January 10, 2024 **FEATURE**

Publicity Rights and the First Amendment: How AI Poses New Challenges in Reality TV

Alyssa J. Devine

Share:

The introduction of Netflix's latest reality series *Deep Fake Love* highlights the emerging challenge of balancing the right of publicity with First Amendment protections in reality TV as new technology, such as artificial intelligence (AI), emerges. Individually, each of these topics presents numerous legal, ethical, and sociological issues. Together, they are the poster child of chaos and the evolving need for modern laws that regulate modern technology and industry practices.

This article explores publicity rights and the emergence of reality TV before diving into common legal issues and discussing how AI poses new challenges

in the ongoing battle between the right of publicity and the First Amendment.

Understanding Publicity Rights

The right of publicity is a state-based intellectual property doctrine that provides an individual's right to control the commercial use of any feature or indicia that "unequivocally identifies" the individual.[1] For states that have not explicitly spoken on their view of publicity rights through legislation or judicial decisions, the majority position is that these states recognize a common law right of publicity.[2] Publicity rights are often confused with privacy rights,[3] copyrights, and trademarks, but the right of publicity is a distinct intellectual property doctrine.[4]

Publicity rights are also mistakenly associated exclusively with famous individuals because legal disputes involving this doctrine frequently involve celebrities, including those who are deceased.[5] However, the first documented cases analyzing the concept of publicity rights in the U.S. involved nonfamous individuals.[6] In fact, history demonstrates that the concept of publicity rights predates what is considered to be the first explanation of privacy rights.

The Origin of Publicity Rights

Judge Jerome Frank is often cited as having coined the term "right of publicity" in the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*[7] However, this was not the first time the term "right of publicity" was referenced in the pursuit of prohibiting others from profiting off an individual's image, name, and likeness without consent.[8]

The conception of publicity rights can be traced back as far as 1888, when Representative John Robert Thomas introduced a federal bill "[t]o prohibit the use of likenesses, portraits, or representations of females for advertising purposes without consent in writing."[9] This federal bill did not pass, but 11 years later in 1899, the first state publicity statute was enacted in California.[10] While it is difficult to ascertain when the first right of publicity case in the U.S. was decided, it is clear that remedies for the unauthorized commercial use of an

individual's name, image, and likeness were pursued in courts across the U.S. before both Warren and Brandeis's *Harvard Law Review* article and *Haelan Laboratories*.[11]

The Emergence of Reality TV

The reality TV genre is broadly defined as unscripted programs displaying real life interactions of people. Shows such as *Survivor*, *Jersey Shore*, and *Real Housewives of Beverly Hills* have paved the way for a new form of entertainment that blurs fictional drama and genuine human experiences.

Unlike publicity rights, reality TV is a relatively recent phenomenon. It was only 23 years ago when *Survivor*, one of the first reality programs, captivated audiences. However, the world today is not the same world 23 years ago, and numerous legal concerns go hand in hand with the production of unscripted shows. However, one issue that is misunderstood, or even overlooked altogether, involves the right of publicity.

Right of Publicity Issues in Reality TV

In most reality TV programs, participants voluntarily relinquish a degree of privacy and license their publicity rights for the fame, fortune, and other incentives reality TV brings. But this can become an issue when third parties attempt to profit from these individuals' publicity rights.

The basic elements of a claim for right of publicity infringement include:

1. the defendant used the plaintiff's identity or persona;
2. such appropriation was for the defendant's advantage, commercial or otherwise;
3. the plaintiff did not consent to the use of the plaintiff's identity; and
4. the appropriation is likely to cause injury to the plaintiff.[12]

In a recently filed class action lawsuit, Kyland Young, a former contestant of the reality show *Big Brother*, sued NeoCortext, Inc., the creator of the smartphone app Reface, which allows users to swap their faces with individuals from popular shows, movies, and other internet content.[13] Young alleges that NeoCortext has been commercially exploiting his and many others' publicity rights to sell paid subscriptions for its app Reface without permission. Young's complaint provides a prima facie case for right of publicity infringement, and if his counsel can present evidence supporting each of the right of publicity infringement elements, NeoCortext could be liable for a substantial amount of damages.

