Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

TTLF Working Papers

No. 147

Deepfakes, the Right of Publicity, and the Right to One's Own Image: A Transatlantic Comparative Analysis

Armin Karabegovic

2026

TTLF Working Papers

Editors: Siegfried Fina, Mark Lemley, and Roland Vogl

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Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Armin Karabegovic is a trainee lawyer in Salzburg, Austria, practicing at a litigation-focused law firm, also handling matters related to EU law, with a particular emphasis on trademark law. He holds an LL.M. in European and International Business Law from the University of Vienna, Austria, which he completed alongside his professional work in legal practice. During his master's studies, he attended Stanford Law School as part of the Stanford-Vienna Student Exchange Program. His academic work centers on intellectual property law, with a particular interest in artificial intelligence and its implications for personality rights, as well as comparative legal studies.

General Note about the Content

Suggested Citation

This TTLF Working Paper should be cited as:
Armin Karabegovic, Deepfakes, the Right of Publicity, and the Right to One's Own Image: A Transatlantic Comparative Analysis, Stanford-Vienna TTLF Working Paper No. 147, http://ttlf.stanford.edu.

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Abstract

With the rise of artificial intelligence, deepfakes have become easier to produce, increasingly realistic, and can now be disseminated to a vast audience on social media platforms with minimal effort. This development poses a potential threat to a democratic society. Individuals can now be depicted in situations in which they never participated, most notably in pornographic or otherwise inappropriate content, without the deepfake being recognizable as a fake. From a legal perspective, protection against such deepfakes may arise under the US Right of Publicity and the EU's Right to One's Own Image. Although these regimes rest on different doctrinal foundations, a comparative analysis has proven to be particularly instructive. It has clarified the underlying rational of each system and has helped to better understand the respective doctrines. The thesis demonstrates that, in the context of deepfakes, both regimes serve the same functional purpose, namely the protection against the unauthorized appropriation of a person's identity. Moreover, the analysis addressed the significant tension between the protection of personal identity, on the one hand, and commercial interests, on the other. Furthermore, the thesis demonstrates that, especially in the context of postings on social media platforms, EU law provides broader protection than US law. However, under both legal regimes, an assessment in light of freedom of expression is unavoidable. In this context, generalized conclusions are difficult to draw, particularly under US law, due to its strongly case-based jurisprudence. Irrespective of these differences, the thesis ultimately shows that neither regime is capable of fully addressing the underlying structural problems, described in this thesis as threshold obstacles, which significantly limit effective legal protection against deepfakes. The thesis has also addressed the question whether further legislative action is required, whether such intervention would be effective at all, or whether the issue is better addressed through broader social change.

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Table of Abbreviations

ACIG	Applied Cybersecurity & Internet Governance
ACM Comput Surv	ACM Computer Surveys
Am J Comp L	American Journal of Comparative Law
App	Appendix
art/arts	article/articles
Bros	Brothers
BTLJ	Berkley Technology Law Journal
Buff L Rev	Buffalo Law Review
CA	Cour d'appel (Court of Appeal)
Cal L Rev	California Law Review
Cardozo Arts & Ent LJ	Cardozo Arts & Entertainment Law Journal
Case W Res L Rev	Case Western Reserve Law Review
Cass civ	Chambre civile de la Cour de cassation française
Cass com	Chambre commerciale de la Cour de cassation
Cc	Code civil français
CJEU	Court of Justice of the European Union
Co	Company
Corp	Corporation
DePaul L Rev	DePaul Law Review
Dept	Department
Dir	Directive
DLTR	Duke Law & Technology Review
DOJ	U.S. Department of Justice
EC	European Communities
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ed/eds	editor/editors
edn	edition
eg	for example (*exempli gratia*)
ELI	European Law Institute
etc	and so on (*et cetera*)
EU	European Union
EuGRZ	Europäische Grundrechte-Zeitschrift
ff	and following
Fordham Intell Prop Media & Ent LJ	Fordham Intellectual Property Media and Entertainment Law Journal
Fordham L Rev	Fordham Law Review
GDPR	EU General Data Protection Regulation
Geo L Tech Rev	Georgetown Law Technology Review
GPR	Zeitschrift für das Privatrecht der Europäischen Union
Harv L Rev	Harvard Law Review
Hous L Rev	Houston Law Review
HUP	Harvard University Press
IAPP	International Association of Privacy Professionals s
IDEA	The Law Review of the Franklin Pierce Center for Intellectual Property
ie	that is
IJILT	The International Journal of Information and Learning Technology
IJME	The International Journal of Management Education
Inf Fusion	Information and Fusion
IP	Intellectual property

J World Intellect Prop	The Journal of World Intellectual Property
JESP	Journal of Ethics and Social Philosophy
JIPLP	Journal of Intellectual Property Law & Practice
JLA	The Columbia Journal of Law & the Arts
JTL	Journal of Tort Law
Loy LA Ent L Rev	Loyola of Los Angeles Entertainment Law Review
Ltd	Limited
Minn L Rev	Minnesota Law Review
MMP	Maastricht Faculty of Law Working Paper
MMR	Multimedia und Recht
MuR	Medien und Recht
no/nos	number/numbers
NY Civ Rights Law	New York Civil Rights Law
ÖJZ	Österreichische Jurist:innen-Zeitung
OUP	Oxford University Press
para(s)	paragraph(s)
Philos Technolo	Philosophy and Technology
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
reg/regs	regulation/regulations
RheinZ	Rheinische Zeitschrift für Zivil- und Prozessrecht
Second Restatement	Restatement (Second) of Torts (1977)
Stan L Rev	Stanford Law Review
STLR	Columbia Science and Technology Law Review
subpara	Subparagraph
TEU	Treaty on European Union
TEX L REV	Texas Law Review
TFEU	Treaty on the Functioning of the European Union
Trib	Tribunale
TWG	Transatlantic Working Group
U Chi L F	University of Chicago Legal Forum
U Pa J Const L	University of Pennsylvania Journal of Constitutional Law
US	United States
USC	United States Code
USD	United States Dollar
v	against (*versus*)
vol/vols	volume/volumes
Wirtsch Inform Manag	Wirtschaftsinformatik & Management
YLJ	The Yale Law Journal
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfDR	Zeitschrift für Digitalisierung und Recht
ZUM	Zeitschrift für Urheber, und Medienrecht

Table of Cases

United States

Europe

ECJ

ECtHR

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Table of Legislation, Instruments and Quasi-Legislation

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Europe

‘There is not one self alone, but a whole world of selves’
Hermann Hesse
Steppenwolf

I. Introduction

Imagine waking up to discover a video online showing you in a sexual encounter that never actually happened - your face precisely imposed onto someone else's body, watched by strangers around the world. Sounds like a nightmare? For many victims of so-called deepfakes, this is their reality.

With the rise of Artificial Intelligence (AI), deepfakes have become more sophisticated and easier to create. It is now possible to manipulate or entirely generate audio, photo, or video content using AI, producing results that are often indistinguishable from reality.[1] As discussed in detail below, deepfakes have become a powerful means of unfairly exploiting a person's image, name, likeness, or other personal attributes.[2] In this context, it is worth noting that we now inhabit a period characterized by 'cheap speech and big speech'.[3] The costs associated with producing and disseminating speech have reached unprecedented lows, while the potential audience for such speech has expanded to historically unmatched proportions. At the individual level, casual or idle commentary about others (e.g., gossip, rumors) has migrated from private settings, such as locker rooms, to deepfakes posted on social media platforms like X. So, is there any legal safeguard to protect our identity?

From a legal perspective, the Right of Publicity and the Right to One's Own Image are subjects of intense debate in US and European literature in the context of deepfakes.[4] This

[1] Luciano Floridi, 'Artificial Intelligence, Deepfakes and a Future of Ectypes' (2018) Philos Technol 317, 320; Europol, 'Facing reality?: law enforcement and the challenge of deepfakes : an observatory report from the Europol Innovation Lab' (Publications Office of the European Union 2024) 5; Insikt Group, 'The Business of Fraud: Deepfakes, Fraud's Next Frontier' (Recorded Future 2021) 2 <https://assets.recordedfuture.com/insikt-report-pdfs/2021/cta-2021-0429.pdf> accessed 25 July 2025; Katharina Kumkar and Julian Rapp, 'Deepfakes - Eine Herausforderung für die Rechtsordnung' (2022) ZfDR 199, 202; Murat Karaboga and others, *Deepfakes und manipulierte Realitäten: Technologiefolgenabschätzung und Handlungsempfehlungen für die Schweiz* (TA-SWISS 2024) 101.

[2] Michael Murray, 'Deceptive Exploitation: Deepfakes, the Rights of Publicity and Privacy, and Trademark Law' (2024) 65 IDEA 1 <https://ssrn.com/abstract=4981531> accessed 25 July 2025.

[3] Justin Hurwitz, 'Defamation and Privacy: What You Can't Say about Me' in Kyle Langvardt and Justin (Gus) Hurwitz (eds), *Media and Society After Technological Disruption* (1st edn, Cambridge University Press 2024) 75.

[4] Matthew Kugler and Carly Pace, 'Deepfake Privacy: Attitudes and Regulation' (2021) 116 Northwestern University Law Review 611 <www.ssrn.com/abstract=3781968> accessed 25 July 2025; Alice Preminger and

initial situation raises questions about which legal framework provides stronger protection against deepfakes, the underlying reasons for the differences, and the areas where further legislative intervention may still be required. In this respect, a transatlantic comparative legal study in this area quickly leads to numerous national publications in the field of technology law. However, most of these studies focus on a specific topic, such as deepfakes and pornography, the film industry, or election campaigns. Furthermore, there is no transatlantic comparative legal study of deepfakes and the Right to One's Own Image versus the Right of Publicity. Since the starting point for a comparative law study is always a specific question, the first step is to determine a specific problem statement, and based on this, specific research questions:

1. Problem Statement

Deepfakes are neither good nor bad per se - their ethical and legal value is determined solely by the context and way they are used:[5]

On the one hand, the deepfakes pose a significant reputational risk, especially for famous personalities and politicians. One example of this is the AI-generated satirical conversation between former US President Biden and current President Trump.[6] Furthermore, deepfakes are increasingly used in connection with fraudulent activities, as demonstrated by a case in which the image and voice of a CFO at a financial company were imitated to induce an employee to

Matthew Kugler, 'The Right of Publicity Can Save Actors From Deepfake Armageddon' (2023) 39 BTLJ 782 <https://lawcat.berkeley.edu/record/1300455> accessed 25 July 2025; Tobias Lantwin, 'Deepf Fakes - Düstere Zeiten Für Den Persönlichkeitsschutz? Rechtliche Herausforderufngen Und Lösungsansätze' (2019) MMR 574; Martina Block, *Deepfakes und Recht: Einführung in Den Deutschen Rechtsrahmen Für Synthetische Medien* (Springer 2023); Europol (n 1); Alex Barber, 'Freedom of Expression Meets Deepfakes' (2023) 202 Synthese 40; Niklas Maamar, 'Urheberrechtliche Fragen Beim Einsatz von Generativen KI-Systemen' ZUM 7/2023 481, 423.

[5] United States Copyright Office, 'Copyright and Artificial Intelligence Part 1: Digital Replicas' (2024) 2 <www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf> accessed 30 July 2025.

[6] GeoMFilms, 'Donald Trump Joe Biden Interview AI Voice' (*YouTube*, 11 March 2023) <www.youtube.com/watch?v=kz3HH-SBX2s&t=2s> accessed 1 August 2025.

release a payment of USD 25.6 million.[7] Another downside is evident in one of the main use cases of deepfakes: AI-generated pornography, in which the faces of adults and, in some cases, minors are used to produce pornographic content.[8]

On the other hand, deepfakes offer enormous commercial potential, especially for the advertising and film industries.[9] In this regard, more and more famous personalities are resorting to AI-generated deepfakes of themselves for advertising purposes, such as TV commercials.[10] In addition, it is now possible to digitally recreate actors who have died during production in television series using deepfakes, or to remove actors from productions that have already been filmed if they become involved in scandals or shitstorms.[11]However, the use of deepfakes can also lead to celebrities being used in advertisements without their knowledge or consent, as happened to the most-subscribed YouTuber, MrBeast, who described an advertisement on TikTok in which an AI-generated version of himself was used, as a 'serious problem' and questioned whether social media platforms were even capable of dealing with the increasing use of deepfakes.[12] Famous actor Tom Hanks also issued a warning in this regard after a deepfake of the actor promoted specific miracle cures and drugs.[13] In this context, the central importance

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[7] Cheng Leng and Chan Ho-him, 'Arup lost $25mn in Hong Kong deepfake video conference scam', *Financial Times* (Hong Kong, 17 May 2024) <www.ft.com/content/b977e8d4-664c-4ae4-8a8e-eb93bdf785ea> accessed 30 July 2025; Heather Chen and Kathleen Magramo, 'Finance worker pays out $25 million after video call with deepfake "chief financial officer"' (*CNN World*, 4 February 2024) <https://edition.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html> accessed 30 July 2025 stating that: 'The elaborate scam saw the [finance] worker duped into attending a video call with what he thought were several other members of staff, but all of whom were, in fact, deepfake recreations (…) the worker put aside his early doubts after the video call because other people in attendance had looked and sounded just like colleagues, he recognized (…)'.

[8] Edvinas Meskys and others, 'Regulating Deep Fakes: Legal and Ethical Considerations' (2020) 15 JIPLP 24, 26ff, highlighting that deepfakes are primarily used in four domains: pornography, political manipulation, commercial exploitation, and creative expression; Henry Ajder and others, 'The State of Deepfakes: Landscape, Threats and Impact' (Deeptrace 2019) 1 <https://regmedia.co.uk/2019/10/08/deepfake_report.pdf> accessed 1 August 2025.

[9] Vejay Lalla, Adine Mitrani and Zach Harned, 'Artificial Intelligence: Deepfakes in the Entertainment Industry' (WIPO Magazine 2022) <www.wipo.int/en/web/wipo-magazine/articles/artificial-intelligence-deepfakes-in-the-entertainment-industry-42620> accessed 2 August 2025.

[10] Preminger and Kugler (n 4) and the sources cited in n 9.

[11] ibid 783.

[12] Kalhan Rosenblatt, 'MrBeast calls TikTok ad showing an AI version of him a "scam"' (*NBC News*, 3 October 2023) <www.nbcnews.com/tech/mrbeast-ai-tiktok-ad-deepfake-rcna118596> accessed 3 August 2025.

[13] Malia Mendez, 'Tom Hanks alerts fans about AI ads using his voice to sell "wonder drugs": "Do not be fooled"', *Los Angeles Times* (Los Angeles, 30 August 2024) <www.latimes.com/entertainment-arts/movies/story/2024-08-30/tom-hanks-warning-fraudulent-ai-ads-wonder-drugs> accessed 3 August 2025.

of social platforms such as Instagram, Facebook, and TikTok for the dissemination of AI-generated deepfakes is apparent.[14] It is not astonishing that deepfakes have doubled in number every six months in recent years. Approximately 8 million deepfakes have been shared in 2025, up from only 500,000 in 2023.[15] Considering the rapid spread of deepfakes through social media platforms, it is estimated that by 2026, around 90 % of online content may be generated synthetically,[16] blurring the line between reality and fiction, making them powerful tools for spreading misinformation and disinformation.[17]

This initial situation is taken as an opportunity to examine the legal implications of deepfakes regarding the US Right of Publicity and the EU's Right to One's Own Image from a comparative law perspective, and to present the resulting findings. In this regard, the transatlantic comparison should also provide insight into the regulatory frameworks in the EU and the US regarding the rapid development of AI and the attempts to strike a balance between regulatory caution and economic opportunities.

2. Research Question

The problem statement outlined above gives rise to the following research questions, which will be examined and answered in the thesis:

Research Question 1: 'To what extent are the US Right of Publicity and the EU's Right to One's Image applicable in the deepfakes context?'

Research Question 2: 'What legal justifications may apply in the creation and use of deepfakes?'

[14] European Commission, 'A multi-dimensional approach to disinformation: Report of the independent, High level Group on fake news and online disinformation' (Publications Office 2018) 11.
[15] Mar Negreiro, 'Children and deepfakes' (European Parliamentary Research Service Briefing 2025) 2 <www.europarl.europa.eu/RegData/etudes/BRIE/2025/775855/EPRS_BRI(2025)775855_EN.pdf> accessed 3 August 2025; Alexandra Ulmer and Anna Tong, 'Deepfaking it: America's 2024 election collides with AI boom' (*Reuters*, 31 May 2023) <www.reuters.com/world/us/deepfaking-it-americas-2024-election-collides-with-ai-boom-2023-05-31/> accessed 3 August 2025.
[16] Negreiro (n 15) 2.
[17] Europol (n 1) 10.

Research Question 3: ‘What insights can be drawn from the transatlantic comparative legal study?’

As a fundamental basis for answering these research questions, the specific comparative legal methodology must first be explained:

3. Comparative Law Methodology in this Thesis

Since incomparable things cannot be meaningfully compared, and in law, only things that fulfill the same task and function are comparable,[18] this thesis compares and analyzes the EU’s Right to One's Own Image with the US Right of Publicity in the context of deepfakes. However, the applicable method of comparative law has been the subject of intense and controversial debate since the very beginning.[19] This starting point led Radbruch to make the following statement:

> Wie Menschen, die sich durch Selbstbeobachtung quälen, meist kranke Menschen sind, so pflegen aber Wissenschaftler, die sich mit ihrer eigenen Methodenlehre zu beschäftigen Anlass haben, kranke Wissenschaftler zu sein; der gesunde Mensch und die gesunde Wissenschaft pflegen nicht viel von sich selbst zu wissen.[20]

The question of methodology, however, should not detract from the value of comparative legal studies, and it should be noted that, in today's practice, comparative legal studies are regularly characterized by their functionality (functional method of comparative law). For Kischel, the functional method is the classic form of comparative law, which most comparative legal studies consciously or unconsciously follow:[21]

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[18] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd ed OUP 1998) 33.
[19] Ralf Michaels, ‘The Functional Method of Comparative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 340 ff; Sarah Piek, 'Die Kritik an der funktionalen Rechtsvergleichung' (2013) ZEuP 60, 62ff; Uwe Kischel, *Rechtsvergleichung* (CH Beck 2015) 95ff.
[20] Gustav Radbruch, *Einführung in die Rechtswissenschaft* (Konrad Zweigert ed, 12th edn, K F Koehler 1969) 253, own translation: 'Just as people who torment themselves through self-observation are usually sick people, scholars who have reason to concern themselves with their own methodology tend to be sick scholars; the healthy person and healthy science generally do not care much about themselves'.
[21] Kischel (n 19) § 3 para 3.

