

Dignity and Deepfakes

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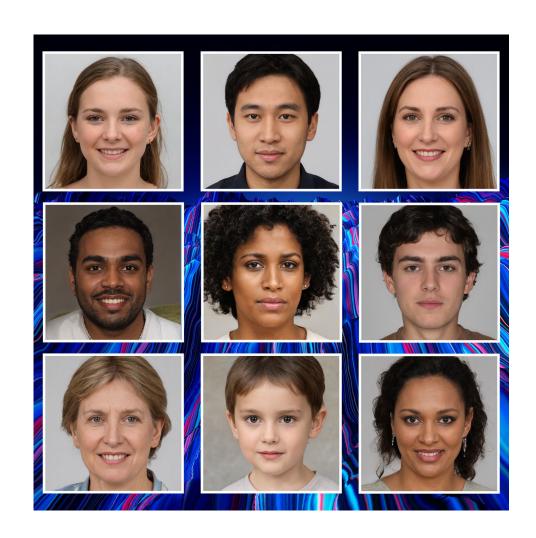






AI-Generated Deepfakes

- 1. Realistic
- 2. Accessible
- 3. Versatile





The Dignitary Harms of Deepfakes

- 1. Depriving one of control over their selfrepresentation
- 2. Reputational harm
- 3. Ostracization through internalized shame







	1890	2025
Image-Capturing Technology	Portable Camera	Generative Al
Distribution Method	Mass Media	Internet



Have you seen the Kodak fiend? Well, he has seen you. He caught your expression yesterday while you were innocently talking at the Post Office. He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every hand.

"The Kodak Fiend," Hawaiian Gazette (Dec. 9, 1890).



HARVARD

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THE RIGHT TO PRIVACY.



THE MAN WHO DID.



THE MAN WHO DIDN'T.



THESE TWO PICTURES TELL THEIR OWN STORY.

"In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and today my family is protected and I am drawing an annual dividend on my paid-up policies." "When I had health, vigor and strength I felt the time would never come when I would need insurance. But I see my mistake. If I could recall my life I would buy one of the New England Mutual's 18-Pay Annual Dividen-Policies."

THOMAS B. LUMPKIN, General Agent, 1008-1009-1010 EMPIRE BUILDING.





The Right of Publicity Analogy

- 1. Address dissemination
- 2. Consider types of harms



Proposed Deepfake Claims

Claim	Dissemination Liability Limits	Conceptual Mismatch
Defamation	Section 230	Requires falsity and (sometimes) malice
Intentional Infliction of Emotional Distress	Section 230	High bar of outrageousness
False Light	Section 230	Requires falsity and malice
NCII	Section 230	Usually do not address synthetic content
State Anti-Deepfake Laws	Section 230	
CSAM		Only children
FOSTA		High scienter requirement
Copyright Infringement	DMCA	Only for copyrighted works; must own copyright
Trademark Infringement	Tiffany v. eBay	Commercial use of identity as a trademark; commercial use in deepfake
Dilution	Tiffany v. eBay(?)	Limited to famous marks



U.S. Online Intermediary Liability Landscape		
Torts	Safe harbor under 47 U.S.C. § 230	
Copyright	Requirement-based safe harbor under 17 U.S.C. § 512, including notice-and-takedown	
Trademark	Common law notice-and-takedown per Tiffany v. eBay (2d Cir. 2010)	
Right of Publicity	???	



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Right of Publicity	Common law notice-and-takedown	





Restoring Dignity to the Right of Publicity

- Deepfakes amplify loss of control over one's identity
- Economic understandings cannot address dignitary harms
- The commercial use requirement is not universal
- Deepfakes affect everyone—not just the rich and famous
- Deepfakes are intentional regardless of their commerciality (or lack thereof)



Benefits Over the TAKE IT DOWN Act

- Not just intimate deepfakes
- Consideration of the First Amendment

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Questions & Discussion

Takeaways

- 1. The historical analogy of the right of publicity can inform our approach to deepfakes
- 2. Most claims either cannot restrict online dissemination or fail to address dignitary harms
- 3. The right of publicity can constrain deepfakes by incorporating notice-and-takedown and once again considering dignitary harms



Michael P. Goodyear, *Dignity* and *Deepfakes*, 57 Ariz. St. L.J. __ (forthcoming).