Additionally, not all reality TV participants consent to being recorded, and this can blur the distinction between public and private information, an important consideration in right of publicity legal disputes.

In another reality TV case,[14] the plaintiff, Eran Best, sued the City of Naperville, two Naperville police officers, and several production companies based on claims arising from her arrest and subsequent appearance on the show *Female Forces*. The show depicts female police officers performing their normal duties and interacting with the public.

Best alleged she was depicted on *Female Forces* without her consent in a way that violated her publicity rights and caused her severe emotional distress. Soon after initiating her lawsuit, the defendants moved to dismiss Best's right of publicity claim. The court found that the broadcasting of Best's arrest on *Female Forces* satisfied the "commercial purpose" requirement of Illinois's right of publicity statute,[15] reasoning that the show was a for-profit broadcasting on a network with commercial advertisements that the public paid to access.

Moving on to the defendant's assertion of the First Amendment as a defense to right of publicity infringement, the court focused on the question of whether the disputed speech concerned a matter of public importance.[16] Noting that the boundaries of the public concern test were not "well defined," the court defined matters of public importance as speech "relating to any matter of political, social, or other concern to the community, or when it is a subject of

legitimate news interest; that is, a subject of general interest and of value and concern to the public."[17]

The court emphasized that the distinction between *Female Forces* as an entertainment program as opposed to a traditional news broadcast was meaningless under a First Amendment analysis.[18] Additionally, Illinois's right of publicity statute provides an exemption for the "use of an individual's identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign."[19] The court found that Best's arrest for driving under a suspended license on *Female Forces*, while somewhat de minimis, satisfied the public affairs exemption in Illinois's right of publicity statute because it conveyed truthful footage of Best's arrest.[20]

Defamation Lawsuits concerning Reality TV

In other reality TV lawsuits, the conflict between truth and falsity comes into play. In these situations, reality TV contestants assert defamation and criticize producers' creative editing (also referred to as frankenbiting)[21] to convey events in a way that is not accurate and misleads viewers.

In 2017, Thomas Donovan Eckhart Jr. participated in filming episodes for a reality TV series titled *Windy City Rehab*.[22] In this series, Eckhart collaborated with Alison Gramenos to acquire, renovate, and sell residential properties in Chicago. The show's producers had complete discretion over the editing and production of what ultimately aired, and the episodes were broadcast on HGTV in 2019.

After the *Windy City Rehab* episodes aired, Eckhart sued the producers, alleging that they edited the show for dramatic effect and falsely portrayed him as a villain. Eckhart claimed the show implied that he misappropriated funds, was dishonest, and was incompetent. As a result of how producers portrayed him on *Windy City Rehab*, Eckhart alleged that his reputation and construction business were harmed. While Eckhart pleaded a prima facie case of defamation, he failed to prove that the producers acted with malice, and subsequently his lawsuit was dismissed.[23]

AI Brings New Challenges to Right of Publicity and Defamation Issues

In Netflix's latest reality series *Deep Fake Love*, the loyalty of significant others is put to the test.[24] The show begins by separating couples into two houses, where they interact with attractive single men and women. This environment challenges each couples' trust and commitment.

The participants are subsequently brought to the studio, where the host displays videos of a significant other engaged in compromising situations with other men or women. Predictably, this results in feelings of betrayal and devastation. However, the host discloses that some of the videos were created using AI and deepfake technology while other videos were real. By not knowing what is real or fake, each participant must determine whether their significant other betrayed them or whether their significant other remains wholly committed to the relationship.

Ethics aside, using AI in this way presents a number of legal issues. The first question is whether *Deep Fake Love* commits defamation. The answer may vary from participant to participant, but it is probable that the contestants could establish a claim for defamation.