3.1 Functional Method of Comparative Law

As already mentioned in the introduction, the starting point for any functional comparative law analysis is a specific question.[22] In this regard, Zweigert and Kötz assume, in accordance with the principle of *praesumtio similitudinis,* that the same needs are regulated or resolved in the same or at least similar ways in different legal systems.[23] This assumption should not only serve as a guide for comparative legal analysis, but also prompt a re-examination if, at the end of the analysis, contradictions and discrepancies are found in the respective solutions of the legal systems being compared.[24] It is important to note that functional comparative law is not limited to written law, but also encompasses the legal norms under examination in their legal, legal-cultural, and extra-legal context, ie, in their actual functions.[25] In functional comparative law, written law alone thus represents merely a 'skeleton without muscles',[26] and the various legal institutions are viewed as a whole as tools for solving real economic, social, and interpersonal problems.[27] Probably the most essential element of the functional method is the *tertium comparationis,* ie, the so-called third element of comparison, and thus those properties and characteristics with respect to which the comparison is made.[28] It is therefore essential to relate the legal systems being compared to a uniform set of facts and, on this basis, to ask what

[22] Zweigert and Kötz (n 18) 33.
[23] Zweigert and Kötz (n 18) 29; regarding the criticism of the functional method in comparative law, in particular the principle of *praesumptio similitudinis*, see Michaels (n 19) 369.
[24] Zweigert and Kötz (n 18) 39; for criticism see Michaels (n 19) 369.
[25] Kischel (n 19) § 1 para 14; Jaakko Husa, 'About the Methodology of Comparative Law - Some Comments Concerning the Wonderland' (2008) MMP 5, 6ff <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085970> accessed 5 August 2025; Michaels (n 19) 364; for a foundational account of the traditional functional method, see Zweigert and Kötz (n 18) 31ff; on the problems of the functional method and its current and potential developments, see Julie De Coninck, 'The Functional Method of Comparative Law: Quo Vadis?' (2010) 74 RabelsZ 318–350; for specific methodological perspectives, see Wolfgang Faber, 'Functional method of comparative law and argumentation analysis in the field of transfers of movables: Can they contribute to each other?' (2013) 2 EPLJ 22-53.
[26] Ernst Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung' (1924) RheinZ 279-301, in Hans Leser (ed), *Gesammelte Aufsätze III: Arbeiten zur Rechtsvergleichung und zur Rechtsvereinheitlichung* (Mohr 1967) 4.
[27] Kischel (n19) § 1 para 15.
[28] Kischel (n 19) § 1 para 9; John Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617–636; Michaels (n 19) 367.

substantive solutions are provided for this specific set of facts in the legal systems under examination.[29] In this regard, caution is required when conducting a comparative legal analysis, as domestic standards must not be applied when examining foreign law.[30]

As a conclusion, functional comparative law can be divided into the following five steps, which this thesis will follow: First, a specific research question must be defined (see II. 2.). Based on that, the solutions offered by the various legal systems must be identified (see III.). Next, differences and similarities must be highlighted (see IV.). In the penultimate step, the differences and similarities between the respective solutions to the defined research question are explained (see IV.). Finally, the findings are critically evaluated (see V.).[31]

3.2 Criticism of the functional method

Given that comparative law lacks a uniform definition, it is not surprising that the functional method is often criticized, especially for neglecting actual comparison, pursuing harmonization, and the apparent necessity of a clear function for each norm.[32] In addition, the previously mentioned *praesumptio stimilitudinis* is subject to criticism to the extent that some authors argue that similarities should not be given preference over differences, but rather that a neutral position should be adopted in comparative law. Nevertheless, none of the alternative methods[33] has been able to establish itself thus far.

As a result, it is likely not possible to establish a universally applicable scheme for practice in comparative law. However, in the author's view, this is precisely where the strength of comparative law can be seen, since a successful comparative law study is not defined by the strict

[29] Otto Sandrock, *Über Sinn und Methode zivilistischer Rechtsvergleichung* (Metzner 1966) 66.
[30] Kischel (n 19) § 1 para 5.
[31] Faber (n 25) 25, referring to Husa (n 25) 425; for a foundational account of the individual steps, see Zweigert and Kötz (n 18) 12ff, 33ff and 43ff.
[32] Kischel (n 19) § 3 para 6ff.
[33] These include the theory of legal formants, economic analysis, statistical comparative law, and postmodern comparative law; see in this regard Kischel (n 19) § 3 para 31.

application of a scheme, but rather by new ideas and their in-depth argumentation and application, which can be seen in the course of a comparative law study.

3.3 Justification for the Comparative Analysis in this Thesis

As will be demonstrated in greater detail below, US case law since *Zacchini* has increasingly conceptualized the Right of Publicity as a property-based right, often described as a quasi IP right that is functionally analogous to copyright and patent law (see III.1.3). In contrast, the Right to One's Image is traditionally classified as a personality right (see III. 2.5). This distinction raises the question whether a comparative analysis between the two regimes is feasible or normatively justified. However, it must be noted that the Right of Publicity historically evolved from a personality right and therefore maintains a close doctrinal connection thereto (see III. 1.3.2). Moreover, both doctrines are regularly invoked in discussions concerning the legal protection against deepfakes. As will be shown below, from a functional perspective, both regimes fulfil the same and therefore comparable normative functions in the deepfake context, namely the protection against the unauthorized appropriation of an individual's identity. Deepfakes constitute a particular challenge, as they not only interfere with the private sphere of the individuals concerned but also involve the unauthorized use of personal identity. Consequently, both personality-based and economic interests are often affected simultaneously. Deepfakes, therefore, blur the traditional boundary between personality rights and property rights in a way we have never seen before. To provide a comprehensive overview and to situate these norms within their broader legal context, this thesis will additionally address related legal doctrines which, while not forming part of the core comparative analysis, serve to illustrate how the unauthorized use of an individual's external appearance through deepfakes is addressed under US and EU law. This leads to the following structure:

4. Structure of the Thesis

First, explanations of the technical background of deepfakes and, necessarily, of AI in general are provided so that, on this basis, a correct legal assessment can be made that covers all aspects (see II. 2.).

Turning to the legal framework, the analysis begins with an overview of the legal norms that may offer protection against the potential harms arising from the use of deepfakes. These include, on the EU side, the General Data Protection Regulation, the Digital Services Act, and the Artificial Intelligence Act (see III. 2.1 – 2.4), and, on the US side, Privacy Torts, the Copyright Act, the Federal Trade Commission Act, and the Lanham Act (see III. 1.1 – 1.2).[34] This is followed by the analysis of the Right of Publicity (see III. 1.3) and the right to one's own image (see III. 2.5). In this regard, possible legal justifications that may exist in this context will also be discussed (see III. 1.3.7 and 2.5.5).

With respect to the central concern of comparative law, the actual comparison of the solutions offered by the respective legal systems, the primary focus will be on the functional comparison of the differences and similarities, together with an explanation of the underlying reasons for those differences and similarities of the Right to One's Own Image and the Right of Publicity (see IV.). The key findings are then presented in Chapter V in response to Research Questions 1–3. Chapter VI provides a re-examination of a potential need for legislative action in the US and the EU. Chapter VII outlines possible avenues for future research. Finally, Chapter VIII contains the author's final remarks.

[34] As the focus of this paper is on a functional comparison of the Right of Publicity and the Right to One's Own Image, these provisions will not be discussed in detail.

II. The Rise of Deepfakes

For this comparative legal study, it is necessary to establish a uniform definition of deepfakes. Since no standardized definition exists, it is essential to understand the meaning of deepfakes in depth. Therefore, the following chapter provides explanations regarding the history and technical background to serve as a basis for such a definition:

1. The Origin of Deepfakes

From a technological perspective, deepfakes are not a recent phenomenon. The term itself derives from the combination of the terms deep learning and fake. Its popularity, however, originates from a Reddit user named Deepfake, who in 2017 created pornographic videos by inserting images of female celebrities.[35] While the label has persisted to this day, its use has since expanded and now refers more broadly to manipulated media, beyond the narrow context of pornographic content.[36] Given the wide range of applications, it is understandable that there are many definitions of the term deepfake; however, it is often described as video or audio recordings digitally modified using machine learning algorithms to depict events that never actually occurred.[37] One of the most recent attempts to define the term deepfake can be found in the EU Artificial Intelligence Act (AI Act).[38] In this regard, art 3(60) of the EU AI Act defines

[35] Shannon Reid, 'The Deepfake Dilemma: Reconciling Privacy and First Amendment Protections' (2021) 23 U Pa J Const L 209 <https://scholarship.law.upenn.edu/jcl/vol23/iss1/5> accessed 20 August 2025.
[36] Barber (n 4) 40; Ajder (n 8) 1.
[37] See the definition in Barber (n 4) fn 5: 'I here characterize deepfakes as audio or video recordings that have been digitally altered using machine learning algorithms to create misrepresentations of events that never took place' referring to Regina Rini and Leah Cohen, 'Deepfakes, Deep Harms' (2022) 22 JESP 143 <https://doi.org/10.26556/jesp.v22i2.1628> accessed 20 August 2025: 'Deepfakes are digitally altered audio or video recordings in which one person's face and/or voice are mapped onto the body of another person, creating misleading evidence of events that never took place'.
[38] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L1689.

the term ‘deep fake' as an 'AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful'.

With this in mind, it seems worthwhile to briefly discuss the nature of AI, particularly machine learning (ML), in order to get a better understanding of the term deepfake: In this context it needs to be emphasized that the field of AI is far too broad to be covered in this thesis, meaning that only the basic principles that contribute to the understanding of the comparative analysis will be outlined.

2. Deepfake Technology

2.1 Artificial Intelligence

The term artificial intelligence was first mentioned in 1955 in connection with a two-month research workshop at Dartmouth College in Hanover, New Hampshire (USA). During the workshop, McCarthy, who is considered one of the founding fathers of AI, came up with the following definition: ‘(…) artificial intelligence problem is taken to be that of making a machine behave in ways that would be called intelligent if a human were so behaving’.[39] Despite this early attempt to establish a definition, there is still no consensus on the meaning of the term artificial intelligence, and no uniform definition exists, which is why a wide variety of opinions are held. In this context, attempts are regularly made to define the term artificial intelligence by its two components, namely artificial and intelligence. In this regard, Gottfredson's definition of intelligence is often used:

[39] John McCarthy and others, ‘A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence’ (Dartmouth Summer Research Project Conference, Hanover, August 1995) <www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html> accessed 30 August 2025.

> Intelligence is a very general mental capability that, among other things, involves the ability to reason, plan, solve problems, think abstractly, comprehend complex ideas, learn quickly and learn from experience. It is not merely book learning, a narrow academic skill, or test-taking smarts. Rather, it reflects a broader and deeper capability for comprehending our surroundings – catching on, making sense of things, or figuring out what to do.[40]

Accordingly, one would then speak of AI when thinking processes, problem-solving, and decision-making processes are taken over by systems using AI methods.[41] According to Kaplan, the lack of a uniform definition stems from the aspirational connection between machine and human intelligence, which clouds our fundamental understanding of this technology. In this regard, Kaplan argues that if McCarthy had chosen a different term, such as 'symbolic processing' or 'analytic computing', many of the debates surrounding the concept of AI today, especially whether it will surpass humans, would be obsolete or would not have arisen at all.[42]

Some experts interpret the term artificial intelligence very narrowly and even reduce it to machine learning.[43] In general terms, machine learning is the systematic process of extracting information from a set of data.[44] More specifically, ML is a process in which computer systems use data to recognize specific patterns, analyze their environment, and make decisions or

[40] Linda Gottfredson, 'Mainstream Science on Intelligence: An Editorial with 52 Signatories, History, and Bibliography' (1997) 24 Intelligence 13.
[41] Sabine Seufert and Siegfried Handschuh, *Generative Künstliche Intelligenz: ChatGPT und Co für Bildung, Wirtschaft und Gesellschaft* (Schäfer-Poeschel 2024), referring to Richard Bellman, *An introduction to artificial intelligence: can computers think?* (Course Technology 1978) 3: 'With this term, we mean systems that perform (…) activities that we associate with human thinking, activities such as decision-making, problem solving, learning (…)'; European Commission, A Definition of AI: Main Capabilities and Disciplines: Definition developed for the purpose of the AI HLEG's deliverables (2019) 1 <www.aepd.es/sites/default/files/2019-12/aidefinition.pdf> accessed 30 August 2025, defining AI as follows: 'Artificial intelligence (AI) refers to systems that display intelligent behavior by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals'.
[42] Jerry Kaplan, *Artificial intelligence: what everyone needs to know* (OUP 2016) 16, arguing that it would have led to great confusion and controversy in the field of powered flight if airplanes had been referred to as artificial birds, which would have led to the philosophical question of whether airplanes can actually fly like birds or only imitate flying - this could be mirrored in the question of whether machines can really think or only imitate thinking.
[43] Daniel Schulz, *Informed Machine Learning* (Springer 2025) 2.
[44] Katharina Bata, *Maschinelles Lernen lernen: Entwicklung und Erforschung einer Lehr-Lernumgebung in den Ingenieurwissenschaften* (Springer 2025) 10, referring to Paul Wilmott, *Machine learning: an applied mathematics introduction* (Panda Ohana Publishing 2020).

predictions.[45] Within ML, three fundamental types are distinguished:[46] Supervised learning (training based on a large amount of labeled - classified - data, which forms the basis for a model that is capable of classifying new data or predicting continuous values),[47] Unsupervised learning (training based on large amounts of unclassified data, which creates a model that is capable of identifying structures, patterns, or groups, for example, through dimension reduction or clustering)[48] and Reinforcement learning (learning in which the AI system performs actions and receives rewards or punishments based on defined goals; through repetition, the system learns to optimize the desired actions).[49] During the training phase, which takes place on a graphics processing unit (GPU), ie, a processor capable of performing fast linear algebra calculations, a vast amount of data is used, in particular, freely available, unlabeled text corpora from public sources.[50]

Even though there is no uniform definition of the term artificial intelligence, at least so far, many people will feel the same way as US Supreme Court Justice Potter Stewart said about pornography: 'I know it when I see it'.[51]

2.2 Generative AI

At least since the emergence of ChatGPT in 2022, AI has been chiefly associated with generative AI (GenAI) in social debate.[52] GenAI functions on the basis of so-called foundation

[45] Maarten De Laat, Srecko Joksimovic and Dirk Ifenthaler, 'Artificial Intelligence, Real-Time Feedback and Workplace Learning Analytics to Support in Situ Complex Problem-Solving: A Commentary' (2020) 37 IJILT 267.
[46] Bert Heinrichs, Jan-Hendrik Heinrichs and Markus Rüther, *Künstliche Intelligenz, Grundthemen Philosophie* (De Gruyter 2022) 20f.
[47] ibid 20f.
[48] ibid 20f.
[49] ibid 20f.
[50] Radford and others, *Improving Language Understanding by Generative Pre-Training* (Open AI 2018) <https://cdn.openai.com/research-covers/language-unsupervised/language_understanding_paper.pdf> accessed 1 September 2025; Seufert (n 41) 35.
[51] *Jacobellis v Ohio* 378 US 184 (1964) (US Supreme court).
[52] Irene Solaiman and others, 'Release Strategies and the Social Impacts of Language Models' (*Open AI,* 2019) <https://arxiv.org/pdf/1908.09203> accessed 30 August 2025, discussing the disruptive social impact of GPT-2.

models.[53] A subcategory of foundation models are large language models (LLMs), which are based on the algorithm of sequentially predicting the next word (token) based on the preceding words and the given context.[54] To be precise, LLMs predict the probabilities of possible tokens in the following position for a preceding text.[55] Therefore, GenAI systems produce continuous texts based on given inputs, known as prompts,[56] whereby no answers to questions are generated through genuine understanding, but instead new texts are generated from previous answers to similar questions.[57] In this regard, it is important to emphasize that GenAI not only transforms existing information but also enables its recombination and use to generate genuinely new data.[58] In applications such as ChatGPT, basic models are further developed into fully fledged AI systems.[59] LLMs have meanwhile advanced to the point that it is now even possible to generate new texts, images, or music.[60] In this context, the recent progress in GenAI technologies and the emergence of modern GenAI tools for producing visual content (such as GPT-image-1,[61] Stable Diffusion[62] and Midjourney[63]), synthetic video (eg, OpenAI's Sora[64] and

[53] The most notable basic models are GPT-5 (OpenAI), LLaMa 4 (META) und Gemini 2.5 (Google).
[54] Seufert (n 41) 36.
[55] ibid.
[56] Tom Brown and others, 'Language Models Are Few-Shot Learners' (*Open AI,* 2020) 25 <https://arxiv.org/abs/2005.14165> accessed 1 September 2025; Weng Lim and others, 'Generative AI and the Future of Education: Ragnarök or Reformation? A Paradoxical Perspective from Management Educators' (2023) 21 IJME 100790, 2.
[57] Seufert (n 41) 34, explaining that in this regard it is necessary to represent the meaning of each word, which can be differentiated in the respective context, by a vector of decimal numbers, therefore an embedding.
[58] Maamar (n 4) 481-491; Seufert (n 41) 48.
[59] ibid 182.
[60] Shulei Ji, Xinyu Yang and Jing Luo, 'A Survey on Deep Learning for Symbolic Music Generation: Representations, Algorithms, Evaluations, and Challenges' (2024) 56 ACM Comput Surv 1.
[61] DALL-E 3 served as OpenAI's standard image- generation model until GPT-image-1surpreseded it on April 23, 2025, see 'Introducing our latest image generation model in the API' (*Open AI*, 23 April 2025) <https://openai.com/index/image-generation-api/?utm_source=chatgpt.com> accessed 15 September 2025.
[62] Stable Diffusion 3.5 was released on 22 October 2025, see 'Introducing Stable Diffusion 3.5' (*Stability.ai*, 22 October 2024) <https://stability.ai/news/introducing-stable-diffusion-3-5> accessed 16 September 2025.
[63] The latest version of Midjourney is Version 7, which was released on 3 April 2025, and became the default model on 17 June 2025, see 'Model Versions' (*Midjourney*, 17 June 2025) <https://docs.midjourney.com/hc/en-us/Arts/32199405667853-Version> accessed 17 September 2025.
[64] As of 30 September 2025, OpenAI released Sora 2 an upgraded version of the text-to-video model Sora, see 'Sora 2 is here' (*Open AI*, 30 September 2025) <https://openai.com/index/sora-2/> accessed January 4, 2026.

RunwayML[65]) or to generate sound, speech, and music (such as Suno[66] and Udio[67]) has made it increasingly simple to reproduce or fabricate a person's image, voice or likeness.[68] Text-to-image models, such as GPT-image-1, can generate digital images in response to a text prompt.[69] It is also possible to make changes to existing images or videos, such as replacing objects to modify the style.[70] This enables users to create digital images or videos without understanding the technology behind them, whereby the quality is now so good that the synthetic faces often cannot be distinguished from real ones.[71] This makes it possible for anyone to create deepfakes in just a few seconds.

