

173. 17 U.S.C. § 114(b) ("The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another

served by the definition of digital replica discussed above, which includes only computer-generated music.[174] The definition will ensure that human created sound recordings will not violate the right of publicity in a performer's voice. With the right defined, and the procedural questions answered, the final portion of the statute is deciding what remedies will be available for violations of this right. The next Section will discuss the various remedies that Congress should enact.

F. REMEDIES

Without a remedy, the protection provided by the proposed statute would be worthless. Because of this, Congress should provide multiple forms of remedies for a performer whose right of publicity in their voice has been violated: (1) injunctive relief and (2) monetary damages. Additionally, this statute should make clear that the remedies provided in this statute are "[i]n addition to any other remedy authorized by law."[175] A clause allowing for cumulative remedies is important where other aspects of the generated music might violate copyright law, like the producer tag on "Heart on My Sleeve."[176]

1. Injunctive Relief

Many states that protect the right of publicity provide for injunctive relief.[177] Congress should also provide injunctive relief to prevent the unauthorized use from continuing.[178] Providing injunctive relief would prevent an end user from creating more generated music that digitally replicates the professional performer's voice. Under the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, a plaintiff typically has four factors to satisfy in order to get a permanent injunction.[179] The four factors of *eBay* are: (1) suffering an irreparable harm, (2) inadequate remedies available, (3) "the balance of hardships between the plaintiff and defendant" show that the injunction is "warranted," and (4) a permanent injunction would not go against "the public interest."[180] This test applies to patents and copyrights.[181] Notably, the statute

sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.").

174. *See supra* Section III.A.

175. LA. STAT. ANN. § 51:470.4E (2023); *see also* CAL. CIV. CODE § 3344.1(m) (West 2016) ("The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.").

176. Paul & Millman, *supra* note 2.

177. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 1075/50 (West 2017); IND. CODE ANN. § 32-36-1-12(2) (West 2013); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2019); 42 PA. STAT. AND CONS. STAT. ANN. § 8316(a) (West 2017).

178. 2 MCCARTHY & SCHECHTER, *supra* note 59, § 11:24 ("[A]n injunction is a common remedy because damages for future infringement are almost automatically regarded as 'inadequate.'").

179. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

180. *Id.*

181. *See id.* at 392.

that Congress enacts to protect the right of publicity in a professional performer's voice should include a clause similar to one in trademark law where "[a] plaintiff seeking any . . . injunction shall be entitled to a rebuttable presumption of irreparable harm upon a finding of a violation identified in this subsection."[182] This clause will ensure that once a violation is found, the plaintiff will presumptively meet the first factor of *eBay*. While the third factor would be fact dependent, preventing a defendant from continuing to imitate a professional singer's voice would be a compelling argument for the second and fourth factors.

2. Monetary Damages

In addition to stopping the unauthorized use, a professional performer should be able to recover monetary damages from the person violating their right of publicity in their voice. This would align with the practices of the majority of states that currently protect the right of publicity.[183] Congress should follow the trend of the states and provide for actual damages in the event that there is a violation. Congress should also provide the profits attributable to the digital replica as a remedy for plaintiffs. The statute should also make explicit that the actual damages suffered by the plaintiff are separate from the profits gained by the defendant's unauthorized use of the singer's voice.[184] For damages, the plaintiff will have to prove the amount of actual damages suffered by them and, in line with most state practices, will have to prove the profits attributable to the defendant's digital replica.[185] Following the states, the defendant will be able to show expenses that should be deducted from the profit damages.[186]

G. PROPOSED STATUTORY LANGUAGE

Following the decisions and considerations in the Sections above, the following language is proposed to protect the right of publicity in professional performer's voices:

Section 1. Definitions.

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182. 15 U.S.C. § 1116(a).

183. *See, e.g.*, CAL. CIV. CODE § 3344(a), 3344.1(a)(1) (West 2016) (providing statutory damages and damages of profits from the unauthorized use); IND. CODE ANN. § 32-36-1-10 (West 2013) (providing that damages will be $1,000 or "actual damages, including profits derived from the unauthorized use"); LA. STAT. ANN. § 51:470.4.E (2023) (providing damages of $1,000 or actual damages and the profits attributable to the unauthorized use); N.Y. CIV. RIGHTS LAW § 50-f.2.c (McKinney Supp. 2024) (providing $2,000 or actual damages, as well as profits attributable to the unauthorized use, and punitive damages).

184. *See, e.g.*, S.D. CODIFIED LAWS § 21-64-5 (Supp. 2024).

185. *See* IND. CODE ANN. § 32-36-1-11(1) (West 2013) ("[T]he plaintiff is required to prove the gross revenue attributable to the unauthorized use.").

186. *See id.* § 32-36-1-11(2) ("[T]he defendant is required to prove properly deductible expenses.").

As used in this Act:

(a) "Right of publicity in a professional singer's voice" means the right of a professional singer to control the uses of their voice.

(b) "Professional singer" means an individual who, for gain or livelihood, is or was regularly engaged in singing.

(c) "Digital replica" means computer-generated performance that is so realistic that it is indistinguishable from the voice of the professional singer.

Section 2. Right of Publicity in Professional Singer's Voices.

(a) This Act establishes a professional singer's right of publicity in their voice, which grants the exclusive to create digital replicas of their voice.

(b) A professional singer's right of publicity in their voice extends seventy years after the professional singer's death, and is freely transferable, descendible, and divisible.

Section 3. Unauthorized Uses of a Professional Singer's Voice.

Except as otherwise provided in this Act, no person may create a digital replica of a professional singer's voice without consent of the professional singer, or their heirs, during the professional singer's lifetime or for seventy years after the professional singer's death.

Section 4. Exemptions.

This Act does not apply to any use of a professional singer's voice in criticism, comment, news reporting, teaching, scholarship, or research.

Section 5. Rights and Remedies.

(a) If a court finds a violation of a professional singer's right of publicity in their voice under Section 3, the court may order an injunction to enjoin the unauthorized use.

(b) If a court finds a violation of a professional singer's right of publicity in their voice under Section 3, the professional singer or the owner of the professional singer's right of publicity in their voice may recover

1. Actual damages; and

2. Profits attributable to the defendant's unauthorized use.

(c) To determine the defendant's profits, the plaintiff must prove the profits attributable to the unauthorized use, and the defendant must prove the properly deductible expenses.

(d) The right and remedies of this Act are in addition to any other rights or remedies provided by law.

Section 6. Preemption.

All legal or equitable rights that are equivalent to the exclusive right of this Act, whether created before or after the effective date of this Act, are governed exclusively by this Act. No person is entitled to any such right or equivalent right as provided herein under the statute of any State.

CONCLUSION

As AI and generated music improves, the imitations will become more indistinguishable from the performers it imitates. Professional singers are currently without adequate protections against this threat, and the existing protections they do have are unevenly distributed across states, each with their own standards and protections. Additionally, many of the existing protections do not contemplate the issues that professional singers face with generative AI. With this new technology, a computer could generate a new Drake song, without Drake ever singing a note. To protect professional singers from this threat before AI gets even more sophisticated, Congress should adopt a right of publicity for professional singers in their voice.