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Identity Manipulation:

Responding to advances in artificial intelligence and robotics

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Draft prepared for discussion at We Robot 2020.

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Identity Manipulation: Responding to advances in artificial intelligence and robotics

Suzie Dunn¹

Introduction

Advances in artificial intelligence (AI) and robotics technologies have destabilized our ability to control our identity. Today, it is increasingly accessible for the average person to appropriate the voice, image, and body of another individual through the use of technology. Deepfake videos swap new faces into existing videos,² facial re-enactment allows for the face of one person to be superimposed on the face of someone else in a real time video,³ artificial speech synthesis can clone another person's voice,⁴ and 3D printing and modern robotics can reproduce life-size copies of living people.⁵ These are all examples of the ways technology is being used to replicate aspects of people's identity, sometimes without their consent.⁶ Once limited to the hands of computer-generated image specialists and robotics professionals, the barriers to accessing these technologies are quickly being removed.⁷ By scrapping audio-visual data from digitally available sources or purchasing robotics parts on the global marketplace, even hobbyists and amateurs are able to experiment with many of these technologies and create content representing another person.⁸ While many of these technologies are in their infancy and are not yet successfully producing perfect replicas,⁹ there have already been examples wherein this

¹ University of Ottawa, Part-time professor & PhD Candidate, suzie.dunn@uottawa.ca; www.suziedunn.com; Twitter: @SuzieMDunn.

² Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 California Law Review 1753.

³ Pamela Johnston & Eyad Elyan, "A review of digital video tampering: From simple editing to full synthesis" (2019) 29 Digital Investigations 67.

⁴ Marie-Helen Maras & Alex Alexandrou, "Determining authenticity of video evidence in the age of artificial intelligence and in the wake of Deepfake videos" (2018) The International Journal of Evidence & Proof 255 at 257.

⁵ Elizabeth Broadbent, "Interactions With Robots: The Truths We Reveal About Ourselves" (2017) 68 Annual Review of Psychology 627 at 635.

⁶ Rebecca Delfino, "Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act" (2019) 88 Fordham L Rev 887.

⁷ Marie-Helen Maras & Alex Alexandrou, "Determining authenticity of video evidence in the age of artificial intelligence and in the wake of Deepfake videos" (2018) The International Journal of Evidence & Proof 255 at 256.

⁸ The original deepfake forums dedicated to sharing how to make pornographic content were banned by Reddit but forums on how to make non-sexual deepfakes are one of the forums available for those interested in making deepfakes: https://www.reddit.com/r/GifFakes/comments/7y7c47/fakeapp_22_forum/. Deeptrace has found that the majority of forums are still located on deepfake pornography sites. Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, "The State of Deepfakes: Landscape, Threats, and Impact" (2019) Deeptrace at 4.

⁹ Yuezun Li, Ming-Ching Chang and Siwei Lyu, "In Ictu Oculi- Exposing AI Generated Fake Face Videos by Detecting Eye Blinking" (2018).

technology has produced convincing copies of aspects of the targeted individual that have effectively fooled other people.¹⁰ As these technologies become more user friendly, less expensive, and produce more realistic content, it is imperative that we explore the law's role in protecting an individual's identity from these types of identity manipulation.

To explore these issues, this paper will first discuss why an individual's identity, particularly representations of their image and voice, are increasingly relevant in our current society. Second, it will cover some existing technologies to illustrate the ways that identities are being manipulated through artificial intelligence and robotics, and highlight some aspects of their production that may be relevant when applying legal protections. Third, it will explore the economically focused torts of appropriation of personality and publicity rights in common law Canada and the United States, respectively, as well as dignity focused personality and image rights in the civil law systems of Germany and Québec. Fourth, it will argue that legal solutions to identity violations should include more of a dignity focused approach that takes a broad understanding of identity to protect people's identities from being harmed by misuses of this technology. As an important disclaimer, these comparisons are not meant to be an exhaustive or comprehensive overview of these systems, but instead draw attention to some of the more relevant aspects of these laws for the purpose of examining the issue of identity-based and dignity focused legal protections.

Part I: Identity

Sociological and psychological concepts of identity are complex and contested, involving various theories that examine a person's social interactions, internal understanding of themselves, and other people's interpretation of them in order to determine what that person's "identity" is.¹¹ As a broad examination of identity theory is beyond the scope of this paper, a more simplistic understanding of identity will be adopted. Borrowing from Lisa Austin's paper "Privacy, Shame, and the Anxieties of Identity," the concept of identity will be limited to a person's outward facing self-presentation.¹²

Identity theorist, Erving Goffman, found that people construct and express their identity differently depending on who they are with and what type of situation they are in. According to

¹⁰ A CEO in the UK spoke on the phone with what he thought was his boss, but was actually a synthetic replica of his voice, and transferred 220,000 Euros to the fraudsters account. Catherine Stupp, "Fraudsters Used AI to Mimic CEO's Voice in Unusual Cybercrime Case" *The Wall Street Journal* (25 February 2020).

¹¹ Several well-known identity theories can be found in these works: C. H. Cooley, *Human Nature and the Social Order* (New York: Scribner's, 1902); George Herbert Mead, *Mind, Self, and Society* (Chicago: University of Chicago Press, 1934); Erving Goffman, *Presentation of Self in Everyday Life* (New York: Anchor Books, 1959); Judith Butler, *Gender Trouble*, (New York: Routledge, 1999); Tajfel, Henry. *Social Identity and Intergroup Relations* (New York: Cambridge University Press, 1982/2010); Sheldon Stryker & Peter Burke. "The Past, Present, and Future of an Identity Theory" (2000) 63:4 *Social Psychology Quarterly* 284; Peter J Burke & Jan E Stets. *Identity Theory*, (New York: Oxford Scholarship Online, 2009).

¹² Lisa Austin, "Privacy, Shame and the Anxieties of Identity" (2012) at 3. Also see: Alice Marwick, "Online Identity" in J Hartley, J Burgess & A Bruns, eds, *Companion to New Media Dynamics* (Malden, MA- Blackwell, 2013) at 355.

Goffman, a person will perform selective aspects of themselves that feel more authentic for that particular contextual situation.¹³ Using the metaphor of a theatre, Goffman divided identity expression into the “front stage” performance of identity, which occurs in front of an audience and is influenced by the social and contextual norms of the situation, and “back stage” identity performance, which occurs in private when a person can let their guard down and be their true selves. The front stage presentation is carefully controlled and curated for the particular or desired audience. This performance is an outward expression of aspects of a person’s identity in that particular situation. Building on the concept of performativity, critical theorist Judith Butler argued that identities are socially constructed through verbal and non-verbal cues. A person’s manner of speech and visual presentation are central to performing their identity and having their identity understood by others. These expressions are often determined, or at the very least influenced, by the relevant cultural norms in the spaces the person presents themselves.¹⁴ The audio and visual cues in front stage identity presentation are the primary identity features and positions relevant to this paper.

In a digitally saturated society, digital identity presentation has become a valuable and necessary practice for most people.¹⁵ Never before has the concept of personal branding been more relevant,¹⁶ nor has there been a time where people across the globe could access identifying information about others with such little effort.¹⁷ Googling someone to learn about who they are has become common practice in our personal, professional, and romantic lives. In response, people choose whether to share certain images, videos, voice recordings, and related text of themselves to express their identity to a particular audience and to interact with their various communities. In a study on Instagram influencers, Crystal Abidni labeled the work put into digital identity presentation as “visibility labour”.¹⁸ The content that is discovered in these searches and presentations have significant social, professional, and economic impact on the person presented and is influenced by the self-created content and by content shared by others. Simply put, a person’s digital identity expression has great value to their identity.

Inaccurate or inappropriate identity presentations can have impactful and sometimes dire consequences, as will be discussed in the following sections, on the person represented. As a result of these consequences, individuals are sensitive to content that is posted about them that

¹³ Erving Goffman, *Presentation of Self in Everyday Life* (New York: Anchor Books, 1959).

¹⁴ Judith Butler, *Gender Trouble*, (New York: Routledge, 1999).

¹⁵ Alice Marwick, "Online Identity" in J Hartley, J Burgess & A Bruns, eds, *Companion to New Media Dynamics* (Malden, MA- Blackwell, 2013) at 355.

¹⁶ Alessandro Gandini, "Digital work: Self-branding and social capital in the freelance knowledge economy" (2015) 16:1 *Marketing Theory* 123-141; Peters, T. *The Brand Called You*, (New York: Random House, 1999).

¹⁷ Danielle Citron, *Hate Crimes in Cyberspace* at 69; H Kristl Davison, Catherine Maraist, RH Hamilton, & Mark Bing, "To Screen or Not to Screen? Using the Internet for Selection Decisions" (2012) 24-1 *Employee Responsibilities and Rights Journal* 1–21.

¹⁸ Crystal Abidin, "Visibility Labour: Engaging with Influencers' Fashion Brands and #OOTD Advertorial Campaigns on Instagram." (2016) 161(1) *Media International Australia* 86 at 90.

does not match their desired identity presentation.¹⁹ Identity management is particularly relevant and onerous for equality seeking groups such as members of the LGBTQ++ community, Black, Indigenous, and people of colour, and women, who face a higher level of scrutiny of their identity presentation.²⁰ Cultural policing works to reinforce stereotypical representations of individuals from these groups whose identities are much more complex than what is embedded in those stereotypes. This policing challenges their ability to express themselves authentically without facing resistance from other groups. As such, these groups may be more self-reflective and cautious about the front stage identity content they share, and may face more severe consequences when false, manipulated or decontextualized content is shared about them.²¹ For individuals belonging to these groups, there is a fine balance between benefiting from visibility that comes with digital identity expression and taking on the vulnerabilities that come along with that visibility.²²

Digital spaces have proven to be fraught spaces for identity performance because they break down the physical separations of social groups. They also allow for others to share – and create – public digital content that represents another person’s voice, image, and identity features. Research by Marwick and boyd explores the complexity of public self-presentation on social media sites where users’ social groups are intermixed, leaving little space for nuanced identity performance among the disparate social groups that are collected online.²³ Unlike most in-person interaction, individuals face “context collapse” in digital spaces,²⁴ where certain facets of their identity are exposed to a wide variety of social groups that may not normally interact or be exposed to specific parts of that person’s identity. For example, a person’s co-workers can gain access to or be exposed to information about another co-worker’s personal life that historically that person may not have chosen to share with their co-workers. But due to the architecture of the internet, that content becomes available. In the digital age, audience segregation can be

¹⁹ Sarah Bloom, "No vengeance for 'revenge porn' victims: Unraveling why this latest female centric, intimate-partner offense is still legal, and why we should criminalize it" (2016) 42-1 *Fordham Urban Law Journal* 234 at 241.

²⁰ Brooke Erin Duffy & Emily Hund, "Gendered Visibility on Social Media- Navigating Instagram's Authenticity Bind" (2019) 13 *International Journal of Communication* 4983; Steeves, Valerie. "'Pretty and just a little bit sexy, I guess': Publicity, privacy, and the pressure to perform 'appropriate' femininity on social media" in Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens: Putting Technology, Theory and Policy into Dialogue with Girls' and Young Women's Voices* (Ottawa: University of Ottawa Press, 2015) 307; Azmina Dhroodia, "#Toxic Twitter: Violence and Abuse Against Women Online" (London, UK: Amnesty International, 2018).

²¹ George Veletsianos, Shandell Houlden, Jaigris Hodson, & Chandell Gosse, "Women scholars' experiences with online harassment and abuse: Self-protection, resistance, acceptance, and self-blame" (2018) 20:12 *New Media & Society* 4689; Brooke Erin Duffy & Emily Hund, "Gendered Visibility on Social Media- Navigating Instagram's Authenticity Bind" (2019) 13 *International Journal of Communication* 4983.

²² Trans visibility article.

²³ boyd, danah & Alice E Marwick. "Social Privacy in Networked Publics: Teens' Attitudes, Practices, and Strategies" (Paper delivered at the Oxford Internet Institute, A Decade in Internet Time: Symposium on the Dynamics of the Internet and Society, 22 September 2011).

²⁴ Alice Marwick, "Online Identity" in J Hartley, J Burgess & A Bruns, eds, *Companion to New Media Dynamics* (Malden, MA: Blackwell, 2013) at 355; Alessandro Gandini, "Digital work: Self-branding and social capital in the freelance knowledge economy" (2015) 16:1 *Marketing Theory* 123-141; Peters, T. *The Brand Called You*, (New York: Random House, 1999).

difficult as information shared online can be viewed by a broad audience²⁵ and technology makes it easier to publish and access information about others.²⁶ Because of the challenges that come along with the digital era Massimo Durante has noted that people want at least a semblance of control over their identity information on digital platforms, but may lack it due to the ease of information being “easily disembedded and re-contextualized across time”.²⁷ Controlling which audiences can view which identity information is critical to front stage identity performance, but is less controllable in a digital environment. Despite the challenges that come along with digital identity presentation, Kristy Young has found that people have managed to gain some stability in their identity performance by prioritizing particular aspects of their identity expression.²⁸ People are getting more skilled at performing their desired identity across particular digital platforms and spaces, however, this requires some elements of control and curation,²⁹ something that can be disrupted when others create and distribute content about another person that does not match their desired identity presentation.

In the current culture of digital identity expression and image sharing, it is unrealistic to expect to have absolute control over one’s digital identity but it is worth considering what the boundaries of identity control are. In more severe examples, co-opting a person’s digital identity has become a more common practice for those wishing to harm another person. In a case of a relationship involving domestic violence, a Canadian man, Patrick Fox, created a website in his ex-wife’s name, misrepresenting her images, personal life choices, and other information in an effort to destroy her digital identity and drive her to suicide.³⁰ Abusive parents have used the internet to label and shame their children by sharing images and videos their child would not want shared.³¹ Women’s private sexual images have been manipulated or posted out of context to impact their digital identity expression.³² Men have had their images scrapped from the internet and used in romance scams that fraudulently convince women to send the scammers money.³³ In less abusive cases, celebrities have had their images and voices used in advertisements without their permission,³⁴ athletes have had avatars of them made for video

²⁵ Lisa Austin, "Privacy, Shame and the Anxieties of Identity" (2012) at 49.

²⁶ Ian Kerr, & Jennifer Barrigar, "Privacy, Identity and Anonymity" in Kristie Ball, Kevin Haggerty and David Lyon, eds, *International Handbook of Surveillance Studies* (London: Routledge, 2011).

²⁷ Massimo Durante, "The Online Construction of Personal Identity Through Trust and Privacy" (2011) 2:4 *Information* 549 at 616.

²⁸ Young, Kristy. "Managing online identity and diverse social networks on Facebook" (2013) 10:2 *Webology* 1.

²⁹ José van Dijck, "'You have one identity': Performing the self on Facebook and LinkedIn" (2013) 35:2 *Media, Culture & Society* 199.

³⁰ *R v Fox*, 2017 BCSC 2361.

³¹ *Yenovkian v Gulian*, 2019 ONSC 7279.

³² Clare McGlynn, Erika Rakley, & Ruth Houghton, "Beyond 'revenge porn': The continuum of image-based sexual abuse" (2017) *Feminist Legal Studies* 15.

³³ Alec Couros, "Info for Romance Scam Victims" educationaltechnology.ca/information-for-romance-scam-victims; Christian Koop et al, "The Role of Love stories in Romance Scams: A Qualitative Analysis of Fraudulent Profiles" (2015) 9:2 *International Journal of Cyber Criminology* 205.

³⁴ *Krouse v Chrysler Canada Ltd et al*, 1973 CanLII 574 (ONCA); Midler

games without their consent,³⁵ and regular people have had their images taken and published without their consent.³⁶

When a person's voice or image is appropriated for the purposes of others, their integrity and autonomy are impacted by that appropriation. In the context of non-consensual distribution of intimate images, Jane Bailey and Carissima Mathen argue that this reduces the person in the image "to a means to achieve some purpose or goal unrelated to her own aspirations, desires or self-interest. [...] Instead, the accused instrumentalizes her – using her to achieve his own goals and sublimating her will to his."³⁷ This reduction can be applied to other forms of identity manipulation where the publication of audio or visual content represents the person in unwarranted ways. Due to the convincing nature of some technologies, this form of identity manipulation is only exacerbated by the development of artificial intelligence and robotics that can create audio and visual content of another person that shows them doing and saying things they never did.

The expanding relevance of digital identity presentations in modern society combined with the technological tools to manipulate and harm another person's identity without warrant, discussed below, have altered the social role of identity presentation, increasing its power and value, and adding vulnerability to the person represented.