However, a significant drawback of GenAI is that these systems are inherently designed to provide an answer to every query, which leads LLMs to guess rather than acknowledge a lack of knowledge - a phenomenon known as hallucination.[72] The occurrence of hallucinations is related to rewards during reinforcement learning, as LLMs, like students taking exams, tend to guess rather than give no answer at all.[73] Furthermore, LLMs do not embody the whole of human knowledge, but only the information that is actually represented in the underlying

[65] On 7 April 2025, RunawayML Turbo was released, which is the fastest and most efficient video model of RunawayML to this date, see 'New updates and improvements to Runaway' (*RunawayML*, 7 April 2025) <https://runwayml.com/changelog?utm_source=chatgpt.com> accessed 4 October 2025.
[66] The latest version of Suno is Suno v5, see 'Introducing v5' (*Suno*, October 2025) <https://help.suno.com/en/Arts/8105153> accessed 10 October 2025.
[67] 'Introducing v1.5' (Udio, 23 July 2024) <www.udio.com/blog/introducing-v1-5> accessed 10 October 2025.
[68] Murray (n 2) 4; Douglas Harris, 'Deepfakes: False Pornography Is Here and the Law Cannot Protect You' (2019) 17 DLTR 99-127, 128 <https://scholarship.law.duke.edu/dltr/vol17/iss1/4> accessed 22 September 2025, citing Kevin Roose, 'Here Come the Fake Videos, Too' NY Times (New York, 4 March 2018) <www.nytimes.com/2018/03/04/technology/fake-videos-deepfakes.html> accessed 20 October 2025, quoting that: 'Until recently, realistic computer-generated video was a laborious pursuit available only to big-budget Hollywood productions or cutting-edge researchers'.
[69] Seufert (n 41) 51.
[70] ibid 53.
[71] ibid 52.
[72] Long Ouyang and others, 'Training Language Models to Follow Instructions with Human Feedback' (*Open AI*, 4 March 2022) 1 <http://arxiv.org/abs/2203.02155> accessed 30 October 2025; Ross Taylor and others, 'Galactica: A Large Language Model for Science' (*Open AI*, 16 November 2022) 3 <https://arxiv.org/abs/2211.09085> accessed 2 November 2025.
[73] Adam Kalai and others, 'Why Language Models Hallucinate' (Open AI, 4 September 2025) <https://cdn.openai.com/pdf/d04913be-3f6f-4d2b-b283-ff432ef4aaa5/why-language-models-hallucinate.pdf> accessed 3 November 2025.

training data.[74] This can lead to incorrect answers if knowledge is lacking, or to stereotypical distortions if information is overrepresented in the training data.[75]

2.3 Meaning and Scope of Deepfakes in this Thesis

To summarize the preceding discussion, three central conclusions can be drawn for the purpose of this thesis:

Firstly, in absence of a uniform definition in the US, this thesis uses the definition of deepfakes given in art 3(60) of the AI Act, where deepfakes are defined as an AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful. This definition aligns with the technical background discussed above and is therefore suitable for the purpose of this thesis.

Secondly, technology has advanced to the point where text-to-image models now enable everyone to manipulate existing images, audio files, or videos, or generate new ones, meaning that nearly everyone with a computer can create deepfakes.

Thirdly, the field of AI is characterized by impressive momentum, which is why the description above can only be considered as a rough overview of the current status quo; it will undoubtedly continue to evolve rapidly in the coming years. Accordingly, further developments in the field of deepfakes are to be expected soon.

[74] Seufert (n 41) 182.
[75] ibid 182.

III. Legal Framework

Before discussing the legal frameworks within the US and the EU, three threshold obstacles should be noted in the context of deepfakes:

The first obstacle refers to the attribution of deepfakes to their creators. A civil law claim is of no use to the victim if the deepfake cannot be attributed to its creator. Careful distributors of deepfakes will usually make efforts to remain anonymous or use technologies such as Tor to ensure their IP addresses cannot be traced to the respective posts.[76] In these cases, victims have no way of taking legal action against the creators or distributors of deepfakes. The second obstacle concerns cases in which the deepfake creators are located in a third country or jurisdiction where legal action is difficult to enforce. Even if the deepfake can be traced back to its creator, legal action does not appear to be effective, especially given the costs of enforcing the claim.[77] Thirdly, filing a lawsuit could also exacerbate the situation, especially in the case of a defamatory deepfake, as court proceedings attract public attention, which could worsen the damage to the victim (Streisand Effect).[78]

Regardless of the applicability of the Right of Publicity or the Right to One's Own Image, the question remains whether either legal regime can offer effective solutions, or whether the law leaves us entirely unprotected against the potential risks posed by deepfakes.

[76] Danielle Citron, *Hate Crimes in Cyberspace* (HUP 2014) 117.
[77] ibid 122.
[78] Bobby Chesney and Danielle Citron, 'Deep Fakes: A Looming Challenge for Privacy' (2019) 107 BTLJ 1753, 1793 <http://dx.doi.org/10.2139/ssrn.3213954> accessed 21 September 2025; Michael Masnick, 'Since When Is It Illegal to Just Mention a Trademark Online?' (*TECHDIRT*, 5 January 2005) <www.techdirt.com/2005/01/05/since-when-is-it-illegal-to-just-mention-a-trademark-online/> accessed 20 September 2025.

1. USA

In the US, some legal scholars consider the right of publicity as a potential legal safeguard against the 'Deepfake Armageddon', especially in the entertainment industry.[79] The reason for this is that traditional tort doctrines and IP law are often not applicable in the context of deepfakes:[80]

1.1 Deepfakes and US Tort Law

1.1.1 Privacy Torts

In most US states, the right to privacy is recognized either under common law or by statute. It is usually divided into four main torts: public disclosure of private facts, intrusion upon seclusion, false light, and appropriation of name or likeness.[81]

The first privacy tort to be examined is the public disclosure of private facts, which enables individuals to recover for private, non-newsworthy information disclosed to the public in a manner that would be 'highly offensive to a reasonable person'.[82] However, in the context of deepfakes, there is no disclosure of private information if the source image used for the

[79] Preminger and Kugler (n 4).
[80] Huijuan Peng and Pey-Woan Lee, 'Reimagining U.S. Tort Law for Deepfake Harms: Comparative Insights from China and Singapore' (2025) 18 JTL 579 < https://doi.org/10.1515/jtl-2025-0028> accessed 21 September 2025; Mark Lemley, 'How Generative AI Turns Copyright Law on its Head' (2023) 25 STLR 21, 44 http://dx.doi.org/10.2139/ssrn.4517702> accessed 20 September 2025, arguing that in the context of copyright, the 'basic doctrines' do not fit GenAI and we will struggle to apply the law to comport with the new realities and therefor it may suggest that copyright itself is a poor fit for the new world of AI-generated works.
[81] William Prosser, 'Privacy' (1960) 48 Cal L Rev 383, 389; Zahra Takhshid, 'Retrievable Images on Social Media Platforms: A Call for a New Privacy Tort' (2020) 68 Buff L Rev 139, 151 <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss1/3> accessed 22 September 2025; Danielle Citron, 'Mainstreaming Privacy Torts' (2010) 98 Cal L Rev 1805 <https://ssrn.com/abstract=1582949> accessed 22 September 2025, citing John Goldberg, *Torts: The Oxford Introductions to US Law* (OUP 2010); Harris (n 68) 128; Moncarol Wang, 'Don't Believe Your Eyes: Fighting Deepfaked Nonconsensual Pornography with Tort Law' (2022) U CHI L F 415 < https://chicagounbound.uchicago.edu/uclf/vol2022/iss1/16> accessed 22 September 2025, arguing that tort law still provides more effective civil remedies for nonconsensual deepfake pornography than existing criminal statutes.
[82] Chesney and Citron (n 78) 1794; Daniel Solove and Paul Schwartz, *Privacy law fundamentals* (IAPP 2011) 47; Restatement (Second) of torts § 652D (Am. L. Inst. 1997).

deepfake is publicly available.[83] Furthermore, deepfakes are not considered facts because they are made up, so they cannot be regarded as private facts anyway.[84]

The privacy tort of intrusion upon seclusion requires an intentional intrusion, 'physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns' in a manner that would be 'highly offensive to a reasonable person'.[85] In the case of deepfakes created from publicly accessible data, however, no such intrusion takes place.[86]

The false light tort imposes liability for publicizing information that portrays individuals in a misleading manner that 'would be highly offensive to a reasonable person', if done knowingly or with reckless disregard as to the falsity of the publicized matter and the false light in which the person is placed.[87] Based on this, a false light claim may succeed when deepfakes portray individuals in offensive or fabricated contexts.[88] However, two key challenges arise in this context. First, courts frequently demand evidence of 'actual malice',[89] which is difficult to establish, given that deepfake creators typically operate anonymously. Second, courts are generally reluctant to recognize false light liability when the content is unlikely to be understood by a reasonable viewer as an actual statement of fact.[90] Accordingly, deepfakes that are clearly labeled as such may not be covered by the false light tort. [91] Furthermore, courts will balance the plaintiff's privacy right against the First Amendment protection of fictitious work,[92] and

[83] Chesney and Citron (n 78) 1794; Solove and Schwartz (n 82) 42-49; Danielle Citron, 'Sexual Privacy' (2019) 128 YLJ 1870 < https://ssrn.com/abstract=3233805> accessed 23 September 2025.
[84] Kugler and Pace (n 4) 628; Peng and Lee (n 80) 584.
[85] Restatement (Second) of Torts § 652B (Am Inst 1977).
[86] Kugler and Pace (n 4) 628; Chesney and Citron (n 78) 1795; Peng and Lee (n 80) 7.
[87] Restatement (Second) of Torts § 652E (Am L Inst 1977).
[88] Peng and Lee (n 80) 584, citing John Goldberg and Benjamin Zipursky, 'A Tort for the Digital Age: False Light Invasion of Privacy Reconsidered' (2024) 73 DePaul L Rev 461, 462 < http://dx.doi.org/10.2139/ssrn.4591188> accessed 1 October 2025: 'If false light has been waiting for its day, that day - our deepfake era - is now'.
[89] *Time Inc v Hill* 385 U.S. 374, 387–91 (1967).
[90] Peng and Lee (n 80) 582-83.
[91] ibid.
[92] Harris (n 68) 113, referring to *Hicks v Casablanca Records Inc* 464 F. Supp. 426, 432 (S.D.N.Y. 1978): 'Thus, the Court of Appeals in Spahn balanced the plaintiff's privacy rights against the first amendment protection of fictionalization Qua falsification and, after finding there to be no such protection, held for the plaintiff'.

the objective 'highly offensive' criterion restricts the tort's applicability to other instances of unauthorized digital replicas, such as depictions that are merely inaccurate.[93]

Under Restatement (Second) of Torts § 652C (Am Inst 1977), a person is liable for the unauthorized use of another's name or likeness for their own benefit.[94] Although a person's image and name are usually protected under the appropriation tort, the human voice often lacks recognition as a protected interest, making it harder to bring claims against AI-generated voice imitations.[95] Over time, the tort has shifted from protecting personal dignity to serving commercial purposes, creating uncertainty about its scope of protection. Furthermore, some jurisdictions restrict protection to famous individuals.[96] Therefore, deepfakes created to harass, deceive, or target private individuals without public recognition often fall outside the scope of protection.[97]

1.1.2 Defamation

Victims of deepfakes may have more success with defamation claims, especially if it is unclear that the videos are fake: US defamation law requires publication of a false and defamatory statement without privilege or fault, and resulting reputational harm.[98] Therefore, liability could arise if a deepfake depicts a person committing a crime or engaging in sexual conduct.[99] However, the more legally challenging cases involve deepfakes that are explicitly labelled as fake.[100] In *Milkovich v Lorain Journal Co.,* the court ruled that Plaintiffs cannot support a claim

[93] *De Havilland v FX Networks LLC* 230 Cal.Rptr.3d 625, 630, 644 (Cal. Ct. App. 2018).
[94] Restatement (Second) of Torts § 652C (Am Inst 1977).
[95] Peng and Lee (n 80) 7, citing US Copyright Office (n 5) 23.
[96] ibid.
[97] Peng and Lee (n 80) 7; Takhshid (n 81) 157.
[98] Restatement (Second) of Torts §§ 558−59 (Am L Inst 1977).
[99] Kugler and Pace (n 4) 629; Russel Spivak, 'Deepfakes: The Newest Way to Commit One of the Oldest Crimes' (2019) 3 Geo L Tech Rev 339, 368-77 < https://georgetownlawtechreview.org/deepfakes-the-newest-way-to-commit-one-of-the-oldest-crimes/GLTR-05-2019/> accessed 5 October 2025.
[100] Peng and Lee (n 80) 5.

based on a statement that cannot reasonably be interpreted as implying a false fact.[101] Despite being highly convincing, deepfakes may not amount to actionable factual assertions, since courts determine liability based on whether a reasonable viewer would perceive the content as a statement of fact.[102] Furthermore, public-figure plaintiffs have to prove 'actual malice', which limits liability significantly.[103]

1.2 US Federal Law

Under US federal law, the following relevant legal frameworks exist to restrict the creation and use of deepfakes:

1.2.1 Copyright Act

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[104] In this regard, copyright owners have exclusive rights to protect their copyright, including the right to reproduce the copyrighted work, to prepare derivative works based upon the copyrighted work, or to distribute copies of the copyrighted work to the public.[105] Deepfakes created from copies of existing copyrighted works or by modifying them may infringe those exclusive rights, thereby entitling the copyright owner to bring an infringement claim.[106] However, copyright does not protect a person's

[101] *Milkovich v Lorain Journal Co* 497 U.S. 1 (1990).
[102] Peng and Lee (n 82) 583.
[103] *New York Times Co v Sullivan* 376 U.S. 254 (1964), establishing a constitutional standard which prohibits: 'a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not'.
[104] Copyright Act 1976, 17 USC § 102.
[105] Copyright Act 1976, 17 USC § 106.
[106] US Copyright Office (n 5) 17; Chesney and Citron (n 78) 1793 1777 referring to Derek Bambauer, 'Exposed' (2025) 98 Minn L Rev 2025, 2065-67 </www.minnesotalawreview.org/wp-content/uploads/2014/06/Bambauer_MLR.pdf> accessed 10 October 2025, discussing the removal of infringing content.

identity, so unless a deepfake reproduces or alters copyrighted material, it generally does not constitute copyright infringement.[107] Furthermore, the prospects for a successful claim remain uncertain, as courts must determine whether a deepfake qualifies as fair use, a fact-specific assessment of whether the work is sufficiently transformative for educational, artistic, or other expressive purposes, for which no clear judicial precedent yet exists.[108]

1.2.2 Federal Trade Commission Act

Under the Federal Trade Commission Act, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are prohibited.[109] According to the Federal Trade Commission (FTC), deepfakes

> (…) may also constitute an unfair method of competition or an unfair or deceptive practice, especially when the copyright violation deceives consumers, exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers.[110]

However, a review of current FTC activity indicates limited scope for action.[111] While most deepfakes will not qualify as advertising, some may fall under the FTC's authority to prevent fraudulent advertising related to food, drugs, devices, services, or cosmetics.[112]

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[107] US Copyright Office (n 5) 17 referring to *Downing v Abercrombie & Fitch* 265 F.3d 994, 1004 (9th Cir. 2001): 'A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C. § 102'; *Midler v Ford Motor Co* 849 F.2d 460, 462 (9th Cir. 1988): 'A voice is not copyrightable (…) The sounds are not "fixed" (…) What is put forward as protectible here is more personal than any work of authorship'; Thomas McCarthy and Roger Schechter, The Rights of Publicity and Privacy (2d edn, Reuters 2024) para 5:41: 'While a recorded aspect of these features, such as a facial photograph or a video, is subject to protection under federal copyright law, the human identity that they identify is not protected by copyright'.

[108] Chesney and Citron (n 78) 1796.

[109] Lanham (Trademark) Act 1946, 15 USC § 45(a) 1; Federal Trade Commission, 'Comment in Response to US Copyright Office's Notice of Inquiry on Copyright and Artificial Intelligence 2023' (FTC, 30 October 2023) 5-6 <www.ftc.gov/system/files/ftc_gov/pdf/p241200_ftc_comment_to_copyright_office.pdf> accessed 10 October 2025: 'the FTC is empowered under Section 5 of the FTC Act to protect the public against unfair methods of competition, including when powerful firms unfairly use AI technologies in a manner that tends to harm competitive conditions'.

[110] ibid.

[111] Chesney and Citron (n 78) 1805.

[112] Lanham (Trademark) Act 1946, 15 USC § 52(a)(1)-(2).

Satirical or parodic deepfakes generally lack intent to deceive. However, where a deepfake misleads consumers or falsely implies endorsement, the FTC or state attorneys general may intervene, particularly if no identifiable private plaintiff exists.[113]

1.2.3 Lanham Act

The Lanham Act, the primary federal trademark law, governs specific forms of unfair competition by prohibiting deceptive or misleading uses of trademarks as well as other acts involving fraud or deception in commerce.[114] In this regard, section 43(a) of the Lanham Act provides a cause of action against the use in commerce of any false or misleading designation, description, or representation of fact that is likely to cause confusion or deception regarding the affiliation, origin, sponsorship, or qualities of goods or services. However, trademark infringement and false endorsement claims require commercial use and a likelihood of consumer confusion, mistake, or deceit, which many individuals will find difficult to prove.[115]

1.2.4 Communications Decency Act

Although section 230 of the Communications Decency Act[116] does not provide a remedy against deepfakes, it must be mentioned. Section 230 of the Communications Decency Act is frequently lauded as 'the most important law protecting internet speech'.[117] The Act has a significant negative impact on efforts to stop deepfakes, as it shields online platforms from liability for content posted by third parties. Online platforms hosting such content generally benefit

[113] Chesney and Citron (n 78) 1805; Congress passed the TAKE IT DOWN Act, criminalizing the nonconsensual publication of intimate images, including 'digital forgeries' (ie deepfakes). The President signed the bill into law on May 19, 2025, and while the criminal provisions took effect immediately, covered platforms have until May 2026 to implement the required notice-and-removal mechanism. It remains to be seen how effectively this law will take hold in practice.
[114] Lanham (Trademark) Act 1946, 15 USC § 1127.
[115] US Copyright Office (n 5) 20.
[116] Communications Decency Act 47 USC § 230.
[117] James Grimmelmann, 'Section 230 as First Amendment Rule' (2018) 131 Harv L Rev 2027 <https://harvard-lawreview.org/wp-content/uploads/2018/05/2027-2048_Online.pdf> accessed 15 October 2025.

from broad immunity under section 230 of the Communications Decency Act. Pursuant to section 230(c)(1), online service providers are not liable for content created by third parties, subject only to narrow statutory exceptions. This significantly complicates enforcement, as platforms are largely shielded from liability.