To create liability for a defamation claim, the plaintiff must prove the following elements:

1. a false statement of fact was made;
2. the statement was communicated to a third party;
3. the defendant was negligent or acted with absolute malice in determining the truth of the statement;
4. the statement was not privileged; and
5. the statement caused reputational harm.[25]

In the case of *Deep Fake Love*, the most obvious false statement arising from the AI-generated videos is that an individual was unfaithful to their significant other. When the host shows the AI-generated videos to the significant other, the false statement has been shared with a third party. The producers have actual knowledge that the AI-generated videos are false, and the producers' creation and sharing of the AI-generated videos are not privileged. Because the participants had no expectation of privacy while being filmed for a reality TV series, the recording of their behavior and statements are also not privileged. Thus, four of the five elements of defamation could be satisfied by *Deep Fake Love* participants, who would need to show quantifiable, reputational harm to establish a defamation claim.

While the producers likely obtained written consent from the participants, as well as a license to use the participants' publicity rights, it is highly questionable whether any written agreement granting the producers the ability to defame the participants would be enforceable. There is a strong argument supporting unconscionability to invalidate a contract providing such an ability. The same argument is true for a contract that forces participants to waive defamation claims against the producers, especially when the producers plan to defame participants as a core element of the reality series.

However, the central theme from the challenges imposed by emerging technology as seen in *Deep Fake Love* is that current laws will have an increasingly difficult time being interpreted in new uses of innovative technology.

Balancing Publicity Rights and First Amendment Protections with Evolving Technology

In the vast landscape of publicity rights, defamation, technology, and reality TV, finding a balance between individual rights and free speech is paramount.

Producers and third parties have a responsibility to ensure they are using individuals' publicity rights only to the extent authorized by contracts or under the law. Conversely, it is the responsibility of reality TV participants to fully

understand the implications of their involvement and verify they are equipped to handle potential consequences of their participation, such as the ways their images and narratives might be used.

Creative expression and the freedom to depict real-life interactions are fundamental to the essence of reality TV. However, the entertainment industry must be cognizant of how new technology can be used to violate the law. While a heavy-handed approach to legal regulation could stifle free speech, the entertainment industry needs to recognize the need for and participate in the creation of modern laws that regulate modern technology and industry practices.

Conclusion

The convergence of publicity rights, defamation, and AI in reality TV presents a fascinating opportunity in the evolution of legal frameworks. The use of emerging technology to expose participants' lives in reality TV offers new challenges and raises important ethical and legal questions. As reality TV continues to captivate audiences and influence culture, it is crucial to strike a balance between protecting individuals' rights and fostering creative expression. But to achieve this goal, our society needs to modernize its laws to address current and foreseeable issues.

Endnotes

1. Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana's Law as a Model, the State-Based Right of Publicity Is Ready to Move to the Federal Level*, 45 Res Gestae 31, 38 n.42 (2001) (defining "right of publicity" as an individual's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, mannerisms, or "[o]ther unequivocal identifying indicia"); 1 J. Thomas McCarthy & Roger E. Schechter, The Rights of Publicity and Privacy § 2:3 (2d ed. 2020) ("[T]he right of publicity is not restricted to "celebrities.'"); 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28:1 (5th ed. 2019) ("The right of publicity is the inherent right of every human being to control the commercial use of his or her identity.").

2. Restatement (Third) of Unfair Competition § 46 (Am. L. Inst. 1995).

3. 5 McCarthy, *supra* note 1, § 28:6; Weston Anson, Right of Publicity Analysis, Valuation, and the Law 18 (2015); *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (stating that publicity rights are not privacy rights because the latter protects "reputation, with the same overtones of mental distress as in defamation," while the former protects "the proprietary interest of the individual in his act in part to encourage such entertainment"). *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 406 (1960).

4. 5 McCarthy, *supra* note 1, § 28:1; Faber & Zirkle, *supra* note 1, at 31–32; *see* Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs. 203, 203–10 (1954) ("The right of publicity must be recognized as a property (not a personal) right, and as such capable of assignment and subsequent enforcement by the assignee.").