Part II: Technology

In our current digital culture, a great deal of identity presentation is done through presentations of the embodied self, usually through photos and videos. People tell stories of themselves through the use of these mediums, along with text and voice recordings, yet no one has full control over all of the content that is made and shared of them. Currently, cultural practices are being developed about what types of images and recordings are acceptable to take and share in digital spaces. A study by The eQuality Project and Media Smarts found that young people have detailed contextual rules for when and why certain types of images can be shared online and across which platforms or messaging groups, much of which is based on consent.³⁸ While we are still in the cultural throes of determining what is acceptable, both legally and socially, when it comes to taking and sharing images and recordings, new technologies add new challenges to those determinations. Artificial intelligence and robotics raise novel questions of when and why certain images and audio recordings can be *created* in someone else's likeness, as well as when they can be shared.

³⁵ *Keller v Elec Arts Inc*, 724 F 3d 1268, 1268 (9th Cir 2016).

³⁶ *Aubry v Éditions Vice-Versa inc*, [1998] 1 SCR 591.

³⁷ Jane Bailey and Carissima Mathen, "Technologically-facilitated Violence Against Women & Girls: If Criminal Law Can Respond, *Should* It?" (2018) University of Ottawa Working Paper Series, SSRN at 21-22, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043506.

³⁸ Matthew Johnson, Valerie Steeves, Leslie Regan Shade, & Grace Foran, "To Share or Not to Share: How teens make privacy decisions about photos on social media" (2017) Media Smarts/The eQuality Project.

The technologies discussed below demonstrate some of the ways that people's identities are being replicated and, in many cases, co-opted without their consent. Open-source software allows hobbyists to experiment with artificial intelligence programs that produce images and audio recordings with a level of accuracy that never existed before. Communities of people who want to learn how to use and develop these programs share tips and tricks, including sharing image caches of the people they want to replicate, on shared forums where anyone with marginal technical proficiency can practice using them. Robots that can be made in a person's likeness are less accessible to the general public, but can be accessed either by ordering custom robots from companies or by purchasing parts and building a robot at home. Building a robot replica takes much more technical expertise and artistic skill than making fake images or voices but, as will be seen below, is not out of the reach of a robotics hobbyist.

This paper will discuss two forms of technology that can be used to replicate a person's identity: synthetic media produced by artificial intelligence and robotics. Describing two examples of synthetic media, synthetic videos, commonly referred to as deepfakes, and synthetic speech, as well as robotics, this section will detail how these technologies can reproduce aspects of a person's identity. It will discuss factors of the development of this technology that may be relevant in legal discussions. Issues that arise include considerations of whose identity features are being replicated, are they public figures or everyday people? Who is creating these replications? Is it made by for-profit businesses or hobbyists? What is the drive behind the creation? Are the creators making this content as social commentary, for economic reasons, for entertainment, experimentation, art, or to cause harm? Did the person being represented consent to the creation or not?

Synthetic video

Synthetic media is an umbrella term that includes any audio, video, image, and text media that has been generated or manipulated through a computerized process such as artificial intelligence.³⁹ Witness, a global non-profit that has been leading research on the human rights perspectives on synthetic media, has described several forms of existing synthetic media including deepfakes, facial expression manipulation, video in-filling, text to video synthesis, realistic text generation simulating individuals, audio synthesis, lip-synch dubbing, and realistic avatars.⁴⁰ Synthetic media can involve manipulating media to remove or change relevant aspects of the content, such as changing the background of a video or swapping in a new face onto the person featured in the footage, or it could involve creating entirely new content like creating an audio recording where all of the audio has been generated through a text-to-speech artificial intelligence program. One of the most well-known forms of synthetic media is deepfake videos. This digital media software places individuals into videos in ways that can have significant consequences on their digital identity presentation.

³⁹ Aviv Ovadya & Jess Whittlestone, "Reducing Malicious Use of Synthetic Media Research: Considerations and Potential Release Practices for Machine Learning" (2019) arXiv Cornell University.

⁴⁰ <https://blog.witness.org/2019/06/deepfakes-synthetic-media-updated-survey-solutions-malicious-usages/>

Synthetic video creation has been available for some time in the movie making industry, but it required highly trained computer graphic experts and significant financing to produce. Living actors have been digitally inputted into historic scenes using a combination of archival footage and computer graphics, such as when Tom Hanks' character in *Forest Gump* appeared to meet John F. Kennedy in the film. Likewise, actors have appeared in films after their death, such as Carrie Fisher's appearance as Princess Leia in *Rogue One: A Star Wars Story*. These bits of cinematic magic involved teams of talented and well-trained computer-generated image specialists to pull off.⁴¹ What changed in 2017 was that for the first time higher-quality open-source face swapping programs were made widely available. This software was easy enough to use for an average interested user with some technical knowledge and a powerful graphics processor to learn over time.⁴² It opened the door to the public to create this content at little to no cost. In 2017, Motherboard journalist Samantha Cole broke the story of a programmer who made a synthetic sexual deepfake video that made it appear as though *Wonder Woman's* Gal Gadot engaged in a sex video with her step brother.⁴³ The video was posted on Reddit by the developer, who went by the user name "u/deepfakes" – a portmanteau referencing the deep machine learning techniques required to make the videos and the falsity of the content. This Reddit user's name is the origin of this synthetic media's commonly known name. The pornographic deepfakes he made featuring female celebrities' faces became wildly popular. Soon after, a desktop app called "FakeApp" was released on Reddit's deepfake forum so users could create their own deepfake videos, and forums began popping up on how to improve the open-source software to create more realistic videos.⁴⁴

What these programmers developed was unique compared to previous publicly available synthetic video techniques in its accessibility, superior quality, and swift advancement supported by the hive mind interest in the steadily improving videos and the adversarial deep learning technology used. All that was required was a "donor" video to be used as a base, a large enough collection of images of a specific person's face, some technical knowledge, and the time needed to train the program.⁴⁵ Forums where members could post tutorials on how to make deepfakes, and share "face sets" (collections of images of the person whose face was to be swapped in the video, usually female celebrities) or donor videos (the original video that the face was to be swapped out of, usually pornographic videos with female faces similar to the celebrity they would like to input) proliferated. Using artificial intelligence techniques known as generative

⁴¹ Britt Paris & Joan Donovan, "Deepfakes and Cheap Fakes: The Manipulation of Audio Visual Evidence" (2019) *Data & Society* at 34.

⁴² Robert Volkert & Henry Ajder, "Analyzing the Commoditization of Deepfakes" *NYU Journal of Legislation and Public Policy* (27 February 2020).

⁴³ Samantha Cole, "AI-assisted Fake Porn is Here and We're All Fucked" *Motherboard* (11 December 2017).

⁴⁴ Holly Kathleen Hall, "Deepfake Videos: When Seeing Isn't Believing", 27 *Cath. U JL & Tech* 51 (2018).

⁴⁵ Jaime Dunaway, "Reddit (finally) bans deepfake communities, but face-swapping porn isn't going anywhere" *Slate* (8 February 2018); Holly Kathleen Hall, "Deepfake Videos: When Seeing Isn't Believing", 27 *Cath U JL & Tech* 51 (2018).

adversarial networks (GAN)⁴⁶, this software would map the biometric characteristics of faces, superimposing the details of one person's face onto the face of the person in the original video. The quality of the deepfakes quickly improved as the neural networks that mapped, mimicked, and replaced learned and improved as they worked.⁴⁷ Within a year, amateurs were producing videos that were nearly as convincing as the CGI in *Rogue One*.⁴⁸ As the technology progressed, fewer images were needed in a face set to produce a convincing deepfake. Indeed, some programmers were able to make low quality, moving and speaking deepfakes using only one image and short audio file⁴⁹ and a Chinese app ZAO only required one image to swap their faces into famous movie scenes.⁵⁰

Hobbyists continue to be active producers of deepfakes, but academics and professional programmers are creating them as well, often at a much higher quality and in much greater detail.⁵¹ A group of researchers out of Carnegie Mellon University were able to produce deepfakes that replicated the unique facial tics of the individual featured in the deepfake.⁵² Hobbyists, programmers, and academics are working with open-source software and creating their own programs to make deepfakes. Those individuals with a less technical skill set can experiment with deepfake through apps or can hire someone to make a deepfake for them. Apps such as Zao,⁵³ which is currently only available in China, allow for users to swap their faces into famous film scenes, while other individuals and companies such as Deepfakes web β⁵⁴ have advertised deepfake services at a cost. Deeptrace, a research group that tracks the production of deepfakes online, recently published their research findings on the commoditization of deepfakes.⁵⁵ They found that most deepfake videos and software were being created and shared without a fee. However, Deeptrace also found that although most deepfake open-source software developers are not actively selling their software some do accept donations on their websites. Others offer to create deepfakes for a fee, either through a services platform that

⁴⁶ Ian J Goodfellow et al, "Generative Adversarial Nets" (2014) ArXiv Cornell University; Tero Karras, Samuli Laine, & Timo Aila, "A Style-Based Generator Architecture for Generative Adversarial Networks" (2019) ArXiv Cornell University.

⁴⁷ Elizabeth Caldera, "Reject the Evidence of Your Eyes and Ears: Deepfakes and the Law of Virtual Replicants" (2019) 50:1 Seton Hall L Rev 177 at 181-182.

⁴⁸ A video produced by someone going under the user name "derpfake" re-created the scenes from the Star Wars film featuring Carrie Fisher with surprisingly similar results. Britt Paris & Joan Donovan, "Deepfakes and Cheap Fakes: The Manipulation of Audio Visual Evidence" (2019) Data & Society at 35.

⁴⁹ Konstantinos Vougioukas, Stravos Petridis, & Maja Pantic, "Realistic Speech-Driven Facial Animation with GANs" (2019) Samsung AI Centre.

⁵⁰ Kelsey Farish, "Do deepfakes pose a golden opportunity? Considering whether English law should adopt California's publicity right in the age of the deepfake" (2020) 15-1 Journal of Intellectual Property Law & Practice 40.

⁵¹ Robert Volkert & Henry Ajder, "Analyzing the Commoditization of Deepfakes" NYU Journal of Legislation and Public Policy (27 February 2020).

⁵² Aayush Bansal, Shugao Ma, Deva Ramanan, & Yaser Sheikh, "Recycle-GAN: Unsupervised Video Retargeting" (2018) Carnegie Mellon University & Facebook Reality Lab.

⁵³ Zak Doffman, "Chinese Deepfake App ZAO Goes Viral, Privacy Of Millions 'At Risk'" (2 September 2019) Forbes; <https://apps.apple.com/cn/app/id1465199127>

⁵⁴ <https://deepfakesweb.com/>

⁵⁵ Robert Volkert & Henry Ajder, "Analyzing the Commoditization of Deepfakes" NYU Journal of Legislation and Public Policy (27 February 2020).

generates the deepfake from uploaded training data of a particular subject, like that offered by Deepfakes web β , or other marketplace sellers who offer custom made deepfakes, with sexual deepfakes being the most lucrative market sector.⁵⁶ This shows the wide variety of groups that are creating and distributing deepfakes and some of the reasons behind those creations.

The original deepfakes shared on Redditt were sexual deepfakes created without the consent of the women who appear in the videos.⁵⁷ It seems that neither the celebrities whose faces were swapped into the videos, nor the pornography actors whose bodies were featured in the donor film were consulted about their images being used in most deepfakes.⁵⁸ This continues to be the case. The vast majority of deepfakes online are sexual deepfakes made predominately of female celebrities without their consent,⁵⁹ however some have been made of everyday women⁶⁰ and some people have made requests to have sexual deepfakes made featuring women they know personally – also without their consent.⁶¹ Hollywood actor Scarlett Johansson (who is not new to sexual exploitation on the internet considering that she previously has had her actual sexual images hacked, stolen and published without her consent) has also had multiple sexual deepfake videos made of her without her consent. In an article published in *The Washington Post*, Johansson commented that she faces a different impact than a lesser-known person featured in a deepfake because people likely don't generally believe that it is actually her in the pornographic film. She also expressed frustration in the challenges – in her opinion, near impossibilities – that come along with legally protecting her identity and image in a globally connected digital world, and noted that vulnerable groups like women and children have to take “extra care” to protect their identities as they are more likely to be targeted by this harmful behaviour.⁶²

Recent research by Deeptrace found that by 2018 96% of publicly facing deepfakes were sexual deepfakes made almost exclusively of women without their consent.⁶³ Racialized women were targeted in a manner not replicated in the non-sexual deepfake content, where 25% of the sexual deepfakes featured South Korean women and only 2% of non-sexual deepfakes targeted South Koreans. While many deepfakes seem to be made for purely pornographic purposes, impacting the sexual autonomy of those non-consensually featured in the videos, some were specifically weaponized to attack female journalists, activists, and social commentators such as

⁵⁶ Robert Volkert & Henry Ajder, "Analyzing the Commoditization of Deepfakes" NYU Journal of Legislation and Public Policy (27 February 2020).

⁵⁷ Jacquelyn Burkell & Chandell Gosse, "Nothing new here: Emphasizing the social and cultural context of deepfakes" (2019) First Monday.

⁵⁸ Lux Alptraum, "Deepfake Porn Harms Adult Performers, Too" Wired (15 January 2020).

⁵⁹ Rebecca Delfino, "Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act" (2019) 887:88 Fordham L Rev.

⁶⁰ Danielle Keats Citron, Sexual Privacy, 128 Yale L.J. (2019) at 1923.

⁶¹ Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 California Law Review 1753 at 1772-1773.

⁶² Drew Harwell, "Scarlett Johansson on fake AI-generated sex videos: 'Nothing can stop someone from cutting and pasting my image'" The Washington Post (31 December 2018).

⁶³ Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, "The State of Deepfakes: Landscape, Threats, and Impact" (2019) Deeptrace.

Rana Ayyub, Noelle Martin, and Anita Sarkisian, each of whom work in various sectors bringing attention to gender inequality.⁶⁴ Sexual deepfakes of those women were created to be used in targeted hate campaigns meant to dox, shame and silence these women, and in the case of Ayyub, put their lives in danger.⁶⁵ Public outcry led to the banning of non-consensual sexual deepfakes on websites such as Reddit, Twitter, Facebook, Google, and Pornhub, however, the technology remains available and the non-consensual sexual deepfakes and their accompanying how-to tutorials moved to other sites with less regulation.⁶⁶

Deeprtrace's research also shows that non-sexual deepfakes represent a small proportion of all deepfakes online (4%) with two thirds of those videos representing men and a third representing women.⁶⁷ Non-sexual deepfakes are mainly made by hobbyists who input famous celebrities' faces into various film or series scenes for comedic or entertainment value. Many of these videos have been made without the consent of the person featured in them but seem to be viewed as relatively harmless parodies. Nicolas Cage, who is famous for playing in a wide variety of roles in his acting career, has become a deepfake meme, where deepfake creators have placed his face in numerous famous movie scenes he never appeared in.⁶⁸ Deepfakes of the Nicolas Cage variety are generally permissible on most platforms, but some platforms have begun regulating deepfakes that are clearly meant to be misleading, regardless of whether they are sexual or not.⁶⁹

Despite non-consensual sexual deepfakes being the primary use of deepfakes, concerns about the sexual commodification of women through deepfakes were quickly surpassed by the concerns of the potential use of deepfakes to disrupt political affairs, particularly elections. Yet, deepfake interference in politics has not yet been broadly borne out.⁷⁰ Most deepfakes featuring politicians or public figures have been clearly made to make political and social commentary.

⁶⁴ Drew Harwell, "Fake-porn videos are being weaponized to harass and humiliate women: 'Everybody is a potential target'" Washington Post (30 December 2018); Danielle Citron, "Sexual Privacy" at 1922-1924.

⁶⁵ United Nations, "UN experts call on India to protect journalist Rana Ayyub from online hate campaign" (24 May 2018).

⁶⁶ Jon Sharman, "Pornhub and Twitter ban AI-generated 'deepfakes' videos that put female celebrities' faces on adult actresses' bodies" The Independent (7 February 2018); Robert Volkert & Henry Ajder, "Analyzing the Commoditization of Deepfakes" NYU Journal of Legislation and Public Policy (27 February 2020).

⁶⁷ Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, "The State of Deepfakes: Landscape, Threats, and Impact" (2019) Deeprtrace.

⁶⁸ Clayton Purdom, "Deep learning technology is now being used to put Nic Cage in every movie" AV Club (29 January 2018).

⁶⁹ See Facebook's policy here: <https://about.fb.com/news/2020/01/enforcing-against-manipulated-media/> and Twitter's here: <https://help.twitter.com/en/rules-and-policies/manipulated-media>; Gilad Edelman, "Facebook's Deepfake Ban Is a Solution to a Distant Problem" (7 January 2020) Wired.

⁷⁰ Henry Ajder, Giorgio Patrini, Francesco Cavalli & Laurence Cullen, "The State of Deepfakes: Landscape, Threats, and Impact" (2019) Deeprtrace.