1.3 Right of publicity

As the above explanations illustrate, tort law offers little protection against deepfakes unless they claim to be accurate illustrations of facts. Consequently, deepfakes that are clearly labeled as a fake are largely immune to the main privacy torts and typically do not meet the criteria for defamation. Moreover, although several federal statutes restrict the creation or use of digital replicas in specific contexts, no federal law directly governs the unauthorized use of an individual's image, likeness, or voice, leaving existing frameworks ill-suited to address deepfakes comprehensively. With this background, the question arises whether the Right of Publicity offers more protection against deepfakes.[118]

1.3.1 Unmasking the Right of Publicity

As a starting point, it must be noted that the US does not recognize a federal Right of Publicity. Moreover, the right of publicity is not provided for in the US Constitution. Rather, it is a state

[118] Spivak (n 99) 383: 'What may instead prove to be the most direct source of redress is a cause of action alleging a violation of the victim's right of publicity (…)'; Alexandra Curren, 'Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity' 102 TEX L REV 155, 164 < https://texaslawreview.org/digital-replicas-harm-caused-by-actors-digital-twins-and-hope-provided-by-the-right-of-publicity/> accessed 30 October 2025, emphasizing that the Right of Publicity can protect actors from abuse of digital replicas; Nancy Menagh, 'When the Screen Lies: Navigating Privacy and Publicity in an AI World' (2025) 94 Fordham L Rev 337, 374 < https://ir.lawnet.fordham.edu/flr/vol94/iss1/8> accessed 30 October 2025, arguing that a federal right of publicity is necessary to address emerging issues in the context of deepfakes.

law, arising either through common law or state legislature, resulting in a non-uniform legal landscape.[119]

Since the right of publicity varies significantly across jurisdictions, developing a uniform definition remains challenging. However, right of publicity claims across jurisdictions tend to follow a similar structural logic: at their core, these actions require the unauthorized appropriation of an individual's identity, its commercial exploitation, and a resulting injury.[120] In this context, across jurisdictions, the element 'name or likeness' is interpreted to cover any type of indicia of identity expansively, encompassing any distinctive indicia that can identify the individual, including attributes such as voice or characteristic personal style, as long as it is distinctive.[121] 'Likeness' does not have to be a literal depiction of an individual; it suffices that the representation enables the person to be identified.[122] Courts have likewise adopted an expansive view of what constitutes 'commercial advantage' or use 'for advertising or trade', treating such appropriations as encompassing any deployment intended to capture the audience's attention.[123]

However, further critical divergences arise among the states regarding who is entitled to assert the right, whether post-mortem rights are recognized, and the scope of applicable exceptions and affirmative defenses,[124] which is why the legal framework in California and New York will be briefly discussed:

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[119] Jennifer Rothman, *The right of publicity: privacy reimagined for a public world* (HUP 2018) 3, emphasizing that (nevertheless), the right of publicity is described as a 'right' because of a sentiment that everybody is entitled to exercise some degree of control over how our identity is used by others.
[120] Preminger and Kugler (n 4) 794.
[121] *Abdul-Jabbar v G.M. Motors* 85 F.3d 407, 414 (9th Cir. 1996); *White v Samsung Electronics America Inc* 971 F.2d 1395, 1397 (9th Cir. 1992); *Waits v Frito-Lay Inc* 978 F.2d 1093, 1103–04 (9th Cir. 1992).
[122] *White* (n 121) 1399; *Abdul-Jabbar* (n 121) 415–16.
[123] *Abdul-Jabbar* (n 121) 415–16.
[124] Preminger and Kugler (n 4) 795, noting that Arizona and Louisiana only recognize right of publicity claims for soldiers.

1.3.1.1 California

California, for example, recognizes the right of publicity under common law and state statute.[125] Under Californian common law, a plaintiff must demonstrate: '(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury'.[126] Claims under statutory law, which apply to both living and deceased individuals as well as to celebrities and non-celebrities, impose the further requirements of 'knowing use' regarding the identity of the plaintiff in 'direct connection' with a 'commercial purpose'.[127]

1.3.1.2 New York

New York only recognizes statutory right of publicity claims: Under section 50 of the New York Civil Rights law, it is a misdemeanor to use the 'name, portrait, picture, likeness, or voice of a living person' for commercial purposes without prior written consent.[128] Section 51 establishes an analogous private right of action[129] and applies to both celebrities and non-celebrities.[130] Statutory exceptions exist for television and audio works, literary works, parody, and satire.[131] The more recent section 50f extends post-mortem rights to certain 'deceased performers' who 'regularly engaged in acting, singing, dancing, or playing a musical instrument' and 'deceased personalities' whose 'name, voice, signature, photograph, or likeness has

[125] Cal Civ Code § 3344 (West 2024).
[126] Inter alia, *White* (n 121).
[127] *Abdul-Jabbar* (n 121) 414; Cal Civ Code § 3344 (West 2024); Cal Civ Code § 3344.1: 'For purposes of this section, acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section'.
[128] NY Civ Rights L § 50 (McKinney 2023).
[129] NY Civ Rights L § 51 (McKinney 2023).
[130] *Stephano v News Grp Publ'ns* 64 N.Y.2d 174, 182 (1984): 'Section 51 of the Civil Rights Law has been applied in cases, such as the *Roberson* case, where the picture of a person who has apparently never sought publicity has been used without his or her consent for trade or advertising purposes'.
[131] NY Civ Rights L § 50-f(2)(d)(ii) (McKinney 2023).

commercial value at the time of his or her death' if they were domiciled in New York at the time of their death.[132]

1.3.2 From Flour to Baseball Cards: From Privacy to Publicity

From a historical perspective, the Right of Publicity originated from the right to privacy,[133] which was initially introduced as a theory by Warren and Brandeis in a law review.[134] The right to privacy was later refined into four categories of torts identified by Prosser, as already discussed in section 1.1 of this thesis. The contemporary Right of Publicity evolved from Prosser's appropriation tort.[135] Although it was initially unclear whether the right to privacy encompassed a Right of Publicity or whether the two should be distinguished:

It was the technological advancements - particularly the reduction in printing costs and the emergence of photography and yellow journalism in the late 1800s - that called for legal change. This societal shift was addressed in *Roberson v Rochester Folding Box*,[136] where the New York Court of Appeals refused to recognize a right of privacy that would have protected Abigail Roberson against a flour company that used her image in lithographic advertisements without her consent.[137] On the heels of public outrage over the *Roberson* decision, the state of New York enacted a statute to prevent the unauthorized use of the name, portrait, or picture of any person for the purposes of trade.[138] A few years later, in *Pavesich v New England Life*

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[132] NY Civ Rights L § 50-f (McKinney 2023).
[133] Daniel Gervais and Martin Holmes, 'Fame, Property & Identity: The Purpose and Scope of the Right of Publicity' (2014) 25 Fordham Intell Prop Media & Ent LJ 181, 186 <https://ir.lawnet.fordham.edu/iplj/vol25/iss1/4> accessed 1 November 2025; Rothmann (n 119) 11, explaining that in the first place, privacy was about the right to control publicity in cases where one's image or name is used by others in public, and therefore the right to privacy 'was and remains the original right of publicity'.
[134] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1980) 4 Harv L Rev 193 <https://doi.org/10.2307/1321160> accessed 1 November 2025.
[135] Gervais and Holmes (n 133) 186.
[136] Before, the Appellate Division affirmed the trial Court's view that every 'woman has a right to keep her face concealed from the observation of the public. Her face is her own private property' that "no man can take from her' without her consent.
[137] *Roberson v Rochester Folding Box Co* 64 N.E. 442 (N.Y. 1902).
[138] Prosser (n 81) 385: 'asserting that the majority opinion in *Roberson* created 'a storm of public disapproval (...) In consequence, the next New York legislature enacted a statute making it both a misdemeanor and a tort to make

Insurance,[139] the Supreme Court of Georgia faced the same legal question and held that a right of privacy is derived from natural law, recognized by municipal law, and is embraced within the absolute rights of personal security and personal liberty. Subsequently, a California Appellate court held in *Melvin v Reid* that an individual could invoke a right of privacy against the producers of a film portraying her past as a prostitute.[140] In further consequence, the right to privacy was increasingly accepted across the US by the 1905s. However, a significant problem remained: The right to privacy allowed recovery for emotional distress, as well as for economic and reputational harms; nevertheless, it fails to take the commercial interests of an individual[141] into account, as the right of privacy was non-transferable and therefore could neither be sold to others nor inherited. In this context, the decision *Haelan Laboratories v Topps Chewing Gum*[142] is of particular importance.[143] In this decision, Judge Frank noted that 'in addition to and independent of that right of privacy (…) a man has a right in the publicity value of his photograph (…) this right might be called a "right of publicity" (…)'.[144] Beyond confirming

use of the name, portrait, or picture of any person for 'advertising purposes or for the purposes of trade' without his written consent'.

[139] *Pavesich v New England Life Ins* 50 S.E 68 (Ga. 1905), Justice Andrew J Cobb noted that 'One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. One may wish to live a life of toil where his work is of a nature that keeps him constantly before the public gaze; while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty'.

[140] *Melvin v Reid* 297 P. 91 (Cal. Dist. Ct. App. 1931).

[141] David Westfall and David Landau, 'Publicity Rights As Moral Rights' (2005) 23 Cardozo Arts & Ent LJ 71, 94 <https://ir.law.fsu.edu/articles/560> accessed 2 November 2025, noting that: '(P)ublicity rights may have stemmed from privacy rights, but they are clearly also independent of those rights—the right question to ask is not simply which aspects of plaintiff's identity are most personal, but rather which aspects have value to an advertiser based on appropriating the celebrity's image. Publicity rights, according to most Courts and commentators, seem to be based at least as much o on pecuniary value as on human dignity concerns'.

[142] *Haelan Laboratories Inc v Topps Chewing Gum Inc* 202 F.2d 866 (2d Cir. 1953).

[143] Rothman (n 119) 50, noting that this case had by far the most influence on the development of the right of publicity but 'it also is a case that has been profoundly misunderstood' because 'the suggestion by the Second Circuit - that absent a right of publicity the players would not have been able to prevent Topps's (or Haelan's) use of their names and likenesses if such uses had been without permission' would be 'unquestionably wrong' because this would be something that New York law already provided, so the right of publicity would not be necessary for the decision.

[144] *Haelan Labs* (n 143) 868-69.

the existence of a Right of Publicity as such, the distinctive innovation introduced by the *Haelan* court's Right of Publicity was its potential transferability.[145]

1.3.3 A Cannonball Flight to the US Supreme Court

Following *Haelan*, the recognition of a transferable Right of Publicity opened new commercial opportunities, particularly for the estates of well-known public figures. Precisely during this period, the Right of Publicity came under the scrutiny of the US Supreme Court in 1977 in *Zacchini v Scripps-Howard Broadcasting Co*,[146] which remains the first and, to date, the only US Supreme Court decision addressing this right.

Hugo Zacchini was widely recognized for his distinctive human cannonball act, in which he would catapult himself around 200 feet through the air before landing in a net. During a performance at the Geauga County Fair in Burton, Ohio, a reporter from Scripps-Howard Broadcasting attended the event. Although Zacchini explicitly requested that his act not be filmed, a 15-second excerpt of his performance was subsequently broadcast on the local evening news. Following the broadcast, Zacchini filed a lawsuit seeking $ 25,000 in damages. While the trial court dismissed his claim, the Ohio Court of Appeals reversed that decision.[147] The Supreme Court of Ohio held that the act itself was not subject to copyright protection but recognized Prosser's tort of appropriation of name and likeness - an element of the right of privacy under Ohio law, sometimes referred to as the 'Right of Publicity'.[148] Consequently, the court reasoned that Zacchini possessed the 'right to the publicity value of his performance', and the appropriation of that right over his objection without license or privilege is an invasion of his

[145] Rothman (n 119) 64.
[146] *Zacchini v Scripps-Howard Broad* 433 U.S. 562 (1977).
[147] *Zacchini v Scripps-Howard Broad* No 33713, 1975 WL 182619 (Ohio Ct App, 10 July 1975).
[148] *Zacchini v Scripps-Howard Broad* 351 N.E. 2d 454 (Ohio 1976).

privacy.[149] However, the Ohio Supreme Court ultimately concluded that the broadcast was constitutionally protected speech as a matter of legitimate public interest.

Zacchini then petitioned for review in the US Supreme Court. The court emphasized that the case concerned the Right of Publicity - defined (quoting the Ohio Supreme Court) as an individual's right to control the 'commercial display and exploitation of his personality and the exercise of his talents'.[150] Whereas the Ohio Court had situated this right within the broader doctrine of privacy, the US Supreme Court characterized it as a distinct category of intellectual property law, safeguarding interests fundamentally different from those protected by privacy rights:

> (…) the State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment (…) As we later note, the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation.[151]

During oral arguments, Zacchini's attorney, John Lancione, underscored this distinction, asserting that 'the right of privacy is the right to have those matters kept away from the public which the public has no right to know about', whereas 'the right of publicity is almost the opposite. An entertainer wants to be in front of the public, he wants to be publicized and advertised'. The US Supreme Court acknowledged that the rationale behind recognizing such a right was to create an incentive mechanism - encouraging the production of 'entertainment' in a way 'analogous to the goals of patent and copyright law'.[152] The court remanded the case for

[149] *Zacchini* US 562 (n 146) para 577.
[150] ibid, para 569.
[151] ibid, para 571.
[152] ibid, paras 573, 576.

further proceedings, but the parties ultimately settled on the second day of trial, leaving the factual issues unresolved.[153]

1.3.4 Can't Help Falling in Law

The US Supreme Court's decision in *Zacchini v Scripps-Howard Broadcasting Co* solidified the Right of Publicity's position within the US law, establishing it as a powerful legal doctrine: a strong, new, quasi-IP right that is functionally analogous to copyright and patent law and is capable of prevailing even over First Amendment protections, including in contexts involving news reporting.[154] This view has been subject to criticism. In particular, some scholars argue that the most convincing justifications for the Right of Publicity are trademark-based and that trademark law, unlike the Right of Publicity, has developed a more coherent and structured set of rules to serve these purposes.[155]

However, *Zacchini* still did not address one issue: As mentioned above, *Haelan* suggested that an independent, potentially assignable right exists in a person's name and likeness. This raised the question of whether the Right of Publicity should descend upon death, as other property rights do. The first notable post-mortem case, which took place before *Zacchini*, involved Bela Lugosi Jr, the son of the actor Bela Lugosi, who died in 1956. Lugosi Jr filed a complaint challenging Universal Pictures' licensing of his father's likeness for use in Dracula-related merchandise, including shirts, cards, games, costumes, and masks.[156] The court relied on *Haelan* to support the Conclusion that the Right of Publicity constitutes a form of property right. Therefore, Lugosi's entitlement to control the commercial use of his name and likeness could pass

[153] This thesis follows the understanding adopted in *Zacchini v Scripps-Howard Broadcasting Co*, according to which the Right of Publicity is conceived as a property right, often described as a quasi IP right that is functionally analogous to copyright and patent law. For reasons of clarity, the terms 'property right' and 'quasi IP right' are used interchangeably in the following analysis.
[154] Rothman (n 119) 76.
[155] Stacey Dogan and Mark Lemley, What the Right of Publicity Can Learn from Trademark Law' (2006) 58 Stan L Rev 1161, 1190 < https://ssrn.com/abstract=862965> accessed 5 November 2025.
[156] *Lugosi v Universal Pictures* 172 U.S.P.Q. (Cal. Super. Ct. 1972).

to his heirs. Although the trial court's holding was ultimately reversed, the recognition of a post-mortem Right of Publicity encouraged other courts to permit similar claims. In response to the decision, California enacted legislation establishing a post-mortem Right of Publicity and explicitly distinguishing it from the right of privacy.[157]

Only a few months after *Zacchini*, one of the most significant events in the history of the Right of Publicity occurred: the death of Elvis Presley, the King of Rock 'n' Roll, on August 16, 1977. Following Presley's death, lawsuits were filed nationwide seeking to prevent the unauthorized sale of in-memoriam merchandise, such as T-shirts and posters. In 1980, a federal court in New York, relying on *Lugosi*, held that revenues from in-memoriam merchandise should go to Presley's heirs and their licensees rather than to unrelated souvenir makers.[158] This holding was affirmed by the Second Circuit of Appeals, emphasizing that the Right of Publicity survives death and drawing on *Zacchini's* analogy to patent and copyright law to prevent a 'windfall in the form of profits from the use of Presley's name and likeness'.[159] By contrast, in Tennessee, the Sixth Circuit ruled in 1981 that post-mortem rights depend on the decedent's domicile at the time of death. Because Presley died in Tennessee and there was no post-mortem right under Tennessee law, his Right of Publicity did not survive death.[160] Tennessee - like California - subsequently enacted legislation to provide post-mortem publicity rights, and in 1984, enacted a statutory Right of Publicity explicitly including post-mortem rights.[161]

Based on this historical overview of the development of the Right of Publicity, the question arises: to what extent can this doctrine provide protection against deepfakes?

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[157] Act of Sept. 30, 1984, ch. 1704, 1984 Cal. Stat. 6169 (codified at Cal Civ Code § 990) (amended and renumbered as Cal Civ Code § 3344.1).
[158] *Factors Etc Inc v Creative Card Co* 444 F. Supp. 279 (S.D.N.Y. 1977).
[159] *Factors Etc Inc v Pro Arts Inc* 579 F.2d 215 (2d Cir. 1978).
[160] *Memphis Development Foundation v Factors Etc Inc* 616 F.2d 956 (6th Cir. 1980).
[161] Personal Rights Protection Act of 1984, ch. 945, § 1, 1984 Tenn Pub Acts 950 (codified at Tenn Code Ann §§ 47-25-1101).

1.3.5 Deepfakes as Unauthorized Uses of Likeness

As already mentioned above, courts have adopted an expansive conception of what qualifies as a use of likeness. In *Motschenbacher*, the court held that the appropriation of a racecar driver's identity was established through the use of his signature vehicle, even though neither his face nor his name appeared in the advertisement.[162] Likewise, in the landmark *Midler v Ford* decision, liability was imposed where an advertiser hired a vocalist to imitate Bette Midler's unmistakable voice for a commercial.[163] In this regard, Computer Generated Imagery (CGI) plays a central role. In *Hart v Electronic Arts,* the court determined that CGI depictions in video games constitute uses of likeness when developers create digital avatars that mirror real individuals.[164] In substance, the analysis turns on the issue of identifiability. The required degree of similarity may vary depending on the precision of the non-literal depiction and the notoriety of the person involved, as attributes of well-known figures tend to be recognized more readily.[165]

With this background, a strong case can be made that deepfakes meet the likeness-appropriation requirement.[166] This is more than reasonable because AI enables the production of hyper-realistic digital replicas that surpass prior capabilities.

