AI Influencers and a Right of Publicity

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The influencer industry has exploded over the past few decades with estimated valuations as high as hundreds of billions of dollars. Most influencers are humans who receive compensation for leveraging their social media followings to promote specific brands. More recently, however, so-called virtual influencers, such as Lil Miquela, who are CGI creations rather than actual people, have achieved success in the young influencer industry. Now, so-called AI influencers enter this rapidly developing field with artificial intelligence technology playing an increasing, but complicated role in the creation and curation of influencer content. This Article catalogs the diverse roles held by artificial intelligence in the influencer space situating its various uses within a broader spectrum of influencer use of technology.

This Article is the first to tackle a pair of important questions concerning whether the right of publicity applies to virtual and AI influencers, and whether it should apply. Descriptively, this Article examines state right of publicity regimes and analyzes whether these statutory or common law frameworks in their current form could apply to virtual or AI influencers. Normatively, the question of whether the right of publicity should apply to virtual or AI influencers is complicated by the fact that scholars and courts have not coalesced around a single theoretical justification for the right of publicity. By examining each of its possible theoretical justifications, the Article argues that there is a stronger case for applying the right of publicity to virtual and AI influencers under each justification than may immediately be apparent. Nonetheless, the strength and scope of the argument differ depending on the justification selected. Ideally this analysis will offer an opportunity for scholars, legislatures, and courts to sharpen their justifications for protecting the right of publicity into a theoretically defensible and coherent body, with broader implications not only for virtual and AI influencers, but the entire right of publicity doctrine.

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INTRODUCTION

In the decades since its inception, the influencer industry has quickly grown into a massive economic phenomenon with estimated valuations as high as hundreds of billions of dollars, and further rapid growth predicted.[1] After major social media companies developed mechanisms to pay content creators, independent creators who were not traditional celebrities, but who could achieve significant followings on social media, could now leverage those followings to get paid to drive consumer internet traffic to the products and services they promoted.[2] Creating social media content quickly became a potentially lucrative career.

With the influencer industry booming, Miquela Sousa, aka Lil Miquela, shared her first Instagram post in 2016.[3] Sousa appeared to be a nineteen-year-old Brazilian-American model and self-described social justice activist[4] and acquired millions of Instagram followers.[5] In June 2018, *Time Magazine* named her one of the "Twenty-five Most Influential People on the Internet."[6] Lil Miquela has had brand deals with UGG and Calvin Klein, released music, and in 2020 even signed a talent agency deal with the Creative Artists Agency ("CAA").[7] Early on, some of her social media followers debated

1. *See* Danielle Chemtob, *The $250 Billion Influencer Economy Is Booming*, FORBES (Oct. 28, 2024), https://www.forbes.com/sites/daniellechemtob/2024/10/28/forbes-daily-the-250-billion-influencer-economy-is-booming/ [https://web.archive.org/web/20251009144714/https://www.forbes.com/sites/daniellechemtob/2024/10/28/forbes-daily-the-250-billion-influencer-economy-is-booming/].

2. *See* Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 83 (2020) (noting that consumers follow and engage with influencers on social media and buy what they endorse).

3. *See* Miquela (@lilmiquela), INSTAGRAM (Apr. 26, 2016), https://www.instagram.com/p/BErpKdVMmxF/ [https://perma.cc/49LA-BKU5?type=image] (displaying her first Instagram post); *see also* Sonia M. Okolie, *Stretching the Boundaries of Intellectual Property Governing Digital Creations*, 12 LANDSLIDE 52, 53 (2020) (noting Lil Miquela's 2016 Instagram appearance as the "earliest identified use" of a virtual influencer).

4. *See* D'Shonda Brown, *Introducing Miquela, the Gen Z Loretta Modern*, LADYGUNN (Oct. 9, 2020), https://www.ladygunn.com/music/miquela-interview/ [https://web.archive.org/web/20251009144920/https://www.ladygunn.com/music/miquela-interview/] (briefly exploring Lil Miquela's commitment to social activism); Madeline Schultz, *Virtual Influencer Miquela Is Back. This Time, Brands Are Metaverse Ready*, VOGUE BUS. (Aug. 12, 2022), https://www.voguebusiness.com/technology/virtual-influencer-miquela-is-back-this-time-brands-are-metaverse-ready [https://web.archive.org/web/20251009145159/https://www.voguebusiness.com/technology/virtual-influencer-miquela-is-back-this-time-brands-are-metaverse-ready] (outlining Lil Miquela's return to brand advertising).

5. *See* Samantha Favela, *Uncovering the "Realness" of CGI Influencers*, 24 SMU SCI. & TECH. L. REV. 325, 325 (2021) (noting that, as of 2021, Lil Miquela had over three million Instagram followers).

6. *The Twenty-five Most Influential People on the Internet,* TIME (June 28, 2018), https://time.com/5324130/most-influential-internet/ [https://web.archive.org/web/20251009145308/https://time.com/5324130/most-influential-internet/].

7. *See* Jim Masteralexis, Steve McKelvey & Keevan Statz*, #IAMAROBOT: Is It Time for the Federal Trade Commission to Rethink Its Approach to Virtual Influencers in Sports, Entertainment, and the Broader Market?*, 12 HARV. J. SPORTS & ENT. L. 353, 366 (explaining that Lil Miquela partnered with Calvin Klein for a heavily criticized 2019 advertisement); Shyam Patel, *One of Ugg's Most Followed Ambassadors Isn't a Person at All,* PAPER (Oct. 17, 2018), https://www.papermag.com/ugg-40-years-lil-miquela-campaign#rebelltitem4

whether she was real, but others insisted that she was a regular teenaged social media influencer, just perhaps with quite a bit of photoshop applied.[8] One Instagram user wrote "that she does actually exist: 'It's just the way she edits her photos.'"[9]

Two years after her social media debut, it was revealed that Lil Miquela is not a real person but rather was initially created using computer-generated imagery ("CGI") technology by a secretive Los Angeles company called Brud.[10] After that disclosure, Miquela's creators fully leaned into her non-human identity.[11] Her YouTube page boasts videos with titles such as "Top Ten Moments of 2021 (From a Robot)," in which she starts by saying that she is celebrating her nineteenth birthday for the sixth time, and that she received a USB with all of her programmed memories on it as her birthday present.[12] She still has millions of followers, has apparently finally aged from nineteen to twenty two, and most recently made headlines when she "posed" with politician Nancy Pelosi.[13] Lil Miquela represents one of the most famous examples of what came to be known as "virtual influencers," which are best defined as human-created fictional influencers created using computer technology.

Fast forward a few years from Lil Miquela's big reveal and generative artificial intelligence ("AI") has quickly impacted just about everything. And if the popular press and internet is to be believed, the young influencer industry is not immune from AI's encroachment. Article headlines proclaim that "AI Influencers" have exploded on and

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[https://web.archive.org/web/20251009145437/https://www.papermag.com/ugg-40-years-lil-miquela-campaign#rebelltitem6] (explaining that Ugg enlisted Miquela for their fortieth anniversary campaign); Todd Spangler, *Miquela, the Uncanny CGI Virtual Influencer, Signs with CAA*, VARIETY (May 6, 2020), https://variety.com/2020/digital/news/miquela-virtual-influencer-signs-caa-1234599368 [https://web.archive.org/web/20251009145659/https://variety.com/2020/digital/news/miquela-virtual-influencer-signs-caa-1234599368/] (describing the deal between talent agency CAA and Miquela).

8. *See, e.g.*, Miquela (@lilmiquela), INSTAGRAM (Oct. 21, 2017), https://www.instagram.com/p/Bahry16lqsm (displaying comments on a Lil Miquela post, many of which question if she is a robot or a human).

9. *See* Rosy Cherrington, *Lil Miquela: Instagram's Latest "It" Model Who's Confusing the Hell Out of Everyone*, HUFFINGTON POST (Feb. 9, 2016), https://www.huffingtonpost.co.uk/entry/lilmiquela-instagram_uk_57c94056e4b085cf1ecdc0af [https://web.archive.org/web/20251007004919/https://www.huffingtonpost.co.uk/entry/lilmiquela-instagram_uk_57c94056e4b085cf1ecdc0af] (referencing the quoted Instagram user and the since-removed Lil Miquela Instagram post it was found under).

10. *See* Favela, *supra* note 5, at 325 (describing the 2018 Instagram hack that led to the revelation that Miquela Sousa is not human).

11. *See generally* Miquela (@lilmiquela), INSTAGRAM, https://www.instagram.com/lilmiquela/ (last visited Oct. 1, 2024) (displaying various posts with "robot" references and the biography section reading, "22. LA. Robot").

12. MIQUELA, *"Top Ten Moments of 2021 (From a Robot),"* (YouTube, Dec. 16, 2021), https://www.youtube.com/watch?v=8ckHHhnpu8g [https://web.archive.org/web/20251030193204/https://www.youtube.com/watch?v=8ckHHhnpu8g].

13. Jessica Roy, *They're Famous. They're Everywhere. And They're Fake.*, N.Y. TIMES (Sep. 3, 2025), https://www.nytimes.com/2025/09/03/style/ai-influencers-lil-miquela-mia-zelu.html [https://web.archive.org/web/20251009150030/https://www.nytimes.com/2025/09/03/style/ai-influencers-lil-miquela-mia-zelu.html].

reshaped social media.[14] As is often the case, the reality is more nuanced than the sensational headlines, which appear to conflate CGI and AI technology.[15] It appears premature to declare that fully autonomous AI influencers have taken over. Instead, thus far humans are using technology in various complex ways in the influencer space, ranging from traditional photoshop and filtering tools to CGI technology like Lil Miquela's original creation, to generative AI.

This addition of virtual and AI influencers into the influencer industry raises a number of challenging legal and moral questions. This Article focuses on just one of them—the applicability of the U.S. right of publicity doctrine.[16] The U.S. right of publicity is currently a state law doctrine in which most states protect against unauthorized use of aspects of someone's identity either via statute, judicially-created common law, or both. Most states protect names and likenesses from commercial appropriation, whereas other states protect broader aspects of identity. If someone were to use the name or likeness of a celebrity or human influencer to promote their product or service without permission or compensation, in most states the person whose name or likeness was used could sue for a violation of their right of publicity. But what happens if someone takes the name or likeness of a virtual or AI influencer and uses it to promote a product or service without permission or compensation? Under existing state legal frameworks, does an unauthorized taking of the identity of a virtual or AI influencer violate the right of publicity? Should it?

Virtual and AI influencers are not the first non-humans to trigger these questions. In his early foundational work, renowned treatise author Melville Nimmer argued for extending the right of publicity to the human owners of animals, businesses, and other institutions.[17] By contrast, Thomas McCarthy's influential treatise covering the right of publicity opposed expanding the right of publicity beyond real humans living or dead.[18] Despite these early contrasting views, there has been a surprising dearth of caselaw or

14. Max Zahn, *AI Influencers Explode on Social Media. Some Are Controlled by Teens*, ABC NEWS (Mar. 22, 2024), https://abcnews.go.com/Business/ai-influencers-explode-social-media-some-controlled-by-teens/story?id=108346584 [https://web.archive.org/web/20251009150303/https://abcnews.go.com/Business/ai-influencers-explode-social-media-some-controlled-by-teens/story?id=108346584]; Shira Lazar, *AI Influencers and Faceless Creators Are Reshaping Social Media,* LINKEDIN (Apr. 22, 2024), https://www.linkedin.com/pulse/ai-influencers-faceless-creators-reshaping-social-media-shira-lazar-wg2gc/ [https://web.archive.org/web/20251009150628/https://www.linkedin.com/pulse/ai-influencers-faceless-creators-reshaping-social-media-shira-lazar-wg2gc/].