Barack Obama⁷¹ and Donald Trump⁷² have had deepfakes made of them saying things they never said, but two better known examples of these deepfake videos explicitly stated or showed that they were fake videos. However, as described by Robert Chesney and Danielle Citron, the risk remains that politicians could be seriously targeted with disastrous effect.⁷³

Public figures are also being targeted for the purposes of social commentary in a similar fashion to that of politicians. In an art installation called Spectre, artists Bill Posters and Daniel Howe created two deepfakes of Mark Zuckerberg and Kim Kardashian, each appearing to talk about misusing data they collected on social media sites in order to use it to influence and control the general public. The artists said the point of the installation was to “to reveal the secrets of the Digital Influence Industry.”⁷⁴ Beyond social commentary and satire, deepfakes are also being used for educational purposes. In Florida, The Dali Museum, has created a deepfake of the artist Salvador Dali that its guests can interact with and learn about art.⁷⁵ These individuals identities have been manipulated and presented in ways that they or their estates may disagree with, but there may be a stronger argument that these types of deepfakes should be protected for their artistic and public interest value, despite their ability to manipulate a well-known person’s identity.

As demonstrated above, deepfakes come in a multitude of formats, featuring a variety of people, and are produced for various reasons. Most are created without the consent of the people featured in them. The ones that are publicly available, predominately feature celebrities, politicians, or public figures and are not made for profit. However, some people are profiting off of making deepfakes, whether that be through earning advertising revenue from the sites deepfakes are featured on, through donations from users of their open-source software, or by charging a fee for the service of deepfake creation. In regards to the intention and purpose behind creating deepfakes, the majority of deepfakes may not be created with the intention to harm, it seems likely that most creators would claim they are being made for sexual entertainment, but in actual fact have resulted in harming the bodily autonomy of the people featured in the non-consensual deepfakes. However, in some cases deepfakes have been intentionally created to cause harm. These are all relevant factors regulators will need to keep in mind when considering the laws application to deepfakes.

⁷¹ BuzzFeed and Jordan Peele made a deepfake of Barak Obama calling President Trump a dipshit as a public service announcement about deepfakes. BuzzFeedVideo, “You Won’t Believe What Obama Says In This Video! ;)” (17 April 2018), online: YouTube <<https://youtu.be/cQ54GDM1eLQ>>.

⁷² A Belgian political party made a fake video of President Trump criticizing the Paris Climate Accord, intentionally made to be identified as a deepfake, in order to garner signatures for a petition on climate change. Sp.a, “Trump heeft een boodschap voor alle Belgen... #Klimaatpetitie”, (20 May 2018 at 2:35am), online: Twitter <https://twitter.com/sp_a/status/998089909369016325?>; hans von der Burchard, “Belgian socialist party circulates ‘deep fake’ Donald Trump video” (21 May 2018) Politico.

⁷³ Robert Chesney & Danielle Keats Citron, “Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security” (2019) 107 California Law Review 1753 at 1777.

⁷⁴ Bill Poster, “Gallery: ‘Spectre’ Launches” Press Release (29 May 2019) <http://billposters.ch/spectre-launch/>

⁷⁵ The Dali Museum, “dali lives (via artificial intelligence) (2019) <https://thedali.org/exhibit/dali-lives/>

Synthetic speech

Like synthetic video, synthetic speech is also not an entirely novel concept.⁷⁶ Used by the health and scientific community to create synthesized speech devices for people experiencing communication challenges,⁷⁷ or to experiment with reactions to mimicked human voices,⁷⁸ this technology has been around for decades. But like synthetic video, it is only recently that the technology has been made more accessible and user friendly to the public through open-source software. Even individual's with basic technical knowledge can experiment with it or the average consumer can pay to have content created for them. Not all uses of this technology have been positive. The Oxford Future of Humanity Institute has expressed concerns over the use of synthetic speech to spread disinformation and impersonate people in malicious ways.⁷⁹

For-profit companies such as the Canadian startup company, Lyrebird (since acquired by Descript), have released synthesized voice samples of well-known people, including Hillary Clinton, Donald Trump and Barack Obama, to promote the services the company provides in replicating voices.⁸⁰ In a promotional video of their services they stated they hoped to help people who had lost their voices to gain back "this part of their identity".⁸¹ However, since being acquired by Descript, the company has expanded to offer its services to anyone who wishes to replicate their own voice for podcasting and overdubbing.⁸² According to the company's ethics page, Descript does not offer services for replicating other people's voices, due to concerns for potential misuses.⁸³ The services that allow users to create generated audio of their own voices is currently in private beta mode and people must apply to see if they would be a good match for the program. The program specifically asks the potential customer whose voices will be used, and if they have that person's explicit permission to replicate their voice.⁸⁴ These types of synthetic speech companies are using methods like WaveNet, which is "a deep neural network for generating raw audio waveforms" that was discovered by researchers at Google's DeepMind.⁸⁵ This technology allows for the inclusion of voices with subtleties like inflection and natural sounding breathing and mouth sounds, making it more convincing than previous

⁷⁶ Robert Chesney & Danielle Keats Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 California Law Review 1753 at 1761.

⁷⁷ Rajinder Koul, "Synthetic Speech" (2011) 4:1 Assistive Technology: Principles and Applications for Communication Disorders and Special Education 265.

⁷⁸ Iain Murray & John Arnott, "Toward the simulation of emotion in synthetic speech: A review of the literature on human vocal emotion" (1993) 93 The Journal of Acoustical Society of America 1097.

⁷⁹ Miles Brundage et al, "The Malicious Use of Artificial Intelligence- Forecasting, Prevention, and Mitigation" (2018) Oxford Future of Humanity Institute at 20.

⁸⁰ Marie-Helen Maras & Alex Alexandrou, "Determining authenticity of video evidence in the age of artificial intelligence and in the wake of Deepfake videos" (2018) The International Journal of Evidence & Proof 255 at 257.

⁸¹ Lyrebird, "Lyrebird – Create a digital copy of your voice" (4 September 2017), https://www.youtube.com/watch?v=YfU_sWHT8mo

⁸² Descript, "Introducing Descript Podcast Studio & Overdub" (n.d.) <https://www.descript.com/post/descript-podcast-studio-and-other-news>

⁸³ Descript, "Descript Ethics Statement" (n.d.) <https://www.descript.com/ethics>

⁸⁴ Descript, (n.d.) <https://descript.typeform.com/to/ncluy5>

⁸⁵ Aaron van den Oord et al, "Wavenet: A Generative Model for Raw Audio" (2016) arXiv Cornell University.

synthetic audio.⁸⁶ But it is not only for-profit companies that are experimenting with these techniques. Amateurs are also exploring the possible uses of synthetic speech.

In 2019, a website called “Not Jordan Peterson” allowed users to input text into a program that used neural-network technology to generate a sound file that made it sound like the controversial Canadian academic Jordan Peterson was reading the inputted text.⁸⁷ Soon after, recordings of Peterson “reading” feminist texts he disagreed with and saying things he had never actually said appeared in various media articles and websites.⁸⁸ This was not the first time Peterson’s voice was mimicked online through artificial intelligence technology. A company called Coding Elite produced a recording utilizing a similar voice mimicking artificial intelligence program that made it sound like Peterson was rapping Eminem’s song *Lose Yourself*, along with several other songs. The *Lose Yourself* YouTube video accompanying the recording went viral and has been watched nearly 300,000 times as of early 2020.⁸⁹

While Peterson seemed amused by the Eminem parody video, he was less lenient regarding the Not Jordan Peterson website recordings. Following the publication of several recordings made on the Not Jordan Peterson website, Peterson called for the unauthorized replication of people’s voices and images to be criminalized, citing harms to a person’s identity as a major factor requiring protection. In an op-ed to the National Post he said: “Wake up. The sanctity of your voice, and your image, is at serious risk. It’s hard to imagine a more serious challenge to the sense of shared, reliable reality that keeps us linked together in relative peace. The deepfake artists need to be stopped, using whatever legal means are necessary, as soon as possible.”⁹⁰

The contrast between Peterson’s reaction to the two voice-replications is significant. When the first replication of the music videos appeared fit well into his identity presentation as a hyper-masculine leader of the lost boys of the modern world, Peterson found it entertaining. He had previously praised Eminem’s talents, so the comparison could be considered complimentary. As for the second voice synthesis from Not Jordan Peterson, some of the recordings were diametrically opposite to Peterson’s chosen identity presentation, particularly his “reading” of Valeria Solanas’ disruptive second-wave feminist SCUM Manifesto.⁹¹ In that case, where the content threatened his preferred identity presentation, he reacted very negatively and called for significant regulation of the technology.⁹²

⁸⁶ DeepMind, “WaveNet: A Generative Model for Raw Audio” (8 September 2016)

<https://deepmind.com/blog/article/wavenet-generative-model-raw-audio>

⁸⁷ Jan Kietzmann, Linda W. Lee, Ian P. McCarthy, Tim C. Kietzmann, “Deepfakes: Trick or Treat?” (2019) Business Horizons. Also see: www.NotJordanPeterson

⁸⁸ For example see: <https://gizmodo.com/make-jordan-peterson-say-anything-you-want-with-this-sp-1837306431>

⁸⁹ Coding Elite, “Jordan Peterson AI Model Tries to Sing ‘Lose Yourself’ by Eminem” (5 April 2019)

<https://www.youtube.com/watch?v=HHf1dNHU0os> For the technology used see these two papers: Yuxuan Wang et al, (2018) “Style Tokens: Unsupervised Style Modeling, Control and transfer in End-to-End Speech Synthesis” Arxiv; RJ Skerry-Ryan, “Towards End-to-End Prosody Transfer for Expressive Speech Synthesis with Tacotron” (2018) Arxiv.

⁹⁰ Jordan Peterson, “I Didn’t Say That” National Post (23 August 2019).

⁹¹ Valerie Solanas, *SCUM Manifesto* (New York: Verso, 2004).

⁹² Jordan Peterson, “I Didn’t Say That” (23 August 2019), Jordan Peterson. National Post.

Another important aspect of the site was that it was not built in order to sell anything or to make a profit off of the project directly. Not Jordan Peterson was developed as a side project by computer engineer, Chris Vigorito, who was curious about artificial speech synthesis created using machine learning.⁹³ Experimenting with open-source software that was “readily available”, he claimed that it was relatively easy to create the program. When Vigorito released the website, it gained near instant notoriety, likely due to Peterson’s strong internet presence. Fans and critics alike began creating audio files of Peterson to suit their needs. Virgorito stated that the drive behind the site was to examine the market viability of such a service in the creative industries, but it was not built to market anything.⁹⁴ The fact that it was a personal project moves it outside of the economic realm, something that becomes relevant when considering which legal remedies might be available to Peterson, as will be discussed later in this chapter.

Peterson is not the only social commentator to have had his voice mimicked through this technology. Deep learning engineers, Hashiam Kadhim, Rayhane Mama, and Joseph Palermo, have showcased their speech synthesis technology on a website called “Fake Joe Rogan”.⁹⁵ The recordings contain quite absurd content that made it fairly obvious that the recordings were not actually Rogan, or in other cases, they were explicitly identified as fake on the site. The difference in the case of Rogan site compared to the Peterson site is that the technology was created by a machine learning company and the synthetic speech recordings were only presented to the public. It was unclear whether the company had asked Rogan for consent to create the content. Nonetheless, visitors to the site could not actually create their own sound recordings of Joe Rogan.⁹⁶ These engineers all work for a company, Dessa, where they developed “RealTalk,” during a work program that “encourages employees to work on independent projects that advance their knowledge of machine learning”.⁹⁷ They claimed that this program could be used to create a replica of “*anyone’s* voice provided that sufficient data is available.”⁹⁸ The company noted their concerns over the potential misuse of the technology: to impersonate a family member in order to obtain personal information via a spam call, to be used to harass and bully, to gain unauthorized entrance to secure areas or information, or to manipulate elections. Recognizing the risks inherent in their technology Dessa said it chose not to release their research, model, or datasets publicly.⁹⁹ Nevertheless, as seen in the Not Jordan Peterson example, this type of technology is currently publicly available with open-source software.

Synthetic speech programs have been used in what are known as “voice frauds” or “voice phishing scams”. Voice phishing scams involve fraudulent phone calls where a person is told that their family member or business is in trouble and just needs a quick money transfer or that their

⁹³ Chris Vigorito, “The Strange Future of Digital Media” Medium (29 August 2019).

⁹⁴ Chris Vigorito, “The Strange Future of Digital Media” Medium (29 August 2019).

⁹⁵ Dessa, “FauxRogan” (n.d.) <https://fakejoerogan.com/>

⁹⁶ Dessa, “FauxRogan” (n.d.) <https://fakejoerogan.com/>

⁹⁷ Dessa, “FauxRogan” (n.d.) <https://fakejoerogan.com/>

⁹⁸ Dessa, “RealTalk: This Speech Synthesis Model Our Engineers Built Recreates a Human Voice Perfectly” (15 May 2019) <https://medium.com/dessa-news/real-talk-speech-synthesis-5dd0897eef7f>

⁹⁹ Dessa, “FauxRogan” (n.d.) <https://fakejoerogan.com/>

financial and personal information is needed by a company or government body.¹⁰⁰ In 2019, the first fraudulent use of artificial intelligence being used to mimic a person's voice in real time for one of these scams was reported by *The Wall Street Journal*. A CEO of an unnamed business in the United Kingdom was tricked into transferring over \$200,000 USD to an overseas account. Over several phone calls, where the scammers reportedly used an artificial intelligence text-to-speech program to mimic the other voice on the call, the CEO thought he was speaking with the chief executive officer of his company's parent company and followed the directions he was given. It is unclear how the scammers would have accessed the voice samples of the CEO of the parent company, but the effect was convincing.¹⁰¹ While the harms of the synthetic speech replication in this case were financial, one can see the potential for identity harms if this technology were to be used to mimic voices in ways that impacted a person's identity presentation.

Similar to deepfakes, there are a breadth of potentially positive uses of this technology ranging from commercial uses to podcasting to the arts.¹⁰² Companies that are creating synthetic audio are producing digitally generated content of actual people in ways that benefit society, such as those crafting automated customer service programs or virtual assistants. However, there are significant risks of misuse. People like Obama, Trump, Peterson, and Rogan whose careers are built on publishing audio content of their work are easy targets for this type of synthesized identity manipulation. Unless the content is identifiable as fake, it could cause both individual harms to identity and societal disruption. Like Peterson, many have particularly crafted their online identities and may feel threatened by the unregulated replication of their voices, despite having a large public platform to refute false content. For those individuals who have readily accessible audio recordings that synthetic speech programs could be modeled off of, they are more vulnerable to misrepresentations of their identity. Nevertheless, public figures are not the only ones at risk of being misrepresented in this way, it is not difficult to gain access to voice recordings of the average person in the age of Zoom calls, smart phones, social media stories, voice messages, and voice mails. When considering the non-consensual replication of people's voices it will be important to consider who is creating the content, who is represented in the audio, what is the context and content of the recording, and what impact might it have on an individual's identity.

Robotics

Robots add a unique element to identity re-creation and manipulation as these replications embody the person represented. There is an additional "creepy" factor when the imitation

¹⁰⁰ Kwan Choi, Ju-lak Lee & Yong-tae Chun, "Voice phishing fraud and its modus operandi" (2017) 30 *Security Journal* 454.

¹⁰¹ Richard Wickliffe, "Summoning the demon: The new risks of artificial intelligence" (2019) *Property & Casualty* 360.

¹⁰² Jaume Ferrete-Vázquez, "Bodies Reappear as Action: On Synthetic Voices in Performance" (2020) 24:7 *A Journal of the Performing Arts* 123.

moves beyond the realm of the digital and into the physical.¹⁰³ Robotic replicas of living individuals are relatively rare and current versions are not particularly convincing, but with the evolution of 3D printing, the ability to recreate a person's likeness in robot form is becoming more practical and affordable.¹⁰⁴ There have been examples where people have made or commissioned duplicate copies of themselves, their children,¹⁰⁵ or their romantic partners,¹⁰⁶ as well as other people, both living¹⁰⁷ and dead.¹⁰⁸ In some cases, consent or licence of the person's image was obtained from the person embodied in the robot, in other cases the robots were built without their consent.¹⁰⁹ The examples below will range from fully embodied robots that act as a puppet for their human twin¹¹⁰ to robot heads that contain artificial intelligence in order to converse with people¹¹¹ to sex bots that react to touch or are programmed to have personalities.¹¹² Most of the robots that will be discussed were produced by professional roboticists or robotics companies, but as will be seen in the case of the Scarlett Johansson lookalike bot built by Ricky Ma, some hobbyists have been able to replicate people at home.¹¹³

One of the earliest copies of a robotic/human replica was made in 2006 by Japanese roboticist Hiroshi Ishiguro and his laboratory team. He and his team created a robot named Geminoid HI-1 that was modeled off of Ishiguro's appearance and mannerisms. It even wears the same style of clothes and glasses as Ishiguro. The stated purpose of Geminoid HI-1 was for Ishiguro to use it as a body double to engage with people where he was not present, including giving tele-lectures through the robot in order to avoid his long commute to work. He chose to replicate the robot after himself rather than another person in his lab so he could experience what it was like to have an embodied robotic duplication.¹¹⁴ Geminoid style robots have been described by Shuichi Nishio et al. as a type of twin robot that "appears and behaves as a person and is connected to the person by a computer network".¹¹⁵ Ishiguro's team built his twin using casts of his body to

¹⁰³ Karl F MacDorman & Hiroshi Ishiguro, "The uncanny advantage of using androids in cognitive and social science research" (2006) 7:3 *Interaction Studies* 297 at 312.