1.3.6 Commercial Exploitation of Deepfakes

Liability under the Right of Publicity is not given by any use of a person's likeness. Most statutes, such as section 3344 of the Cal Civ Code and section 50 of the NY Civ Rights L, limit claims to the commercial exploitation of a name or likeness. In this area, however, state law

[162] *Motschenbacher v RJ Reynolds Tobacco Co* 498 F.2d 821, 824 (9th Cir. 1974).
[163] *Midler* (n 107).
[164] Preminger and Kugler (n 4) 799, underscoring that protection can extend even to so called 'skins' which are 'cosmetic add-ons that customize the look of game characters'.
[165] *White* (n 121) 1399.
[166] Preminger and Kugler (n 4) 800, pointing out that because of the possibility to create perfect commercial substitutes and the therefore existing threat for reputational damage, deepfakes have to be considered as a distinguished form of likeness unlike any other law has yet addressed.

differs insignificantly. Unlike most jurisdictions that restrict the right to commercial contexts, California's common law extends to noncommercial uses as well. Liability may arise where the defendant appropriates another's identity 'for the defendant's advantage, commercially or otherwise' and the phrase 'or otherwise' permits claims even when no monetary benefit is involved.[167] In this regard, a California court imposed liability for incorporating a well-known song into an advertisement supporting Senator John McCain, finding that the use advanced the candidate's political interests despite its noncommercial nature.[168] However, when considering the commercial exploitation of deepfakes, the given context must be considered:

1.3.6.1 Product Advertising

The appropriation of likenesses in product advertising falls squarely within the core conduct targeted by the Right of Publicity.[169] Absent the individual's consent, a deepfake that promotes goods or services may be actionable under Right of Publicity law.[170] In this context, it should be noted that courts treat such advertising uses as those bearing 'not the slightest semblance of an expression of an idea, a thought, or an opinion', but instead serve no purpose other than to advertise another unrelated product merely.[171]

1.3.6.2 Deepfakes on Social Media Platforms

More challenging are cases where deepfakes are used for noncommercial purposes, especially when posted on social media platforms by private users: Although platforms such as TikTok and YouTube operate as commercial enterprises generating substantial advertising revenue, the

[167] *Comedy III Prods v Saderup* 21 P.3d 797 (Cal. 2001); *Eastwood v Superior Court* 149 Cal. App. 3d 409 (1983); *White* (n 121).
[168] *Browne v McCain* 611 F. Supp. 2d 1062 (2009).
[169] Preminger and Kugler (n 4) 804, drawing a distinction between appropriation used in advertising, and appropriation in other contexts.
[170] Chesney and Citron (n 78) 1794.
[171] *Toffoloni v LFP Publishing Group LLC* 572 F.3d 1201, 1208, 1212 (11th Cir. 2009).

mere presence of user-generated content on these sites does not automatically render it commercial.[172] While courts have not yet definitively ruled on this issue under the Right of Publicity, prevailing decisions suggest that a content's use must involve some reference to a commercial transaction to be deemed actionable.[173] A different approach may apply in California, where, pursuant to section 3344 of the Cal Civ Code, the phrase 'or otherwise' permits claims even in the absence of any monetary benefit.

1.3.6.3 Selling Deepfakes as a Product

A further category of deepfake use arises where the deepfake does not serve promotional purposes but constitutes the product itself. In this regard, courts have consistently treated the sale of goods incorporating a person's identity as commercial exploitation. In *Comedy III*, for example, the court held that T-shirts bearing an original illustration of the Three Stooges constituted a violation of the plaintiff's Right of Publicity under California law; even though the T-shirts cannot be seen as advertising, they were 'made as products to be sold' and therefore met the commercial element.[174]

In this context, deepfakes can similarly embed a celebrity's likeness into consumer products, for example, in educational tools that show historical figures.[175] Furthermore, deepfakes can be used to imitate celebrities in all kinds of products, like parties, training, communications, or other purposes.[176] Although educational uses may fall within the fair-use exception in copyright law, it seems that no analogous exemption exists under the Right of Publicity.[177] In

[172] *Yurish v Sinclair Broadcast Group Inc* 866 S.E.2d 156, 168 (W. Va. 2021).
[173] Preminger and Kugler (n 4) 806 citing *ADB Interest LLC v Wallace* 606 S.W.3d 413, 422–28 (2020); *Yurish* (n 172) para 167; *Ariix LLC v NutriSearch Corporation* 985 F.3d 1107, 1115 (2021).
[174] *Comedy III,* (n 167) para 808.
[175] Jessica Ice, 'Defamatory Political Deepfakes and the First Amendment' (2019) 70 Case W Res L Rev 417, 428 <https://scholarlycommons.law.case.edu/caselrev/vol70/iss2/12> accessed 5 November 2025.
[176] Preminger and Kugler (n 4) 808.
[177] ibid 794.

conclusion, the commercial sale of deepfakes is highly likely to trigger liability under both statutory and common-law right-of-publicity frameworks.

1.3.7 Balancing Deepfakes with the First Amendment

The Right of Publicity is not absolute. From its inception, it has been in tension with the First Amendment, which protects the constitutional freedom of speech.[178] The First Amendment establishes that 'Congress shall make no law (…) abridging the freedom of speech'.[179] Therefore, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'.[180] Courts, however, have struggled to articulate a coherent standard for determining when the enforcement of Right of Publicity laws unconstitutionally restricts speech.

As already mentioned, in *Zacchini*, the Supreme Court declined to recognize a First Amendment defense where a news station broadcast the performer's entire performance, holding that such use fell outside constitutional protection. This holding triggered a substantial expansion of Right of Publicity claims, and the decision was subsequently invoked to support the broad proposition that there is no First Amendment protection with respect to the appropriation of another's name or likeness for commercial purposes.[181] Even though some courts continue to invoke *Zacchini*, [182] this interpretation has quickly proven to be too broad, as *Zacchini*

[178] Rothman (n 119) 138.
[179] US Constitution Frist Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.
[180] *Ashcroft v Am Civ Liberties Union* 535 U.S. 564, 573 (2002) referring to *Boulger v Youngs Drug Prods Corp* 463 U.S. 60, 65 (1983).
[181] Rothman (n 119) 143–54; Jennifer Rothman, 'The Right of Publicity's Intellectual Property Turn' (2019) 42 JLA 277 <https://scholarship.law.upenn.edu/faculty_scholarship/2377> accessed 6 November 2025; Robert Post and Jennifer Rothman, 'The First Amendment and the Right(s) of Publicity' (2020) 130 YLJ 86, 126 <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3379&context=faculty_scholarship> accessed 10 November 2025 citing *Fitzgerald v Penthouse International Ltd* 525 F. Supp 585, 601 n.79 (D. Md. 1981), *Doe v TCI Cablevision* 110 S.W.3d 363, 372–74 (Mo. 2003), *Carson v Here's Johnny Portable Toilets Inc* 698 F.2d 831, 834 (6th Cir. 1983) and *National Bank of Commerce v Shaklee Corp* 503 F. Supp 533, 540 (W.D. Tex. 1980).
[182] Post and Rothman (n 181) 33 referring to *Doe* (n 177) 372–74 (First Amendment defense was rejected concerning comic books); *Comedy III (n 167)* 799, 808 (First Amendment defense was rejected concerning lithograph

involved the broadcast of an entire performance; consequently, the First Amendment considerations from that case do not readily extend to other contexts, particularly those implicating commercial value or personal dignity.[183] Therefore, the judicial landscape has been widely criticized, provoking what one commentator has aptly described as a 'dumpster fire'.[184]

In response to these tensions, numerous statutes include explicit carveouts for categories of speech likely to involve expressive activity, including news reporting, sports coverage, political campaigns, commentary, and satire.[185] California, for instance, allows the unauthorized use of a person's voice or likeness 'in connection with any news, public affairs, or sports broadcast or account, or any political campaign'.[186] Other state statutes omit such safeguards entirely, leaving the First Amendment conflict to judicial interpretation.[187]

The resulting landscape extends far beyond a mere circuit split: Courts employ divergent constitutional frameworks, leaving speakers with little guidance when they may lawfully use the name or likeness of individuals in video games, digital media, or even news content. [188] The jurisprudence has produced significant inconsistency and doctrinal uncertainty, creating, as Rothman describes, a 'mess'.[189] Nevertheless, two approaches should be noted:

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sold in multiple copies and on T-Shirts); *NCAA Student-Athlete Name & Likeness Licensing Litigation* 724 F.3d 1268, 1284 n.1 (9th Cir. 2013) (Judge Thomas J dissenting, noting that according to *Zacchini* the right of publicity is an 'economic right to use the value of one's own celebrity', thus it requires a different approach for First Amendment analysis than Lanham Act claims that generally hinge on the likelihood of consumer confusion); *Toffoloni* (n 167) 1207, holding that *Zacchini* establishes that 'when a media outlet appropriates "some aspect" of an individual "that would have market value and for which he would normally pay," without that individual's permission, the media outlet is subject to damages in a tort suit for violation of the right of publicity'; *Bosley v Wildwett.com* 310 F. Supp.2d 914, 925–26 (N.D. Ohio 2004): 'The Supreme Court [in *Zacchini*] indicated that the right to publicity was constitutional and did comport with the First Amendment'.

[183] Post/Rothman (n 181) 93f, identifying four distinct interests that the right of publicity generally seeks to vindicate: the right of performance, the right of commercial value, the right of control, and the right of dignity.

[184] William McGeveran, 'Selfmarks' (2018) 56 Hous L Rev 333, 362 <https://ssrn.com/abstract=3305255> accessed 11 November 2025.

[185] Cal Civ Code § 3344 (West 2024); Arkansas Code Annotated § 4-75-1110 (2024); NY Civ Rights L § 50-f(2)(d) (McKinney 2024); Louisiana Statues Annotated § 51:470.5 (2024); Nevada Revised Statues § 597.790 (2023).

[186] Cal Civ Code § 3344(d) (West 2024).

[187] Ohio Revised Code Annotated § 2741.09(A)(1)(a) (West 2024).

[188] Post and Rothman (n 181) 91; Rothman (n 119) 145–48; Roberta Kwall, 'A Perspective on Human Dignity' (2009) 50 BCL Rev 1345, 1356–57 <https://ssrn.com/abstract=1410372> accessed 15 November 2025.

[189] Rothman (n 119) 138.

1.3.7.1 Expressive-Use

Some jurisdictions employ a speech-protective standard commonly termed the relatedness test developed in *Rogers v Grimaldi,*[190] where the court held that the use of Ginger Roger's name in the film Ginger and Fred was relevant to the movie's content and did not amount to a disguised advertisement for anything other than the film itself, thus no Right of Publicity claim could be pursued. Thus, under this approach, the use of an individual's identity in an expressive work is constitutionally protected unless the work is 'wholly unrelated to the individual' or the use amounts to a 'disguised advertisement for the sale of goods or services or a collateral commercial product'.[191] Some courts impose liability under this standard if the use is 'solely to attract attention to a work'.[192] Versions of this test have been adopted by the Second, Fifth, and (occasionally) the Sixth Circuits, as well as by courts in Kentucky and New York, either as a state-law limitation on Right of Publicity claims or as an independent First Amendment test.[193]

Deepfakes can constitute political expression or social commentary and thus qualify as protected speech under the relatedness and transformative-work tests, as discussed below.[194] In this regard, some deepfakes - such as the one referenced in the introduction depicting a fabricated conversation between President Donald Trump and former President Joe Biden - provide

[190] The relatedness test is frequently labeled the Rogers test due to its development in *Rogers v Grimaldi*. However, this relatedness/Rogers test must be distinguished from the widely applied Rogers test governing First Amendment defenses to false-endorsement and trademark claims under the Lanham Act. Both standards originate in the *Rogers v Grimaldi* decision, where the Court held that liability under the Lanham Act cannot attach '[w]here a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work'. While this Lanham Act–based Rogers test is broadly deployed in trademark litigation, Courts have been far more reluctant to extend it to right-of-publicity claims. This divergence is evident in the Ninth Circuit's treatment of the *Brown v Elec Arts Inc* 724 F.3d 1235, 1245 (9th Cir. 2013) and *Davis v Elec Arts Inc* 775 F.3d 1172 (9th Cir. 2015) decision, which involved the same video game but reached opposite conclusions regarding the applicability of the Rogers analysis.

[191] *Rogers v Grimaldi* 875 F.2d 994, 1004–05 (2d Cir. 1989).

[192] *Parks v LaFace Records* 329 F.3d 437, 461 (6th Cir. 2003), referring to Restatement (Third) of Unfair Competition § 47.

[193] ibid 460–61; *Matthews v Wozencraft* 15 F.3d 432, 440 (5th Cir. 1994); *Romantics v Activision Publ'g* 574 F. Supp. 2d 758, 765–766 (E.D. Mich. 2008); *Montgomery v Montgomery* 60 S.W.3d 524, 528–530 (Ky. 2001); *Frosch v Grosset & Dunlap Inc* 427 N.Y.S.2d 828, 829 (App. Div. 1980); Post and Rothman (n 181) 130, noting that the Third Restatement of Unfair Competition has adopted this approach 'as a limit on the scope of the right of publicity tort, rather than as an independent defense'; Restatement (Third) of Unfair Competition § 47 (Am L Inst 1995).

[194] Preminger and Kugler (n 4) 814.

a potent form of social commentary, given the extensive public visibility and media attention surrounding such videos.[195] By contrast, uses within the entertainment industry raise more complex questions, particularly when a public figure operates across multiple public roles: for example, whether one may deepfake a television actor into a series, insert a real individual as a cameo, digitally replace an actor, fabricate a presidential address, or depict a person starring in a biographical film about their own life.[196]

1.3.7.2 Transformative-Use

A further approach is the transformative-work test, developed by the California Supreme Court in *Comedy III* and derived from copyright's fair use doctrine. This test asks whether a work 'adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation'.[197]

Some courts, particularly the Third and Ninth Circuits, have adopted an (unacknowledged),[198] narrower, identity-focused version: Rather than assessing whether the work is transformative, these courts examine whether the plaintiff's identity has been transformed. Under this approach, First Amendment protection requires that the defendant 'distort' or 'transmogrif(y)' the specific identity 'for purposes of lampoon, parody, or caricature', thus the use must be 'more of a fanciful, creative character, rather than an imitative character'.[199]

As already mentioned above, jurisdictions applying the transformative-use framework treat video games as inherently expressive works fully covered by the First Amendment, provided the use of the identity is sufficiently transformative.[200] Although not a traditional medium, video games are recognized alongside books, plays, and movies because they

[195] ibid.
[196] ibid, arguing that the Screen Actors Guild is struggling to tackle these questions.
[197] *Comedy III* (n 167) 799.
[198] Rothman (n 119) 146.
[199] *Hilton v Hallmark* 599 F.3d 894, 910–11 (9th Cir. 2010).
[200] *Brown v Entm't Merchs Ass'n* 131 S. Ct. 2729, 2733 (2011).

communicate ideas and social messages.[201] The same logic extends to deepfakes:[202] the more an individual, particularly a public figure, is repositioned into a different role, the more transformative the resulting work. However, in longer-form entertainment, nonconsensual deepfakes will frequently implicate the Right of Publicity. For example, inserting a president into a fabricated presidential address to lend authenticity to a Science Fiction movie may neither be considered as social commentary nor as transformative; presidents routinely deliver addresses.[203] Likewise, deploying deepfakes to insert or replace an actor within a film typically triggers Right of Publicity concerns, as it creates a directly competing product analogous to the unauthorized use at issue in the *OMG Girlz* litigation.[204]

2. European Union

The European Union has, in line with its often-criticized reputation in scholarship and public discourse,[205] also acted in the field of AI, and, alongside the AI Act, has adopted several other regulations intended to address the potential dangers of deepfakes:

[201] *Zacchini* (n 146) 576.
[202] Preminger and Kugler (n 4) 816, citing *Kirby v Sega of America Inc* 50 Cal.Rptr.3d 607, 144 Cal.App.4th 47 (Cal. App. 2006), arguing that while a Deepfake showing a Trum v Obama Fortnite battle may may not deliver a particularly sophisticated social message, it nonetheless conveys an idea - namely, how the radically different public personas of two former Presidents might be expressed within a virtual gaming environment. In line with the jurisprudence on video games, 'the pivotal issue is whether the work is transformative'.
[203] ibid 818.
[204] *MGA Ent Inc v OMG Girlz LLC* No. 2:20-cv-11548-JVS(AGRx), 2022 WL 4596697 (C.D. Cal. Sept. 29, 2022).
[205] Thomas Weck, 'EU Competitiveness at a Crossroads: Why the Draghi Report Falls Short, and the EU Treaties Offer a Solution, European Network for Economic and Fiscal Policy Research' (2024) 25 EconPol 26, 29 <www.ifo.de/DocDL/econpol-forum-2024-6-weck-eu-regulation.pdf> accessed 20 November 2025, arguing, that in the context of Overregulation the 'EU will have to choose: Does it want to create "European Champions" (like von der Leyen does) to keep up with the US and China in competition at global scale, or does it chiefly want to focus on the development of its internal market?'.

2.1 Artificial Intelligence Act

With the Artificial Intelligence Act (AI Act), the European legislator has established the world's first comprehensive framework for regulating AI, likely aiming to achieve a 'Brussels Effect'.[206] The AI Act's legal text itself, comprising 113 articles and 180 recitals, is extensive, complex, and at times even contradictory, particularly in relation to other European legislation, such as the GDPR.[207] The AI Act also contains provisions concerning deepfakes, and - as noted above in Section II.2.3 – art 3(60) establishes a legal definition: 'AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful'. Under art 50(2) AI Act, providers[208] of AI systems that generate synthetic audio, image, video, or text content shall ensure that the outputs of the AI system are labelled in a machine-readable format and are detectable as artificially generated or manipulated. This obligation shall not apply to the extent that the AI systems perform an assistive function for standard editing or do not substantially alter the input data provided by the deployer or the semantics thereof, or where authorized by law to detect, prevent, investigate, or prosecute criminal offences.

[206] Lukas Feiler and Nikolaus Forgó, *KI-VO: EU-Verordnung über Künstliche Intelligenz: Kommentar* (Verlag Österreich 2024), Preface.

[207] ibid; on the AI Act, scholarly commentary has sometimes been sharply critical, see Marco Barenkamp, 'Der AI Act: Historische Chance wegbürokratisiert?' (2024) 16 Wirtsch Inform Manag 87–93 < https://doi.org/10.1365/s35764-024-00520-7> accessed 1 December 2025, posing the question of whether the AI-Act has 'bureaucratized away' a historic opportunity or paves the way to develop high-quality AI solutions with a unique selling point, which could then be sold as "AI Made in Germany"'; Claudio Novelli and others, 'Taking AI risks seriously: a new assessment model for the AI Act' (2024) 39 AI & Society 2493–97 <https://doi.org/10.1007/s00146-023-01723-z> accessed 1 December 2025, arguing that, as the risk categories statically depend on broad fields of application of AI, the risk magnitude may be wrongly estimated and, therefore, the AI Act may not be enforced effectively - consequently, the AI Act should apply the risk categories to specific AI scenarios rather than solely to fields of application; Menagh (n 118) 373, emphasizing that the AI Act imposes a heavy compliance burden, which is why smaller companies may be forced to abandon projects requiring regulation or even may be deterred from entering the EU market entirely.

[208] Art 3(3) AI Act: 'provider means a natural or legal person, public authority, agency or other body that develops an AI system or a general-purpose AI model or that has an AI system or a general-purpose AI model developed and places it on the market or puts the AI system into service under its own name or trademark, whether for payment or free of charge'.

Furthermore, pursuant to art 50(4) AI Act, deployers[209] of an AI system that generates or manipulates image, audio, or video content constituting a deepfake shall disclose that the content has been artificially generated or manipulated.[210] However, this obligation shall not apply where the use is authorized by law to detect, prevent, investigate, or prosecute a criminal offence. Where the content forms part of an evidently artistic, creative, satirical, fictional, or analogous work, the transparency obligations are limited to disclosure of the existence of such generated or manipulated content in an 'appropriate manner that does not hamper the display or enjoyment' of the work.[211] As a result, the regulation of deepfakes under the AI Act is narrowly targeted, since it imposes transparency obligations only on providers and deployers of AI systems, and one of the main use cases - dissemination of deepfakes by private individuals on social platforms - is not adequately addressed by art 50(4).[212]

[209] Art 3(4) AI Act: 'deployer means a natural or legal person, public authority, agency or other body using an AI system under its authority except where the AI system is used in the course of a personal non-professional activity'.

