

The Future of Digital Actors & Musicians, Ripped Off Merchandise, Economic Justice for All, and the Fake News & Porn We Should All Be Appalled By

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Unless you're a lawyer, I'm guessing you have never heard of the right of publicity. It's a 60-ish year-old intellectual property right that, after a much-needed update, is going to help save us all from theft, lies, and exploitation.

There are technologies out there that can insert female actors' faces into nonconsensual fake porn, and manipulate video and radio content to literally put words in the mouths of anyone, including actors, news broadcasters, and politicians.

Without digital image rights and defamation law, the future will bring a market flooded with fake porn, fake news, unauthorized Prince holograms, and awful films featuring (likely painful to watch) performances by a not consenting Digital Meryl Streep, Digital Daniel Day Lewis, or Digital [insert a performer of lesser notoriety].



What I imagine Video Game Me to look like—the FaceApp Young filter



What's more terrifying is this being Digital Me—fake video content that looks and sounds real. Undetectable to the viewer.

The Right of [What?]

The Second Circuit coined the term “right of publicity” back in the 1950s to describe a public figure’s economic right to control and license what was called their “publicity,” hence the name. Up until that point, all we had was the tort of misappropriation to remedy hurt feelings. While the judiciary was right to develop a new intellectual property right, these image and voice rights really have little to do with a famous person controlling their publicity. In fact, the Constitution provides a broad newsworthiness standard, so public figures have no say in what kind of truthful publicity they get. Rather this form of intellectual property gives all human beings (public or private) an inherent right to control and manage the **commercialization** of their likeness.

It also gives individuals a path to civil remedies if a loathsome content creator makes commercialized fake porn or fake news with their likeness.

From Expensive CGI Craftsmanship to Cheap, Fake, and Dangerous Content

fake: not genuine; counterfeit; a sham; forgery

Until recently, it seemed only top Hollywood special effects professionals had the skill, money, and time to pull off realistic digital avatars or holograms of living and dead performers for movies, video games, or live concerts. Now even internet trolls can do truly appalling things with freely available apps. Thanks, internet. The new DeepFakes app, for example, uses advanced machine learning technology to insert people into video content, including porn, without consent. All that is required is a large volume of image content and, as one colleague noted, a total lack of empathy.

Publicity rights (along with privacy and false endorsement laws) have long stopped despicable or unjust uses of someone’s image in commercials, advertisements, or on products. And, in modern history, publicity rights have been justly used in court to protect the digital avatars of musicians and athletes in video games. This case law is going to be critical for professional performers, now that dead actors are appearing in movies.

Unfortunately, statutes need to modernize if we are really going to prevent new technology from changing the rules of the entertainment business or, let’s be honest, a civil society. Currently, inadequate state statutes either do not protect people after death and/or they give companies and internet trolls a free, absolute pass to use a likeness in any type of expressive “audiovisual work” imaginable, including, but not limited to, the production of fake acting, fake singing, fake porn, and fake news.

To be clear, the First Amendment needs to be balanced, to a varying degree, depending on what kind of “fake” we are talking about. Certainly there will be legitimate reasons to create fake acting without consent (such as a biopic about the actor), whereas there will never be a legitimate reason to create fake porn.

Ripping Off Someone's Likeness Hurts Business

The concept that everyone has an intellectual property right to their likeness is an expression of economic justice to ensure everyone gets a fair share. In the Supreme Court's sole decision on the right of publicity, the Court embraced this legal right as a way to reward performers for their investments and creative labors. After all, professional performers manage diverse income streams and make daily decisions about artistic integrity, branding, and market trends to stay competitive and employed.

As such, it is repulsive that a corporation would steal the hard-earned value that a performer worked to build. It makes me angry (yes, let me go with angry) for someone to finally achieve either local or national recognition for their talents and then not be rewarded.



\$21.95

To give one example, the heir of jazz musician Thelonious Monk is suing a beer company after it exceeded the bounds of a (now withdrawn) oral agreement to use his likeness on a beer label by selling some 17 unauthorized pieces of merchandise in its gift shop. There is no shame, at any age, in buying a t-shirt or bobblehead of your favorite musician. It is the mark of a true fan, and a great way to support the artists that you love. But it is *shameful* when companies produce and sell products and merchandise without permission from or compensation to the persons depicted. To be fair to North Coast Brewing, it has been donating, on its terms, a percentage of proceeds to the Thelonious Monk Institute of Jazz. But that noble financial arrangement was the family's decision to make. Artists agree to specific, narrow uses of a likeness all the time; that doesn't give receiving companies carte blanche to exploit the likeness however they please.

Economic Justice for All

It's also repulsive when a corporation uses anyone's image or voice (we are all on social media now, aren't we?) to sell or advertise products and services. All of us provide some kind of value to advertisers, manufacturers, or other content creators. Our individual value might be our access to a social network, our appearance, or the quality or uniqueness of our voice. Everyone should be compensated for the commercial use of their likeness. Or at least asked for permission.

Granted, most things that happen on the internet are not commercial and fall well outside of right of publicity law. Which means, this country is going to have to look past publicity rights to gut the internet of fake porn. Revenge Porn legislation? Something else? News companies should be able to take down fake news that manipulates copyrighted news programming. But it's going to be a struggle to even keep that fake news down, given the "pops right back up" takedown system we are stuck with.

Our evolving economy is based, in large part, on the digital, global, and fast exchange of data and intellectual property, so we need modern laws that sufficiently protect us from what is here and what is coming. As citizens, we also need to better understand our rights in case we end up in internet ads or fake porn. Along the way, we should be fighting for better, easier, more efficient systems for legitimate creators to get permission and distribute wealth.

We may need a better name than "right of publicity," but the underlying principles, crafted by the judiciary, are going to help ensure the future doesn't lose sight of personal dignity and economic justice for all.

This blog post reflects my personal opinions on art, life, economics, democracy, and law. For my day job, I'm the Director and Counsel of Government Affairs and Public Policy at SAG-AFTRA, but this blog post does not reflect the views of my employer. Just me. Check out Charlie Warzel's article for more discussion on fake news and our democracy: "He Predicted The 2016 Fake News Crisis. Now He's Worried About An Information Apocalypse."



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