¹⁰⁴ M Christian, "These 'Cheaper' Sexbots Are Made with 3D-Printed Scans of Real People" *Future of Sex* (10 November 2018).

¹⁰⁵ Jennifer Robertson, "Gendering Humanoid Robots: Robo-Sexism In Japan" (2010) 16:2 *Body and Society*.

¹⁰⁶ Martine Aliana Rothblatt, *Virtually Human: The Promise - and the Peril - of Digital Immortality* (New York: St Martin's Press, 2014).

¹⁰⁷ Elizabeth Broadbent, "Interactions with Robots: The Truths We Reveal About Ourselves" (2017) 68 *Annual Review of Psychology* 627 at 635.

¹⁰⁸ --, "Widow bought sex doll to replace late wife" *Toronto Sun* (10 November 2016).

¹⁰⁹ April Glaser, "The Scarlett Johansson Bot is the Robotic Future of Objectifying Women" *Wired* (4 April 2016).

¹¹⁰ Jennifer Robertson, "Gendering Humanoid Robots: Robo-Sexism In Japan" (2010) 16:2 *Body and Soc'y* 1.

¹¹¹ Shelleen Greene, "Bina48: Gender, Race, and Queer Artificial Life" (2016) 9 *Ada: A Journal of Gender, New Media & Technology*.

¹¹² Kate Devlin, *Turned On: Science, sex and robots*, (London: Bloomsbury, 2018) at 138-142.

¹¹³ Elizabeth Broadbent, "Interactions With Robots: The Truths We Reveal About Ourselves" (2017) 68 *Annual Review of Psychology* 627 at 635; April Glaser, "The Scarlett Johansson Bot is the Robotic Future of Objectifying Women" *Wired* (4 April 2016).

¹¹⁴ Jennifer Robertson, "Gendering Humanoid Robots: Robo-Sexism In Japan" (2010) 16:2 *Body and Soc'y* 1 at 25.

¹¹⁵ Shuichi Nishio, Hiroshi Ishiguro and Norihiro Hagita (2007) 'Geminoid: Teleoperated Android of an Existing Person', in Armando Carlos de Pina Filho (ed.) *Humanoid Robots – New Developments*. Vienna: Advanced Robotic Systems International, I-Tech 342.

replicate him along with samples of his actual hair. They programmed the robot to mimic Ishiguro's facial, body, and voice patterns in order for the robot to reproduce his unique identity factors in the form of distributed personhood.¹¹⁶ Ishiguro could portray his identity factors such as his appearance and voice to the audience of Geminoid HI-1. It is worth noting that Ishiguro maintained agency of his identity presentation as he remained in control of his robotic replica, controlling completely what it said and did.¹¹⁷

In addition to his robotic twin, Ishiguro has created robot doubles of other people, though neither robot was directly connected to the human it was modeled from as it was for Geminoid HI-1. One of his first robots was modeled off of his 4-year-old daughter, called Repliee R1, which reportedly caused both Ishiguro and his daughter to feel uneasy around it due to its resemblance to the girl, perhaps meeting the "uncanny valley" which, as described by Masahiro Mori, is the moment when robots breach human comfort due to their uncanny realism.¹¹⁸ He also made another robot modeled after a Japanese newscaster, Fujii Ayako, that could talk with and interview people.¹¹⁹ It was not clear what involvement, if any, his daughter or Ayako had in controlling the use and expression of their robotic twins once they were created.

Not long after Ishiguro created his digital twin, Martine Rothblatt, the CEO of biotech firm United Therapeutics and one of the richest women CEO's in the United States, commissioned Hanson Robotics to create a robotic copy of her wife, Bina Rothblatt.¹²⁰ The robot, Bina48, consists of a robotic head and shoulders¹²¹ that is programmed with artificial intelligence that allows the robot to converse, type, and express emotions. It even has its own Twitter account.¹²² Bina48's artificial intelligence personality was created using a program called MindFile, which the company describes as a "digital back-up" of a person "captured in video, image, audio and documents" of the person.¹²³ With a cache of personal information provided by Bina Rothblatt, the AI recreates her personality in order to converse with her companions mimicking Rothblatt's speech patterns and using personal knowledge of her life.¹²⁴

Bina48 is owned by Terasem Movement, a not-for-profit charity that Bina and Martine Rothblatt co-founded. The charity's purpose is to educate the public on extending human life through

¹¹⁶ Jennifer Robertson, "Gendering Humanoid Robots: Robo-Sexism In Japan" (2010) 16:2 *Body and Soc'y* 1 at 26; James Meese et al, "Posthumous Personhood and the Affordances of Digital Media" (2015) 20:4 *Morality* 408.

¹¹⁷ David Levy, *Love and Sex with Robots* (New York: Harper, 2008) at 172.

¹¹⁸ Masahiro Mori, "The Uncanny Valley," trans. Karl F. MacDorman and Norri Kageki, (2012) 19:2 *IEEE Robotics & Automation Magazine* 98.

¹¹⁹ Jennifer Robertson, "Gendering Humanoid Robots: Robo-Sexism In Japan" (2010) 16:2 *Body and Soc'y* 1 at 21-22.

¹²⁰ Martine Aliana Rothblatt, *Virtually Human: The Promise - and the Peril - of Digital Immortality* (New York: St Martin's Press, 2014).

¹²¹ Shellenn Greene, "Bina48: Gender, Race, and Queer Artificial Life" (2016) 9 *Ada: A Journal of Gender, New Media & Technology*.

¹²² See: @iBina48

¹²³ <https://www.lifenaut.com/>

¹²⁴ Takeshi Kimura, "Robotics and AI in the sociology of religion: A human in imago roboticae" (2017) 64:1 *Social Compass* 6 at 18.

technology.¹²⁵ In interview with *Quartz*, Martine Rothblatt said that after her wife Bina dies, her robot self will live on, allowing for “our identity to begin to transcend our bodies.”¹²⁶ This raises questions about who should have control over a person’s identity presentation after death. With modern technology even people who have died have been “brought back to life” through different forms of identity replication. In another example of extending the life of another person, engineer Eugenia Kuyda created an AI texting app that replicated her friend and colleague Roman Masurenko’s unique texting style so she could communicate with him after he died tragically in a traffic accident. The app relied on texts and digital communication between Masurenko and Kuyda while he was still alive to mimic his communication style.¹²⁷ Other similar programs like Eterni.me allows artificial intelligence to “re-enliven” a deceased person who had trained the AI prior to their death to replicate their style of communication.¹²⁸ Further, in 2020, a virtual reality (VR) program allowed a South Korean mother, Jang Ji-sung, to “reunite” with her young daughter, Na-yeon, who had died of a blood disease a few years prior, in a virtual simulation.¹²⁹ These tools may have valid applications for managing grief and perhaps even theoretically extending existence through replicating a person’s appearance and manner of speaking, but they also raise complex legal questions on who should control the rights of people’s post-mortem identity presentation.

Robot companion and sex robot companies are another driving force behind identity replication technology.¹³⁰ Matthew McMullen, CEO of Abyss Creations and creator of RealDolls, heads of one of the most successful “love doll” companies in the United States and has been a leader in this field. His company is well known for three things. First, RealDolls are some of the most lifelike and high quality sex dolls on the market.¹³¹ Second, the company offers custom dolls to their customers and has made replica sex dolls of individual people, once the company secures that person’s consent prior to making a replica of them.¹³² It has even licenced the images of pornography actors such as Stormy Daniels and offers a doll in her likeness to the public for just under \$7,000 USD.¹³³ Third, his company has been working on an artificially intelligent robotic head to be fitted onto the sex dolls. The AI is programmable with three distinct personalities currently known as Harmony, Solana, and Henry.¹³⁴ The AI in the robotic head is not modeled off of any particular person, but one can see the potential for creating both custom body and personalities to replicate existing people.

¹²⁵ <https://terasemcentral.org/>

¹²⁶ Shelly Banjo, "The highest-paid woman in America is working on robot clones and pigs with human DNA" *Quartz* (16 March 2015).

¹²⁷ Maggi Savin-Baden & David Burden, “Digital Immortality and Virtual Humans” (2019) 1 *Postdigital Science and Education* 87; Courtney Humphries, "Never Let Me Go" (2018) 121:6 *MIT Technology Review* 72.

¹²⁸ James Meese et al, “Posthumous Personhood and the Affordances of Digital Media” (2015) 20:4 *Morality* 408.

¹²⁹ Minwoo Park, "South Korean mother given tearful VR reunion with deceased daughter" (14 February 2020) *Reuters*.

¹³⁰ Cathy O’Neil, "A History of Cyborg Sex, 2018" (17 December 2018) *Boston Review*.

¹³¹ Kate Devlin, *Turned On: Science, sex and robots*, (London: Bloomsbury, 2018) at 138-142.

¹³² Jason Lee, *Sex Robots: The Future of Desire* (Cham, Switzerland: Palgrave MacMillan, 2017) at 5.

¹³³ "Stormy Daniels Has Licensed Her Face and Body to Sex Robot Company" *Sputnik International* (6 April 2018); See RealDolls site sales for the doll: <https://www.realdoll.com/product/stormy-daniels-wicked-lw/>

¹³⁴ Kate Devlin, *Turned On: Science, sex and robots*, (London: Bloomsbury, 2018) at 138-140.

Abyss Creations is not the only company on the market offering these services. An American company, True Companions, a now defunct company, has offered customized dolls that respond to touch, and can engage in conversation, and have adjustable personality setting. Douglas Hines, founder of True Companions, says that the most common requests he gets for custom dolls are for celebrity lookalikes and replicas of the customer's dead spouse, but Hines says that his company will not make a lookalike doll without permission to use that person's likeness.¹³⁵ In China, a widower was able to order a custom replica of his deceased wife from an unnamed company that prints 3D sex dolls.¹³⁶ Another company, DS Robotics, models their robotic sex dolls off of the body parts and faces of actual models whose faces they have licenced, but does not offer custom robots of celebrities or other women.¹³⁷

Not all roboticists or avatar developers are following these strict requirements of consent in creating replicants of actual people. In 2016, a graphic designer and robotic hobbyist with no formal training in robotics, Ricky Ma, revealed a life-size robot he built for himself that was clearly modeled off of actor Scarlett Johansson.¹³⁸ Ma stated that the robot was "anatomically correct" and was programmed to express love for Ma, it's creator.¹³⁹ As noted above Johansson is not new to misrepresentations of her identity without consent. She has also been targeted by hacks of her sexual photos and has had deepfakes created of her without her consent. Here her identity was once again exploited, as she did not consent to having a robot likeness created of her. Zara Dinnen and Sam McBean have commented on how this robot demonstrates the complex role Johansson's position as an "object of male fantasy" plays into her recreation and how replications of Johansson are "central to emergent anxieties about embodiment and technology" in a culture where the meaning of images are drastically shifting and the face is becoming a "new kind of digital object".¹⁴⁰ They see representations of Johansson's face as a larger part of a social narrative that implicates fantasy, privilege, sexuality, race and gender.¹⁴¹ From a legal perspective, as will be discussed below, Ma would likely have been able to dodge legal action that would protect Johansson's identity because he did not create the robot for commercial sale or use, but only for his personal use.¹⁴²

Identity, celebrity, and art play a complicated role in the legitimacy of creating human replicas that can misrepresent an individual's identity. This was illustrated in 2016 when Kanye West commissioned a company, DONDA, to create a dozen breathing "anatomically correct

¹³⁵ Lia Eustachewich, "Widowers are Turning to Sex Dolls to Overcome their Grief" New York Post (14 April 2017).

¹³⁶ --, "Widow bought sex doll to replace late wife" Toronto Sun (10 November 2016).

¹³⁷ Tara L, "Sex robots are being made with 3D printers, making them more lifelike (and cheaper) than ever" Sextech Guide (27 October 2019).

¹³⁸ "An 'anatomically correct' Scarlett Johansson robot" Quartz (24 July 2017).

¹³⁹ Elizabeth Broadbent, "Interactions With Robots: The Truths We Reveal About Ourselves" (2017) 68 Annual Review of Psychology 627 at 635; April Glaser, "The Scarlett Johansson Bot is the Robotic Future of Objectifying Women" Wired (4 April 2016).

¹⁴⁰ Zara Dinnen & Sam McBean, "The Face as Technology" (2018) New Formations 122 at 123.

¹⁴¹ Zara Dinnen & Sam McBean, "The Face as Technology" (2018) New Formations 122 at 136.

¹⁴² April Glaser, "The Scarlett Johansson Bot is the Robotic Future of Objectifying Women" Wired (4 April 2016).

representations” of celebrities, including Taylor Swift¹⁴³ – who West has a long-standing dispute with – to appear naked and sleeping next to him in his music video *Famous*.¹⁴⁴ Ellen Whitehorn described the celebrity replicas as “hyper-realistic, anatomically accurate synthetic bodies that even mimic breathing.”¹⁴⁵ Copies of convicted and alleged perpetrators of domestic violence and sexual assault including Chris Brown, Donald Trump, Bill Cosby, and Ray J were sleeping naked interspersed between various celebrity women, including Kanye’s wife Kim Kardashian who rose to fame after a sex tape featuring her and Ray J was leaked to the public.¹⁴⁶ At times the music video made it look as though a voyeur was filming the sleeping party and later the names of the individual’s featured in the video were listed, thanking them for being famous and removing any doubt over who was represented in the video.¹⁴⁷ Despite the nudity, sexual symbolism, and fraught relationships between some of the figures represented, West claimed the intention of the video was neither to be sexual nor to negatively represent any person in the film. Instead, he claimed it was meant to be a “comment on fame”.¹⁴⁸ Troublingly, West did not get consent from several of the people in the video.¹⁴⁹ Yet, he clearly recognized the provocative status of his artistic piece; following the release of the video he Tweeted “[c]an somebody sue me already #I’llwait.”¹⁵⁰ Ultimately, there were no reports of any of the celebrities suing West, but several publicly stated they were not consulted or involved in the videos’ production.¹⁵¹

The non-consensual sexual misrepresentation of celebrities and everyday figures occurs in virtual avatar forms as well. Samantha Cole, the Motherboard journalist who broke the deepfakes story, has written on virtual reality hobbyists who are making sexual avatars representing their ex-girlfriends and female celebrities without their consent using technology called “Virt-A-Mate”. This program simulates interactive sexual activity with the 3D avatars. Some hobbyists shared

¹⁴³ Karla Utset, "Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's Famous Music Video" (2018) 72:3 U Miami L Rev 920 at 958.

¹⁴⁴ Ellen Whitehorn, “Publicity, Privacy, and Fame: A Comparative Analysis of the Right of Publicity in the United States, Canada, and the U.K., Through the Lens of Kanye West's Famous" (2017) 27 Transnational Law & Contemporary Problems 201 at 202.

¹⁴⁵ Ellen Whitehorn, “Publicity, Privacy, and Fame: A Comparative Analysis of the Right of Publicity in the United States, Canada, and the U.K., Through the Lens of Kanye West's Famous" (2017) 27 Transnational Law & Contemporary Problems 201 at 202.

¹⁴⁶ Karla Utset, "Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's Famous Music Video" (2018) 72:3 U Miami L Rev 920 at 957.

¹⁴⁷ The twelve people included George W Bush, Anna Wintour, Donald Trump, Rhianna, Christ Brown, Taylor Swift, Kanye West, Kim Kardashian West, Ray J, Amber Rose, Caitlyn Jenner, and Bill Cosby. Karla Utset, "Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's Famous Music Video" (2018) 72:3 U Miami L Rev 920 at 957.

¹⁴⁸ Karla Utset, "Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's Famous Music Video" (2018) 72:3 U Miami L Rev 920 at 958.

¹⁴⁹ Karla Utset, "Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's Famous Music Video" (2018) 72:3 U Miami L Rev 920.

¹⁵⁰ Ellen Whitehorn, “Publicity, Privacy, and Fame: A Comparative Analysis of the Right of Publicity in the United States, Canada, and the U.K., Through the Lens of Kanye West's Famous" (2017) 27 Transnational Law & Contemporary Problems 201 at 202.

