Generative Artificial Intelligence and Deepfakes Prompt a Need for Expanded Right of Publicity Protection in Kentucky

Bruce Paul and Mari-Elise Paul

"Senator Jack Chinn is a prominent figure in the Blue Grass of Kentucky, famous for its beautiful women and . . . fine blooded horses" was the introductory language of an early 1900s advertisement for Doan's Kidney Pills, which was the subject of Kentucky's first trial over the misappropriation of likeness—known today as a right of publicity action. *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 365 (1909). Senator Chinn sued the company because he never endorsed Doan's kidney pills or agreed to the advertisement. *Id.* A jury awarded Senator Chinn $2,500 for the misappropriation of his likeness, and the Kentucky Court of Appeals affirmed, holding "a person is entitled to the right of privacy as to his picture, and that the publication of the picture of a person without his consent, as a part of an advertisement for the purpose of exploiting the publisher's business, is a violation of the right of privacy. . . [and] a fraud on the public to publish indorsements of public men in publications of this character which are not genuine." *Id.* at 365-66.

Kentucky continues to recognize common law right of publicity claims and has enacted a statute in 1984 expanding the right of publicity. Unfortunately, current societal norms and developing technology are placing those rights in jeopardy. Generative artificial intelligence tools now enable people to misrepresent and misappropriate the names, images and likenesses of others for commercial, political and even vengeful reasons. Traditional First Amendment and fair use interests protect uses of an individual's name, image and likeness without consent, but without reasonable limits, reputational damage and harm can occur to individuals and society. Now is the time for Kentucky to follow the lead of other states by enacting legislation that bolsters Kentuckians' name, image and likeness rights while clarifying their legitimate limits.

Kentucky's Right of Publicity Regime

Aside from a subset of claims for false endorsement or false affiliation that can be brought under the Lanham Act, the federal government has left publicity rights to the states. The result is little uniformity from state to state and questions in the internet era about what states' laws can or should apply to individuals' publicity rights. In Kentucky, those publicity rights exist as both common law and statutory causes of action with certain limits.

In 1981, the Kentucky Supreme Court adopted the Restatement (Second) of Torts § 652A (1976), which provides recovery for the "appropriation of the other's name or likeness." *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981). Under § 652A, a person or entity cannot appropriate a plaintiff's name or likeness without the plaintiff's permission for the person's or entity's "own purposes or benefit." Restatement (Second) of Torts § 652C cmt. b. A right of publicity claim is present even where the tortfeasor's use "is not a commercial one" and "the benefit sought to be obtained is not a pecuniary one." *Id.*

In 1984, the Kentucky General Assembly codified publicity rights, recognizing that a person has priority rights in his name and likeness which are entitled to protection from commercial exploitation. KRS § 391.170. The statute also established a 50-year post-mortem right, albeit only for public figures. *Id.* The most notable case involved then-country music star John Michael Montgomery. *Montgomery v. Montgomery*, 60 S.W.3d 524 (Ky. 2001). John Michael prevailed against his father's widow, who claimed he violated § 391.170 by using his deceased father's name and likeness in a 1990s music video. *Id.* At issue was whether John Michael's father was sufficiently famous to benefit from § 391.170, which the Court of Appeals defined as "significant commercial value." *Id.* at 530-31. The dissent opined that John Michael's father's commercial value was not sufficiently developed at the trial court level, and the case should have been returned to make that decision. *Id.* at 531-33.

The majority in *Montgomery* skipped over the question of John Michael's father's fame and focused instead on John Michael's creative and First Amendment rights to use his father's name in his music, which would be exempt from a right of publicity claim. *Id.* at 528-30. Favorably citing the rap duo Outkast's victory in a Michigan federal court against Rosa Parks, who filed a similar right of publicity action related to the '90s song *Rosa Parks*, the Kentucky Supreme Court held John Michael's First Amendment rights in his music trumped his stepmother's § 391.170 rights in his father's name and likeness. *Id.* (citing *Parks v. LaFace Records*, 76 F.Supp.2d 775 (E.D. Mich. 1999)). The dissent did not reject the majority's respect for First Amendment protections but, rather, cited a California Court of Appeals case involving the Three Stooges, which found that First Amendment rights would only trump right of publicity rights where the expressive work transformed the original. *Id.* at 534-36 (citing *Comedy III Prods., Inc. v. Saderup*, 21 P.3d 797, 806 (2001)).