[210] Regarding the form of disclosure, recital 133 of the AI Act explicitly mentions watermarks, metadata identification, cryptographic methods for proving the provenance and authenticity of content, logging methods, and fingerprints.

[211] Recital 134 AI Act: '(…) deep fakes, should also clearly and distinguishably disclose that the content has been artificially created or manipulated by labelling the AI output accordingly and disclosing its artificial origin. Compliance with this transparency obligation should not be interpreted as indicating that the use of the AI system or its output impedes the right to freedom of expression and the right to freedom of the arts and sciences guaranteed in the Charter, in particular where the content is part of an evidently creative, satirical, artistic, fictional or analogous work or programme, subject to appropriate safeguards for the rights and freedoms of third parties'.

[212] In literature, a broad prohibition of deepfakes with only limited exceptions has also been advocated: Dimitrios Linardatos, 'Auf dem Weg zu einer europäischen KI-Verordnung - ein (kritischer) Blick auf den aktuellen Kommissionsentwurf' (2022) 19 GPR 58, 69 <www.degruyterbrill.com/document/doi/10.9785/gpr-2022-190204/html?lang=de&srsltid=AfmBOooqNKHHLpyPx-pR4AgGI5hYtIzW3osnisULYYzEhbORKxi03vIe> accessed 5 December 2025, arguing that the correct approach would be to treat deepfakes as prohibited AI practice, allowing them only under narrowly defined exceptions - such as for artistic purposes; Bart Van Der Sloot and Yvette Wagensveld, 'Deepfakes: regulatory challenges for the synthetic society' (2022) 46 Computer Law & Security Review 105716, 13 <https://doi.org/10.1016/j.clsr.2022.105716> accessed 7 December 2025: 'The main problem regarding deepfakes is an enforcement problem. Therefore, in the context of deepfakes, consideration could be given to ex ante regulation, either by prohibiting the production, offering, use or possession of deepfake technology for the consumer market or by introducing a mandatory ex ante legitimacy test, which should be carried out before any material is published and/or distributed by citizens'; Mateusz Łabuz, 'Regulating Deep Fakes in the Artificial Intelligence Act' (2023) 2 ACIG 253, 277 <www.acigjournal.com/pdf-184302-105060?filename=Regulating-Deep-Fakes-in-.pdf> accessed 7 December 2025: 'Disclosure rules give the illusory belief that revealing the false nature of content (if it gets done at all) will lead to the elimination of the negative effects of creating and disseminating deep fakes. It will not. The problem with deep porn or discrediting materials is the non-consensual use of someone else's image and the psychological and reputational harm it creates (…)'.

2.2 General Data Protection Regulation

The General Data Protection Regulation (GDPR)[213] may also be relevant in the context of deepfakes. This is the case where images, videos, or audio recordings of an 'identified or identifiable natural person' ('data subject') are used within the meaning of art 4(1) GDPR ('personal data'). According to art 6(1) GDPR, the processing of personal data is lawful only if one of the conditions set out therein applies, in particular: the data subject has given consent (art 6(1)(a) GDPR), the processing is necessary for the performance of a contract (art 6(1)(b) GDPR), or it is necessary for the purposes of legitimate interests pursued by the controller or a third party (art 6(1)(f) GDPR).[214] Pursuant to art 17(1)(d) GDPR, individuals affected by deepfakes may have the right to obtain the erasure of their personal data from the controller where the data have been unlawfully processed ('right to be forgotten').[215] In addition, a compensation claim may arise under art 82 GDPR. In cases involving satirical or parodic deepfakes, the controller may invoke the right to freedom of expression and information under art 17(3)(a) GDPR as a limitation to the right to erasure. In addition, a derogation may apply under art 85 GDPR.[216] The potential respondent to such claims would be the data controller within the meaning of art 4(7) GDPR, that is, the natural or legal person who determines the purposes and means of processing personal data.[217] In this regard, the deepfake creator can be regarded as a controller under art 24 GDPR, and therefore may be seen as the addressee of claims. [218] On an ad-funded

[213] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[214] Kumkar and Rapp (n 1) 199, pointing out that an audio or video recording made with consent may not automatically be used to create a deepfake, since consent under the GDPR is always limited to the specific purpose for which it was given.
[215] Block (n 4) citing Lantwin (n 4) 574.
[216] Art 85 GDPR requires Member States to reconcile, by law, the right to the protection of personal data under this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and for academic, artistic, or literary expression.
[217] Tobias Hinderks, Die Kennzeichnungspflicht von Deepfakes, ZUM 2022, 110, emphasizes that the provider of software for creating deepfakes does not qualify as a controller within the meaning of Art 24 GDPR, as they lack a direct interest in the production of any specific deepfake.
[218] Block (n 4) 21, citing Lantwin (n 4) 574 and Hinderks (n 17) 110.

platform, the platform operator and the user uploading deepfakes may also be considered 'joint controllers' under art 26 GDPR; however, the platform cannot be held directly liable if it was unaware of the infringement or acted promptly once informed.[219]

2.3 Digital Services Act

The Digital Services Act (DSA)[220] aims to provide the conditions for innovative digital services to emerge and scale up within the internal market.[221] The scope of the DSA extends, among others, to 'intermediary services' and 'hosting services', and therefore in particular also to online platforms (such as Instagram, Facebook, etc), as defined in art 3(g) and (i) DSA. Pursuant to art 34(1) DSA, providers of very large online platforms (VLOPs) and very large online search engines (VLOSEs) shall diligently identify, analyze, and assess any systemic risks. In the context of deepfakes,[222] art 35(1)(k) DSA provides protection by obliging VLOPs and VLOSEs to implement reasonable, proportionate, and effective mitigation measures, including making 'prominent markings' on deepfakes.[223] However, due to the lack of jurisprudence, it remains unclear how the labeling of deepfakes pursuant to art 35(1)(k) should be implemented in practice. Apart from that, the notice and action mechanism is crucial, as it obliges online platforms to remove or restrict access to illegal content upon receiving a 'sufficiently precise

[219] Kumkar and Rapp (n 1) 215 - 16.
[220] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.
[221] DSA Recital 4: 'in order to safeguard and improve the functioning of the internal market, a targeted set of uniform, effective and proportionate mandatory rules should be established at Union level. This Regulation provides the conditions for innovative digital services to emerge and to scale up in the internal market'.
[222] Art 35(1)(k) DSA, unlike art 50 AI Act, does not explicitly refer to deepfakes. However, when comparing the exact wording of these provisions, it becomes evident that they cover essentially the same situations in substance, although the DSA is formulated somewhat more narrowly, as it only applies to content that 'resembles existing persons, objects, places or other entities or events and falsely appears to a person to be authentic or truthful'.
[223] Art 35(1)(k) DSA: '(…) ensuring that an item of information, whether it constitutes a generated or manipulated image, audio or video that appreciably resembles existing persons, objects, places or other entities or events and falsely appears to a person to be authentic or truthful is distinguishable through prominent markings when presented on their online interfaces, and, in addition, providing an easy to use functionality which enables recipients of the service to indicate such information'.

and adequately substantiated notice'.[224] Following a review by the platforms, the unlawful content must then be removed.[225]

As a result, the DSA contains several regulatory measures; however, it does not provide genuine protection against deepfakes, as its provisions primarily focus on platform obligations rather than on the rights of affected individuals. In addition, the absence of jurisprudence makes it difficult to determine whether all types of deepfakes (for instance, those used in advertising) qualify as a systemic risk within the meaning of art 34 DSA.

2.4 Directive on Copyright in the Digital Single Market

Article 17 of the Directive on Copyright in the Digital Single Market (DSM)[226] is also of significance in the context of deepfakes, since online content-sharing service providers (OCSSPs), as defined in art 2(6) DSM, may now be held directly liable for copyright-infringing content uploaded by their users.[227] Therefore, OCSSPs shall obtain an authorization from the rightsholders, for instance by concluding a licensing agreement.[228] If no authorization is granted, OCSSPs must demonstrate that they have made the best possible efforts to obtain authorization of the copyright-protected works and that they have made best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event

[224] Art. 16 DSA; In this regard, art 16 DSA, in conjunction with art 50 AI Act, could gain particular importance, as unlabeled deepfakes might be regarded as 'illegal content' within the meaning of art 3(h) DSA: 'information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law', and therefore could be subject to removal obligations; however, a different view is taken by Lennart Laude and Andreas Daum, 'KI als neues Wahlkampfinstrument' (*Verfassungsblog*, 3 May 2024) <https://verfassungsblog.de/ki-als-neues-wahlkampfinstrument/> accessed 15 December 2025, arguing that Recital 136 AI Act explicitly provides that the lack of labelling shall be 'without prejudice' to the assessment of the lawfulness of content.
[225] Werner Schroeder and Leonard Reider, 'Der rechtliche Kampf gegen Hass im Netz - Nationale Spielräume unter dem DSA' ÖJZ 2024/71, 465.
[226] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] L130/92.
[227] Felix Daum, 'Verantwortlichkeit von Online-Portalen nach Art 17 DSM-RL (Teil I)' MuR 2019, 229 para 6.
[228] ibid.

acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to restrict access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads.[229] As a result, art 17 DSM, while not directly tailored to deepfakes, provides an indirect protection mechanism, as many deepfakes involve the unauthorized digital reproduction of copyrighted works.

2.5 Art 7 CFR: The Right to One's Own Image

This chapter first examines the historical background as well as the key elements of art 7 CFR 'Respect for private and family life',[230] which encompasses the right to one's own image. This is followed by a quick overview of some domestic legal frameworks. Building on this foundation, the analysis then turns to the specific implications for deepfakes:

2.5.1 If it ain't broke, don't fix it

With the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union (CFR) acquired the status of primary law and has since been binding as an integral part thereof.[231] This follows from art 6(1) Treaty on European Union (TEU),[232] which establishes that the Charter and the Treaties enjoy equal legal status and obliges the Union to respect the rights, freedoms, and principles enshrined therein.[233]

The CFR contains a provision guaranteeing respect for private and family life: Pursuant to art 7 CFR '(e)veryone (…) has the right to respect for his or her private and family life, home

[229] Case C-401/19 *Poland v Parliament and Council* [2022] EU:C:2022:297, para 34.
[230] Charter of Fundamental Rights of the European Union [adopted 7 December 2000, entered into force 1 December 2009] OJ C364/01.
[231] Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010] ECR I-11063, para 45.
[232] Consolidated version of the Treaty on European Union [2012] OJ C326/01.
[233] Walter Obwexer, 'Die Rechtsstellung Einzelner in der Union nach Inkrafttreten des Vertrags von Lissabon' ÖJZ 2010/13, 101-104.

and communications'. The drafting of art 7 CFR deliberately mirrors art 8 ECHR,[234] an alignment that was uncontested from the outset.[235] Only certain detail questions were debated, including whether to incorporate explicit references to the protection of honor, dignity, or anonymous internet access.[236] These proposals were ultimately rejected, as the envisaged interests were, in any event, already encompassed by one of the protected interests recognized under art 8 ECHR according to the case law of the ECtHR.[237] However, one deviation from art 8 ECHR was adopted: instead of the term 'correspondence', the Charter employs 'communications' to reflect technological developments and to ensure coverage of new forms of communication, such as the internet.[238]

In conclusion, art 7 CFR constitutes one of the rights that, pursuant to art 52(3) CFR, corresponds to a right guaranteed under the ECHR.[239] Accordingly, art 7 CFR generally carries the same normative meaning as art 8 ECHR.[240] For that reason, the following analysis will revert to the jurisprudential developments under art 8 ECHR where appropriate.

2.5.2 Dimension of Art 7 CFR

Article 7 CFR and art 8 ECHR are designed to protect individuals against arbitrary interference by national authorities and, in the case of the Charter, by Union institutions, bodies, offices,

[234] European Convention of Human Rights (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5, art 8: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.
[235] Laura Pavlidis, 'Art 7 GRC: Achtung des Privat und Familienlebens' in Michael Holoubek and Georg Lienbacher (eds), *GRC-Kommentar* (2nd edn, Manz 2019) para 1.
[236] Stefan Barriga, *Die Entstehung der Charta der Grundrechte der Europäischen Union* (Nomos 2003) 81.
[237] Norbert Bernsdorff and Martin Borowsky, *Die Charta der Grundrechte der Europäischen Union: Handreichungen und Sitzungsprotokolle* (Nomos 2002) 154 ff and 284f.
[238] Barriga (n 236) 82; Hans Jarass, 'Art 7: Achtung des Privat- und Familienlebens' in Hans Jarass (ed), *Charta der Grundrechte der Europäischen Union* (4th edn, CH Beck, 2021); Dennis Jennsen, *Datenschuldrecht: Die Einwilligung als Instrument der kommerziellen (Bild-)Datenverarbeitung* (Springer 2022).
[239] Explanations relating to the Charter of Fundamental Rights OJ C 303/20: 'The rights guaranteed in Art 7 correspond to those guaranteed by Art 8 of the ECHR. To take account of developments in technology the word "correspondence" has been replaced by "communications". In accordance with Art 52(3), the meaning and scope of this right are the same as those of the corresponding Art of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Art 8 of the ECHR'.
[240] Jarass (n 238) para 1.

and agencies with the right to respect for private and family life, home, and communications.[241] Viewed through the lens of effective fundamental rights protection, 'effective respect' requires Member States not only to abstain from interference (negative obligations) but also to assume positive obligations, including duties of protection and regulatory action with indirect horizontal effect.[242] The scope of both positive and negative obligations is case-specific.[243] Nevertheless, the Convention framework does not mandate criminal-law protection of physical integrity in every case.[244]

2.5.3 Domestic Legal Frameworks

Before turning to the relevant case law, a preliminary overview of the domestic legal frameworks in Germany, France, and Austria is provided. This is done because the subsequent jurisprudence frequently draws on these national provisions, and it also serves to illustrate how the respective legal systems have responded to the concept of positive obligations:

2.5.3.1 Germany

In Germany, arts 1(1) and 1(2) of the Basic Law for the Federal Republic Germany (*Grundgesetz für die Bundesrepublik Deutschland*) establish a comprehensive general personality right

[241] Pavlidis (n 235) para 5.
[242] ibid para 13, noting that art 8 ECHR, together with arts 2 and 11 of the Convention, was among the first provisions from which legal doctrine and case law developed duties of protection and guarantee. It is now generally recognized that art 8 ECHR does not only protect individuals against disproportionate interference by Contracting States, but also creates positive obligations, which may require regulatory or protective measures that, through indirect horizontal effect, affect relations between private parties, referring to EuGH 27. 6. 2006, C-540/03, Case C-540/03 *Parliament v Council* [2006] ECR I-5769, para 54.
[243] *Abdulaziz, Cabales and Balkandali v the United Kingdom* App no 9214/80; 9473/81; 9474/81 (ECtHR, 28 May 1985), para 67, holding that States enjoy a wide margin of appreciation in matters concerning the admission of family members of immigrants when assessing the measures required to fulfil their positive obligations under the Convention, taking into account collective and individual needs and available resources; *Király und Dömötör/Hungary* App no 10851/13 (ECtHR, 17 January 2017), para 79 f, holding that in contexts such as racially motivated intimidation, authorities must provide a 'sufficient response to the true and complex nature of the situation complained of' to avoid any perception of legitimizing or tolerating violence.
[244] Pavlidis (n 235) para 23 referring to Walter Berka, *Die Grundrechte – Grundfreiheiten und Menschenrechte in Österreich* (Springer 1999) para 461 and Michael Holoubek, *Grundrechtliche Gewährleistungspflichten: ein Beitrag zu einer allgemeinen Grundrechtsdogmatik* (Springer 1997) 161ff, 297ff.

grounded in the principle of the inviolability of human dignity.[245] Beyond constitutional protection, specific laws exist to protect personal identity. Section 22 of the Act on Copyright in Artistic Works and Photography (KunstUrhG)[246] establishes the general rule that images may be distributed or published only with the consent of the person depicted. However, section 23 KunstUrhG provides narrowly tailored exceptions, provided that the individual's legitimate interests are not infringed. Images are protected when they represent a person's external appearance in a manner recognizable to third parties.[247] In the context of deepfakes, recognizability will generally be present; accordingly, deepfakes qualify as 'portraits' within the meaning of section 22 KunstUrhG.[248]

2.5.3.2 France

The French *droit à l'image* is a personality-based right derived from privacy: Scholarly analysis describes it as comprising both an extra patrimonial dimension safeguarding the 'integrity of the human personality' and a patrimonial dimension protecting commercial interests.[249] Its normative foundation lies in art 9 of the French Civil Code,[250] which guarantees respect for private

[245] Art 1 Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*): 'Die Würde des Menschen ist unantastbar' translation: 'Human dignity shall be inviolable'; Judicial interpretation has construed this guarantee to encompass not only dignitary and autonomy-based interests but also the economic value of an individual's persona, see BGHZ 30, 7 [2003] GRUR 1959, 430, 431 - Caterina Valente, where the unauthorized use of the well-known singer's name in advertising a dental product was held to constitute an infringement of her general personality right under Art. 1(1); BGHZ 143, 214 [1999] NJW 2000, 2195 - Marlene Dietrich BGHZ 20, 345, para 354 [1956] NJW 1956, 1554 - Paul Dahlke, where the unauthorized use of a prominent actor's photograph in motorcycle advertising was found unlawful, and the Federal Supreme Court awarded compensation corresponding to a reasonable license fee based on unjust enrichment.

[246] Act on Copyright in Artistic Works and Photography (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie – KunstUrhG*).

[247] BGH [1999] NJW 2000, 2201; OLG Hamburg [2004] MMR 2004, 413; BGH [1961] MDR 1962, 194.

[248] Kumkar and Rapp (n 1) 205; Block (n 4) 22-23, noting that digital insertion of a person into existing image or video material without the consent of the relevant authors constitutes an infringement of section 23(1) of the Act on Copyright and Related Rights (*Urheberrechtsgesetz – UrhG*) and may be prohibited under section 14 UrhG. By contrast, satirical deepfakes may be permissible under sections 51(a) and 64(4a) UrhG as caricature, parody, or pastiche.

[249] Elisabeth Logeais and Jean-Baptiste Schroeder, 'The French Right of Image: An Ambiguous Concept Protecting the Human Persona' (1998) 18 Loy LA Ent L Rev 11, 542 <https://digitalcommons.lmu.edu/elr/vol18/iss3/5> accessed 15 December 2025.