¹⁵¹ Karla Utset, "Drawing the Line: The Jurisprudence of Non-Consensual Pornography and the Implications of Kanye West's Famous Music Video" (2018) 72:3 U Miami L Rev 920 at 959-960.

tips such as asking their girlfriend's for photos with different angles of their face so that they can secretly recreate them in these VR programs and have the avatars look more realistic. According to the rules of this community, users are permitted to post 3D models representing celebrities performing sexual acts, as long as they are not accompanied by the person's real name or real photograph, but "[a]bbreviations, nicknames and different names are perfectly fine". Cole reported that several celebrity avatars were recognizable on sight. Most sexual avatars were of female celebrities, but there were a few versions of male celebrities as well. The group had no explicit rules about displaying avatars of everyday people.¹⁵²

Building a robot is no easy feat and it will be some time before the likes of Ricky Ma become common place. Yet the market for lookalikes exists and the demand for robots and avatars representing those people who are admired and desired will inevitably increase. Robotics and programmers are experimenting with replication, whether that be for sexual engagement, the convenience of a telepresence, or to experience engaging with a loved one who has died or is not present. Examining the practices of for-profits sexual robotics companies, it seems that industry practice is leaning towards obtaining consent if a robotic or doll model of a specific person is to be built.¹⁵³ However, not all hobbyists or artists seem to have the same concern for obtaining the consent of the person they are replicating. Consent is also complicated when the person is a public figure, a child, or has died. These are factors that need to be considered when examining the ways the law could protect people's identities.

Part III: Law

Artificial intelligence and robotics have many beneficial applications; however, when they are used in malicious or biased ways, these misuses can impact a person's identity causing harms that call for a legal response.¹⁵⁴ In the context of identity manipulation by these technologies, the exact boundary between which applications are harmless and which are harmful is not perfectly clear. What is clear is that in an increasingly image-based culture where the faces and voices of people have become digital objects of great value¹⁵⁵ with the potential to be re-created, stored, and distributed by others,¹⁵⁶ there is a greater need for dignity-focused identity-

¹⁵² Samantha Cole & Emanuel Maiberg, "They Can't Stop Us: People Are Having Sex With 3D Avatars of Their Exes and Celebrities" Motherboard (19 November 2019).

¹⁵³ A Russian robots company has offered to make a robot of any living person, it is unclear whether they are seeking consent of those people or not in that creation: <https://promo-bot.ai/news/promobot-launched-mass-production-of-life-like-robots-that-look-like-humans/>

¹⁵⁴ Kate Crawford, Meredith Whittaker, Madeleine Clare Elish, Solon Barocas, Aaron Plasek, Kadija Ferryman, 2016 "The AI Now Report: The Social and Economic Implications of Artificial Intelligence." Tabled with the White House Office of Science and Technology Policy for their Future of Artificial Intelligence Series; Sinziana Gutiu, "The Robotization of Consent" in Ryan Calo, Micheal Froomkin & Ian Kerr (eds) *Robot Law* (2016) 186; Ryan Calo, "Robots in American Law" (2016) University of Washington School of Law Legal Studies Research Paper No. 2016-04 at 8; Ian Kerr, "Schrödinger's Robot: Privacy in Uncertain States" (2019) 20:1 *Theoretical Inquires in Law* 123.

¹⁵⁵ Zara Dinnen & Sam McBean, "The Face as Technology" (2018) *New Formations* 122 at 123.

¹⁵⁶ Jacquelyn Burkell & Chandell Gosse, "Nothing new here: Emphasizing the social and cultural context of deepfakes" (2019) *First Monday*.

based protections. As audio and visual identity presentations gain more currency in society, particularly in digital contexts, identity manipulation can have serious impacts on those who have been subjected to digital and robotic manipulation. Even if the representation of the individual is not entirely convincing (as is the case with some synthetic media, robots, and avatars) the lack of agency in these undesirable identity expressions can have a devastating impact on a person's dignity, autonomy, and identity. Many of the examples provided above involved the manipulation of celebrities and public figures, but it will not be long before this technology is applied to everyday people with more frequency. This section will explore the rights of publicity and appropriation of personality in Canada and the United States, respectively, and personality and image rights in Germany and Québec, in order to argue that a dignity-based approach which advocates for a broad understanding of identity should be adopted when regulating identity-based harms.

In the previous section, the technologies described provide modern examples of potential identity violations through the replication and manipulation of images, voices, and bodies, however, identity-based harms are nothing new. For instance, concerns over the harms of mis-attributing statements to individuals can be traced deep back into history.¹⁵⁷ Pabst Battin discussed Plato's objection to certain poetry because of its ability to shift societal norms. Plato was worried that if poets wrote false stories about the gods that described a manner of life that did not match the paradigm that Plato held to be true, then those poets could disrupt society. In that era, many people believed poetry to express truths, which lent it the power to deceive in Plato's eyes; this is why he believed poetry should be excluded from the ideal state.¹⁵⁸ Only the state's desired identity expression of the gods should be presented. However, this ban was not absolute. Plato did approve of factually false stories that furthered the approved norms of society, what he called "noble lies,"¹⁵⁹ highlighting the complexity of why those in power will approve or disapprove of misrepresented information.

In ancient Rome, the laws of *injuria* and *actio iniuriarum* were developed to protect people from insulting statements and other damages to their personality, honour, and dignity.¹⁶⁰ Aspects of these dignity focused laws continue to be followed in certain modern-day jurisdictions, including Germany.¹⁶¹ In more recent times there have been calls for the law to respond to various actions

¹⁵⁷ *Bou Malhab v Diffusion Métromédia CMR Inc*, 2011 SCC 9 at para 15; Eva Ondreasova, "Personality Rights in Different European Legal Systems: Privacy, Dignity, Honour and Reputation" 24-70 in Oliphant, Ken, Zhang Pinghua & Chen Lei (eds). *The Legal Protection of Personality Rights* (Boston: Brill Nijhoff, 2018) at 26-28.

¹⁵⁸ Margaret Pabst Battin, "Plato on True and False Poetry" (1977) 36:2 *The Journal of Aesthetics and Art Criticism* 163 at 167, 172.

¹⁵⁹ *Ibid* (Battin) at 169.

¹⁶⁰ *Bou Malhab v Diffusion Métromédia CMR Inc*, 2011 SCC 9 at para 15; Eva Ondreasova, "Personality Rights in Different European Legal Systems: Privacy, Dignity, Honour and Reputation" 24-70 in Oliphant, Ken, Zhang Pinghua & Chen Lei (eds). *The Legal Protection of Personality Rights* (Boston: Brill Nijhoff, 2018) at 26-28; Robert Danay, "The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation" (2010) 56:1 *McGill LJ* 1 at 3.

¹⁶¹ Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 *USF L Rev* 799 at 828.

that could damage a person's identity, including spreading false rumours,¹⁶² distributing scandalous publications,¹⁶³ unauthorized memoirs,¹⁶⁴ impersonations,¹⁶⁵ unsanctioned advertisements,¹⁶⁶ the non-consensual publication of private photos,¹⁶⁷ and now the misuse of digital and robotic avatars.¹⁶⁸ With each wave of technological development, whether it be the printing press, cameras, social media, or robotics, new worries about how these novel technologies could impact people's ability to protect their identity were raised, and the law has continued to respond to and evolve with them.¹⁶⁹

In the United States, Samuel Warren and Louis Brandeis' seminal article, *The Right to Privacy*, was published in 1890.¹⁷⁰ This article has been credited for sparking the recognition of privacy laws in the United States, an area of law that is key in protecting identity in that country. In their article, Warren and Brandeis considered the dignity and personality interests of people when conceptualizing the legal right to privacy.¹⁷¹ According to Anita Allen, the article was inspired in part by concerns Warren had about his daughter's photographs being published by "yellow journalists" in gossip papers without her consent.¹⁷² As can be seen, concerns about identity violations are age old and rooted in questions around protecting dignity, but these newly developed technologies in the digital age urge us to revisit these interests and their application to the law.

Films, newspapers, radio, television, and advertisements used to be the only ways that a person's image and identity information could be exposed to and scrutinized by the public at

¹⁶² Cass Sunstein, "'She Said What?' 'He Did That?'" Believing False Rumors" (2008) Harvard Public Law Working Paper No. 08-56.

¹⁶³ Alice Krzanich, "Virtue and Vindication: An Historical Analysis of Sexual Slander and a Woman's Good Name" (2011) 17 Auckland University Law Review 33 at 57.

¹⁶⁴ Eva Ondreasova, "Personality Rights in Different European Legal Systems: Privacy, Dignity, Honour and Reputation" 24-70 in Oliphant, Ken, Zhang Pinghua & Chen Lei (eds). *The Legal Protection of Personality Rights* (Boston: Brill Nijhoff, 2018) at 34.

¹⁶⁵ Suzanne Dunn, Julie S Lalonde & Jane Bailey, "Terms of silence: Weaknesses in corporate and law enforcement responses to cyberviolence against girls" (2017) 10:2 *Girlhood Studies* 80.

¹⁶⁶ Ellen Whitehorn, "Publicity, Privacy, and Fame: A Comparative Analysis of the Right of Publicity in the United States, Canada, and the U.K., Through the Lens of Kanye West's Famous" (2017) 27 *Transnational Law & Contemporary Problems* 201 at 210.

¹⁶⁷ Alexa Dodge, "Digitizing rape culture- Online sexual violence and the power of the digital photograph" (2016) 12-1 *Crime Media Culture* 65.

¹⁶⁸ Jacquelyn Burkell & Chandell Gosse, "Nothing new here: Emphasizing the social and cultural context of deepfakes" (2019) *First Monday*.

¹⁶⁹ Daniel J Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007).

¹⁷⁰ Samuel D Warren & Louise D Brandeis, "The Right to Privacy" (1890) 4:5 *Harvard Law Review* 193.

¹⁷¹ Lisa Austin, "Privacy, Shame and the Anxieties of Identity" (2012); Olaf Weber, "Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights" (2004) 1:1 *SCRIPTed: A J of L, Technology & Society* 160 at 167.

¹⁷² Anita Allen, *Uneasy Access: Privacy for Women in a Free Society*, (Totowa, New Jersey: Rowan & Littlefield, 1988) at 20.

large with any frequency.¹⁷³ These mediums were controlled by institutions that dictated the flow of information. With the advent of social media and the internet, these large formal institutions now share the power of broad information creation and sharing with the general public. It is fairly typical for the average person to have a readily accessible public facing identity, one that they put thought and effort into curating, a practice that was once limited to celebrities and other public figures. In fact, modern platforms encourage the development of profiles and the sharing of identity information with others.¹⁷⁴ These identity presentations build social and economic value, and create risks, in ways that are unique to the technologically connected society.¹⁷⁵ This combined with the ease at which new information can be created, shared, and decontextualized, adds new pressures and concerns about identity presentation for public figures and average people alike.¹⁷⁶ In this day and age, it is more common for the ordinary person to have a branded identity and for deeply personal information about celebrities to be documented and shared.¹⁷⁷

On top of digital identity manipulation, the ability to create convincing replicas of people's voices, images, and bodies must be also addressed. Concerns have arisen about how best to manage the boundaries of existing information and content sharing standards, when every user is at risk of having entirely new content created about them over which they have no control. Unsanctioned and manipulated content strips an individual of their autonomy and places their identity presentation into the hands of others, turning them into a puppet of that person's desires.¹⁷⁸ In order to correct the balance of this, it is important that the dignity of the person represented be considered when the courts decide whether non-consensually created content adds to the public discourse in a way that is deserving of protection, or, alternatively, if identity defining content should be protected and remain in the control of the individual represented. Below, this paper will discuss select approaches taken in Canada, the United States, Germany, and Québec to examine the values that are currently taken into account when protecting an individual's identity and why a dignity approach should be preferred.

A Focus on Economic Rights: Common Law in Canada and the United States

In the common law jurisdictions of Canada and the United States, there are a wide variety of laws that could be applied to identity violations. These include laws that prohibit the creation

¹⁷³ Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 USF L Rev 799.

¹⁷⁴ Ari Ezra Waldman, "Law, Privacy, and Online Dating: 'Revenge Porn' in Gay Online Communities" (2019) 44:4 Law & Social Inquiry 987.

¹⁷⁵ Alice Marwick, "Online Identity" in J Hartley, J Burgess & A Bruns, eds, *Companion to New Media Dynamics* (Malden, MA- Blackwell, 2013) at 355; Peters, T. *The Brand Called You*, (New York: Random House, 1999).

¹⁷⁶ Anastasia Powell & Nicola Henry, *Sexual Violence in a Digital Age* (London- Palgrave MacMillan 2017).

¹⁷⁷ Anastasia Powell & Nicola Henry, *Sexual Violence in a Digital Age* (London- Palgrave MacMillan 2017); Alessandro Gandini, "Digital work: Self-branding and social capital in the freelance knowledge economy" (2015) 16:1 Marketing Theory 123-141.

¹⁷⁸ Megan Richardson, "A Virtual Puppet-Performance and Privacy in the Digital Age" (2018) 4 Can J of Comparative & Contemporary L 231.

and use of false identity documents,¹⁷⁹ identity fraud,¹⁸⁰ impersonation,¹⁸¹ copyright,¹⁸² human rights laws,¹⁸³ defamation,¹⁸⁴ hate speech protections,¹⁸⁵ false light publicity,¹⁸⁶ and the publication of private facts¹⁸⁷ to name a few. A broad examination of all potentially applicable laws to identity violations is beyond the scope of this paper. Instead, it will focus on the common law and statutory torts that protect a person's right to their identity presentation, what is known as the appropriation of personality in Canada and the right to publicity in the United States.¹⁸⁸

The structure of Canada's and the United States' current privacy torts, in which these rights find their home, are rooted in William Prosser's 1960 article, *Privacy*. Well before Prosser's article, the right to privacy had been recognized and thoroughly litigated in the United States. In 1903 the New York Legislature enacted a statute that forbade the use of a person's name, portrait, or picture in advertising without their consent.¹⁸⁹ This law was introduced after Abigail Roberson lost a case where her image had been used without her consent to advertise a brand of flour across the country. Her right to privacy was not protected, one of the judges even said that the ad was "a compliment to [her] beauty."¹⁹⁰ The decision not to protect her image from unauthorized use caused a great uproar in the country about the rights one should have over their image.¹⁹¹ Between that time and Prosser's article, several decades of winding privacy litigation in the United States had passed. Prosser reviewed the state of privacy litigation and legislation in the country up to that time and identified four privacy invasions that had been recognized by the courts:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.

¹⁷⁹ Jonathan Clough, "Towards a Common Identity? The Harmonisation of Identity Theft Laws" (2015) 22-4 Journal of Financial Crime 492-512.

¹⁸⁰ Jennifer R. Whitson, & Kevin D Haggerty. "Identity Theft and the Care of the Virtual Self" (2008) 4 Economy and Society 572-594.

¹⁸¹ Suzanne Dunn, Julie S Lalonde & Jane Bailey, "Terms of silence: Weaknesses in corporate and law enforcement responses to cyberviolence against girls" (2017) 10:2 Girlhood Studies 80.

¹⁸² Douglas Harris, "Deepfakes: False Pornography Is Here and the Law Cannot Protect You," (2018-2019) Duke Law & Technology Review 17 at 107.

¹⁸³ *Canadian Human Rights Act*, RSC 1985, c H-6.

¹⁸⁴ Law Commission of Ontario, "Defamation Law in the Internet Age- Consultation Paper" (Toronto, Ontario- Law Commission of Ontario, 2017).

¹⁸⁵ Jane Bailey & Carissim Mathen, "Constitutional advancement of women's equality: Responding to challenges and seizing opportunities" (2005) 30 Queen's Law Journal 660-714.

¹⁸⁶ *VMY v SHG*, 2019 ONSC 7279 (CanLII).

¹⁸⁷ Suzie Dunn & Alessia Petricone-Westwood, "More Than 'Revenge Porn': Civil Remedies for the Non-Consensual Distribution of Intimate Images" CCLA 38th Civil Litigation Conference publication.

¹⁸⁸ Conrad Nest, "From 'ABBA' to Gould: A Closer Look at the Development of Personality Rights in Canada" (1999) 5 Appeal 12.

¹⁸⁹ N.Y. Sess. Laws 1903, ch. 132, §§ 1-2.

¹⁹⁰ Walter Michaels, "The Contracted Heart" (1990) 21:3 New Literary History 495 at 501.

¹⁹¹ William L Prosser, "Privacy" (1960) 48-3 Cal L Rev 383 at 385.

4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁹²

Each of these privacy torts have a potential role to play in protecting a person's identity and have been recognized in some parts of Canada and the United States. However, because synthetic media and robots are used to reproduce a person's image, voice, and likeness, the appropriation of personality is particularly relevant when assessing the legal impacts of these technologies on identity. While this is one of the primary privacy torts that can protect a person's identity and one that has been more widely applied, various challenges arise when applying this tort to these technologies, especially in the age of technological hobbyist where a great deal of replicated identity content is produced in a non-commercial setting that may not comfortably fit under the economic rationale of this tort.¹⁹³ In Canada and the United States, the central incentive behind protecting this right is economic, protecting the financial benefits that come from developing and using a marketable identity.