5. *See generally* Loren Cheri Shokes, *Life after Death: How to Protect Artists' Post-Mortem Rights*, 9 Harv. J. Sports & Ent. L. 27 (2018).

6. *See* Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895); Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902); Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905).

7. 202 F.2d 866 (2d Cir. 1953). Interestingly, the term "right of publicity" was actually used before *Haelan Laboratories* by the Georgia Supreme Court in 1905. *See Pavesich*, 50 S.E. at 70 ("If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy; and this is no new idea in Georgia law."); *see also* Harold R. Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. U. L. Rev. 553, 605 (1960) ("The early cases recognizing an independent right of privacy were premised on property rights."). *See generally* Warren & Brandeis, *supra* note 3.

8. While scholars correctly point out that *Haelan Laboratories* did not address an infringement of publicity rights and was not the first case involving the

concept of publicity rights, the conclusion that publicity rights are privacy rights falls short. Privacy rights represent an individual's right to be let alone. *See* Jennifer E. Rothman, *The Right of Publicity's Intellectual Property Turn*, 42 Colum. J.L. & Arts 277, 288–89 (2019); Warren & Brandeis, *supra* note 3, at 195 (citing Thomas M. Cooley, Treatise on the Law of Torts 29 (2d ed. 1888)). In contrast, publicity rights represent an individual's right to control the commercial use of their property made from unequivocally identifying characteristics; publicity rights are not privacy rights. 5 McCarthy, *supra* note 1, § 28:1; *Zacchini*, 433 U.S. at 572–73; Acme Circus Operating Co. v. Kuperstock, 711 F.2d 1538, 1541 (11th Cir. 1983) (defining the right of publicity as "an intangible personal property right"); *see also* 1 McCarthy & Schechter, *supra* note 1, § 1:7. *See generally* Nimmer, *supra* note 4 (explaining how the right of publicity is a unique intellectual property right distinct from privacy rights, unfair competition, and other legal doctrines).

9. Jennifer E. Rothman, The Right of Publicity: Privacy Reimagined for a Public World 17–18 (2018); A Bill to Protect Ladies, H.R. 8151, 50th Cong. (1888).

10. In February 1899, California was the first state to enact a right of publicity statute that prohibited the publication and circulation of any living California resident's likeness without written consent. However, it is unclear whether any cases were decided under this statute, and California repealed the act in May 1915 for unknown reasons. In 1971, California would again enact a right of publicity statute. Rothman, *supra* note 9, at 19 (citing Act of Feb. 23, 1899, ch. 29, 1899 Cal. Stat. 28 (codified at Cal. Penal Code § 258); Act of May 22, 1915, ch. 459, 1915 Cal. Stat. 761); Steven Andreacola, *History: California Civil Code § 3344.1*, 12 J. Contemp. Legal Issues 592 (2000); *see* Cal. Civ. Code § 3344.

11. Although these early claims were often asserted as privacy violations or breaches of contract, courts discussed and alluded to the concept of publicity rights in their reasoning. *See generally* Manola v. Stevens & Meyers (N.Y. Sup. Ct. 1890) (issuing a permanent injunction to prohibit misappropriation of a photo taken of an actress without permission), *cited in* Warren & Brandeis, *supra* note 3, at 195 n.7; Marks v. Jaffa, 26 N.Y.S. 908, 909 (Super. Ct. 1893) ("No newspaper or institution, no matter how worthy, has the right to use the name or picture of

any [individual to vote on the individual's popularity] without his consent."); Corliss v. E.W. Walker Co., 57 F. 434 (D. Mass. 1893), *rev'd*, 64 F. 280 (D. Mass. 1894); *Schuyler*, 42 N.E. 22; *Roberson*, 64 N.E. 442; *Pavesich*, 50 S.E. 68; Edison v. Edison Polyform Mfg. Co., 67 A. 392, 394 (N.J. Ch. 1907) (granting an injunction against a company for misappropriating Thomas Edison's name and image to sell polyform bottles).

12. Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 LANDSLIDE, no. 1, Sept./Oct. 2020, at 20 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 2, § 46); *see also* 1 MCCARTHY & SCHECHTER, *supra* note 1, § 3:2; Eastwood v. Superior Court, 198 Cal. Rptr. 342 (Ct. App. 1983).

13. Class Action Complaint, Young v. NeoCortext, Inc., No. 2:23-cv-02496 (C.D. Cal. Apr. 3, 2023), https://assets.law360news.com/1593000/1593407/https-ecf-cacd-uscourts-gov-doc1-031139769418.pdf?utm_source=ios&utm_medium=ios&utm_campaign=ios-shared.

14. Best v. Berard, 776 F. Supp. 2d 752 (N.D. Ill. 2011).

15. 765 ILL. COMP. STAT. 1075/30.

16. *Best*, 776 F. Supp. 2d at 757 (citing Chaklos v. Stevens, 560 F.3d 705, 712 (7th Cir. 2009)).

17. *Id.* (quoting Snyder v. Phelps, 562 U.S. 443, 453 (2011)).

18. *Id.* at 758 (quoting Winters v. New York, 333 U.S. 507, 510 (1948) ("'The line between the informing and the entertaining is too elusive for the protection of th[e] basic right' of a free press." (alteration in original)); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news."); City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986) ("Cable television partakes of some of the aspects of speech and the communication of ideas as do the

traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers.")).

19. 765 Ill. Comp. Stat. 1075/35(b)(2).

20. *Best*, 776 F. Supp. 2d at 758.

21. Hannah Frishberg, *Reality TV Stars Come Out against Extreme Editing, or "Frankenbiting,"* N.Y. Post (July 9, 2021), https://nypost.com/2021/07/09/reality-tv-stars-bash-extreme-editing-or-frankenbiting.

22. Eckhardt v. Idea Factory, LLC, 193 N.E.3d 182, 187 (Ill. Ct. App. 2021).

23. Winston Cho, *Scripps Defeats Defamation Lawsuit from Former "Windy City Rehab" Co-star*, Hollywood Rep. (Mar. 15, 2022), https://www.hollywoodreporter.com/business/business-news/hgtv-defamation-lawsuit-from-former-windy-city-rehab-costar-1235112362; Bruce Haring, *Former HGTV "Windy City Rehab" Costar Donovan Eckhardt Again Has Defamation Suit Dismissed*, Deadline (Mar. 16, 2021), https://deadline.com/2021/03/donovan-eckhardt-windy-city-rehab-defamation-suit-dismissed-1234674422; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (to show "actual malice," a plaintiff must present "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth").

24. Paulina Okunyte, *Deep Fake Love: How Netflix Makes Profit out of Deepfake Defamation*, Cybernews (Aug. 4, 2023), https://cybernews.com/editorial/deep-fake-love-netflix-deepfake; Josh Rosenberg, *Deep Fake Love Is Netflix's Stanford Prison Experiment*, Esquire (Aug. 10, 2023), https://www.esquire.com/entertainment/tv/a44772226/deep-fake-love-netflix-reality-dating-show.

25. Restatement (Second) of Torts § 558 (Am. L. Inst. 1977); Christy Bieber, *5 Elements of Defamation*, Forbes (May 23, 2023), https://www.forbes.com/advisor/legal/personal-injury/elements-defamation.

ENTITY:

SECTION OF INTELLECTUAL PROPERTY LAW

TOPIC:

TECHNOLOGY, INTELLECTUAL PROPERTY, CIVIL RIGHTS AND CONSTITUTION

Author

Alyssa J. Devine
Purple Fox Legal

Alyssa J. Devine is the founder and managing attorney of Purple Fox Legal in Nashville, Tennessee, where her practice focuses on business, trademark, copyright, and right of publicity law.