Right of Publicity and First Amendment in the Current Era

The development and use of artificial intelligence has further challenged individuals' publicity rights. State and federal legislators are exploring legislation in response to right of publicity abuses involving generative artificial intelligence and deepfakes. Deepfakes are audio or visual content generated or manipulated using artificial intelligence (AI) that misrepresents someone. Generative AI tools can create life-like content that may humiliate, abuse or otherwise falsely depict individuals, causing harm to the victims of the deepfakes.

The term "deepfake" first appeared in 2017 after a Reddit user with that moniker used AI to create and post pornographic videos on the site. The videos superimposed celebrity faces onto the bodies of others. More recent deepfake scandals include the posting of deepfake pornographic images of Taylor Swift on X in January 2024. Ultimately the images were removed, but other celebrities have not experienced the same result. Another newsworthy example involved a deepfake robocall using a digital manipulation or imitation of President Biden's voice. Designed to suppress voter turnout in New Hampshire's 2024 primary, the AI-generated robocall stated: "Voting this Tuesday only enables the Republicans in their quest to elect Donald Trump again. Your vote makes a difference in November, not this Tuesday." The political operative who orchestrated the robocalls is facing a $6,000,000 fine by the Federal Communications Commission (FCC) and criminal charges. The FCC also issued a $1,000,000 fine to the company that distributed the robocalls—the first of its kind. The Federal Trade Commission is also issuing rules that target the use of AI tools to target or impersonate individuals.

State Responses to Deepfakes

State governments are starting to respond to the use of AI tools and deepfakes as well. Tennessee enacted the Ensuring Likeness, Voice, and Image Security ("ELVIS") Act in March 2024. Expanding on its already comprehensive right of publicity statute, the ELVIS Act added a prohibition on uses of voice to its already existing list of name, photograph and likeness. The ELVIS Act also created secondary liability for a person or company that "publishes, performs, distributes, transmits, or otherwise makes available" the voice or likeness. The Act also arguably narrows defenses to First Amendment-protected speech.

More recently, California enacted several laws intended to protect individuals from the misuse of digital content—both criminally and civilly. On the criminal side, SB 926 makes targeting AI-generated sexually explicit deepfake content a crime. SB 981 targets sexually explicit digital identity theft. SB 981 requires social media platforms to establish a mechanism for users to report sexually explicit deepfakes of themselves and mandates a response from social media platform. On the civil side, California now has laws targeting AI-generated digital replicas of a performer's voice or likeness (AB 2602) and digital replicas of deceased performers without consent of estates (AB 1836).

Finally, California has enacted laws establishing a reporting mechanism of deepfakes in the electoral process to online platforms and requiring those platforms to remove or label deceptive and digitally altered or created content during election cycles (AB 2655). A sixth law, AB 2839, which also limits the use of election material containing deceptive AI-generated or manipulated content for purposes of electoral politics, was enacted in September 2024 and shortly thereafter enjoined on October 2, 2024, over concerns that it violated the First Amendment. In the ruling, the court observed that "this fear [of deepfakes] does not give legislators unbridled license to bulldoze over the longstanding tradition of critique, parody, and satire protected by the First Amendment."

Kentucky's legislature has considered similar legislation with mostly discouraging results. SB317, a bipartisan bill that passed out of the Senate with only two "nay" votes is comparable to the ELVIS Act in that it protects name, image, likeness and voice and explicitly calls out deepfakes and the technological tools that create them. SB317 provides statutory damages but also provides significant counterbalances that account for First Amendment and other traditionally recognized fair use defenses. HB45 addresses many privacy issues, including the use of deepfakes in political campaigns, but it has not meaningfully advanced to enactment.

Despite those setbacks, Kentucky enacted HB207 on March 28, 2024, which added computer-generated images of a minor to child pornography provisions. The time is now for Kentucky to build on HB207 and bolster right of publicity laws to guard against new technologies that can misrepresent and misappropriate likenesses in a few keystrokes. HB317 appears to strike a fair balance between rights of publicity and traditional First Amendment and fair use values. We could even call the legislation the Chinn Act. The senator himself might even approve.

Bruce Paul and Mari-Elise Paul are partners at McBrayer PLLC as well as partners in life. Both Bruce and Mari-Elise are members of McBrayer's Intellectual Property Practice Group. Mari-Elise is the service group leader, specializing in trademark and copyright prosecution and transactions, while Bruce specializes in litigation. Mari-Elise and Bruce also contribute to McBrayer's Intellectual Property podcast Protected Thoughts. ■