15. Lazar, *supra* note 14. Notably, news reports, including such reputable organizations as the *New York Times*, seem to not understand the difference between CGI and AI. As discussed further below, the terms are frequently used interchangeably, with more recent accounts calling Lil Miquela an "AI Influencer." *See, e.g.*, Roy, *supra* note 13. It is certainly possible that the people behind Lil Miquela are now using AI technology in addition to CGI technology, but the accounts of her creation and the team behind her make it sound like she is still a virtual rather than an AI influencer.

16. This Article focuses on the right of publicity doctrine within the United States. For an interesting comparison of the differences in protecting celebrity persona between the United States and the United Kingdom, see EMMA PEROT, COMMERCIALIZING CELEBRITY PERSONA (2023).

17. Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 216 (1954).

18. J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 4:37 (2d ed. 2025).

recent scholarship addressing whether the right of publicity does or should apply to nonhumans. This Article seeks to fill that gap through the lens of virtual and AI influencers.

Part I introduces a nuanced descriptive account of the full range of uses of technology within the influencer space. This robust account replaces the standard false and overly simplistic dichotomy between human and AI influencers with a more sophisticated understanding that permits careful thinking about the various legal implications of the growing use of technology in the influencer industry.

Part II offers a deep dive into the descriptive question of whether the existing diverse patchwork of state right of publicity protections could protect the identity of virtual and AI influencers by looking at the statutory language and common law discussions in various states. It then also looks at the sparse caselaw addressing whether the right of publicity applies to non-humans in the context of animals, fictional characters, and corporations.

Part III evaluates whether the right of publicity normatively should protect the identities of virtual and AI influencers. It considers the various normative theories that have been offered in defense of the right of publicity and concludes that although some provide stronger justifications than others, each is consistent with supporting some kind of right of publicity protection for virtual and AI influencers. Some theories even provide a stronger justification for protecting virtual and AI influencers than for protecting non-celebrity humans.

Part IV concludes by considering the broader implications of this analysis. Assessing the right of publicity's application to virtual and AI influencers may improve right of publicity doctrine overall by forcing analytical transparency of the normative goals for the right of publicity.

I. FROM HUMAN TO VIRTUAL TO AI INFLUENCERS

While paying individuals to promote products and services is certainly nothing new, the modern social media influencer industry is only a few decades old. Yet even in its relative infancy, the influencer industry that began with bloggers and quickly moved to social media has expanded alongside the technology that makes it possible. The complicated reality is that there is not a clean divide between human, virtual, and AI influencers. While human influencers continue to dominate the industry, human influencers use technology in a plethora of ways that impact the way that an influencer is portrayed, such as pervasive use of photoshop technologies and other similar tools.[19] Technology caused a significant shift in the influencer industry nearly a decade ago with the introduction of virtual influencers, like Lil Miquela, whose images were created using CGI technology. Most recently, the media has proclaimed the birth of an

19. *See* Albertina Antognini & Andrew Keane Woods, *Shallow Fakes*, 128 PENN ST. L. REV. 69, 74 (2023) (describing the harms from pervasive use of filters, posting photos out of context, and otherwise presenting fake versions of one's life on social media); Roberts, *supra* note 2, at 113 ("Influencers on Instagram and various other platforms are known for using filters, Photoshop, Facetune, and other means of post-production tweaking on their skin, hair, and curves.") (internal citation omitted).

AI influencer phenomenon.[20] As is often the case, this declaration appears premature. Nonetheless, it is worth taking a nuanced look at the ways in which AI plays a role in the influencer industry. Doing so rejects an artificial division of influencers into human, virtual, or AI in favor of a spectrum in which humans use a range of technology in various complex ways in order to create, enhance, and curate the influencers' identities and content.

A. BIRTH OF THE MODERN INFLUENCER INDUSTRY

While the modern concept of social media influencers is quite new, influential people acting to sway consumer consumption is not new at all. Historically, members of royal families served as early influencers.[21] When a royal family would endorse a particular business or make it known that the royal family uses a particular dressmaker or porcelain, that endorsement would cause ordinary subjects to want to shop at the same stores and with the same merchants as the royals.[22] Then, in royalty-free countries such as the United States, celebrities from various entertainment industries began serving in a similar role—appearing in commercials or otherwise endorsing goods and services in exchange for payment.[23] Beginning in the 2000s, the growth of social media democratized the influencer concept, expanding the pool of influencers beyond royalty and entertainment celebrities to allow seemingly ordinary people to influence the purchasing decisions of those around them by harnessing the power of their social media networks.[24]

20. *See, e.g.*, Zahn, *supra* note 14 (describing AI influencers created by the company 1337); Lazar, *supra* note 14 (explaining the evolving landscape of AI influencers).

21. *See* Nadra Nittle, *The British Royals Were the Original Fashion Influencers*, RACKED (May 16, 2018), https://www.racked.com/2018/5/16/17360792/british-royal-family-princess-diana-meghan-markle-fashion-influencers
[https://web.archive.org/web/20251009151001/https://www.racked.com/2018/5/16/17360792/british-royal-family-princess-diana-meghan-markle-fashion-influencers].

22. *See id.*

23. *See* Elizabeth Lee, *Celebrity Endorsements and Partnerships for Marketing Purposes*, USC GOULD'S BUS. L. DIG. (Apr. 24, 2023), https://lawforbusiness.usc.edu/celebrity-endorsements-and-partnerships-for-marketing-purposes/
[https://web.archive.org/web/20251009151340/https://lawforbusiness.usc.edu/celebrity-endorsements-and-partnerships-for-marketing-purposes/] (mentioning that since the beginning of advertising, celebrities have been used to market products).

24. *See id.* (noting the advent of Instagram enabled the influencer market to rapidly develop and expand).

Many commentators credit bloggers, and specifically somewhat disparagingly so-called "mommy bloggers,"[25] with launching the modern influencer concept.[26] These accounts explain how, in the early 2000s, a wave of bloggers began to write "confessional, raw accounts" of their everyday struggles and experiences with motherhood.[27] These women "began creating online spaces where they could express their joys and frustrations, get help and forge connections in new digital villages."[28] At that time most blogs did not have advertising, and the first major wave of social media consisting of Facebook (founded 2004), YouTube (founded 2005), and Twitter (founded 2006) had not yet implemented monetization strategies.[29] In 2010, the launch of Instagram accompanied the technical ability of web hosts to handle larger photos.[30] This allowed text-based blogs to become more visual, and caused bloggers to realize that they could make more money by posting visually appealing aspirational content about brands.[31] With this shift many blogs transitioned into "lifestyle" blogs, and bloggers transitioned into influencers based on the followers they had accumulated.

Before long, social media powerhouses YouTube, Facebook, Twitter, and Instagram developed mechanisms to pay content creators, leading to an explosion in influencers. With the monetization of social media, independent creators began to have a strong influence on public perception. They could drive traffic to the products and services they promoted online by leveraging their social media following and now had an effective mechanism to be compensated for it. As Alexandra Roberts explains, anyone who "receives payment, commission, free goods or services, or any other benefit that might affect the weight consumers give their endorsements in exchange for posting on social media or elsewhere online" is engaged in influencer marketing.[32] The

25. *See* Lauren Apfel, *I'm a Mommy Blogger and Proud of It*, TIME (Nov. 14, 2014), https://time.com/3592698/im-a-mommy-blogger-and-proud-of-it/ [https://web.archive.org/web/20251009151629/https://time.com/3592698/im-a-mommy-blogger-and-proud-of-it/] (recognizing that the term "mommy blogger" can be considered both patronizing and derogatory); *see also* Danielle Wiley, *How Mom Bloggers Helped Create Influencer Marketing*, AD WEEK (Mar. 19, 2018), https://www.adweek.com/brand-marketing/how-mom-bloggers-helped-create-influencer-marketing/ [https://web.archive.org/web/20251009151943/https://www.adweek.com/brand-marketing/how-mom-bloggers-helped-create-influencer-marketing/] ("In retrospect, we see this as the dawn of 'Mommy blogging,' now considered an archaic, borderline-offensive, catch-all term for any woman who has written about parenthood.").

26. *See, e.g.*, Kathryn Jezer-Morton, *Did Moms Exist Before Social Media?,* N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2020/04/16/parenting/mommy-influencers.html [https://web.archive.org/web/20251009152437/https://www.nytimes.com/2020/04/16/parenting/mommy-influencers.html] (recognizing a shift from mommy blogs to mom blogging influencers); Wiley, *supra* note 25 (noting influencer marketing began with women in the mommy blogging days).

27. Jezer-Morton, *supra* note 26.

28. Wiley, *supra* note 25.

29. *See* Whitney Blankenship, *A Brief History of Social Media [Infographic]*, OKTOPOST (Aug. 16, 2022), https://www.oktopost.com/blog/history-social-media/ [https://perma.cc/WH3L-UJF8] (noting that social media monetization began in 2007 when Facebook launched Facebook Ads).

30. *See* Mark Glick, Catherine Ruetschlin & Darren Bush, *Big Tech's Buying Spree and the Failed Ideology of Competition Law*, 72 HASTINGS L.J. 465, 487–88 (2021) (noting that by 2009, Facebook "was the largest photo sharing service in the world," and mentioning the 2010 launch of Instagram).

31. Jezer-Morton, *supra* note 26.

32. Roberts, *supra* note 2, at 89–90.

phenomenon further evolved with the 2018 launch of TikTok in the United States, which became the most downloaded app in 2020.[33] Despite recent legal controversies over its ownership,[34] TikTok is credited with further democratizing the influencer space because its unique algorithm doesn't necessarily prioritize the largest followings, allowing normal people to compete against larger influencers that dominate other platforms.[35] The influencer industry rose rapidly and Forbes estimated that it is worth $250 billion in 2025, with Goldman Sachs predicting it will double to nearly $500 billion by 2027.[36] Although the influencer marketing space includes both men and women, women continue to dominate the space both in terms of numbers and levels of engagement.[37]

Dictionary usage of the term "influencer" has similarly evolved. The Oxford English dictionary has long defined "influencer" as "[a] person who or thing which influences," in other words the noun created from the verb "to influence."[38] In 2022 it added two new entries for "influencer."[39] The first offers, "[a] person who has the ability to influence other people's decisions about the purchase of particular goods or services."[40] The second states, "[a] person who has become well-known through use of the internet and social media, and uses celebrity to endorse, promote, or generate interest in specific products, brands, etc., often for payment."[41] Lexicographer Jane Solomon notes that the original definition of the word "influencer" has been used in English since the mid-1600s just to mean someone with the ability to influence, but that the modern understanding of an influencer as leveraging social media strategically and for profit is much more recent.[42]

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33. *TikTok Named as the Most Downloaded App of 2020*, BBC (Aug. 10, 2021), https://www.bbc.com/news/business-58155103 [https://web.archive.org/web/20251009152819/https://www.bbc.com/news/business-58155103].

34. *See generally* TikTok Inc. v. Garland, 604 U.S. 56 (2025) (outlining recent controversy over TikTok's ownership).

35. Danielle Moskowitz, *How TikTok Created the "Everyday Influencer" and Why Brands Should Care*, LONG DASH (Oct. 27, 2022), https://web.archive.org/web/20241015021500/https://www.longdash.co/altered/how-tiktok-created-the-everyday-influencer-and-why-brands-should-care/.

36. Chemtob, *supra* note 1.

37. *See* Haley Thorpe, *Seven Stats That Show Women Dominate Influencer Marketing*, FOHR (Feb. 9, 2024), https://www.fohr.co/articles/7-stats-that-show-women-dominate-influencer-marketing [https://web.archive.org/web/20251010130930/https://www.fohr.co/articles/7-stats-that-show-women-dominate-influencer-marketing] (noting "86% of women use social media for purchasing advice" and "77% of influencers monetizing their content are female"); Wiley, *supra* note 25 (noting that on Instagram women receive five times more likes than men).