The proprietary rights of personality protected under the appropriation of personality and the right of publicity are useful for protecting a number of things. The impetus for the proprietary right is based on a combination of labour theories, which focus on recognizing the value of the work put into the product of the identity, and incentive theory, which encourages the development of and investment in identities that have commercial value.¹⁹⁴ According to this framework, for those who put effort into becoming celebrities or establishing a brand as an Instagram influencer, for example, the fruits of their labour should be protected. When someone else uses their image for a commercial use without permission, they should have a right to a remedy for that infringement. In the case of commercially produced robots, deepfakes, and synthetic speech programs this can provide a valuable protection for a person's identity from commercial misuse. This is especially as it may become cheaper to replicate a person than to hire them. This right is likely the incentive behind synthetic voice companies like Descript,¹⁹⁵ and 3D sex doll and robotics companies like Abyss Creations and TrueCompanion requiring consent from the individual they have been asked to replicate.¹⁹⁶ It also allows celebrities like Stormy Daniels to profit from her brand's value by licencing her image to be reproduced on these dolls and sold wholesale.¹⁹⁷ This law provides worthwhile protections for celebrities whose images and voices can be misused by these companies. However, the main economic focus falls short on the needs of people in the digital era, where these types of products can be created and shared with the public in non-commercial settings and the people being featured may not have engaged in the visibility labour necessary for their image to hold much value.

¹⁹² William L Prosser, "Privacy" (1960) 48-3 Cal L Rev 383 at 389.

¹⁹³ Conrad Nest, "From 'ABBA' to Gould: A Closer Look at the Development of Personality Rights in Canada" (1999) 5 Appeal 12 at 1, 3.

¹⁹⁴ Melville B Nimmer, "The Right of Publicity", (1954) 19 Law & Contemporary Problems 203 at 216; Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 USF L Rev 799 at 814-815.

¹⁹⁵ Descript, "Descript Ethics Statement" (n.d.) <https://www.descript.com/ethics>

¹⁹⁶ Jason Lee, *Sex Robots: The Future of Desire* (Cham, Switzerland: Palgrave MacMillan, 2017) at 5.

¹⁹⁷ "Stormy Daniels Has Licensed Her Face and Body to Sex Robot Company" Sputnik International (6 April 2018); See RealDolls site sales for the doll: <https://www.realdoll.com/product/stormy-daniels-wicked-lw/>

In Canada, the tort of the appropriation of personality protects an individual's right to control the commercial exploitation of their likeness, such as the use of a celebrity's image to promote a product.¹⁹⁸ This could include the name, image, or voice of the person, including the use of look-alikes, sound-alikes, or representations of character's they have played, among other things.¹⁹⁹ It is not consistently protected across the country but it has been recognized as a common law tort in Alberta²⁰⁰, Ontario,²⁰¹ New Brunswick,²⁰² and Nova Scotia,²⁰³ and is protected under privacy legislation in British Columbia,²⁰⁴ Manitoba,²⁰⁵ Saskatchewan,²⁰⁶ and Newfoundland and Labrador.²⁰⁷ The general approach to this tort requires that an aspect of a person's personality must have been intentionally exploited for commercial purposes in a manner in which the person is identifiable, and they were more than an incidental figure in the representation. Once that has been established, the courts will balance that right with the public's interest in publicity of the image.²⁰⁸

The appropriation of personality was first recognized in an Ontario case, *Krouse v Chrysler Canada Ltd*,²⁰⁹ where a Canadian Football League player, Bob Krouse, sued Chrysler motor company for using an image of him without his consent on a Chrysler promotional product. Being cautious of extending this right too far, Justice Estey said, "[t]he danger of extending the law of torts to cover every such exposure in public not expressly authorized is obvious. Progress in the law is not served by the recognition of a right which, while helpful to some persons or classes of persons, turns out to be an unreasonable disruption to the community at large and to the conduct of its commerce".²¹⁰ Krouse ultimately lost the case because the promotion in question did not target his personal image specifically, it only showed his back and jersey number within a photograph of several other players during a football game. According to the decision, The image on the product did not make it appear as though Krouse was promoting or endorsing the product.

This right falls under the umbrella of privacy law in Canada, but the underlying value that it aims to protect is decidedly a proprietary one. The proprietary nature of this tort was affirmed in a second case of note, *Athans v Canadian Adventure Camps Ltd*, where Justice Henry recognized

¹⁹⁸ Conrad Nest, "From 'ABBA' to Gould: A Closer Look at the Development of Personality Rights in Canada" (1999) 5 Appeal 12.

¹⁹⁹ Jason Samuel Thomas Kotler, "Merchandising Celebrity A User's Guide to Personality Rights" (2002).

²⁰⁰ *Hay v Platinum Equities Inc*, 2012 ABQB 204.

²⁰¹ *Krouse v Chrysler Canada Ltd et al*, 1973 CanLII 574 (ONCA).

²⁰² *Mavis v Lavoie*, [2000] NBJ No 527 (NBSCC). Note that this a small claims court decision.

²⁰³ *Trout Point Lodge Ltd v Handshoe*, 2014 NSSC 62; *Hapi Feet Promotions Inc. v. Martin*, 2004 NSSC 254.

²⁰⁴ *Privacy Act*, RSBC 1996, c 373, s 5

²⁰⁵ *Privacy Act*, RSM 1987, c P125, CCSM, c P125, s 3(c).

²⁰⁶ *Privacy Act*, RSS 1978, c P-24, s 10 [am 2018, c 28, s 8].

²⁰⁷ *Privacy Act*, RSNL 1990, c P-22, s 4(c).

²⁰⁸ Conrad Nest, "From 'ABBA' to Gould: A Closer Look at the Development of Personality Rights in Canada" (1999) 5 Appeal 12.

²⁰⁹ *Krouse v Chrysler Canada Ltd et al*, 1973 CanLII 574 (ONCA).

²¹⁰ *Krouse v Chrysler Canada Ltd et al*, 1973 CanLII 574 (ONCA) at para 42.

that the plaintiff in this case had “a proprietary right in the exclusive marketing for gain of [the plaintiff’s] personality, image and name, and that law entitles him to protect that right, if it is invaded”.²¹¹ It protects the commercial value athletes and celebrities have established through their notoriety, as well as the value everyday people have in representations of their identity.²¹² The relevant privacy acts limit the prohibition to the use of the image or likeness advertising or promotional works without consent, emphasizing the proprietary nature of the tort. The level of damages awarded for the misuse of the person’s image corresponds with the person’s relative level of fame or skill. The rationale behind this is that those individuals who have put significant work into building the value of their identity deserve to reap the benefits from that work, and be protected from others exploiting that value.²¹³ Every day people can claim this right, but as was seen in the 2017 case of *Vanderveen v Waterbridge Media Inc*, an ordinary person will not be awarded significant damages. In this case, a woman was awarded \$100 for the appropriation of her personality when a video of her jogging was featured prominently in an ad for a condo development and the company had not obtained her consent to use her image.²¹⁴ Although she experienced the same wrong that a celebrity would – the unwanted association with a product and the unauthorized use of her image – the damages available to her were nominal, equivalent to the cost of hiring a model for the job. What was interesting about that case was that Vanderveen’s primary concern seemed to be that an unflattering or embarrassing image was used in the company’s video rather than a concern of the commercial loss for not being paid for her image.²¹⁵ In some cases, non-celebrities will find significant value in the use of their identity. In *Hay v Platinum Equities Inc*, a case involving the misappropriation of a chartered accountant’s name and signature, the damage award was much higher at \$18,000, due to the value of the accountant’s skill set.²¹⁶

In the United States, the right of publicity²¹⁷ protects similar proprietary rights surrounding the commercial use of a person’s identity.²¹⁸ The exact parameters of the tort will vary slightly from state to state and not all states protect this right. However, at least thirty-three states have recognized a common law or statutory right of publicity that protects against the unauthorized use of a person’s name or likeness in commercial advertising.²¹⁹ It is a right that is commonly invoked by celebrities and because of this much of the jurisprudence arises out of New York and California where most media production occurs in the United States.²²⁰ Section 46 of the Restatement of Unfair Competition recognizes the right of publicity, stating “[o]ne who

²¹¹ *Athans v Canadian Adventure Camps Ltd*, 1977 CanLII 1255 (ONSC) at para 24.

²¹² *Vanderveen v Waterbridge Media Inc*, 2017 CanLII 77435 (ONSC).

²¹³ Jason Samuel Thomas Kotler, "Merchandising Celebrity A User's Guide to Personality Rights" (2002).

²¹⁴ *Vanderveen v Waterbridge Media Inc*, 2017 CanLII 77435 (ONSC).

²¹⁵ *Vanderveen v Waterbridge Media Inc*, 2017 CanLII 77435 (ONSC) at para 5.

²¹⁶ *Hay v Platinum Equities Inc*, 2012 ABQB 204 at 89.

²¹⁷ Melville B. Nimmer, "The Right of Publicity", (1954) 19 Law and Contemporary Problems 203.

²¹⁸ Thomas E Kadri, "Drawing Trump Naked- Curbing the Right of Publicity to Protect Public Disclosure" (2019) 78-4 Maryland Law Review Article 7 at 908.

²¹⁹ Thomas E Kadri, "Drawing Trump Naked- Curbing the Right of Publicity to Protect Public Disclosure" (2019) 78-4 Maryland Law Review Article 7 at 906

²²⁰ See NY Civil Rights Law § 51;

appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief".²²¹

The proprietary interest in celebrity image was recognized in a case *Haelan Labs v Topps Chewing Gum Inc.*, where a baseball player's images had been used by a chewing gum company without the player's consent.²²² By focusing primarily on the economic interest in the image in this case, the courts steered the protections under this right away from any considerations of whether the misuse impacted the identity of the person by harming their dignity towards its current economic focus.²²³ The economic focus established in this case has followed the jurisprudence on the right of publicity in the United States.²²⁴ There are some exceptions to this. In California, which is known for having the broadest publicity rights in the United States, common law publicity rights are broad enough to include economic and other "advantages" gained by the misuse of the image.²²⁵ Most cases have involved the non-consensual use of celebrity's identity features, but some ordinary people have been able to benefit from this protection as well. This was the case in *Christoff v Nestle USA* where a kindergarten teacher who had his images used on millions of coffee packages without his consent. The court found that he should have been able to benefit from the proprietary use of his identity. Other cases involving non-celebrities include the use of images of a carpenter working and a family photo used in a real estate ad.²²⁶

The lack of protection for non-commercial identity harms leaves a gap in the law where harmful identity violations are apparent, but the misuse of a person's identity is non-commercial and thus not protected. Consider unauthorized sexual deepfake videos or robotic replicas made by hobbyists. As long as the creators of these replicas are not engaged in commercial promotion, individuals have little control over their identities in most jurisdictions. Neither Gal Gadot nor the celebrities in Kanye's video would likely have claim to their identity under this provision, as long as the deepfake or music video was not promoting any commercial product.²²⁷ The same issue would arise in the case of Ma's Scarlett Johansson look-alike robot. As noted by Ryan Calo, Johansson would likely not be protected by the right of publicity in the United States

²²¹ Restatement (3rd) Unfair Competition.

²²² *Haelan Labs v Topps Chewing Gum Inc.*, 202 F.2s 866 (2d Cir 1953).

²²³ Stacey L Dogan, "Haelan Laboratories v. Topps Chewing Gum: Publicity as a legal right".

²²⁴ Stacey L Dogan, "Haelan Laboratories v. Topps Chewing Gum - Publicity as a legal right".

²²⁵ See Kelsey Farish, "Do deepfakes pose a golden opportunity? Considering whether English law should adopt California's publicity right in the age of the deepfake" (2020) 15-1 Journal of Intellectual Property Law & Practice 40-48, citing *Eastwood v. Superior Court*, 149 Cal.App.3d 409 (Cal. Ct. App. 1983).

²²⁶ Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 USF L Rev 799 referencing: *Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122, 126-28, 140-41 (Ct. App. 2007), rev'g on other grounds, 169 P.3d 888 (Cal. 2007).

²²⁷ Ellen Whitehorn, "Publicity, Privacy, and Fame: A Comparative Analysis of the Right of Publicity in the United States, Canada, and the UK, Through the Lens of Kanye West's Famous" (2017) 27 Transnational Law & Contemporary Problems 201.

because Ma built it for his own personal use and was not using it for commercial purposes.²²⁸ This is also the case in *Virt-A-Mate*, where celebrity avatar replicas have been input into sexual VR games,²²⁹ as well as with *Not Jordan Peterson*, where Peterson's voice was available for replication to the public free of cost.²³⁰ In these cases, these products aren't being released on the commercial market, but are being created and shared by hobbyists on public forums, leaving these individuals without a solution under these torts. Yet, each of these individual's identities were co-opted in ways that potentially harmed the identities of some of the individuals featured. With its primarily economic focus, these laws miss important dignity-based aspects of identity misrepresentations that should be protected.

A Focus on Dignity Rights: Québec and Germany

Dignity protects a person's right their identity by protecting that person's autonomy and self-determination. It should be central to identity protections, such as personality rights and image based protections.²³¹ By protecting the inherent, rather than commercial value, of a person's identity, a person's autonomy and unique individuality is thereby prioritized, shifting the judicial gaze away from the economic realm towards the personhood of the individual.²³² By doing so, it does not remove the ability to protect this right in commercial settings, it merely expands the protection to include both personal and economic identity violations. This allows for a more contextual and flexible approach to balancing the competing interests of identity protection and freedom of expression.²³³ By adopting these values, the civil law jurisdictions of Germany and Québec have taken a substantially different path in protecting identity compared to the common law jurisdictions in Canada and the United States. In respect to identity protection, Germany and Québec both protect general personality rights and the right to image.²³⁴ These rights are more focused on protecting an individual's right to dignity than the economically focused right to publicity or appropriation of personality, and are balanced with other rights and duties.²³⁵

²²⁸ Ryan Calo, "Robots in American Law" (2016) University of Washington School of Law Legal Studies Research Paper No. 2016-04.

²²⁹ Samantha Cole & Emanuel Maiberg, "'They Can't Stop Us:' People Are Having Sex With 3D Avatars of Their Exes and Celebrities" *Motherboard* (19 November 2019).

²³⁰ Jan Kietzmann, Linda W. Lee, Ian P. McCarthy, Tim C. Kietzmann, "Deepfakes: Trick or Treat?" (2019) *Business Horizons*. Also see: www.NotJordanPeterson.com.

²³¹ Olaf Weber, "Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights" (2004) 1:1 *SCRIPTed: A J of L, Technology & Society* 160 at 167.

²³² Clare Sullivan, "Digital Citizenship and the Right to Digital Identity Under International Law" (2016) 32-3 *Computer Law & Security Review- The International Journal of Technology Law and Practice* 474; Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 *USF L Rev* 799.

²³³ Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 *USF L Rev* 799 at 823-825. Eva Ondreasova, "Personality Rights in Different European Legal Systems: Privacy, Dignity, Honour and Reputation" 24-70 in Oliphant, Ken, Zhang Pinghua & Chen Lei (eds). *The Legal Protection of Personality Rights* (Boston: Brill Nijhoff, 2018) at 47-50.

²³⁵ Karen Eltis, "Is 'truthtelling' decontextualized online still reasonable? Restoring context to defamation analysis in the digital age" (Toronto- Law Commission of Ontario, 2017).

The idea of a general right to personality was developed in Germany by Karl Gareis in 1877 and was later expanded on by Josef Kohler and Otto von Gierke.²³⁶ Personality rights recognize a person's right to their own existence and are connected to their identity and personhood.²³⁷ According to Jonathan Neethling, they can cover an array of legal protections including rights to privacy, reputation, freedom, dignity, image, name, body, health, and life.²³⁸ They are a broader right in application than the appropriation of personality or the right of publicity, because the impetus behind them is on personal autonomy. As noted by Edward Eberle, "[t]he focus on human personality is designed to empower people to achieve and realize their talents and capabilities; in short, to develop who they are as full, rounded people."²³⁹ Personality rights, which focus on personhood rather than property, are based on dignity and having control over one's identity.²⁴⁰ Additional image rights which exist in German and Québec are also more personally focused than economically when compared to the current Canadian and American legal framework. However, these rights are not without limits and are balanced with other legal duties and societal protections, such as freedom of expression and public interest.