[250] French Civil Code (*Code civil des Français*).

life and has been interpreted broadly by courts to address the commercial use of personal identity.[251] French jurisprudence progressively acknowledged the economic character of personality rights, notably in the *Bordas* decision, where the Cour de cassation upheld the contractual assignment of a famous individual's name for commercial purposes.[252] Furthermore, the Versailles Court of Appeal further affirmed that every person enjoys exclusive control over their image and may prevent its dissemination absent express and specific authorization.[253]

Therefore, art 9 of the French Civil Code may be applicable to deepfakes in cases where no consent has been given, as, by analogy to the *Philippe Le Gallou*[254] and *Rachel*[255] cases, deepfakes - as a new form of media - would implicitly be covered when the person depicted is recognizable. [256]

2.5.3.3 Austria

In Austria, section 78 of the Copyright Act (UrhG),[257] building on the personality right under section 16 of the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch - ABGB*),[258] prohibits the public dissemination or making available of images of individuals. The protection afforded by this provision is not the depiction itself, but the 'legitimate interests' of the person depicted. Accordingly, section 78 UrhG forbids publication of images only where it infringes legitimate interests of the depicted individual.[259]

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[251] David Lefranc, 'Do the French Have Their Own "Haelan" Case? The as an Emerging Intellectual Property Right' in Rochelle Dreyfuss and Jane Ginsburg (eds), *Intellectual Property at the Edge* (Cambridge University Press 2014) 40.
[252] Cass com 12 March 1985, appeal no 84-17163 (Bordas).
[253] CA Versailles, 12th ch sect, 22 September 2005, Juris-Data no 2005-288-693.
[254] Cass civ (1) 16 July 1998 (Sylla v Le Gallou).
[255] Trib civil de la Seine 16 June 1858 (Rachel).
[256] Alix Heugas, 'Protecting Image Rights in the Face of Digitalization: A United States and European Analysis' (2021) 24 J World Intellect Prop 344 <https://doi.org/10.1111/jwip.12194> accessed 15 December 2025.
[257] Austrian Copyright Act (*Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte, UrhG*).
[258] Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch, ABGB*).
[259] Christian Feltl, '§ 78 UrhG' para 3 in Mathias Görg und Christian Feltl, *UrhG Praxiskommentar zum Urheberrechtsgesetz* (LexisNexis 2023).

According to the Austrian case law, it is degrading, defamatory, and infringes personality rights and thus legitimate interests within the meaning of section 78 UrhG if a person, who has not participated in any public political debate, is placed without any factual basis in an associative context with National Socialism or one of its leaders.[260] Therefore, placing someone as an involuntary protagonist in a deepfake video in such or a similarly extreme political context violates section 78 UrhG.[261]

2.5.4 Unmasking the Right to One's Own Image

This chapter examines the scope of the Right to One's Own Image under art 7 CFR. It focuses in particular on the case law, which has developed and refined the guiding principles governing its protection.

2.5.4.1 The Right to the Image of a Princess

One of the most influential cases in the development of the Right to One's Own Image is that of Princess Caroline of Monaco, who arguably contributed more than any other individual to shaping contemporary protection under this regime. [262] The applicant, Princess Caroline von Hannover, sought injunctive relief before the German courts to prevent further publication of photographs depicting her private life in German magazines, claiming an infringement of her right to protection of her private life and own image. These photographs were the subject of multiple proceedings in Germany, in which her claims were dismissed.

[260] OGH 4 Ob 174/10g [2011] ÖBl 2011, 236 (Büchele) - Meinls Kampf.
[261] Alexandra Thurner, 'Bildmanipulation und Persönlichkeitsschutz in Zeiten von "Deepfakes"' MuR 2019, 155 para 38.
[262] *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004), para 53 referring to *Burghartz v Switzerland* App no 16213/90 (ECtHR, 22 February 1994), para 24; in the context of a person's picture see *Schüssel v Austria* App no 42409/98 (ECtHR, 21 February 2002).

The ECtHR found a violation of art 8 of the ECHR, holding that the concept of private life extends to aspects relating to 'personal identity, such as a person's name, or a person's picture'.[263] The court emphasized that merely classifying the applicant as a figure of contemporary society 'par excellence' is insufficient to justify an intrusion into her private life.[264] Central to the decision is the balancing of the right to one's image with the freedom of expression, a topic addressed below. In this context, the court observed that the criteria applied by the domestic courts were inadequate to secure effective protection of the applicant's private life, and that, under the circumstances, she was entitled to a 'legitimate expectation' that her private life would be safeguarded.[265]

In von *Hannover v Germany* (no. 2),[266] the applicants, Princess Caroline von Hannover and her husband, Prince Ernst August von Hannover, challenged the German courts' refusal to prohibit the further publication of two photographs taken during their holiday without consent and published in German magazines. They argued, in particular, that the domestic courts had insufficiently considered the European Court's 2004 ruling in *von Hannover v Germany* (see above). Even though the court held that

> (a) person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof (…)[267]

it found no violation of art 8 ECHR, observing that the German courts had duly balanced the publishers' freedom of expression against the applicants' right to respect for their private life.

[263] *Von Hannover* (n 262), para 50.
[264] ibid, para 75.
[265] ibid, para 78.
[266] *Von Hannover v Germany* (no 2) App no 40660/08; 60641/08 (ECtHR, 7 February 2012).
[267] ibid, para 96.

2.5.4.2 La République assassinée

What *Von Hannover v Germany* did not address is whether the guarantees under art 8 ECHR are capable of post-mortem application. This issue was subsequently confronted in *Hachette Filipacchi Associés v France*.[268] Shortly after the assassination of a French prefect, the weekly magazine Paris Match published an article entitled *La République assassinée* ('The Murdered Republic'). This Article was accompanied by a photograph depicting the victim's body immediately after the attack. The victim's widow and children sought judicial relief, requesting that the magazine's issues be seized and their distribution to be stopped, arguing that the publication violated their right to private life. The publisher challenged the judicial order requiring it, under penalty, to issue a public statement acknowledging that the photograph had been published without the family's consent.

The court noted that art 9 of the French Code Civil empowers judges to prevent or terminate intrusions into an individual's private life. Furthermore, the court held that the interference had a legitimate aim, which was to protect the rights of others, and that the interests involved were covered by art 8 ECHR. The court further held that 'the death of a close relative and the ensuing mourning, which were a source of intense grief, must sometimes lead the authorities to take the necessary measures to ensure respect for the private and family lives of the persons concerned'.[269]

In this context, the court did not recognize an autonomous post-mortem right to one's image vested in the deceased person. Instead, it grounded the protection in the rights of relatives of the deceased, acknowledging their entitlement to respect for their own private and family life under art 8 ECHR.

[268] *Hachette Filipacchi Associés v France* App no 71111/01 (EctHR, 14 June 2007).
[269] ibid, para 46.

2.5.4.3 Protection for Everybody

What the above-mentioned cases had in common is that the right to one's image was addressed primarily in the context of public figures. In *Rothe v Austria*,[270] the court was confronted with the question of the extent to which the protection of one's image depends on the individual's degree of prominence. The applicant, Mr. Rothe, was a deputy principal in a catholic seminary. A newspaper published an article alleging that he had been involved in a homosexual relationship with one of the seminarians. The article was illustrated with pictures of Mr. Rothe kissing the seminarian. Mr. Rothe initiated defamation proceedings against the newspaper, which the national courts subsequently dismissed. The court emphasized that

> a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image including the right to refuse publication thereof.[271]

In this context, the court underscored that protection of one's image extends regardless of a person's public standing. Ultimately, however, no violation of art 8 ECHR was found, as the court concluded that the Austrian courts had carefully balanced the interests of respect for private and family life against the freedom of expression.

2.5.5 Balancing deepfakes with the freedom of expression

The above-mentioned cases are characterized by a recurring balancing of competing interests, namely the right to one's own image and the freedom of expression, as enshrined in art 11 CFR and art 10 ECHR. In this regard, it has to be noted that art 11 CFR corresponds to art 10 ECHR

[270] *Rothe v Austria* App no 6490/07 (ECtHR, 4 December 2012).
[271] ibid, para 42.

of the ECHR and therefore, pursuant to art 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR.[272]

2.5.5.1 The freedom of expression and information

Article 11(1) CFR[273] protects freedom of expression as 'an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with art 2 TEU, is based'.[274] Article 11 CFR establishes two interrelated spheres of protection: on the one hand, the (active) freedom of expression of the speaker, and on the other hand, the (passive) freedom of information of the recipient.[275] The freedom of expression encompasses statements of fact irrespective of their truthfulness,[276] as well as value judgments (information and ideas),[277] and generally extends to all forms of communicative acts.[278] However, the freedom of expression applies not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb. Such are the demands of pluralism, tolerance, and broadmindedness, without which there is no 'democratic society'.[279] In this regard, it must be noted that freedom of expression, notwithstanding its very broad scope, is likewise subject to fundamental rights limitations:[280]

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[272] CJEU, 17 December 2015, Case C-157/14, Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* [2015] EU:C:2015:823, para 65.
[273] Art 11 CFR: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.
[274] Case C-163/10 *Criminal proceedings against Aldo Patriciello* [2011] ECR I-07565, para 31.
[275] Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* [2016] EU:C:2016:644, para 31.
[276] Christoph Grabenwarter and Katharina Pabel, Europäische Menschenrechtskonvention (MANZ 2021) § 23 para 5.
[277] *Lingens v Austria* App no 9815/82, (ECtHR, 8 July 1986), para 41.
[278] Christoph Bezemek, 'Freie Meinungsäußerung - Fragen des Grundrechtseingriffs, Fragen der Grundrechtsausübung' ZÖR 2012, 564 ff.
[279] *Von Hannover* (n 262) para 53 referring to *Handyside v the United Kingdom* App no 5493/72, (ECtHR, 7 December 1976), para. 49: 'Freedom of Expression (...) is applicable not only to information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population'.
[280] What implications are to be drawn from the respect for the freedom and pluralism of the media enshrined in art 11(2) CFR - which, as such, is not expressly provided for in the ECHR - remains a matter of debate in legal scholarship. In literature, it is commonly argued that restrictions on art 11 CFR should generally be assessed primarily in light of the requirements set out in art 10(2) ECHR, in accordance with art 52(3), first sentence, CFR;

The restrictions on freedom of expression under art 11 CFR largely mirror those under art 10(2) ECHR. Law must prescribe interferences, pursue a legitimate aim in the public interest, and be necessary in a democratic society, meaning proportionate to the 'legitimate aim' pursued.[281] The ECtHR and the CJEU recognize a flexible scope of discretion in commercial,[282] moral,[283] but applying stricter review in matters of political expression and debate of general interest.[284] Public figures, especially politicians, face reduced protection against criticism, as the need for open discussion outweighs reputational concerns.[285] Journalists enjoy robust safeguards, including source and editorial protection, to ensure media independence and the free exchange of ideas.[286]

2.5.5.2 Deepfakes and the freedom of expression

Although, as far as is apparent, no specific case law exists on this matter, the criteria established by the CJEU and the ECtHR suggest that deepfakes could, in certain circumstances, fall within the scope of protection of art 11 CFR and art 10 ECHR:

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in this regard see Julia Iliopoulos-Strangas, 'Die Freiheit der Medien in einer künftigen europäischen Verfassung' in Klaus Stern and Hanns Prütting (eds), *Kultur- und Medienpolitik im Kontext des Entwurfs einer europäischen Verfassung* (CH Beck 2005) 27, 79f; However, as the focus of this thesis does not lie on freedom of expression, this issue will not be examined further.

[281] Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-03025, para 50; CJEU 06.06. 1997, C-368/95, Case C-368/95 Vereinigte *Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-03689, para 26.

[282] Maya Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?' (2003) 6 Human Rights Law Review 53 <https://doi.org/10.1093/hrlr/ngi036> accessed 20 December 2025; Christian Calliess, 'Zwischen staatlicher Souveränität und europäischer Effektivität: Zum Beurteilungsspielraum der Vertragsstaaten im Rahmen des Art 10 EMRK' EuGRZ 1996, 293; *Mouvement raëlien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012), para 61; *Karner* (n 281), para 51.

[283] *Open Door and Dublin Well Woman v Ireland* App no 14324/88 and 14235/88 (ECtHR 29 October 1992); *Neptune Distribution SNC* (n 254), para 76.

[284] Regarding the jurisprudence to the topic of ‚contribution to a debate of general interest' see *Von Hannover* (no 2) (n 266) and the jurisprudence cited in para 109ff, or *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013), para 102.

[285] *Jerusalem v Austria* App no 26968/95 (ECtHR 27 February 2001), para 40; *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991); *Krone Verlag GmbH & Co. Kg v Austria* App no 34315/96 (ECtHR, 26 February 2002), para 35.

[286] Case C-100/88 *Augustin Oyowe and Amadou Traore v Commission of the* European Communities [1989] ECR 4285, para 16; *Goodwin v the United Kingdom* App no 17488/90 (ECtHR 27 March 1996), para 39; *Roemen and Schmit* App no 51772/99 (ECtHR, 25 February 2003), para 46f, for more recent case law, see *Görmüş and Other v Turkey* App no 49085/07 (ECtHR, 19 January 2016).

In this context, it must be noted that art 11 CFR and art 10 ECHR do not limit the forms and means in which information and ideas are expressed. Consequently, all forms and modalities of expression, including those conveyed through deepfakes, fall within the protective scope of the Convention.[287] In *Magyar Helsinki Bizottság v Hungary*[288] the Court held that the Internet plays a central role 'in enhancing the public's access to news and facilitating the dissemination of information'. Therefore, bloggers and influential users of social media may, in certain circumstances, perform a role comparable to that of 'public watchdogs' and therefore benefit from the protection of art 10 ECHR. Given that the creation and maintenance of online archives constitute an essential function of Internet services, the ECtHR has held that such activities fall within the protective scope of art 10 ECHR when employed for purposes such as art, education, self-expression, parody, or satire, as they constitute forms of expression integral to democratic discourse. [289]

These criteria, established by the ECtHR concerning freedom of expression, support the view that deepfakes fall within the scope of protection under art 11 CFR if they contribute to public debate. On the other side, malicious deepfakes, such as non-consensual pornography, threats to public order,[290] national security,[291] or the rights and reputation of others,[292] are most likely to fall outside art 11 CFR protection.

[287] Dominic McGoldrick, 'The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective' (2013) 13 Human Rights Law Review 125, 126 <www.corteidh.or.cr/tablas/r30709.pdf> accessed 24 December 2025.
[288] *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016), para 168.
[289] *Times Newspapers Ltd v United Kingdom* App no 3002/03; 23676/03 (ECtHR, 2009).
[290] *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008), paras 45-46.
[291] *Stomakhin v Russia* App no 52273/07 (ECtHR, 9 May 2018), paras 85-86; *Dmitriyevskiy v Russia* App 42168/06 (ECtHR, 3 October 2017), para 87.
[292] *Von Hannover* (no 2) (n 266), para 103.

2.5.5.3 Deepfakes as a Means of Satire on Social Media

As already illustrated by the satirical deepfake involving President Trump and former President Biden mentioned in the introduction, deepfakes are frequently shared on social media for satirical purposes. This raises the question whether such deepfakes may fall within the scope of protection of the freedom of expression under art 11 CFR. In this context, the Court has consistently recognized satire as a form of artistic expression and social commentary, which 'aims to provoke and agitate'.[293] The Court's case-law shows that satire may take many different forms, including a painting,[294] publicly mocking of a monument by disguising it,[295] a sign with a political message,[296] a fictitious interview,[297] an advertisement,[298] a caricature,[299] and a press article in a local newspaper.[300]

Following the Court's established case-law, it can be assumed that many deepfakes posted for satirical purposes on social media may fall within the protection of art 11 CFR. However, each instance must still be assessed on a case-by-case basis.

[293] *Vereinigung Bildender Künstler v Austria* App no 68354/01 (ECtHR, 25 January 2007), para 33.
[294] ibid.
[295] *Handzhiyski v Bulgaria* App no 10783/14 (ECtHR, 6 April 2021).
[296] *Eon v France* App no 26118/10 (ECtHR, 14 March 2013), para 53.
[297] *Nikowitz and Verlagsgruppe News GmbH v Austria* App no 5266/03 (ECtHR, 22 February 2007), para 18.
[298] *Bohlen v Germany* App no 53495/09 (ECtHR, 19 February 2015), para 50.
[299] *Leroy* (n 290), para 44; *Patrício Monteiro Telo de Abreu v Portugal* App no 42713/15 (ECtHR, 7 June 2022), para 40.
[300] *Ziembiński v Poland* (no. 2) App no 1799/07 (ECtHR, 5 July 2016), para 45.

IV. Comparative Analysis

1. Purpose and Structure of the Chapter

This chapter aims to provide a comparative analysis of the Right to One's Own Image under art 7 CFR and the US Right of Publicity, particularly in the context of deepfakes. Therefore, the comparison proceeds along key doctrinal dimensions, including the underlying legal foundations, personal and material scope of protection, the interaction with freedom of expression, and other implications. For this purpose, this chapter compares the results of the analysis of the Right of Publicity and the Right to One's Own image undertaken above, to illustrate the similarities and differences between the two legal regimes. Subsequently, the underlying reasons for such similarities and differences will be explained. In a concluding step, the specific implications of deepfakes are outlined.

2. Illustrative Deepfake Scenario

For analytical clarity, the comparison is illustrated by reference to a single hypothetical deepfake scenario. This scenario serves as a consistent point of reference for assessing how each legal regime addresses identical factual circumstances, without replacing the doctrinal analysis itself. The illustrative example is as follows:

> A creates a deepfake of his archrival B in which B falsely states that he has been unfaithful to his spouse. The deepfake is subsequently uploaded to the social media platform C. The deepfake is not recognizable as a fake.

3. Divergent Dogmatic Point of Departure

At the outset it must be emphasized that the Right to One's Own Image under art 7 CFR is embedded in the framework of fundamental rights protection: As held by the court in the *von Hannover* (no 2) case, an individual's image constitutes one of the chief attributes of his or her personality,[301] and consequently falls within the protective scope of art 7 CFR. By contrast, the Right of Publicity originated from the right to privacy and is recognized under US state law, either through common law or state legislature. Since *Zacchini*, the Right of Publicity has been recognized as a property right, aiming to control the commercial exploitation of a person's identity.[302]

Despite this divergent dogmatic point of departure, both regimes serve a comparable functional role in the context of deepfakes, namely the protection against unauthorized appropriation of a person's identity. This justifies a functional comparative approach despite their different normative foundations.

4. Substantive Comparative Analysis: Right of Publicity v Right to One's Own Image

As noted above, the following section functionally compares the key elements of the Right of Publicity, with a focus on the illustrative reference scenario in the context of deepfakes.

[301] *Von Hannover* (no 2) (n 266), para 96.
[302] *Zacchini* U.S. 562 (n 146), paras 573, 576.

4.1 Personal Scope of Protection

4.1.1 Comparative finding

Both, the Right of Publicity and the Right to One's Own Image, offer a legal safeguard against the unauthorized appropriation of an individual's identity (especially name, likeness, and voice); however, there is a divergence regarding the persons who benefit from protection: The protection of the Right to One's Own Image under art 7 CFR applies irrespective of an individual's public standing. Conversely, the practical relevance of the Right of Publicity has predominantly arisen in relation to public figures, although the Right of Publicity in most states is not formally limited to public figures.[303]

4.1.2 Explanation

As already mentioned above, certain US states reveal a tendency to provide effective protection primarily to celebrities.[304] This tendency is understandable, as the commercial value of a celebrity's identity is typically easier to identify and exploit economically.[305] The Right to One's Own Image under art 7 CFR, as the court held in the *Rothe* decision, however, applies regardless of a person's public standing universally to all natural persons, irrespective of notoriety or fame, since a 'person's picture constitutes one of the chief attributes of his or her personality'.[306] This distinction can be explained by the different normative foundations of the two regimes: commercial exploitation of a person's identity on the one hand, and fundamental right protection of private and family life on the other.