38. *Influencer*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/influencer_n?tab=meaning_and_use#409239 [https://web.archive.org/web/20251010131506/https://www.oed.com/dictionary/influencer_n?tab=meaning_and_use&tl=true#409239] (last visited Oct. 10, 2025).

39. *Id.*

40. *Id.*

41. *Id.*

42. Jane Solomon, *What Is an "Influencer" and How Has This Word Changed?*, DICTIONARY.COM (Jan. 7, 2019), https://www.dictionary.com/e/influencer/ [https://web.archive.org/web/20251010132838/https://www.dictionary.com/e/influencer/].

B. THE INFLUENCER TECHNOLOGY SPECTRUM

Rather than neatly dividing influencers into human, virtual, and AI categories, this section considers each of those characterizations as existing along a spectrum of interactions between humans and technology in developing an influencer's likeness/physical appearance, name, and the content that forms part of an influencer's identity.

1. Pure Authenticity

Human influencers who post raw content unedited and unfiltered by technology sit at one end of the influencer technology spectrum. Regarding appearance, these rare influencers post technologically unaltered and untouched photographs of themselves.[43] Yet, through the process of selecting which photos to post, wearing makeup, or engaging in cosmetic procedures, even the most "authentic" influencers do not reflect pure reality, although they do not use technology to alter their appearance. Presumably, these influencers also use their actual legal names and do not rely on technology to create their content, although of course all social media influencing necessarily uses technology to some extent.

2. Shallow Fakes

The next prong in the influencer technology spectrum are human influencers who use photoshop, filters, and other similar appearance-altering technology to make edits to their likeness. Most human influencers fall into this category to some degree. Albertina Antognini and Andrew Keane Woods catalog a variety of ways in which social media users, including influencers, post "filtered, edited, or otherwise enhanced images of themselves."[44] They call this phenomenon "shallow fakes," which they define as seemingly harmless, superficial, and commonplace online tweaks to one's image affecting one's self-presentation.[45]

Alterations can vary from fixing red eyes to filters that smooth out skin to entirely altering body shape. Some of this technology is nothing new. Back in 1997, before the explosion of social media, FotoNation patented the technology for software to detect

43. *See* Patrick Landman, *The Unfiltered Feed: Influencers Trading Perfection for Authenticity*, HOSPITALITY NET (May 9, 2025), https://www.hospitalitynet.org/opinion/4127105.html [https://web.archive.org/web/20251010133414/https://www.hospitalitynet.org/opinion/4127105.html] (discussing the shift to unfiltered influencers).

44. Antognini & Woods, *supra* note 19, at 74.

45. *Id.* Admittedly, that term feels somewhat normative rather than purely descriptive of the phenomenon. Antognini and Woods document the potentially harmful impacts of the heavily altered and unattainable influencer appearance on body image and the mental health of social media followers, including concerns with body dysmorphia, mental health, pressure to sexualize, reinforcing traditional gender roles, racialized harms with appropriation and whitewashing, and democratic harms. They also acknowledge the arguments that such digital alteration of one's image can be autonomy-enhancing, allowing for a positive form of play, self-expression, or self-discovery. *See id.*

and correct the red-eye effect in photography, where people's eyes, especially light-colored eyes, appear red in flash photos as the result of reflected light from the blood vessels in the retina.[46] More recent technology takes image alterations to entirely new levels by altering one's appearance in more extreme ways. According to a recent survey cited by Antognini and Woods, 90% of women regularly apply filters to their selfie photos.[47] They point to the success of the billion-dollar app FaceTune, a digital tool that makes reshaping the appearance of one's body online extremely easy.[48] Many social media sites, including Instagram, have tools embedded to allow users, including influencers, to alter their images in various ways. Notably, the practice is so widespread that when Lil Miquela debuted, some of her followers believed her CGI-appearing features merely meant extensive use of photoshop or similar technology.

3. Virtual Influencers

In an impressive piece of prognostication, in 2001 the late Joseph Beard analyzed legal protection for what he called "virtual humans."[49] Beard's paper did not anticipate the influencer turn that virtual humans would take, and instead he focused "on the exploitation of virtual humans in film and television."[50] Nonetheless, he helpfully created a taxonomy of virtual humans, dividing them between "real virtual humans," which includes both digital clones of living individuals, and digital resurrections of deceased persons, and "imaginary virtual humans" who are not based on any particular human individual.[51] These categories are useful in considering the next band of the influencer spectrum consisting of various forms of virtual influencers.

Beard's subset of "real virtual humans" consisting of "digital clones of living individuals" represent the next step on the influencer technological spectrum. These digital influencers, also sometimes called digital avatars, are based on a particular human individual and designed to look like that human. They can range from basic avatars, simple icons or cartoon-like figures, to 3D avatars, more complex, three-dimensional representations, all the way to digitally generated avatars, which can be customized to look a great deal like the humans behind them.[52] In the context of

46. Lonnie Brown, *Cameras Take Red Out Before Storing Photos*, LEDGER (Oct. 1, 2006), https://www.theledger.com/story/news/2006/10/01/cameras-take-red-out-before-storing-photos/25925469007/ [https://web.archive.org/web/20251010133744/https://www.theledger.com/story/news/2006/10/01/cameras-take-red-out-before-storing-photos/25925469007/].

47. Antognini & Woods, *supra* note 19, at 74.

48. *Id.*

49. *See generally* Joseph J. Beard, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165 (2001).

50. *Id.* at 1169.

51. *Id.* at 1253–54.

52. *See, e.g.*, Conor Dewey, *Virtual Avatars and Influencers*, CONORDEWEY.COM (Oct. 1, 2020), https://www.conordewey.com/blog/virtual-avatars-and-influencers/ [https://web.archive.org/web/20251010134747/https://www.conordewey.com/blog/virtual-avatars-and-influencers/] (observing that a popular account on Twitch called Pokimane streamed a virtual version of herself that resembled what she would look like as a cartoon).

influencers this could mean a regular human influencer engaging on social media in all the typical ways except that the normal posting of photographs, even photoshopped ones, are replaced with technologically created images of a digital clone.

Closely related is Beard's "digital resurrection of a deceased person," which in the influencer space could be an influencer consisting of a digital resurrection designed to look like someone who has passed away.[53] Unlike the former category, the humans underlying these influencers are deceased, so someone other than the deceased person depicted is necessarily making decisions regarding the content posted by the digital resurrection of the deceased person. For both digital clone and digital resurrection forms of real virtual influencers, the virtual influencer's name would likely be the real name (or nickname) of the associated human. Similarly, for both digital clones and digital resurrections, aspects of the influencer's life story would likely be drawn from the associated individual's real-life story, although for digital resurrections the person's death may mean fictionalization of elements past the underlying human's death.

Beard's next category of "imaginary virtual humans" can be further subdivided for purposes of the influencer space between imaginary virtual influencers meant to represent (but not look like) an individual person and imaginary virtual influencers not tied to a particular individual.[54] Thus, one type of imaginary virtual influencer is imaginary in the sense that they do not particularly physically resemble the single human influencer behind it. The human behind the imaginary virtual influencer may have created it as a low stakes way to play with what it could be like to be an influencer of a different gender, race, physical apperance, etc. than their own. Given this freedom, the imaginary virtual influencer does not necessarily share the name or other life-story aspects of identity with the human behind it, but rather those could be entirely fictional just like the person's image. Nonetheless, this could be a way to experiment with identity by taking on a new persona.

By contrast, the most famous virtual influencers do not appear linked to a single individual as a form of playing with identity. For example, Trevor McFedries and Sara DeCou of Brud seemingly created Lil Miquela, the first known and most prominent example of virtual influencers, to create new models for storytelling—not to play with aspects of their own identity.[55] Two years after her social media debut, the 2018 revelation that Lil Miquela was not in fact a human influencer, but rather was created using CGI technology by Brud, generated a great deal of media attention to the virtual influencer phenomenon more broadly.[56] Lil Miquela's millions of followers, inclusion

53. Beard, *supra* note 49, at 1171, 1226–29.

54. *See generally id.*

55. Emilia Petrarca, *Body Con Job*, THE CUT (May 14, 2018) https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html [https://web.archive.org/web/20251108191521/https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html].

56. *See, e.g.*, Emilia Petrarca, *Everything We Know About the Feud Between These Two Computer-Generated Instagram Influencers*, THE CUT (Apr. 18, 2018), https://www.thecut.com/2018/04/lil-miquela-hack-instagram.html [https://web.archive.org/web/20251010135427/https://www.thecut.com/2018/04/lil-miquela-hack-instagram.html] (discussing the drama that ensued following the big reveal that Lil Miquela is not a real person).

in the *Time Magazine*'s 2018 "Twenty-five Most Influential People on the Internet," high profile brand deals, and CAA talent agency deal increased attention.[57]

According to *the New York Times*, tech company Dapper Labs acquired Brud, and Lil Miquela's account is now run by a team that "creates the story lines, images and captions that bring Miquela to life."[58] The company's vice president elaborated, "We think it's healthy to have multiple people thinking through Miquela's voice, analyzing what we're seeing her audience care about, worry about, think about, and also understand what are the problems in the world today that Miquela can have a voice on."[59] These problems include Lil Miquela's claims that she has leukemia, supposedly to raise awareness for the illness, and somewhat ironically becoming a victim of deepfakes.[60]

Within the United States, Lil Miquela may be the most famous "virtual influencer" but she is not the sole example of a successful virtual influencer.[61] Rather, virtual influencers are an international phenomenon. For example, Shudu Gram is a black South African Instagram model with hundreds of thousands of followers.[62] She wears and promotes lipstick and clothing.[63] Like Lil Miquela, she is also not a real person.[64] She is the CGI creation of white male British photographer Cameron-James Wilson,[65] who refers to her as an "art piece."[66] In an interview, Wilson explained, "I use a 3D modeling program. It's like virtual photography, so once I create her, I can kind of pose her in certain ways."[67] He went on to describe his vision of Shudu Gram by saying, "I

57. *See supra* notes 4–6 and accompanying text.

58. *See* Roy, *supra* note 13.

59. *Id.*

60. *Id.*

61. *See* Sean Sands et al., *False Idols: Unpacking the Opportunities and Challenges of Falsity in the Context of Virtual Influencers*, 65 BUS. HORIZONS 777, 778–79 (noting that Lil Miquela is likely the most famous virtual influencer and naming various other virtual influencers who occupy social media spaces).

62. *See* Ifeoma Ajunwa, *Artificial Intelligence, Afrofuturism, and Economic Justice*, 112 GEO. L.J. 1267, 1288 (2024) (introducing Shudu Gram as a "Black model" who, upon introduction to Instagram, amassed many followers and landed modeling deals with some of the biggest names in fashion); Sinead Bovell, *I Am a Model and I Know That Artificial Intelligence Will Eventually Take My Job*, VOGUE (July 21, 2020), https://www.vogue.com/article/sinead-bovell-model-artificial-intelligence [https://web.archive.org/web/20251010141553/https://www.vogue.com/article/sinead-bovell-model-artificial-intelligence] (identifying Shudu Gram as South African).

63. *See generally* Shudu (@shudu.gram), INSTAGRAM, https://www.instagram.com/shudu.gram/' (last visited Oct. 1, 2024) (displaying Shudu Gram's pictures and promotions).

64. *See* Ajunwa, *supra* note 62, at 1288 (identifying Shudu Gram as "not a real person," but instead "an AI-created image").