In Québec, these rights are captured under several laws. The *Québec Charter of Human Rights and Freedoms* (Québec Charter) provides several protections for the identity and dignity of individuals. Section 4 of the Québec Charter states, "[e]very person has a right to the safeguard of his dignity, honour and reputation."²⁴¹ Section 5 states: "[e]very person has a right to respect for his private life"²⁴², which includes a right to control their image. Under the *Civil Code of Québec*, personality rights are enshrined under Article 3, which states: "[e]very person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy. These rights are inalienable."²⁴³ Article 36 of the *Civil Code of Québec* further protects an individual from privacy invasions, including using "his name, image, likeness or voice for a purpose other than the legitimate information of the public"²⁴⁴ and is not limited to misuse in commercial settings. These broadly framed rights capture both commercial and non-commercial uses. One of the most highly cited cases in Canada on an individual's right to control their image is the Supreme Court of Canada case, *Aubry v Éditions Vice-Versa Inc.*

²³⁶ Johann Neethling, "Personality Rights- A Comparative Overview" (2005) 38-2 The Comparative and International Law Journal of Southern Africa 210 at 210; Eva Ondreasova, "Personality Rights in Different European Legal Systems: Privacy, Dignity, Honour and Reputation" 24-70 in Oliphant, Ken, Zhang Pinghua & Chen Lei (eds). *The Legal Protection of Personality Rights* (Boston: Brill Nijhoff, 2018) at note 160 at 36.

²³⁷ Johann Neethling, "Personality Rights- A Comparative Overview" (2005) 38-2 The Comparative and International Law Journal of Southern Africa 210 at 210-212.

²³⁸ Johann Neethling, "Personality Rights- A Comparative Overview" (2005) 38-2 The Comparative and International Law Journal of Southern Africa 210 at 210-212, 225-237.

²³⁹ Edward Eberle, "The German Idea of Freedom" (2008) 10 Oregon Review of Int'l Law 2 at 23.

²⁴⁰ Karen Eltis, "Is 'truthtelling' decontextualized online still reasonable? Restoring context to defamation analysis in the digital age" (Toronto- Law Commission of Ontario, 2017) at 22.

²⁴¹ *Québec Charter of Human Rights and Freedoms*, CQLR c C-12, s 4.

²⁴² *Québec Charter of Human Rights and Freedoms*, CQLR c C-12, s 5.

²⁴³ *Civil Code of Québec*, CQLR c CCQ-1991.

²⁴⁴ *Civil Code of Québec*, CQLR c CCQ-1991, art 36.

In *Aubry v Éditions Vice-Versa Inc*, a young woman named Pascale Claude Aubry was sitting outside on the steps of a public building in Montreal when a photographer took her photo without asking for her consent.²⁴⁵ Afterwards the photographer published the photo in a magazine, *Vice-Versa*, leading Aubry to file a claim for a violation of section 5 of the Québec *Charter*, which protects her right to image.²⁴⁶ This section protects individual's from the publication of their image where they are recognizable and a central figure in the image.²⁴⁷ At the Supreme Court of Canada, Justice L'Heureux-Dubé, writing for the majority, said that the privacy right protected under this section, includes "the ability to control the use made of one's image, since the right to one's image is based on the idea of individual autonomy, that is, on the control each person has over his or her identity."²⁴⁸ In this case, the image did not significantly harm Aubry's honour or reputation but limited the control she had over her identity presentation. The Court had to balance her right to privacy with the journalist's freedom of expression rights under section 3 of the Québec *Charter*, however, because Aubry was not a public figure or a person who had gained any sense of notoriety, nor did she appear in the image in an incidental manner, she had the right to control her image. She was an ordinary person who was the true subject of the photograph.²⁴⁹ The Court noted that Aubry's "right not to consent must be also be taken into consideration" along with the artists freedom of expression.²⁵⁰ It found that Aubry had suffered moral damages, as the publication of the photograph turned Aubry into an object or a spectacle, impacting her human dignity and her interests were protected above the journalist's interests in freedom of expression.²⁵¹

This focus on human dignity is embedded in German law as well. The inviolability of dignity is expressly recognized under Article 1 the 1949 German Basic Law, the *Grundgesetz*. More specific personality rights are found under Article 2(1) which states: "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."²⁵² This must be balanced with Article 5 of the *Grundgesetz* which protects freedom of expression, stating "[e]very person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources."²⁵³ Personality rights are further enshrined in the *Bundesgerichtshof* which protects against any personality violations.²⁵⁴ The German *Kunsturhebergesetz* (KUG) also protects a general right to image. Article 22 protects the right to image, which requires the publisher to get consent before showing the image, and

²⁴⁵ Jason Samuel Thomas Kotler, "Merchandising Celebrity A User's Guide to Personality Rights" (2002).

²⁴⁶ *Aubry v Éditions Vice-Versa Inc*, [1998] 1 SCR 591.

²⁴⁷ Jason Samuel Thomas Kotler, "Merchandising Celebrity A User's Guide to Personality Rights" (2002).

²⁴⁸ *Aubry v Éditions Vice-Versa Inc*, [1998] 1 SCR 591 at para 52.

²⁴⁹ *Aubry v Éditions Vice-Versa Inc*, [1998] 1 SCR 591 at para 59.

²⁵⁰ *Aubry v Éditions Vice-Versa Inc*, [1998] 1 SCR 591 at para 63.

²⁵¹ *Aubry v Éditions Vice-Versa Inc*, [1998] 1 SCR 591 at para 69.

²⁵² Articles 1(1) & 2(1).

²⁵³ Olaf Weber, "Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights" (2004) 1:1 SCRIPTed: A J of L, Technology & Society 160.

²⁵⁴ BGH May 25, 1954, 13 BGHZ 334 (338) (FRG).

protects both commercial and non-commercial use. The right is not centred on the economic value of the image, nor the celebrity status of the individual, but on a person's right to their self-determination in the use of their own image where they are recognizable.²⁵⁵ Consent is a key guiding factor. In a case involving a famous soccer player, Oliver Kahn, the player was able to contest the use of his image in an Electronic Arts FIFA 2002 video game. Because he had not consented to the use of the animated image of himself, the game had to be pulled from the shelves.²⁵⁶ Under section 22, he had a right to control his image, and the unauthorized use damaged his ability to choose how his likeness was used.²⁵⁷ Nevertheless, not all images and representations will be protected as will be discussed below. They must be balanced with countervailing interests, such as freedom of expression and public interest.

When considering the technologies highlighted in this paper, a dignity-based model, like those in German and Québec, provides for a more relevant starting place than the economic models of appropriation of personality and publicity rights in Canada and the United States. The impact on identity is similar whether it is a commercial organization or an individual who makes the robotic or synthetic copy of another person. Unlike the days of paper-based advertising, newspapers and movie theatres, the ability to create and distribute identity replications has been democratized through the proliferation of digital platforms and open-source software.

Part IV: Moving towards dignity

Robotics, deepfakes and synthetic media bring a person's image, voice, and body alive in a way that has never been seen before. As this technology advances and becomes more user friendly and accessible to the public, more people will need to protect their personality rights and identity presentation. Not only those who invest in the commercial value of their identity or whose identities have been misused for commercial purposes should be protected. Even if most people are putting some visualization labour into their online profiles these days, their potential commercial value as a brand should not be the primary focus of what the law protects. While some ordinary individuals were able to have their identity rights recognized in the United States and Canada, the central value structuring considerations in their identity violation was only their personal image as an economic object, not as an extension of their personal dignity. What that

²⁵⁵ Antoon Quaedy, "Image Rights in Civil Law Systems: Four questions and three systems" in Nari Lee, Guido Westkamp, Annette Kur (eds), *Intellectual Property, Unfair Competition and Publicity: Convergence and Development* (Cheltenham: Edward Elgar Publishing Limited, 2014) at 343.

²⁵⁶ Andre M Louw, "Suggestions for the Protection of Star Athletes and Other Famous Persons against Unauthorised Celebrity Merchandising in South African Law" (2007) 19:3 *South African Mercantile LJ* 272; Jamie Litty, "How real is too real for the law? Realism versus right of publicity in game design" (2016) 60:3 *Journal of Broadcasting & Electronic Media* 373.

²⁵⁷ Carol Greer, "International Personality Rights and Holographic Portrayals" (2017) 27 *Indiana Int'l & Comp Law Review* 247 at 268; Hannes Rosler, "Dignitarian Posthumous Personality Rights: An Analysis of U.S. and German Constitutional & Tort Law" (2008) 26 *Berkley J Int'l Law* 153.

person was more commonly due was the rent for their image, not the right to control how and where they are presented, as was seen in the *Vanderveen* case.²⁵⁸

In the case of non-consensual sexual deepfake videos and sexual avatars, people are making requests to have sexual replications made of everyday women whose images have little commercial value in the eyes of American and Canadian courts. Financial compensation is likely the least of these women's concerns. For women like Rana Ayyub, Noelle Martin, and Anita Sarkisian maintaining control over their sexual images and autonomy is likely much more important to them than being reimbursed for their relatively miniscule value of their sexual images. As noted by Danielle Citron, sexual agency and autonomy is a vital aspect of human dignity, and a person's ability to develop their personality, which is worthy of protection.²⁵⁹

In developing and adjusting laws in this area, dignity should be the guiding principle in protecting identity. That being said, this right cannot be absolute. Just as there is a greater need for identity protection in our image-based society due to societal and technical changes, it is also a time where people learn and communicate through images. People are experimenting content to make art and social commentary using the images and voices of other people. Mashups and memes are staples of modern culture. As was seen in the case of the Kardashian and Zuckerberg deepfakes, synthetic media was used as artistic expression and to spread awareness on the downsides of digital influencers and data collection.²⁶⁰ Depending on the deceptive quality of the work, its purpose, and the public status of the person involved, the courts will need to engage in an exercise of proportionality to balance a person's right to their personality with the rights of freedom of expression that the creator holds and the public interest in the subject matter.

What is Included in identity protections?

Before moving on to the issue of balancing rights, it is important to consider what the courts include in concepts like personality and image. As the technological representations are not actual recordings or physical manifestations of the person they are representing, will they be understood as part of a person's personality, image, or identity? The courts have taken into consideration whether someone could identify the person in the image or sound recording, as well as how convincing the representations were as relevant factors to consider.

In Canada, British Columbia's *Privacy Act*, only explicitly lists a person's name or portrait as being protected by the appropriation of personality, although the definition of portrait is broad enough to include caricatures or images made to look like the individual in question.²⁶¹ This provision would likely capture deepfakes and robotic replicas, however, it is unclear if it could be interpreted to include synthetic voice recordings. In a British Columbia case, *Joseph v Daniels*, the provision was interpreted broadly which suggests that voice recordings could be considered.

²⁵⁸ *Vanderveen v Waterbridge Media Inc*, 2017 CanLII 77435 (ONSC) at para 5.

²⁵⁹ Danielle Keats Citron, *Sexual Privacy*, 128 Yale L.J. (2019) at 1886.

²⁶⁰ Bill Poster, "Gallery: 'Spectre' Launches" Press Release (29 May 2019) <http://billposters.ch/spectre-launch/>

²⁶¹ *Privacy Act*, RSBC 1996, c 373, s 5, s 3(1).

Justice Wallace stated that the “unauthorized use of a name or likeness of a person as a symbol of his identity [is what] constitutes the essential element of the cause of action. The cause of action is proprietary in nature and the interest protected is that of the individual in the exclusive use of his own identity in so far as it is represented by his name, reputation, likeness or other value. For the defendant to be found liable he must be taking advantage of the name, reputation, likeness, or some other components of the plaintiff’s individuality or personality which the viewer associates or identifies with the plaintiff.” In Manitoba,²⁶² Saskatchewan,²⁶³ and Newfoundland and Labrador,²⁶⁴ the statute protects the misuse of name, likeness or voice, and Ontario’s court recognized the protection of “image, voice or otherwise”.²⁶⁵ With broad definitions like these, it is likely that a plaintiff who has had their likeness misrepresented by synthetic media or robotics could be successful in pursuing legal action.

In the United States, what the tort covers varies from state to state. For example, California has some of the strongest protections where anything that evokes the idea of a person could be considered. The laws in California protect against the misuses of commercial content that “reminds someone of a person”.²⁶⁶ Whereas in New York, the protection is limited to the person’s “name, portrait, picture, or voice.”²⁶⁷ There is quite a bit of room for interpretation of what would be captured under these statutes and common law. In regards to the technology mentioned above, cases in the United States have already protected people from their images being misused in robotic form and through misrepresented voices in the form of voice impersonators. In *White v Samsung*²⁶⁸, Samsung used a robotic version of Vanna White from the game show, *Wheel of Fortune*, in one of its advertisements. The robot was wearing a blonde wig, a gown and jewelry in the fashion that White usually wore, standing in front of a futurized Wheel of Fortune board. She was successful in her appropriation of personality claim against the company even though the robot did not have her face because her persona was identifiable.²⁶⁹ Bette Midler and Tom Waits were both similarly successful in bringing actions against companies that hired voice impersonators that sounded like them in the advertisement.²⁷⁰ Midler had been approached by the Ford Motor Company which wanted to use her voice in a commercial advertisement. Midler declined to contract with the company for the use of her voice so the company hired a voice impersonator to sing Midler’s song, “Do you want to dance?”, for the commercial, which was found to be a violation of Midler’s identity.²⁷¹ Several years later, Waits

²⁶² *Privacy Act*, RSM 1987, c P125, CCSM, c P125, s 3(c).

²⁶³ *Privacy Act*, RSS 1978, c P-24, s 10 [am 2018, c 28, s 8], s 3(c).

²⁶⁴ *Privacy Act*, RSNL 1990, c P-22, s 4(c), s 4(c).

²⁶⁵ *Krouse v Chrysler Canada Ltd et al*, 1973 CanLII 574 (ONCA) at para 43.

²⁶⁶ Thomas E Kadri, "Drawing Trump Naked- Curbing the Right of Publicity to Protect Public Disclosure" (2019) 78-4 Maryland Law Review Article 7 at 906.

²⁶⁷ Civil Rights Law § 51

²⁶⁸ *White v Samsung Elecs Am, Inc*, 971 F2d 1395, 1396 (9th Cir 1992), cert. denied, 508 U.S. 951 (1993).

²⁶⁹ *White v Samsung Elecs Am, Inc*, 971 F2d 1395, 1396 (9th Cir 1992), cert. denied, 508 U.S. 951 (1993).

²⁷⁰ Ellen Whitehorn, "Publicity, Privacy, and Fame: A Comparative Analysis of the Right of Publicity in the United States, Canada, and the UK, Through the Lens of Kanye West's Famous" (2017) 27 Transnational Law & Contemporary Problems 201 at 210 citing *Midler v Ford Motor Co*, 849 F2d 460, 463 (9th Cir 1988); *Waits v Frito-Lay, Inc*, 978 F2d 1093 (9th Cir 1992).

²⁷¹ Jason Samuel Thomas Kotler, "Merchandising Celebrity A User's Guide to Personality Rights" (2002).

found himself in a similar position and relied on Midler's case to make a claim. Waits who did not believe in using his music for advertising purposes, heard a Frito-Lay's commercial on the radio where the singer mimicked his distinct vocal style. Frito-lays used one of Waits songs as inspiration for making the commercial. The resulting commercial included a person performing in the iconic raspy and rhyming style of Waits. The impersonation was supposedly uncannily similar to Waits'. At trial Waits said the impersonation was too close of a replication of him, with "[a]ll the scars, dimples, the lines all being in the same place."²⁷² As a result of his claim for the breach of his publicity rights, the courts not only awarded him damages for his right of publicity, but awarded Waits additional damages for the embarrassment he suffered from the commercial as well.²⁷³

These decisions are important to note when considering the future of synthetic and robotic technology in impersonating real people. The understanding of what is a representation of a person's identity needs to be quite broad to capture misrepresentations by these new technologies. If the claims were to be limited to the use of the actual voice or image of a person, completely convincing digital replications (such as that of Jordan Peterson's voice) could be used without repercussions. Now that technology can create near replicas of certain images and videos, the laws must be able to capture the full extent of these technologies' potential abilities to harm individuals. However, as will be discussed below, there must also be room for expressive works that enhance public discourse.

Balancing Rights: Public Interest and Freedom of Expression

Protecting identity-based rights requires the courts to engage in a proportional balancing of those rights with the rights of the creator's freedom of expression and the public interest in the subject matter. In each of the jurisdictions mentioned above, law makers have taken these into consideration when making decisions and some legislative measures have been put in place to balance these rights. When the purpose of the representation is simply to exploit the commercial success of that person's image or to use to use their image to advertise a product, the individual represented will be protected by the appropriation of personality rights in Canada or the publicity rights in the United States. They will maintain the ability to control their image in those situations. However, if their representation promotes a societal interest in freedom of expression, such as biographies or satirical skits, and is not just a commercial promotion, the producer's freedom of expression will prevail. In Québec and Germany, where the economic connection is not as prevalent, the division between protected and permissible content focuses more on consent, public status, and dignity. While elements of the economic model are applicable in the proportional balancing of rights under a dignity-based model, additional considerations such as autonomy and consent must be considered in a dignity-based model.

When protecting dignity, consent should be a major consideration for the courts when balancing interests, as it is in Québec and Germany. As can be seen in the cases of the Hiroshi Ishiguro's

²⁷² <https://www.latimes.com/archives/la-xpm-1990-04-13-fi-1428-story.html>

²⁷³ *Waits v Frito-Lay, Inc*, 978 F2d 1093 (9th Cir 1992).