[303] *Ali v Playgirl Inc* 447 F. Supp. 723, 728 (S.D.N.Y. 1978): '[t]he distinctive aspect of the common law right of publicity is that it recognizes the commercial value of the picture or representation of a prominent person or performer, and protects his proprietary interest in the profitability of his public reputation or "persona"'.
[304] Spivak (n 99) 384.
[305] Curren (n 118) 164.
[306] *Rothe* (n 270), para 42.

4.1.3 Deepfake context

In the context of deepfakes, the personal scope of application can be of crucial importance. Deepfakes can affect anyone, regardless of whether they are celebrities or private individuals. However, since the personal scope of application of the right of publicity is not explicitly limited to celebrities in most states anyway, this point does not appear to be of decisive importance. However, where there could be a major disadvantage is in proving the element of 'commercial exploitation' under Right of Publicity law for private persons, because this element is more obvious in the case of celebrities.

For the illustrative scenario, it can be assumed that the personal scope of application is satisfied under both regimes, the Right to One's Own Image and the Right of Publicity. This assumption holds only insofar as the illustrative scenario does not arise in a state where the Right of Publicity is restricted to a specific category of persons.

4.2. Material Scope of Protection

4.2.1 Comparative finding

Both regimes adopt a broad understanding of the material subject matter, namely, a person's identity. Under the Right of Publicity, the element 'name or likeness' is interpreted expansively and covers any indicia capable of identifying an individual. This includes attributes such as voice or a characteristic personal style, as long as it is distinctive.[307] In contrast, under the Right to One's Own Image, courts regularly examine whether the person depicted is identifiable.[308]

[307] *Abdul-Jabbar* (n 121) 414; *White* (n 121) 1397; *Waits* (n 121) 1103–04.
[308] *Peck v the United Kingdom* App no 44647/98 (ECtHR, 28 January 2003), where the court held that disclosure of the footage in question constituted a serious interference with the applicant's right to respect for his private life, because '(t)he applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast - he was recognized by certain members of his family and by his friends, neighbors and colleagues'.

4.2.2 Explanation

The comparative finding shows that identifiability is a prerequisite for protection under both regimes. However, the above analysis suggests that the underlying rationale differs: In the context of the Right of Publicity, identifiability is essential because the commercial value of a person's identity can only be exploited if the person is recognizable. Under the Right to One's Own Image, by contrast, the requirement of recognizability follows from its function as a component of personality protection. Since the 'protection of one's image is one of the essential components of personal development',[309] the person depicted must at least be identifiable so that this protection can be granted.

4.2.3 Deepfake context

Deepfakes make it now possible to depict individuals in such a way that they are not only identifiable but also appear to be genuinely real. As a result, the requirement of the material scope of protection will rarely constitute a limiting factor. The different rationales underlying the identifiability requirement lose much of their practical relevance in this context, as both regimes are triggered by the same factual circumstance: the recognizability of an individual.

Regarding the illustrative scenario, there is likewise no doubt that the material scope of application is satisfied under both regimes. The deepfake is not recognizable as a fake and B is identifiable; therefore, the material scope of protection is fulfilled.

[309] *Von Hannover* (no 2) (n 266), para 96.

4.3 Appropriation of an Individual's Identity

4.3.1 Comparative finding

Since the Right of Publicity is generally conceived as a proprietary right, whereas the Right to One's Own Image is framed as a fundamental right, a structural tension arises in the interpretation of the concept of 'personal identity' when the two regimes are compared. Although this point has already been noted at the beginning of this chapter, it warrants renewed emphasis.

4.3.2 Explanation

Under the Right of Publicity, personal identity is treated as an asset with commercial value.[310] This assessment does not apply in states where, as under California common law, non-commercial exploitation may also give rise to claims under the Right of Publicity.[311] However, in most cases, protection is primarily triggered by the commercial exploitation of an individual's identity. By contrast, under the Right to One's Own Image, the focus lies on the protection of personal identity as such: Article 7 CFR is engaged where an individual's identity is interfered with,[312] irrespective of whether any economic value is at stake. The interest protected is not commercial value, but personal identity itself.

4.3.3 Deepfake context

This distinction becomes particularly relevant in the context of deepfakes. In states that limit the Right of Publicity to commercial exploitation, significant difficulties arise where deepfakes are disseminated on social media platforms by private individuals for non-commercial purposes. In the absence of any reference to a commercial transaction, such uses will generally

[310] *Zacchini* U.S. 562 (n 146).
[311] *Comedy III* (n 167); *Eastwood* (n 167); *White* (n 121).
[312] *Von Hannover* (no 2) (n 266), para 95.

fall outside the scope of the Right of Publicity.[313] In such cases, protection is more plausibly grounded in the Right to One's Own Image rather than under the Right of Publicity claims.

This aspect is also of central relevance for the illustrative reference scenario. Under the Right to One's Own Image, no difficulty arises in assuming a violation of art 7 CFR. B's personal identity, which is protected as a fundamental right, is used without his consent and is therefore infringed. By contrast, the applicability of the Right of Publicity in this case is uncertain. B is only protected if the factual constellation arises in a state, such as California, where non-commercial uses are actionable under (common) law, or if the creation or dissemination of the deepfake is connected to a transaction that causes B economic harm.

4.4 Post-Mortem Protection

4.4.1 Comparative finding

Regarding the question of whether the Right of Publicity and the Right to One's Own Image extend after the death of the person in question, the comparative legal analysis reveals a structural difference between the two regimes.

4.4.2 Explanation

In this context, US state law differs with regard to post-mortem protection. Under section 50-f of the NY Civ Rights L, post-mortem rights extend only to certain deceased performers who were domiciled in New York at the time of their death. By contrast, under section 3344.1 of the Cal Civ Code, the Right of Publicity applies to both living and deceased individuals. This distinction may be explained by the as the Right of Publicity reflects a property right, which,

[313] Preminger and Kugler (n 4) 806 fn 143 citing *ADB Interest LLC v Wallace* 606 S.W.3d 413, 422–28 (2020); *Yurish* (n 168) 167; *Ariix* (n 169) 1115.

following the *Haelan* decision, is recognized as transferable. In contrast, art 7 CFR does not recognize a post-mortem right per se. Nevertheless, protection may be provided indirectly through the heirs of the deceased, where their own rights under art 7 CFR are violated. This is because art 7 CFR protects personal identity as a fundamental right of the living individual and does not establish an autonomous post-mortem right.[314]

4.4.3 Deepfake context

Deepfakes involving deceased persons further highlight the structural differences between the two regimes. In practice, however, the outcome will often be similar. In states that recognize post-mortem publicity rights, protection against deepfakes depicting deceased individuals is available and will typically be asserted by the heirs of the deceased. By contrast, under art 7 CFR, deepfakes involving deceased persons can only be addressed indirectly, namely where they interfere with the private or family life of surviving relatives.

For the reference scenario, the question of post-mortem protection has no relevance. If, however, B were deceased, protection could be available in states that recognize a post-mortem right of publicity. Under art 7 CFR, the assessment would instead focus on whether the deepfake interferes with the private or family life of the surviving relatives.

4.5 Freedom of Expression

4.5.1 Comparative finding

Both regimes require a balance with freedom of expression. In this regard, it remains challenging to make a general statement about the comparison of legal systems, particularly due to the

[314] *Hachette* (n 268), para 49: 'Its publication in a widely distributed magazine intensified the trauma suffered by the relatives as a result of the murder, so that they had legitimate reason to consider that their right to respect for their private life had been infringed'.

inherent ambiguity of US case law. The most significant difference is that the First Amendment provides near-absolute protection,[315] whereas freedom of expression under art 11 CFR requires a balancing exercise against other rights.[316]

4.5.2 Explanation

Under US law, limitations on the Right of Publicity derive primarily from the First Amendment and apply through various judicial tests, resulting in a 'messy' doctrinal landscape.[317] The Right to One's Own Image, however, requires the balancing with freedom of expression under art 11 CFR. That the case law is sometimes chaotic is understandable, given that historically, freedom of expression has been a cornerstone of democracy. [318]

4.5.3 Deepfake context

Deepfakes sharpen the tension between the protection of an individual's identity and freedom of expression. In most cases, deepfakes may constitute forms of expression capable of contributing to public discourse, satire, or artistic expression, which means they may enjoy protection under the freedom of expression under both regimes.

Regarding the illustrative reference scenario, the deepfake depicts B falsely stating that he has been unfaithful to his spouse. This content cannot plausibly be classified as satire or parody. Nor does it appear to contribute to any matter of public interest. Rather, the deepfake constitutes an attack on B's personal dignity and reputation. Such interference is not protected by freedom of expression, neither under EU nor under US law.

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[315] Zachary Price, 'Our Imperiled Absolutist First Amendment' (2018) 20 U Pa J Const L 817, 824 <https://ssrn.com/abstract=3042868> accessed 2 January 2026.
[316] Riccardo de Garcia, *Freedom of Expression as a Common Constitutional Tradition in Europe*: *report of the European Law Institute* (ELI 2022) 26 <www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Report_on_FreFree_of_Expression.pdf> accessed 2 January 2026.
[317] Rothman (n 119) 138.
[318] Brittan Heller and Joris van Hoboken, 'Freedom of Expression: A Comparative Summary of United States and European Law' (TWG, 3 May 2019) 2 <http://dx.doi.org/10.2139/ssrn.4563882> accessed 2 January 2026.

V. Findings of the Comparative Analysis

This chapter addresses Research Questions 1 to 3. It summarizes the key findings of the preceding analysis. The focus lies on applicability, legal justifications, and comparative insights.

1. Deepfakes: The Right of Publicity v the Right to One's Own Image

> 'To what extent are the US Right of Publicity and the EU's Right to One's Image applicable in the deepfakes context?'

The comparative analysis shows that both the US Right of Publicity and the EU Right to One's Own Image under art 7 CFR may provide protection against deepfakes. Both regimes serve the same function in the context of deepfakes. They protect against the unauthorized appropriation of an individual's identity. The underlying rationale, however, differs. Article 7 CFR applies once a deepfake interferes with personal identity, in particular with a person's image. No commercial element is required. By contrast, in most US states, the Right of Publicity presupposes a commercial use of identity.

The illustrative reference scenario highlights this difference clearly. Where deepfakes are posted on social media platforms, art 7 CFR offers broader protection. A link to a commercial transaction is not necessary. Under the Right of Publicity, this constitutes a structural limitation in most US jurisdictions. Accordingly, deepfakes may give rise to Right of Publicity claims when used commercially, while falling under art 7 CFR where they interfere with personal rights or privacy. This distinction is partly blurred under California law, where common law also extends protection to certain non-commercial uses of a person's identity.

2. Legal Justifications in the Creation and Use of Deepfakes

‘What legal justifications may apply in the creation and use of deepfakes?’

Protection under both the Right of Publicity and the Right to One’s Own Image is not absolute. In each case, a balancing exercise with freedom of expression is required. The comparative analysis shows that both regimes may, in principle, legitimize deepfakes where they qualify as satire, parody, or artistic expression. However, the specific context is decisive. At the same time, the analysis reveals substantial uncertainty, particularly under US law. Due to the casuistic case law, broad generalizations are difficult. The legal assessment depends heavily on the specific circumstances of each case. Deepfakes that impair personal dignity are rarely justified. This applies under both EU and US law. The resulting legal uncertainty is especially apparent in the US entertainment sector. It remains unclear which forms of deepfake use are protected by freedom of expression.

As a result, deepfake cases require a case-by-case assessment. No clear doctrinal line has emerged. This significantly complicates comparative analysis.

3. Insights of the Transatlantic Comparative Analysis

‘What insights can be drawn from the transatlantic comparative legal study?’

The comparative analysis shows that both regimes provide protection against deepfakes. Both respond to the same technological challenge and protect similar interests in the deepfake context: protection against the unauthorized appropriation of an individual’s identity. As explained above, art 7 CFR also protects against non-commercial deepfakes, which is particularly important for postings on social media. In the US, legal uncertainty is partly mitigated by detailed state law.

Furthermore, both regimes often produce the same factual outcome, although their underlying legal reasoning differs. This is particularly clear regarding the material scope of protection. Under art 7 CFR, personal identity is protected as such, and a person's image is considered part of that identity. By contrast, in most US states, the Right of Publicity treats personal identity as an asset with commercial value, which triggers protection. A similar observation arises regarding post-mortem rights. At first glance, a substantial difference exists: the Right of Publicity often provides post-mortem protection, while art 7 CFR does not. Nevertheless, heirs may assert their own rights under art 7 CFR, so the practical outcome under both regimes is often similar. However, in this regard, legal certainty seems to be higher in the US context.

However, neither regime adequately addresses the threshold obstacles identified above. Enforcement is most likely to fail when deepfakes are disseminated anonymously on social media platforms. In addition, cross-border enforcement against deepfake creators in third states remains difficult. Furthermore, deepfake litigation is particularly prone to the Streisand effect. These threshold obstacles remain unresolved.

VI. Re-examination

According to Zweigert and Kötz,[319] identifying contradictions or discrepancies between the legal systems being compared may raise the question of whether legislative intervention is required. Such an assessment, however, cannot be made in isolation. For this reason, the analysis has briefly addressed the wider legal frameworks in both the EU and the US. From this perspective, it becomes apparent that the legal landscape within the EU has already taken significant steps to address the risks posed by AI, including deepfakes. In particular, the AI Act and the Digital Services Act provide far-reaching regulatory tools. Article 50(2) AI Act requires providers to label deepfakes as such. Article 34(1) DSA obliges VLOPs and VLOSE to implement reasonable, proportionate, and effective mitigation measures, including making 'prominent markings' on deepfakes. In this context, no immediate need for additional EU-level legislation appears to exist at this stage.

The situation is different in the US. From a comparative perspective, a legislative need for action can be identified. Although the so-called 'Brussels Effect' of the AI Act has not materialized, US legislators have acknowledged that deepfakes pose a serious threat. In this context, the NO FAKES Act was introduced in the US Senate in April 2025. The bill proposes a federal 'digital replica right'. It would prohibit, inter alia, the creation or distribution of AI-generated likenesses or voice replicas without consent, subject to exceptions for satire, commentary, and news reporting. It remains uncertain whether, and in what form, the bill will be enacted. [320] At present, a stricter regulatory framework specifically targeting social media platforms, such as Instagram or Facebook, with regard to reporting and removal mechanisms for deepfakes, does

[319] Zweigert and Kötz (n 18) 39.
[320] NO FAKES Act of 2025 (H.R. 2794, 119th Congress, introduced 8 April 2025) <www.congress.gov/bill/119th-congress/house-bill/2794/text> accessed 2 January 2026.

not appear politically foreseeable in the US. [321] Parts of the US literature argue that any future regulation should be narrowly tailored. Suggested focus areas include high-risk contexts such as electoral processes or the entertainment industry, rather than a broad regulatory approach.[322]

[321] In 2023, President Biden adopted the 'Executive Order on the Safe, Secure, Trustworthy Development and Use of Artificial Intelligence', which sought to establish a comprehensive federal governance framework for the development of AI. However, in January 2025, on his first day in office, newly inaugurated President Trump revoked this Executive Order and replaced it with a new 'Executive Order on Removing Barriers to American Leadership in Artificial Intelligence'.

[322] Benjamin Sheffner, 'Testimony of Benjamin S. Sheffner, Senior Vice President & Associate General Counsel, Motion Picture Association, Inc., Before the U.S. Senate Committee on the Judiciary, Subcommittee on Intellectual Property: The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas' (*Motion Picture Association*, 30 April 2024) <www.judiciary.senate.gov/imo/media/doc/2024-04-30_-_testimony_-_sheffner.pdf> accessed 5 January 2026.

VII. Future Research

As the comparative analysis has shown, deepfakes raise several legal questions that remain unresolved at the moment.

In US law, the commercial requirement under the Right of Publicity is particularly problematic. This is evident in cases involving deepfakes of public figures, such as former President Trump. Such deepfakes may not be commercial at the outset, but are often monetized later, for example through advertising revenue or donations. Furthermore, it becomes difficult to argue that no commercial benefit exists at all once a deepfake goes viral or generates a large audience, and the creator gains followers. As a result, the distinction between commercial and non-commercial use becomes increasingly blurred.

By contrast, under EU law, the tension between deepfakes and freedom of expression has not yet been fully addressed in literature. Therefore, the existing literature remains limited. Further research is therefore needed to clarify the role of freedom of expression in the deepfake context.

VIII. Final Remarks

‘Don’t believe everything you see or hear’
Herman Hesse
Steppenwolf

From the author’s perspective, the comparative analysis has shown that, despite their different dogmatic points of departure, both the Right of Publicity and the Right to One’s Own Image provide legal protection in the deepfake context. At the same time, the analysis has revealed inherent limitations in both regimes. Neither right adequately addresses the threshold problems identified above. Deepfake creators are often anonymous, and they may operate from jurisdictions where enforcement is difficult or ineffective. In cases involving public figures, legal action may even increase the visibility of the deepfake due to the so-called Streisand effect. As a result, deepfakes pose a serious threat, while existing legal remedies often remain ineffective in practice.

In the author’s view, this calls for a re-examination that goes beyond the legal framework. Therefore, a broader societal response is required. Traditionally, photographs, videos, and audio recordings were regarded as reliable evidence. This assumption is no longer valid. With the rise of AI, deepfakes have become easier to create, easier to disseminate, and increasingly realistic. Particularly in the EU, this suggests a shift away from excessive regulatory complexity toward a stronger focus on education. One practical skill concerns the detection of deepfakes. At present, deepfakes may sometimes be identified through missing eye blinking, unnatural lip movements, or visual inconsistencies in the eyes or teeth.[323]

More importantly, however, a broader societal skill is required. Individuals must learn to critically assess and question digital content from an early age. Just as students have always

[323] Ruben Tolosana R, and others ‘DeepFakes and Be-yond: A Survey of Face Manipulation and Fake Detection’ (2020) 64 Inf Fusion 131, 138f <https://doi.org/10.1016/j.inffus.2020.06.014> accessed 5 January 2026.

been required to complete assignments manually, the focus should now be more on how to evaluate assignments. This principle applies to deepfakes. Students must now learn how to evaluate AI-generated outputs. This suggests that the challenge posed by deepfakes is not primarily the absence of legal rules. Rather, it lies in societal adaptation. Only through critical thinking can the economic opportunities of AI be balanced with the protection of individual rights. Until adequate legal or social mechanisms are in place, visual and auditory online content should be approached with caution.

Much like Harry Haller in Hesse's Steppenwolf, who struggles between his cultivated self and his instinctual nature, we are reminded not to believe everything we see or hear. Deepfakes force us to reconsider the foundations of trust in digital media, and demand sustained critical reflection.

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