65. Jonathan Square, *Is Instagram's Newest Sensation Just Another Example of Cultural Appropriation?*, FASHIONISTA (Mar. 27, 2018), https://fashionista.com/2018/03/computer-generated-models-cultural-appropriation. There are undoubtedly challenging racial, historical, and cultural misappropriation questions raised when individuals from traditionally advantaged groups create virtual influencers with the racial and/or gender characteristics of traditionally disadvantaged groups. *See id.* At the same time, experiencing what it may be like to interact and "live" on social media as a member of a traditionally disadvantaged group may allow for individuals to see what it can be like for others of different backgrounds. *See generally id.*

66. Jenna Rosenstein, *People Can't Tell If This Fenty Model Is Real or Fake*, HARPER'S BAZAAR (Feb. 9, 2018), https://www.harpersbazaar.com/beauty/makeup/a16810663/shudu-gram-fenty-model-fake/ [https://web.archive.org/web/20251010150155/https://www.harpersbazaar.com/beauty/makeup/a16810663/shudu-gram-fenty-model-fake/].

67. *Id.*

am a photographer anyway, so it's just a way of exploring my creativity when I'm not shooting."[68]

Imma is a virtual influencer whose "home" is in Tokyo, Japan, but whose work and influence have global reach.[69] She was created by Aww Inc. and ModelingCafe and debuted in 2018.[70] Imma has distinctive pink hair and expressive eyes, and, like Lil Miquela, promotes modern societal themes in addition to her partnerships with brands such as Valentino, Chanel, Adidas, and The North Face.[71] Other social media biographies from around the world read, "Virtual girl in [Japan],"[72] "24-year-old virtual girl living in Helsinki,"[73] and "Korea's First Virtual Influencer."[74]

A *Forbes* article identifies benefits for brands in working with virtual influencers including accessibility, the possibility of maintaining more control over the projects, the ability of the teams behind virtual influencers to create content around the clock, and the opportunity to reach a new, younger audience who is particularly interested in new media content.[75] In support of the younger audience point, the article notes that a 2022 survey found that 58% of respondents followed at least one virtual influencer and 35% had purchased a product promoted by a virtual influencer, with those aged 18–44 most likely to have done so.[76]

Relatedly, there is another category of virtual influencers who are created by a company, primarily to be the spokesperson for their brand. For example, Lu Do Magalu is a virtual influencer who is a sensation in Brazil.[77] Lu appeared on Brazil's *Dancing with the Stars*, fights violence against women, creates content on major social media platforms, and partners with international brands such as Adidas, Samsung, Red Bull and McDonald's.[78] She appeared on the cover of fashion magazine *Vogue Brasil*, and

68. *Id.*

69. Gloria Maria Cappelletti, *The Rise of Imma: A Virtual Model Who Redefines Fashion in the Web3 Era*, RED EYE (Feb. 20, 2023), https://red-eye.world/c/the-rise-of-imma-a-virtual-model-who-redefines-fashion-in-the-web3-era [https://web.archive.org/web/20251010150510/https://red-eye.world/c/the-rise-of-imma-a-virtual-model-who-redefines-fashion-in-the-web3-era].

70. *Id.*

71. *Id.*

72. imma (@imma.gram), INSTAGRAM, https://www.instagram.com/imma.gram/ (last visited Nov. 8, 2025).

73. Milla Sofia (@millasofiafin), TIKTOK, https://www.tiktok.com/@millas_sofia?lang=en [https://web.archive.org/web/20251030195403/https://www.tiktok.com/@millas_sofia?lang=en] (last visited Oct. 24, 2025).

74. Rozy Oh (@rozy.gram), INSTAGRAM, https://www.instagram.com/rozy.gram/ (last visited June 17, 2024).

75. Alison Bringé, *The Rise of Virtual Influencers and What It Means for Brands*, FORBES (Oct. 18, 2022), https://www.forbes.com/councils/forbescommunicationscouncil/2022/10/18/the-rise-of-virtual-influencers-and-what-it-means-for-brands/ [https://web.archive.org/web/20251108194051/https://www.forbes.com/councils/forbescommunicationscouncil/2022/10/18/the-rise-of-virtual-influencers-and-what-it-means-for-brands/].

76. *Id.*

77. *How Lu from Magalu Became the Biggest Virtual Influencer in the World*, LITTLE BLACK BOX (May 17, 2022), https://lbbonline.com/news/how-lu-from-magalu-became-the-biggest-virtual-influencer-in-the-world [https://web.archive.org/web/20251010151640/https://lbbonline.com/news/how-lu-from-magalu-became-the-biggest-virtual-influencer-in-the-world].

78. *Id.*

even commented on a football (soccer) game in Brazil live on TikTok.[79] In 2022, Lu amassed over thirty million followers on social media.[80] Lu was created by Brazilian retail giant Magazine Luiza (known as Magalu), from which she gets her last name, and is designed as a virtual spokeswoman specifically for the company.[81]

Virtual influencers like Lil Miquela and Lu Do Magalu introduced numerous legal and ethical questions, and both the popular press[82] and the law review literature have begun to grapple with some of these issues.[83] A number of works have focused on the role of the Federal Trade Commission ("FTC") in addressing concerns about deception

79. *Id.*

80. *Id.*

81. *Id.*

82. *See generally* Bernard Marr, *How Online Influencers and Idols Are Using Generative AI*, FORBES (Dec. 1, 2023), https://forbes.com/sites/bernardmarr/2023/12/01/how-online-influencers-and-idols-are-using-generative-ai/?sh=190d904f720c [https://web.archive.org/web/20251010210207/https://www.forbes.com/sites/bernardmarr/2023/12/01/how-online-influencers-and-idols-are-using-generative-ai/] (discussing AI influencer marketing); *What Are AI Influencers? And Should Your Brand Care?*, GOAT (Dec. 21, 2023), https://goatagency.com/blog/influencer-marketing/ai-influencers/#page-jump-1 [https://web.archive.org/web/20251010210916/https://goatagency.com/blog/ai-influencers/] (discussing the history of AI influencers, how they are currently used, and what their future looks like); Astrid Hiort, *Understanding the Role of AI and Virtual Influencers Today*, VIRTUAL HUMANS (Feb. 8, 2023), https://www.virtualhumans.org/article/understanding-the-role-of-ai-and-virtual-influencers-today [https://web.archive.org/web/20251010211445/https://www.virtualhumans.org/article/understanding-the-role-of-ai-and-virtual-influencers-today] (explaining AI and how it is used for virtual influencers like Kuki AI); Mai Nguyen, *Virtual Influencers: Meet the AI-generated Figures Posing as Your New Online Friends—as They Try to Sell You Stuff*, THE CONVERSATION (Sep. 19, 2023), https://theconversation.com/virtual-influencers-meet-the-ai-generated-figures-posing-as-your-new-online-friends-as-they-try-to-sell-you-stuff-212001 [https://web.archive.org/web/20251010212116/https://theconversation.com/virtual-influencers-meet-the-ai-generated-figures-posing-as-your-new-online-friends-as-they-try-to-sell-you-stuff-212001] (discussing virtual influencers and whether they pose a threat to human influencers); Brooke Steinberg, *Gen Z Has a Surprising Opinion About AI Influencers on Social Media, Study Finds*, N.Y. POST (May 8, 2024), https://nypost.com/2024/05/08/tech/gen-z-has-a-surprising-opinion-about-ai-influencers-on-social-media-study-finds/ [https://web.archive.org/web/20251010212404/https://nypost.com/2024/05/08/tech/gen-z-has-a-surprising-opinion-about-ai-influencers-on-social-media-study-finds/] (discussing Gen Z's acceptance of AI influencers); *Unveiling the Power of Generative AI Influencers: Shaping the Future of Social Media,* MODERN DIPLOMACY (Apr. 23, 2024), https://moderndiplomacy.eu/2024/04/23/unveiling-the-power-of-generative-ai-influencers-shaping-the-future-of-social-media/ [https://web.archive.org/web/20251010213135/https://moderndiplomacy.eu/2024/04/23/unveiling-the-power-of-generative-ai-influencers-shaping-the-future-of-social-media/] (considering the benefits of using AI influencers in marketing and noting some successes).

83. *See generally* Favela, *supra* note 5 (discussing concerns with CGI influencers and possible solutions); Kelly Callahan, *CGI Social Media Influencers: Are They Above the FTC's Influence?*, 16 J. BUS. & TECH. L. 361 (2021) (calling on the FTC to consider CGI influencers and begin regulating them in the context of deceptive advertising); Masteralexis, McKelvey & Statz, *supra* note 7 (proposing different paths for the FTC to handle robots); Okolie, *supra* note 3 (examining the impending legal implications of virtual influencers); Katherine B. Forrest, *The Ethics and Challenges of Legal Personhood for AI*, 133 YALE L.J. 1175, 1179 (2024) ("set[ting] forth legal and ethical frameworks to address the status of sentient AI"); Alexander Plansky, *Virtual Stardom: The Case for Protecting the Intellectual Property Rights of Digital Celebrities as Software*, 32 U. MIAMI BUS. L. REV. 150 (2024) (analogizing imaginary virtual human performers to software).

from virtual influencers.[84] These discussions center on two problems posed by virtual influencers: that consumers are unaware that the influencer promoting a particular product or service is not a real person, and, relatedly, that some of the "influencers" promoting a particular product or service are really the creation of that brand or company.[85] Just as the FTC has made clear that human influencers need to disclose that they have been paid/compensated for promoting a brand, scholars argue that there should be similar mandatory disclosures for these creations.[86] Along these lines, in July 2023, the FTC adopted changes to its "Guides Concerning Use of Endorsements and Testimonials in Advertising" and made clear that virtual influencers are subject to the FTC's overall disclosure requirements for endorsements, but did not offer additional virtual influencer-specific guidance.[87]

4. AI Influencers

Finally, Beard predicted that just like Geppetto wished that his wooden puppet Pinocchio would someday become a real boy, that early in the twenty-first century there would be "virtual humans who can see, speak, hear, touch and be touched, exhibit behavior, and think just as we do."[88] He forecasted that "[l]ike Pinocchio, virtual humans will shed their 'strings'" and "be virtually autonomous."[89] Most recently, the media has seemingly proclaimed the fulfilment of Beard's prediction with so-called "AI Influencers."[90] A March 2024 *ABC News* article declared, "AI Influencers Explode on

84. *See generally* Favela, *supra* note 5 (discussing the lack of regulations for CGI influencers); Masteralexis, McKelvey & Statz, *supra* note 7 (discussing how, at the time of writing, the FTC had not offered any guidance regarding regulation of CGI influencers); Callahan, *supra* note 83 (calling on the FTC to regulate CGI influencers).

85. *See* Masteralexis, McKelvey & Statz, *supra* note 7, at 363 (noting the confusion CGI influencers can cause).

86. *See, e.g.*, *id.* at 381 ("[W]e propose one approach in which Robots would be required to disclose any material connections, but through a specific set of tactics designed to clearly and unequivocally identify them as Robots so as to eliminate the potential of misleading or deceiving the consumer.").

87. FED. TRADE COMM'N, *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements* (June 29, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements [https://web.archive.org/web/20251010223703/https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements].