Geminoid HI-1²⁷⁴ and the Rothblatt's Bina48,²⁷⁵ the consensual use of replicating technologies can enhance and expand the identity possibilities of an individual. In both of those cases the individual had input into what information their robotic replica would present about them, even down to what they would wear. They were able to maintain their autonomy and control their identity presentation, even when recreated in robotic form. Whereas the non-consensual use of someone's identity factors, such as the use of Scarlett Johansson's face on Ricky Ma's robots or the use of the famous people in Kanye West's music video, removes their agency. In the case of Ma's robot, it was built to be "anatomically correct" and has been programmed by Ma to show affection for him and express things that Johansson would likely never say, imbedding his desires into what is publicly recognized as Johansson's face when shown in videos.²⁷⁶ This was the same case for Kanye West's robots, who were cast naked and in bed with each other. Their representation was West's vision on celebrity and had little to no consideration for most of those people's represented identity, they were merely used as props.

In Canada and the United States, the courts differentiate between a purely economic use of the person's identity to promote a product with expressive works that they are the subject of. In Canada, the question of what consists of the commercial use of a person's image was addressed in 1996, in *Gould Estate v Stoddard Publishing*.²⁷⁷ This case involved a book published by a journalist, Jock Carroll, about a reclusive piano player, Glenn Gould. Carroll's book contained multiple photographs he had taken during previous interviews he had with Gould as a young man. He did not obtain permission from Gould's estate to publish the images in the book. At trial, it was held that Gould's estate did not have rights to Gould's persona in this case because he was the *subject* of the book. His images weren't being used for a commercial purpose to promote anything. The trial court noted that this tort did not cover every use of an individual's identity, it was limited to the appropriation of personality for commercial use. Works such as biographies, plays, and satirical skits were not covered by the tort.²⁷⁸ The trial judge, Justice Lederman, examined whether the use of the images served a social function that should be protected by freedom of expression. He found that if a person's image was being used to sell a product, it was in a violation of this tort, however, if the person was a mere subject of the work, it would not be protected by this tort.²⁷⁹ This has been affirmed since in cases like *Wiseau Studio et al v Richard Harper* where the courts found that a person who is the subject of a documentary film could not claim appropriation of personality.²⁸⁰

²⁷⁴ Jennifer Robertson, "Gendering Humanoid Robots: Robo-Sexism In Japan" (2010) 16:2 Body and Soc'y 1 at 25.

²⁷⁵ Shellenn Greene, "Bina48: Gender, Race, and Queer Artificial Life" (2016) 9 Ada: A Journal of Gender, New Media & Technology.

²⁷⁶ Elizabeth Broadbent, "Interactions with Robots: The Truths We Reveal About Ourselves" (2017) 68 Annual Review of Psychology 627 at 635; April Glaser, "The Scarlett Johansson Bot is the Robotic Future of Objectifying Women" Wired (4 April 2016).

²⁷⁷ *Gould Estate v Stoddard Publishing*, 1996 CanLII 8209 (ONSC).

²⁷⁸ *Gould Estate v Stoddard Publishing*, 1996 CanLII 8209 (ONSC) paras 8-13.

²⁷⁹ It should be noted that this case was later appealed to the court of appeal and decided on the issue of copyright, but the lower level case is still cited for the appropriation of personality tort.

²⁸⁰ *Wiseau Studio et al v Richard Harper*, 2017 ONSC 6535; 2020 ONSC 2504.

Similar exclusions exist in the United States where, depending on the state, exceptions are made for content such as biographical works, films, plays, novels, news reports, and sports broadcasts.²⁸¹ In the United States expressive works in commercial products are differentiated from commercial advertisements or merchandising. The *Rogers v Grimaldi* test allows for the use of a person's likeness in expressive works unless the work is actually an advertisement disguised as an expressive work, or if the celebrities name is completely unrelated to the work.²⁸² When a celebrity is featured on a product or piece of work, the courts separate those products by examining "whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist."²⁸³

Additional considerations of whether the expressive content is transformative are relevant to expressive works in the United States.²⁸⁴ In *Keller v Electronic Arts*,²⁸⁵ video game developers have tried to rely on their First Amendment protections over creative works, arguing they could use the likeness of sports stars in the avatar characters in their video games because the games were expressive works. Video games are certainly expressive works, however, the court in *Keller v Electronic Arts*²⁸⁶ held that the developer had to meet the "transformative use defense" set out in the California Supreme Court if they were to use an avatar of an athlete in their game. In this case, the test was not met because the game represented the athlete in the setting he had become famous for (playing the sport), as such, there was no transformation.²⁸⁷ There was a similar decision made in *Hart v Electronic Arts Inc* where the court stated that "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."²⁸⁸ When the representation is sufficiently transformed, such as turning it into a half man-half beast character, or if the celebrity is not identifiable they won't be able to make a claim under this right.²⁸⁹ As the creator moves away from the realism of the likeness to something more abstract, the more likely the right of expression would trump the rights of the individual's right to the commercial use of their identity.

While there are interesting factors that could be borrowed from these jurisdictions, such as protecting certain creative works and representations that are in the public interest, the laws in Québec and Germany go one step further and also protect the publication of identity representations in non-commercial settings, something that is important in this technological era

²⁸¹ Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, (1993) 81 Cal L Rev 125 178.

²⁸² Stacey L Dogan, "Haelan Laboratories v. Topps Chewing Gum: Publicity as a legal right" at 31.

²⁸³ *Keller v Elec Arts Inc*, 724 F 3d 1268, 1268 (9th Cir 2016).

²⁸⁴ Carol Greer, "International Personality Rights and Holographic Portrayals" (2017) 27 Indiana Int'l & Comp Law Review 247.

²⁸⁵ *Keller v Elec Arts Inc*, 724 F 3d 1268, 1268 (9th Cir 2016).

²⁸⁶ *Keller v Elec Arts Inc*, 724 F 3d 1268, 1268 (9th Cir 2016).

²⁸⁷ *Keller v Elec Arts Inc*, 724 F 3d 1268, 1268 (9th Cir 2016).

²⁸⁸ *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387 (2001).

²⁸⁹ *Winters v New York*, 333 U.S. 507, 510, (1948); *Kirby v Sega of Am., Inc.*, 144 Cal. App. 4th 47, 50 Cal. Rptr. 3d 607 (2006).

of hobbyists and amateurs creating synthetic identity material. Considerations such as whether the person consented to the use or their status as a public figure are additional significant factors in the analysis in a dignity-based approach.

In Québec, the right to image is protected unless the image provides legitimate information of public interest, according to Article 36 of the *Civil Code of Québec*.²⁹⁰ This and additional rights to image such as section 5 of the Québec *Charter*, are balanced with the publisher's or creator's freedom of expression rights. In *Aubry*, the court held that the artist's right to photograph people in public was not an absolute right. If there is no relevant public interest in the image of the person, the person's right to image and protections of dignity prevail. The courts decided that because *Aubry* was just an ordinary teenage girl, there was no legitimate public interest in seeing her sitting on a public step. As such, the photographer was required to get the permission of the subject of the photo before publishing the image.²⁹¹

In Germany Section 23 of the KUG limits a person's right to control their image by balancing it with that of public interest. It includes exceptions that protect freedom of expression when the person in question is only incidentally featured in the image, or if the image is of a public figure in relevant social setting.²⁹² In practice, the public's interest in images of public figures will often outweigh that person's image rights in Germany. This would include contemporary public figures who are involved in the political, social, economic, sporting or cultural life of Germany.²⁹³ In protecting the press' freedom of expression, the German courts differentiate between "absolute" public figures, such as politicians or celebrities, with "relative" public figures, who have been forced into the limelight due to a particular event.²⁹⁴ In the case of absolute figures, the German courts have allowed more permissive rights for the press, allowing the publication of images for the purpose of entertainment or gossip.²⁹⁵ However, the Germany courts permissiveness towards the publication of images of Princess Caroline von Hannover's personal life was later challenged by the Princess at the European Court on Human Rights, which found the publication of the photos of her private life had breached her rights to privacy and her right to control her image. It held that the private aspects of public figure's lives should be protected, even when they are in public.²⁹⁶

²⁹⁰ *Civil Code of Québec*, CQLR c CCQ-1991, art 36.

²⁹¹ Conrad Nest, "From 'ABBA' to Gould: A Closer Look at the Development of Personality Rights in Canada" (1999) 5 Appeal 12 at 5.

²⁹² Article 23(1). Antoon Quaedvlieg, "Image Rights in Civil Law Systems: Four questions and three systems" in Nari Lee, Guido Westkamp, Annette Kur (eds), *Intellectual Property, Unfair Competition and Publicity: Convergence and Development* (Cheltenham: Edward Elgar Publishing Limited, 2014) at 348.

²⁹³ Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 USF L Rev 799 at 839.

²⁹⁴ Olaf Weber, "Human Dignity and the Commercial Appropriation of Personality: Towards a Cosmopolitan Consensus in Publicity Rights" (2004) 1:1 SCRIPTed: A J of L, Technology & Society 160 at 182.

²⁹⁵ Ellen S Bass, "A Right in Search of a Coherent Rationale - Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Personality Rights" (2008) 42:3 USF L Rev 799 at 841.

²⁹⁶ Carol Greer, "International Personality Rights and Holographic Portrayals" (2017) 27 *Indiana Int'l & Comp Law Review* 247 at 268.

A dignity-based approach to balancing rights in a technological world

Due to its constitutional protection of freedom of speech, courts in the United States have been reluctant to put limits on speech for dignitary harms occurring in non-commercial public discourse.²⁹⁷ However, with the advent of technologies like deepfakes, some American scholars have been calling for a more dignity focused protection of non-commercial speech. Thomas Kadri has argued that a “modified dignitary rationale might be more responsive to some of the harms of new technologies” like non-consensual sexual deepfakes due to their abusive and extreme content that has the potential to undermine public discourse.²⁹⁸ Kadri noted that the value of freedom of expression is not just for the benefit of the speaker or creator of that expression, it is also to enhance public discourse, something that non-consensual sexual deepfakes do not do. In the context of non-consensual sexual deepfakes, Mary Anne Franks and Ari Ezra Waldman have argued that this type of speech should be limited because it causes significant dignitary harms to the individuals represented, despite the content not being true representations of the women. They argue that as there is no counter speech to defend against such images, and the harms to the sexual autonomy of the person represented significant enough to warrant a limit on that type of speech.²⁹⁹

A dignity-based approach to protecting identity and personality rights should first focus on whether the person has given their consent to the use of the representation of a person’s identity, and then, in cases where consent has not been obtained, consideration should be given as to what exceptions should be allowed to reasonably and proportionately balance the dignity and identity rights of the individual who is represented with the freedom of expression rights of the person exposing the content and the public’s interest in the content. Ideally, it should be assumed that a person maintains reasonable control over replications of their public-facing³⁰⁰ identity presentations of their image and voice, with certain exceptions to the rules in order to protect important social values such as freedom of expression and public interest (e.g. use in publications that are newsworthy, provides useful information to the public, or if it is used in works of art, humour, fiction or satire, so long as those don’t severely impact the dignity of the person represented).

Commercial use of an individual’s image to sell a product should not be considered to provide significant enough social value worthy of overriding a person’s right to their image and likeness. As such, an individual’s consent should be required for all commercial goods or services where the person’s image is being used to sell or advertise a product.

²⁹⁷ Thomas E Kadri, "Drawing Trump Naked- Curbing the Right of Publicity to Protect Public Disclosure" (2019) 78-4 Maryland Law Review Article 7 at 948.

²⁹⁸ Thomas E Kadri, "Drawing Trump Naked- Curbing the Right of Publicity to Protect Public Disclosure" (2019) 78-4 Maryland Law Review Article 7 at 956.

²⁹⁹ Mary Anne Franks & Ari Ezra Waldman "Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions" (2019) 78:4 Maryland Law Review Article 6 at 859.

³⁰⁰

In a non-commercial context, determining when a synthetic or robotic replication of someone's identity represents something that is in the public interest and should be protected is a complicated question. The answer is likely to shift over time as societal norms and expectations change. Educational uses, such as the research done by Carnegie Mellon University could be protected as it adds a social benefit. Playful deepfakes, like those created to poke fun at celebrities like Nicolas Cage using relatively benign images and scenes, could be protected by exceptions for satire. Similarly, those deepfakes that clearly state that they are fake and are used to make an artistic or political statement, like those made of Kardashian, Zuckerberg, Trump or Obama, could be considered in the public interest in many cases for providing useful social commentary. In regards to transformative works, consideration must be given to the context of the representation. For example, if a robotic, deepfake or avatar representation is made of someone, the consideration should not be solely on whether it is a realistic representation of them, but what the dignity harms are. If a person is represented in a transformative manner, for example, having their body being represented as an animal in a sexual or dehumanizing context, the courts should consider the effect of the representation rather than merely how transformative it is from their actual figure.

Where things get murky are the cases like Not Jordan Peterson where users could make content that could border on satirical social commentary and deceptive messages that could significantly harm his dignity and identity presentation. Factors that may tip the balance in these circumstances may include whether the content was clearly marked as fake so that people can contextualize the content, as well as what was actually said in the recording. In the context of holographs, Carol Greer has argued that the more recognizable the person is in synthetically made content and the more convincing the replication is, the higher the need should be for that person's consent.³⁰¹ Nevertheless, even content that is clearly marked as fake may still impact that person's dignity. Kanye West's video of nude robotic replicas of twelve famous people creates could be an example of this. The music video was a piece of artistic expression commenting on fame, but the hyper-realistic robots positioned in the nude could have crossed the line from social commentary to significant dignity harms. While this video is a bit of a grey area, this line is clearer when considering non-consensual sexual deepfakes and 3D sexual avatars. Even if it is clear that they are fake, they clearly implicate the dignity rights of the person represented in a serious way by stripping them of their sexual autonomy. Allowing these images to be produced without consent is not in the public interest. In those cases, the rights of the individual represented could trump the interests of the public, and the freedom of expression rights of the creators, due to the severe dignity impacts. The boundaries between art, social commentary, and dignity in regards to synthetic media and robotics will be challenging to assess in some cases.

Even under a dignity-based model, public figures will be expected to have more of their identities exposed due to the legitimate public interest in their activities. However, simply because someone has stepped into the limelight or has chosen a public facing career, their right

³⁰¹ Carol Greer, "International Personality Rights and Holographic Portrayals" (2017) 27 *Indiana Int'l & Comp Law Review* 247.

to protect their identity should not be removed in all circumstances. If the use of their image leads to unnecessarily invasive prying into their personal life, or if the use is extremely harmful to the person's dignity, such as the non-consensual creation of sexual deepfakes, there should be limits on that use. This is further complicated when the person being misrepresented by this technology is a politician or other public figure whose trustworthiness depends on accurate and consistent reporting of what they have said and done and convincing, but fake, content is created about them. Understandably, the question of what crosses the line in harming dignity will be challenging to determine at times, particularly when the content is not actually representations of the public figure in question, but is synthetic or robotic replications of them.

Other factors that will be important for law makers to explore in determining the boundaries of these types of protections, but are beyond the scope of this paper, include the reasonableness of the publication, such as publishing content of family and friends on social media pages, the centrality of the individual in the image, what is considered a public representation on digital platforms, and what rights exist after the death of the individual.

Consent, public interest, freedom of expression, and public figure status are all factors that courts will have to grapple with when balancing the personality rights of one individual with the freedom of expression rights of another. Yet, however those decisions are made, concerns of dignity, autonomy and self-determination must remain central when protecting identity.

Conclusion

Synthetic media and robotics open up the possibilities for nearly limitless representations of things a person never said or did. While some of these faux representations have a way to go before becoming entirely convincing, they have the power to shape a person's identity presentation even without perfect realism. Voice replica software seems to be the most convincing and has already been able to trick people into believing what they were hearing was that actually that person's voice, however, even 3D avatars and robots that are not sophisticated enough to convince anyone they are actual copies of a person can have impacts on a person's dignity and autonomy, such as sex bots and 3D interactive sexual avatars. This paper explored various technologies that are being used to represent people's identities in both commercial and non-commercial contexts. Given the advancements of these technologies, combined with the current image-based culture that allows for instantaneous and widespread public sharing of content, a dignity-based approach to identity-based protections is preferred to an economic-based approach that focuses on commercial misuse of a person's identity. Discussing some of the complications that may come up in balancing the dignity and identity rights of the individual represented with those of the creator and the viewer, factors that should be considered in this proportionate and reasonable balancing of rights included consent, status as a public figure, impacts on dignity, and public interest, among others. As we move into a technological era where it is possible for both hobbyists and professionals to recreate people's faces, voices, and bodies, it is critical that identity-based protections extend beyond the commercial sphere and focus on protecting the dignity of those misrepresented.