88. Beard, *supra* note 49, at 1167.

89. *Id.*

90. *See generally Seventeen Expert Insights into the Rise of AI Influencers*, FORBES (May 23, 2024), https://www.forbes.com/councils/forbesagencycouncil/2024/05/23/17-expert-insights-into-the-rise-of-ai-influencers/ [https://web.archive.org/web/20251010223906/https://www.forbes.com/councils/forbesagencycouncil/2024/05/23/17-expert-insights-into-the-rise-of-ai-influencers/] (discussing how "AI Influencers could revolutionize brand representation"); *AI Influencers: How Virtual Personalities Are Shaping the Future of Marketing*, INFLUENCITY (Jan. 3, 2025), https://influencity.com/blog/en/ai-influencer [https://web.archive.org/web/20251010224101/https://influencity.com/blog/en/ai-influencer] (discussing the new relationship between AI influencers and brand marketing); *The Digital Revolution of AI Influencers on Instagram*, LEFTY (Nov. 6, 2024), https://lefty.io/blog/ai-influencers-on-instagram

Social Media."[91] A second headline pronounced, "AI Influencers and Faceless Creators are Reshaping Social Media."[92] Another headline teased, "AI Influencers secretly outearn their human counterparts."[93] Most recently, a September 2025 *New York Times* headline for an article about AI Influencers proclaimed, "They're Famous. They're Everywhere. And They're Fake."[94] Looking to social media, influencers have biographies in which they refer to themselves as "AI girl"[95] and "India's first AI Influencer."[96]

Scrutinizing more closely, however, it appears that the coronation of AI influencers may be premature, at least if what is meant by the term is an influencer autonomously created by generative AI. Instead, the media seems to use the term "AI influencer" to refer to a wide variety of roles for generative AI, and often include CGI virtual influencers.[97]

For example, the *ABC News* article discusses a number of influencers created by a company called 1337 (pronounced "Leet") that "designs and operates artificial intelligence–generated online influencers."[98] Jenny Dearing, the co-founder and CEO of 1337, explains that the company designs a new influencer by identifying a community of people with a specific interest or trait who may take an interest in the influencer, but "then the firm fills out the details" such as "how they might live their lives, where they reside, what does their room look like, what are their hobbies."[99] Dearing admits that "humans are involved at multiple points to moderate the creation process," and she

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[https://web.archive.org/web/20251010224251/https://lefty.io/blog/ai-influencers-on-instagram] (discussing the rise and impact of AI Influencers); Amanda Longa, *AI Influencers: A New Phenomenon*, THE AGENCY (Jan. 20, 2024), https://web.archive.org/web/20241209055738/https://theagency.jou.ufl.edu/post/ai-influencers-a-new-phenomenon; Rosebud-Benitez, *The Rise of AI Influencers: How Virtual Celebrities Are Taking Over Social Media*, PHL MENUS (Feb. 15, 2025), https://phlmenus.org/the-rise-of-ai-influencers-how-virtual-celebrities-are-taking-over-social-media/ [https://web.archive.org/web/20251010224826/https://phlmenus.org/the-rise-of-ai-influencers-how-virtual-celebrities-are-taking-over-social-media/] (discussing the rise of AI Influencers, some of the ethical considerations, and the future).

91. Zahn, *supra* note 14.

92. Lazar, *supra* note 14.

93. Priyanka Dadhich, *AI Influencers Secretly Outearn Their Human Counterparts*, WIRE19 (Feb. 14, 2024), https://wire19.com/ai-influencers-secretly-outearn-their-human-counterparts/ [https://web.archive.org/web/20251011010212/https://www.wire19.com/ai-influencers-secretly-outearn-their-human-counterparts/].

94. Roy, *supra* note 13.

95. *See supra* note 15 (explaining the difference); *see* Victor Tangermann, *Fully Generated AI Influencers Are Getting Thousands of Reactions Per Thirst Trap*, FUTURISM (July 19, 2023), https://futurism.com/ai-generated-influencers [https://web.archive.org/web/20251010225854/https://futurism.com/ai-generated-influencers] (referring to various AI influencers' social media descriptors, including "AI girl" and "AI model").

96. Kyra Onig (@kyraonig), INSTAGRAM, https://www.instagram.com/kyraonig/ (last visited Nov. 8, 2025).

97. Lazar, *supra* note 14 ("This isn't the first time we are seeing AI influencers going viral. Shout out to Lil Miquela, who was one of the first. Lil Miquela is a fictional CGI character. . . ."); Roy, *supra* note 13 (describing Lil Miquela as an AI influencer, when she appears to be CGI).

98. Zahn, supra note 14.

99. Id.

refers to those humans as the "creators."[100] The human creators help filter out flawed AI images such those with extra limbs or missing fingers.[101] The human creators also select posts that fit the given influencer's persona. This suggests that even when the term "AI influencer" is being used, there is still a good deal of human control.

Similarly, IZEA, a marketing technology company that helps brands collaborate with social influencers and content creators, has a page on its website titled "The Rise of AI Influencers on Instagram: Check Out These Creators."[102] The page defines AI influencers as "influencers on social media who are created by artificial intelligence."[103] The page then goes on to list a number of supposed AI influencers on Instagram along with images of them.[104] Except that the first two listed are Lil Miquela and Shudu Gram, who, as discussed above, have human creators even if they use CGI technology to help with that creation, and therefore do not seem to fit IZEA's own definition of being "created by artificial intelligence."[105]

Given the slipperiness of the term "AI influencer," it may be useful to examine more closely how generative AI can be used in the influencer industry. In a December 2023 *Forbes* piece, Bernard Marr—self-described futurist and author of *Generative AI in Practice: 100+ Amazing Ways Generative Artificial Intelligence Is Changing Business and Society*—describes some of the varied ways AI is being used by influencers.[106]

The first category, at one end of the AI influencer technological spectrum, is the "AI Personal Assistant."[107] This involves a human influencer using generative AI to help with behind-the-scenes aspects of the day-to-day work of an influencer, almost like a human personal assistant.[108] Marr explains that generative AI can help a human influencer with data analytics, analyzing content success, finding brands to collaborate with, and completing business tasks such as scheduling.[109] For this category, both the name and images depicted remain those of the human influencer.

In the second category, "AI Content Creation for Human Influencer," the generative AI moves from a background supporting role to an active role in creating actual content

100. Id.

101. *Id.*; *see also* Meg Matthias, *Why Does AI Art Screw Up Hands and Fingers?*, BRITANNICA, https://www.britannica.com/topic/Why-does-AI-art-screw-up-hands-and-fingers-2230501 [https://web.archive.org/web/20251011010626/https://www.britannica.com/topic/Why-does-AI-art-screw-up-hands-and-fingers-2230501] (last visited Mar. 8, 2025) ("An AI-generated hand might have nine fingers or fingers sticking out of its palm. In some images hands appear as if floating, unattached to a human body. Elsewhere, two or more hands are fused at the wrists."); *see also How to Remove Extra Limbs with Stable Diffusion Inpainting*, STABLE DIFFUSION ART (Feb. 27, 2023), https://stable-diffusion-art.com/inpainting-remove-extra-limbs [https://web.archive.org/web/20251011011128/https://stable-diffusion-art.com/inpainting-remove-extra-limbs/] (discussing frequent problems with AI generation, like extra limbs appearing, and instructing how to fix the problems).

102. *The Rise of AI Influencers on Instagram: Check Out These Creators*, IZEA (Aug. 30, 2023), https://izea.com/resources/ai-influencers-on-instagram/ [https://perma.cc/X896-43ZJ].

103. *Id.*

104. *Id.*

105. *Id.*

106. Marr, *supra* note 82.

107. *Id.*

108. *Id.*

109. *Id.*

for a human influencer.[110] Influencers need to create constant written and audiovisual content to keep their audiences engaged.[111] Human influencers can use generative AI as a tool to help satisfy the never-ending need for new content.[112] Similarly, many human influencers expend significant amounts of time attempting to interact with their fans/followers.[113] As Marr explains, these human influencers can use "generative AI for help with carrying out engagement activity."[114] The AI can help respond to messages and engage with the human influencer's followers.[115] This second category, like the first, still involves an underlying human influencer, whose name and image are used.[116]

Once human influencers are using AI to help with content creation, the second category can quickly blur into a third category consisting of AI-generated digital replicas. The human influencer who was using generative AI to help engage with fans/followers and create new content, might decide that, for efficiency reasons, it makes sense to use an AI-generated avatar of themselves to do some of that engagement, as well as new content creation.[117] Marr offers the example of popular Twitch streamer Amouranth, who created an AI version of herself that responds to fans' messages in her own voice generated by AI.[118] Similarly, Marr explains that DreamGF is a platform that creates AI versions of real human models and influencers that can chat as if they are actual people.[119] These digital replicas are based entirely upon a real human influencer and meant to duplicate that human influencer's various characteristics to the extent possible, while reducing the heavy workload that it takes to keep up with fan engagement as an influencer.[120] This third category, like the first two, has a real human influencer at its root, but is different from the first two categories

110. *Id.*

111. *See* Sam Blum, *The Fatigue Hitting Influencers as Instagram Evolves*, BBC (Oct. 21, 2019), https://www.bbc.com/worklife/article/20191022-the-fatigue-hitting-influencers-as-instagram-evolves [https://web.archive.org/web/20251109125044/https://www.bbc.com/worklife/article/20191022-the-fatigue-hitting-influencers-as-instagram-evolves] (describing the appetite for constant content as influencing becomes more popular and the toll that takes on human influencers).

112. Marr, *supra* note 82.

113. *See, e.g.*, Harriet Shepherd, *Pokimane Is the Most-Followed Female Twitch Streamer. How Did She Get There?*, TEEN VOGUE (Aug. 22, 2024), https://www.teenvogue.com/story/pokimane-twitch-streamer-interview [https://web.archive.org/web/20251109125129/https://www.teenvogue.com/story/pokimane-twitch-streamer-interview] (describing the dedication of one Twitch player-turned-influencer and the time spent building a following).

114. Marr, *supra* note 82.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The creation and use of digital replicas were a big topic of debate in the recent Hollywood SAG-AFTRA strikes, resulting in a settlement on the specific terms for their use in TV/theatrical productions. *See Digital Replicas 101: What You Need to Know About the 2023 TV/Theatrical Contracts*, SAG-AFTRA (2023), https://www.sagaftra.org/sites/default/files/sa_documents/DigitalReplicas.pdf [https://web.archive.org/web/20250722112634/https://www.sagaftra.org/sites/default/files/sa_documents/DigitalReplicas.pdf].

in that an AI-generated digital clone of the human influencer is what users are seeing and hearing.

After these first three human-centered uses of generative AI, the next category shifts to using generative AI to create a fictional influencer character who is not primarily based on a real human person and not meant as a digital avatar for a real human influencer. This is the AI version of Beard's imaginary virtual humans, only using AI technology rather than earlier technology such as CGI.[121] As discussed above, virtual influencers such as Lil Miquela and Shudu Gram were created using computer-generated imagery (CGI) technology, which has been around for a long time.[122] CGI technology involved a considerable amount of time and skill by the human-creator behind it, almost like using a set of art tools.[123] With the shift to AI technology, a human creator can input a few relatively simple prompts and ask generative AI to, for example, create numerous images of a young, attractive, stylish influencer with certain defined characteristics.[124] Thus far much of the use of generative AI in this space is to create a universe of possible images for the influencer, with the human then making selections, or "AI influencers with human filters."[125] The AI can create large amounts of content of various quality in terms of possible names, images, and content, but it is still ultimately humans deciding which to choose.

The final category is "fully autonomous AI influencer," where, theoretically, generative AI makes all decisions for the influencer: generating, selecting, and posting name, images, and content without any human involvement, perhaps beyond the initial prompts setting the process in motion. While the sensational article titles suggest this final category has arrived, under closer examination, it seems this is not the case.[126] Regardless, even if fully autonomous AI influencers are not yet here to the degree the media is suggesting, there is good reason to believe the technological ability for such a phenomenon is on its way. Additionally, a *New York Post* article reports the result of a

121. *See supra* Section I.B; Beard, *supra* note 49.

122. *See What Is CGI?—Everything You Need to Know*, NASHVILLE FILM INST., https://www.nfi.edu/what-is-cgi/ [https://web.archive.org/web/20251011012352/https://www.nfi.edu/what-is-cgi/] (last visited Mar. 8, 2025) (describing the history of CGI and noting that the technology dates back to the 1950s).

123. *See* Giovanni Scippo, *What Is CGI? A Look at Its History*, 3D LINES (Jan. 23, 2025), https://www.3dlines.co.uk/a-short-history-of-cgi/ [https://web.archive.org/web/20251011012738/https://www.3dlines.co.uk/a-short-history-of-cgi/] ("Computer generated imagery for artistic purposes has of course found its biggest outlet in film, but that has in turn spawned an entire category of artists who work primarily with animated visual content. The technical know-how and artistic skills spent perfecting the ripples in a pool of water are equally at home in a movie production studio and an artist's digital canvas.").

124. *See What Is Generative AI?*, NVIDIA, https://www.nvidia.com/en-us/glossary/generative-ai/ [https://web.archive.org/web/20251011013149/https://www.nvidia.com/en-us/glossary/generative-ai/] (last visited Mar. 8, 2025) ("Stable Diffusion allows users to generate photorealistic images given a text input.").

125. Zahn, *supra* note 14.

126. *See, e.g.*, *supra* note 82 and accompanying text (listing examples of some article titles that may make it seem like generative AI influencers have arrived).

poll finding that Gen Z was 46% more likely to be interested in "companies and brands using AI Influencers instead of humans."[127]

The legal implications of these uses of generative AI vary tremendously depending on which category is being used. And besides the challenges of imprecise terminology in which all uses of AI are lumped together into "AI influencers," the challenge is exacerbated by the secrecy that shrouds the companies involved.[128] Returning to the Lil Miquela example, the role of humans versus technology in the creation of her visual appearance is not entirely transparent even since her big reveal as not being human. It does not appear that she was initially created using generative AI, and given the timing of her creation, that would not make sense.[129] Rather, the visual depictions of Miquela appear to be created using CGI technology, while the content she shares appears to be written for her by her very human creators at Brud.[130] Of course it is possible that in more recent years that some of the images of her are created and perhaps even curated using AI technology. Due to the secretive nature of the companies behind her, there is no way to know for sure whether AI tools play any role in creating Lil Miquela or her content, or whether there has been any shift over the years.

C. RETHINKING THE AUTHENTICITY RATIONALE FOR INFLUENCERS

The rapid explosion of the influencer industry begs the question: Why? Brands utilize influencer marketing because research suggests that it is effective.[131] But why do consumers follow influencers on social media and buy what they promote? As Alexandra Roberts explains in her work on false influencing, the dominant view is that "[a]uthenticity lies at the core" of the influencer model, with consumers pointing to "authenticity as driving their engagement with influencer content."[132]

The existence of openly virtual and AI influencers, and the fact that they continue to have large numbers of followers and ink brand deals even after their virtual/AI status is known, suggests that the authenticity explanation for the influencer phenomenon is

127. Steinberg, *supra* note 82.

128. *See* Christina Schmidt, *Lil Miquela—the New "It-Girl" That Received $6M in Funding*, MEDIUM (Jan. 13, 2019), https://medium.com/@christina_39925/lil-miquela-the-new-it-girl-that-received-6m-funding-8dfd80febd05 [https://web.archive.org/web/20251025201858/https://medium.com/@christina_39925/lil-miquela-the-new-it-girl-that-received-6m-funding-8dfd80febd05] (noting that Brud, the company behind Lil Miquela, is shrouded in secrecy).

129. *See* Kaitlyn Tiffany, *Lil Miquela and the Virtual Influencer Hype, Explained*, VOX (June 3, 2019), https://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups [https://web.archive.org/web/20251025202145/https://www.vox.com/the-goods/2019/6/3/18647626/instagram-virtual-influencers-lil-miquela-ai-startups] (noting that Brud does not hold any patents in AI or robotics and concluding that Lil Miquela is excellent imagery).

130. *See* Favela, *supra* note 5, at 332 ("The most popular CGI influencers, such as Miquela, are still run by people, meaning the captions, the replies, and the image itself are all done by a person.").

131. *Understanding Influencer Marketing and Why It Is So Effective*, FORBES: COUNCIL POST (July 30, 2018), https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective/ [https://perma.cc/V23T-HDKG].

132. Roberts, *supra* note 2, at 84.

incomplete. If authenticity was the sole driver of the influencer industry, then once Lil Miquela was revealed to be a virtual influencer, her followers and brand deals would evaporate. That does not appear to be what happened. This suggests that there is more to the influencing phenomenon than authenticity.

Scholars in other disciplines have begun to study and opine on the virtual influencer phenomenon. For example, experts in business and advertising have studied the impact and effectiveness of human and virtual influencer marketing.[133] This research seems to suggest that, despite what the authenticity rationale would predict, virtual influencers can be nearly as effective as human influencers.[134] Perhaps a piece of the explanation is that consumers are not only drawn to authenticity, as the dominant view suggests, but also to an aspirational lifestyle. Therefore, even if the consumer knows that a human is being paid to promote a product, or, in the case of virtual or AI influencers, knows the influencer is not even a real person, the product or service promoted by the influencer can represent an aspirational lifestyle that is attractive to the consumer even in the absence of authenticity.

II. DO EXISTING RIGHT OF PUBLICITY LAWS PROTECT THE IDENTITIES OF VIRTUAL AND AI INFLUENCERS?

Before turning to the challenging normative questions in Part III, this Part first considers whether existing formulations of state right of publicity law can apply to protect the identities of non-human virtual and AI influencers. To date, there do not appear to be any court decisions addressing this question. Nor do the various state

133. *See* David Belanch, Luis V. Casaló & Marta Flavián, *Human Versus Virtual Influencers, A Comparative Study*, 173 J. BUS. RSCH. 1, 1 (2024) (discussing research pertaining to effectiveness of human and virtual influencer marketing and concluding that "virtual influencers should endorse utilitarian products" and "human influencers should be hired to endorse hedonic products"); Jiemin Looi & Lee Ann Kahlor, *Artificial Intelligence in Influencer Marketing: A Mixed-Method Comparison of Human and Virtual Influencers on Instagram*, 24 J. INTERACTIVE ADVERT. 107, 122–23 (2024) (considering the effectiveness of virtual influencers as compared to human influencers in Instagram marketing and determining that virtual influencers are not as persuasive as human influencers on Instagram but may still be useful if carefully designed); Oihab Allal-Chérif, Rosa Puertas & Patricia Carracedo, *Intelligent Influencer Marketing: How AI-Powered Virtual Influencers Outperform Human Influencers*, 200 TECH. FORECASTING & SOC. CHANGE, 1, 10 (2024) (discussing research findings regarding the high effectiveness of virtual influencers compared to humans, including that (1) people recognize virtual influencers lack human flaws, (2) storytelling is integral to credibility, (3) constant and complete commitment of virtual influencers is a plus, and (4) virtual influencers are capable of being more believable and reliable than humans); Lennart Hofeditz et al., *Trust Me, I'm an Influencer!—A Comparison of Perceived Trust in Human and Virtual Influencers*, ASSOC. INFO. SYS.: ECIS 2022 PROCEEDINGS 1, 7 (June 18, 2022) (examining the rise of virtual influencer Miquela Sousa and discussing a study conducted by the authors on trustworthiness between virtual and human influencers, ultimately concluding that people generally "perceived trust, social presence, and humanness" more in human influencers); Sean Sands et al., *False Idols: Unpacking the Opportunities and Challenges of Falsity in the Context of Virtual Influencers*, 65 BUS. HORIZONS, 777, 784 (2022) (outlining opportunities and challenges of utilizing virtual influencers in branding); Ozan Ozdemir et al., *Human or Virtual: How Influencer Type Shapes Brand Attitudes*, 145 COMPUTS. HUM. BEHAV. 1, 9 (2023) (finding that when virtual influencers use rational language rather than emotional language as brand endorsers, they become nearly as effective as human influencers).

134. *See supra* note 133 and accompanying text.

statutory right of publicity frameworks appear to explicitly contemplate their application to virtual or AI influencers. This is unsurprising given the relative infancy of the phenomenon. Many state statutes do have language limiting their protections to "natural" or "living" persons. There have been discussions regarding whether virtual or AI influencers can themselves violate a human's right of publicity, but not whether they can have their own right of publicity.[135] Indeed, there is even surprisingly little resolution of the broader question of whether the right of publicity can protect the identity characteristics of any non-humans such as animals, corporations, or characters.[136]

A. STATE RIGHT OF PUBLICITY PROTECTION UNDER EXISTING REGIMES

The right of publicity is protected by a hodgepodge of state statutory and common law regimes. Some states only have statutory protection for the right of publicity,[137] some states only have common law protection,[138] and some states have both.[139] Nearly

135. *See, e.g.*, Carly Kessler, *Pixel Perfect: The Legal Implications of Virtual Influencers and Supermodels*, ROBINS KAPLAN (July 1, 2019), https://www.lexology.com/library/detail.aspx?g=91ec38c5-d656-42f3-9544-df1c8016d7fc [https://web.archive.org/web/20251109131651/https://www.lexology.com/library/detail.aspx?g=91ec38c5-d656-42f3-9544-df1c8016d7fc] ("[V]irtual influencers may actually be *liable* under various states' right of publicity laws for misappropriation.").

136. *See* Andrew W. Eaton, *We're Not Gonna Take It!: Limiting the Right of Publicity's Concept of Group Identity for the Good of Intellectual Property, The Music Industry, and the People*, 14 J. INTELL. PROP. L. 173, 195 (2006) (claiming that "[c]ourts generally conclude that the right of publicity is limited to natural persons"). The only support provided for that broad claim, however, is a single case—discussed further below—concluding in a single sentence that New York's statutory right of privacy "concededly does not cover the case of a dog or a photograph of a dog," where that statute uses the term "living person" to describe the requirement for triggering the right. Lawrence v. Ylla, 55 N.Y.S. 2d 343, 345 (Sup. Ct. 1945). This does not appear sufficient to support that courts generally have concluded that the right of publicity is limited to natural persons. *See id.*

137. ALA. CODE § 6-5-770 to § 6-5-774 (1975); ARK. CODE ANN. §4-75-1104 (West 2025); HAW. REV. STAT. ANN. §§ 482P-1–482-8 (West 2024); 765 ILL. COMP. STAT. ANN. 1075/1–1075/60 (West 2024); IND. CODE ANN. § 32-36-1-0.2 (West 2024); LA. REV. STAT. ANN. 14:102.21 (West 2024); NEB. REV. STAT. ANN. §§ 20-201, 20-202, 20-207 (West 2025); NEV. REV. STAT. ANN. §§ 597.770–597.810 (West 2025); N.Y. CIV. RIGHTS LAW §§ 50(f)–51 (McKinney 2015); 9 R.I. GEN. LAWS ANN. §§ 9-1-28 (West 2024); S.D. CODIFIED LAWS § 21-64 (2015); VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (West 2024).

138. *See* Martin Luther King, Jr., Ctr. for Soc. Change v. Am. Heritage Prods., 296 S.E.2d 697, 703 (Ga. 1982) (holding that a common law right of publicity exists in Georgia for public figures); Arnold v. Treadwell, No. 283093, 2009 WL 2136909, at *4 (Mich. Ct. App., July 16, 2009) (recognizing a common law right of publicity in Michigan); Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995) (recognizing a common law right of publicity in Minnesota); Doe v. TCI Cablevision, 110 S.W.3d 363, 368 (Mo. 2003) (recognizing a common law right of publicity in Missouri); Hart v. Elec. Arts, Inc., 717 F.3d 141, 151 (3d Cir. 2013) (recognizing a common law right of publicity in New Jersey); Moore v. Sun Publ'g Corp., 881 P.2d 735, 743 (N.M. 1994) (recognizing a common law right of publicity in New Mexico); Gignilliat v. Gignilliat, Savitz & Bettis L.L.P., 684 S.E.2d 756, 760 (S.C. 2009) (holding that South Carolina recognizes a common law right of publicity); Curran v. Amazon.com, Inc., No. 2:07–0354, 2008 WL 472433, at *3 (S.D. W. Va., Feb. 19, 2008) (recognizing a common law right of publicity in West Virginia).

139. CAL. CIV. CODE § 3344 (West 2024) (recognizing a statutory right of publicity for California); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) (recognizing a common law right of publicity for California); OHIO REV. CODE ANN. § 2741.02 (West 2024) (recognizing a statutory right of

a dozen states have no right of publicity protection.[140] As a result of this federalist system, the scope, length, transferability, and applicability of the right of publicity can vary substantially across states.[141] Despite extensive discussion of the possibility, currently there is no federal right of publicity.[142] Perhaps unsurprisingly, given the plethora of applicable regimes, the short answer to the descriptive question of whether the various existing right of publicity laws can protect the identities of virtual and AI influencers is an unsatisfying "it depends."

1. States Requiring "Natural" or "Living" Persons

The statutory language for the right of publicity in numerous states clearly limits protection to natural persons thus preventing applicability to many virtual and AI

publicity for Ohio); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 566 (1977) (recognizing a common law right of publicity for Ohio); OKLA. STAT. ANN. tit. 12 § 1449 (West 2024) (recognizing a statutory right of publicity for Oklahoma); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 967 (10th Cir. 1996) (recognizing a common law right of publicity for Oklahoma); 42 PA. STAT. & CONS. STAT. ANN. § 8316 (West 2025) (recognizing a statutory right of publicity for Pennsylvania); Lewis v. Marriott Int'l, Inc., 527 F. Supp. 2d 422, 428 (E.D. Pa. 2007) (recognizing a common law right of publicity for Pennsylvania); TEX. PROP. CODE ANN. § 26.002 (West 1987) (recognizing a statutory right of publicity for deceased persons in Texas); Brown v. Ames, 201 F.3d 654, 657 (5th Cir. 2000) (recognizing a common law right of publicity in Texas); WIS. STAT. ANN. § 995.50 (West 2024) (recognizing a statutory right of publicity for Wisconsin); Hirsch v. S.C. Johnson & Son, Inc., 90 Wis.2d 379, 389 (1979) (recognizing a common law right of publicity in Wisconsin).

140. *See* Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, https://rightofpublicityroadmap.com [https://web.archive.org/web/20251109150105/https://rightofpublicityroadmap.com/] (last visited Mar. 17, 2025) (noting that Alaska, Idaho, Kansas, Maine, Maryland, Mississippi, Montana, North Carolina, North Dakota, Vermont, and Wyoming have not explicitly recognized a common law or statutory right of publicity).

141. *Compare* ARIZ. REV. STAT. ANN. § 12-761 (2007) (outlining a statutory right of publicity only for soldiers in Arizona), *with* CAL. CIV. CODE § 3344 (West 2024) (outlining a broad statutory right of publicity in California).

142. *See* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMMC'NS L. 14, 14 (2011) ("[P]roviders should not be required to navigate a hodgepodge of right of publicity laws . . . The best solution to this problem is a federal right of publicity statute that expressly preempts state law and brings uniformity and predictability to right of publicity law."); Mark Roesler & Joey Roesler, *Patchwork Protections: The Growing Need for a Federal Right of Publicity Law*, 16 LANDSLIDE 38, 39 (2024) ("[I]t is time to harmonize the law in this area by means of a federal right of publicity statute . . . that . . . would alleviate many unnecessary burdens and transaction costs that businesses currently face . . ."); Toni-Ann Hines, *The Right of Publicity in the Age of Technology, Social Media, and Heightened Cultural Exchange*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 164, 166 (2022) ("This article contends that there is an emerging need for federal law to recognize the right of publicity, particularly considering this country's history of cultural theft among people of color."); Nanci K. Carr, *Social Media and the Internet Drive the Need for a Federal Statute to Protect the Commercial Value of Identity*, 22 TUL. J. TECH. & INTELL. PROP. 31, 36 (2020) ("Due to the incongruities in state law protection and the pervasive use of social media and the Internet for international distribution of sponsored content, a federal right of publicity statute . . . is needed now more than ever."); *see also* Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2024 (NO FAKES Act), S.J. Res., S. 4875, 118th Cong. (2024) (proposing legislation at the intersection of AI and right of publicity at the federal level); No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024 (No AI Fraud Act), H.R. 6943, 118th Cong. (2024) (proposing a specific federal right of publicity to combat new AI issues).

influencers, at least where there is not a natural person whose interests can be asserted. Some states directly define the right as applying to a "natural person." For example, Florida's statutory framework directly limits protection to "the name, portrait, photograph, or other likeness of any natural person."[143] Similarly, Pennsylvania gives the right of publicity to "[a]ny natural person whose name or likeness has commercial value."[144]

Other states make clear in their definitions sections that the right is limited to "natural persons." For example, Alabama's right of publicity statute covers the "indicia of identity of a person," and "person" is defined as a "natural person or a deceased natural person."[145] Similarly, Arkansas's statute protects "an individual," and defines that term as "a natural person, alive or dead."[146] Illinois also recognizes the right of publicity for "an individual's identity" and defines "individual" as "a living or deceased natural person."[147] Indiana's statute prohibits use of a "personality's right of publicity for a commercial purpose," and defines personality as "a living or deceased natural person."[148] Whether directly in the rights section or in the definitions section, these natural person requirements pose a challenge for applying the right of publicity to protect the identities of virtual or AI influencers in most circumstances.

Some other states do not specify that the right be held by a "natural person," instead referencing a "living person," which likely will impose a similar barrier to protection for the identities of virtual and AI influencers. Notably, both New York and Wisconsin's statutes prevent unauthorized use of the "name, portrait or picture of any living person."[149] This language was likely originally drafted as "living person" to clarify that the right of publicity in both states only extended to living persons and not to deceased persons, although New York added a postmortem right in 2020.[150] Nonetheless, the plain meaning of the term "living person" is likely to foreclose successful claims for protecting the name, portrait, or picture of virtual or AI influencers under New York's and Wisconsin's existing statutory frameworks.

Nevada's right of publicity statute provides a remedy for "[a]ny commercial use of the name, voice, signature, photograph or likeness of another by a person, firm or corporation without first having obtained written consent for the use."[151] The term "another" is used with regard to the rightsholder in the remedy provision.[152] And because the term "person" is used in the second half of the clause in reference to the infringing party, as a matter of statutory interpretation, there is a strong argument that

143. FLA. STAT. ANN. § 540.08 (West 2024).
144. 42 PA. STAT. & CONS. STAT. ANN. § 8316 (West 2025).
145. ALA. CODE § 6-5-772 (1975).
146. ARK. CODE ANN. §§ 4-75-1104, 4-75-1103 (West 2025).
147. 765 ILL. COMP. STAT. ANN. 1075/5, 1075/10 (West 2024).
148. IND. CODE ANN. §§ 32-36-1-6, 32-36-1-8 (West 2024).
149. N.Y. CIV. RIGHTS L. § 50 (West 2022); WIS. STAT. ANN. § 995.50 (West 2024).
150. N.Y. CIV. RIGHTS L. § 50(f) (West 2022).
151. NEV. REV. STAT. ANN. §§ 597.770–597.810 (West 2025).
152. *Id.*

Nevada's legislature could have used "person" had they wanted to.[153] However, a different provision titled "Scope" states that a number of provisions, including the remedy provision referenced above, applies to "any commercial use within this state of a living or deceased person's name, voice, signature, photograph or likeness" thus appearing to limit its scope to living or deceased persons, foreclosing virtual or AI influencers.[154]

Similarly, Hawaii's existing statutory right of publicity initially appears to be a strong contender for protecting virtual or AI influencers.[155] That statute states: "Every individual or personality has a property right in the use of the individual's or personality's name, voice, signature, and likeness," which seems open to interpretation as encompassing virtual and AI influencers."[156] "Personality" is defined by the Hawaii statute in relevant part as "any individual whose name, voice, signature, likeness, or other attribute of their personality has commercial value."[157] However, the term "individual" is further defined as limited to "a natural person, living or dead" thus undermining protection for virtual or AI influencers.[158]

Along the same lines, Tennessee's statutory right of publicity broadly states that "[e]very individual has a property right in the use of that individual's name, photograph, voice, or likeness in any medium in any manner[,]" which appears broad enough to cover the right of publicity for virtual or AI influencers.[159] The definitions provision, however, limits the definition of an individual to "human being, living or dead."[160] Tennessee is especially interesting because it has updated its right of publicity law to account for artificial intelligence with the ELVIS act.[161] That update considered the fact that artificial intelligence could be the defendant infringing upon a person's right of publicity, but did not expressly discuss whether the individual rightsholder ought to be similarly expanded to include virtual or AI influencers.[162]

2. States with More Promising Statutory Language

Right of publicity protection in California would be very significant given the prominence of the entertainment industry there. California has both a statutory and

153. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 25 (2023) ("Often, a statutory dispute will turn on the meaning of only a few words. Courts will interpret those words, though, in light of the full statutory context. To gather evidence of statutory meaning, a judge may turn to the rest of the provision, to the act as a whole, or to similar provisions elsewhere in the law." (internal citations omitted).)

154. NEV. REV. STAT. ANN. § 597.780 (West 2025).

155. *See* HAW. REV. STAT. ANN. § 482P-2 (West 2024) (lacking a definition of "individual" or "personality" in this specific provision).

156. *Id.*

157. *Id.* at § 482P-1.

158. *Id.*

159. TENN. CODE ANN. § 47-25-1103 (West 2024).

160. *Id.* at § 47-25-1102.

161. *Id.* at § 47-25-1101 et seq.

162. *Id.*

common law right of publicity.[163] To be more specific, California has two statutory rights of publicity, and the earlier of the two has some potential for protecting the identities of virtual and AI influencers.[164] California's initial right of publicity statute codified in Section 3344 states:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.[165]

California's first statutory reference to the subject of the right of publicity protection is to "another," and specifically with respect to their "name, voice, signature, photograph, or likeness."[166] Virtual and AI influencers typically will have names, photographs, and likenesses, and may even have voices and signatures.[167] They also can easily be described as "another."[168] Later, however, the California statutory language modifies the behavior that results in damages as being only when those activities are done "without such person's prior consent," thus suggesting that the rightsholder in the first clause is also a "person."[169] This reference to person is not necessarily fatal as, without a modifier such as "living" or "natural," "person" does not preclude protection for the identities of virtual or AI influencers.[170] There does not appear to be a statutory definition that narrows the scope of California's initial right of publicity statute codified in Section 3344 to living or natural persons.[171] Furthermore, California courts have held that the right of publicity protected by Section 3344 is assignable.[172]

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163. CAL. CIV. CODE § 3344 (West 2024) (recognizing a statutory right of publicity in California); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) (recognizing a common law right of publicity in California).

164. CAL. CIV. CODE § 3344 (West 2024) (outlining the statutory right of publicity for use of another's name, voice, or likeness); CAL. CIV. CODE § 3344.1 (West 2024) (outlining the statutory right of publicity for use of a deceased person's name, voice, or likeness).

165. CAL. CIV. CODE § 3344(a) (West 2024).

166. *See supra* notes 163–64 (outlining both of California's right of publicity statutes); NEV. REV. STAT. ANN. § 597.770 (West 2025) (outlining Nevada's right of publicity, which refers to "another" and does not define the term).

167. *See* Marr, *supra* note 82 (noting that some AI Influencers have started using AI to generate their voice and music).

168. *See* CAL. CIV. CODE § 3344 (West 2024) (referring to the protected entity as another).

169. *Id.*

170. *Compare* ARK. CODE ANN. § 4-75-1103 (2016) (defining an individual as a "natural person, alive or dead" and therefore ultimately precluding protection of AI Influencers), *with* CAL. CIV. CODE § 3344 (West 2024) (neglecting to provide a comprehensive definition for the term "another," leaving open the possibility for AI Influencer protection).

171. *See* CAL. CIV. CODE § 3344 (West 2024) (illustrating some definitions in the statute, where others are left out).

172. *See e.g.*, Timed Out, LLC v. Youabian, Inc., 229 Cal. App. 4th 1001, 1008 (2014) (finding that the statutory right of publicity is assignable); Upper Deck Co. v. Panini Am., Inc., 469 F. Supp. 3d 963, 984 (S.D. Cal. 2020) (upholding the finding in *Timed Out* that rights under § 3344 are assignable); Milton H. Green

Despite this statutory ambiguity and the absence of a narrowing term, California courts have described the statutory right in Section 3344 as the right of publicity for a "living person."[173] A careful reading of these cases, however, reveals that this description has not taken the form of an explicit holding that the original statutory right of publicity is limited to living or natural persons.[174] Instead, these cases refer to a right of publicity for a living person to emphasize a contrast with a second, later-enacted right of publicity statute, Section 3344.1, which California passed in 1984.[175] Section 3344.1 provides protection against "a person who uses a deceased personality's name, voice, signature, photograph, or likeness" in prohibited ways and provides protections for heirs.[176] Unlike its predecessor, the second statute specifically defines "deceased personality" as meaning any natural person.[177] The latter statute was passed in response to case law that stated the initial statute did not apply if the rights holder had failed to exploit their own right of publicity during their lifetime, thus making clear that the heirs of deceased personalities also have an interest.[178]

For example, in 2001 the California Supreme Court, in the background section of an opinion, writes that Section 3344 "enacted in 1971, authoriz[es] recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent."[179] The court goes on to discuss the addition of the second statutory right of publicity in 1984, and it is that second statute that forms the basis of the court's discussion and analysis in that case.[180] Although the court refers in passing to Section 3344 as authorizing recovery of damages "by any living person," the statute itself does not have that limitation, and the court does not cite any support for limiting it to living persons.[181] Similarly, the earliest case referring to Section 3344 as governing "a living person's right of publicity in his or her own identity" is a federal district court case focusing on a choice of law analysis arising out

Archives, Inc. v. CMG Worldwide, Inc., No. CV 05-02200 MMM (MCx), 2008 WL 655604, at *3 (C.D. Cal. Jan. 7, 2008); Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400, 409 (Ct. App. 2001).

173. *See Gionfriddo*, 94 Cal. App. 4th at 408 ("In 1971, the Legislature enacted section 3344, which authorized recovery of damages by any living person whose name, photograph, or likeness was used for commercial purposes without his or her consent."); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001) ("The statutory right originated in California Civil Code Section 3344 (hereafter Section 3344), enacted in 1971, authorizing recovery of damages by any living person whose name, photograph, or likeness has been used for commercial purposes without his or her consent."); Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1028 (C.D. Cal. 1998) ("Cases applying California Civil Code § 3344, which governs a living person's right of publicity in his or her own identity, have not addressed § 946, and the Court need not consider the relationship between § 3344 and the property choice of law statute.").

174. *See supra* note 173 and accompanying text (using the language of living person, but distinctly not holding that the statute only applies to living persons).

175. CAL. CIV. CODE § 3344.1 (West 2024).

176. *Id.*

177. *Id.*

178. *See* Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) (holding that publicity rights are not assignable post-mortem).

179. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001).

180. *Id.* at 799–800.

181. *Id.* at 799; *see also* CAL. CIV. CODE § 3344 (West 2024) (neglecting to limit the language in the statute to living persons).

of claims by the executors of the estate of Princess Diana.[182] This case too does not cite any support for the idea that Section 3344 is limited to a living person's right of publicity.[183] This pattern appears to be true for every case describing the Section 3344 coverage as a right of publicity for a living person without any citation, support, or analysis.[184] Other cases quote from earlier cases, which had made the claim without support.[185] Therefore, it appears that courts are using "living person" in reference to Section 3344 as short hand to distinguish it from the 3344.1 right of publicity, which was added for posthumous rights, but not because there has been an actual holding that limits the Section 3344 California statutory right of publicity to natural or living persons.[186]

Oklahoma's statutory regime appears to track the duality of California's statute.[187] Like in California, Title 12, Section 1449 imposes liability on "[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person's prior consent . . . ."[188] Just as with California, the reference to "person" is not modified by a term such as "natural" or "living" that would limit protection for virtual or AI influencers.

Additionally, beginning in 2016, Oklahoma added a new statutory provision prohibiting using "another's name, voice, signature, photograph or likeness through social media to create a false identity" without consent.[189] As with Oklahoma's original statutory provision, the statutory language does not explicitly modify "person" with a limiting term such as "natural" or "living." Therefore, it should be possible to argue that using the name or likeness of a virtual or AI influencer on social media without consent may violate the statute.

Beyond California and Oklahoma, both Massachusetts and Rhode Island provide right of publicity protection to a person, without a definition limiting "person" to natural or living beings.[190] Massachusetts protects "[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the

182. Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1028 (C.D. Cal. 1998).

183. *Id.* (lacking citations to authority holding that § 3344 applies only to living persons).

184. *See* Gionfriddo v. Major League Baseball, 94 Cal. App. 4th 400 (Ct. App. 2001) (lacking a citation to authority, even though the opinion refers to living persons as the protectable class under § 3344).

185. *See, e.g.*, Geragos v. Borer, No. B208827, 2010 WL 60639, at *5 (Cal. Ct. App. Jan. 11, 2010) (citing *Gionfriddo*, 94 Cal. App. 4th at 408); Melendez v. Sirius XM Radio, Inc. 50 F.4th 294, 299 (2d Cir. 2022) (citing Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 799 (Cal. 2001)).

186. *Compare* CAL. CIV. CODE § 3344 (West 2024) (outlining the statutory right of publicity for the non-deceased), *with* CAL. CIV. CODE § 3344.1 (West 2024) (outlining the statutory right of publicity for the deceased).

187. *See* OKLA. STAT. tit. 12, § 1449 (1986) (refraining from defining the terms "another" or "person").

188. *Id.*

189. OKLA. STAT. tit. 12, § 1450 (2016).

190. *See* MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2024) (outlining Massachusetts's statutory right of publicity); 9 R.I. GEN. LAWS ANN. §§ 9-1-28 (West 2024) (outlining Rhode Island's statutory right of publicity).

purposes of trade without his written consent."[191] "Person" is not defined in the statute as limited to a natural or living person, and, in fact, a federal district court sitting in diversity jurisdiction recognized in an unpublished order that "Massachusetts courts have not yet decided whether or not [the state's right of publicity statute] applies to the commercial use of a corporation's name."[192] If the right of publicity could potentially be asserted by a corporation, which the federal court acknowledged remains an open question, then it certainly could apply to virtual and AI influencers, as it means the statute is not limited to natural or living persons.[193] The same federal district court assumed "without deciding that [Massachusetts' statutory right of publicity] applies to the commercial use of a corporation's name[,]" despite the fact that it acknowledged that an earlier district court "expresse[d] grave doubt."[194] Looking to the earlier published federal district court opinion that had expressed "grave doubt," it appears that court's grave doubt was linked to the following sentence where the court noted "that the Massachusetts legislature has already provided ample remedies for" protecting against use of a corporation's name, namely through deceptive trade practices and trademark infringement statutes.[195] That same concern would be less applicable for virtual and AI influencers who are less likely to be protected by trademark law. Despite this policy-based doubt, the court implicitly conceded that the statutory language of Massachusetts's right of publicity statute does not in any way limit the cause of action to natural or living persons.[196] Rhode Island's right of publicity statute also provides remedies for "any person whose name, portrait, or picture is used within the state for commercial purposes without his or her written consent."[197] Without any caselaw or statutory definitions limiting the term person to living or natural persons, Rhode Island also remains a possibility for protecting the identities of virtual or AI influencers.

Admittedly, these statutes are at best ambiguous regarding their application to virtual and AI influencers. Joe Miller has argued when a court encounters an ambiguous statute it is better to interpret it narrowly so that the legislature can correct it more easily.[198] If Miller is correct, it would be better to interpret these ambiguous statutory provisions narrowly as not covering virtual and AI influencers and leaving it to the legislatures to consider expansion. But for courts not persuaded by Miller's thesis, the statutory language in the states above provide enough leeway for courts to apply them to virtual and AI influencers.

191. MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2024).

192. Bonacorso Constr. Co. v. Master Builders, Inc., CIV.A. No. 87–1827–WF, 1991 WL 72796, at *8 (D. Mass. Apr. 24, 1991).

193. *See id.* (recognizing an open question as to whether corporations can have a right of publicity claim).

194. *Id.*

195. Pump, Inc., v. Collins Mgmt., Inc., 746 F. Supp. 1159, 1172 (D. Mass. 1990).

196. *See id.* (refraining from limiting the statutory protection to living persons).

197. 9 R.I. GEN. LAWS ANN. § 9-1-28 (West 2024).

198. Joseph S. Miller, *Error Costs & IP Law*, 2014 U. ILL. L. REV. 175, 176 (2013).

3. Common Law Right of Publicity

As noted, several states offer common law right of publicity regimes, some of which may protect virtual or AI influencers. For example, California courts and federal courts applying California law have held that California's common law right of publicity cause of action "may be pleaded by alleging (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."[199] By referring more generally to plaintiff's identity and plaintiff's name or likeness rather than more limiting language such as a "living person" or "natural person," this formulation of California's common law right of publicity is broad enough to potentially cover the identity of virtual or AI influencers.

The Sixth Circuit interpreted Michigan's common law right of publicity broadly holding that it developed "to protect the commercial interest of celebrities in their identities" under the theory that "a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity."[200] Virtual and AI Influencers can similarly have valuable identities as shown by their ability to get paid to promote products and services. The court went on to say that under the right of publicity "a celebrity has a protected pecuniary interest in the commercial exploitation of his identity."[201] The same logic could apply to virtual or AI influencers. Therefore, the logic of Michigan's common law right of publicity applies equally to virtual or AI influencers.

Similarly, the Eighth Circuit held that Minnesota would likely recognize a right of publicity that is different from the right to privacy in that its purpose is to "protect[] the ability of public personae to control the types of publicity that they receive" so that it "protects pecuniary, not emotional, interests."[202] With that justification, it seems Minnesota's common law right of publicity could equally apply to protect the pecuniary interests of virtual and AI influencers.

The Missouri Supreme Court has also recognized a common law right of publicity cause of action designed to "'protect a person from losing the benefit of their work in creating a publicly recognizable persona.'"[203] Virtual and AI influencers also have created publicly recognizable personas that might be protected under Missouri's common law right of publicity. Missouri requires that the plaintiff prove that the defendant used the plaintiff's name without consent to obtain a commercial advantage.[204]

199. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992) (quoting Eastwood v. Superior Ct., 198 Cal. Rptr. 342, 347 (Ct. App. 1983)).

200. Carson v. Here's Johnny Portable Toilets. Inc., 698 F.2d 831, 835 (6th Cir. 1983).

201. *Id.*

202. Ventura v. Titan Sports, Inc., 65 F.3d 725, 730 (8th Cir. 1995).

203. Doe v. TCI Cablevision, 110 S.W.3d 363, 368 (Mo. 2003) (quoting Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. App. 1998)).

204. *Id.*

Similarly, the Wisconsin Supreme Court concluded that the "right of a person to be compensated for the use of his name for advertising purposes or purposes of trade . . . protects primarily the property interest in the publicity value of one's name."[205] This suggests that a virtual or AI influencer might be able to recover in Missouri or Wisconsin if their name was used without consent to obtain a commercial advantage, or for advertising purposes or purposes of trade, both of which would be true when promoting a product or service on social media. Similar logic would likely apply in other states with similar common law right of publicity protections.[206]

4. Protection for Humans Behind Virtual or AI Influencers

One subset of the spectrum of influencers discussed in Part II may have another path to protection under the right of publicity in some states—namely, virtual and AI Influencers who are the creation of a single human individual may be able to claim that aspects of the virtual or AI Influencer are protected by that individual's right of publicity. This is not limited to virtual and AI Influencers who are digital replicas of the human individual, but even potentially virtual influencers who have a different name or face than the human individual. Even McCarthy notes in a footnote to his treatise that "if a pet or animal 'mascot' is always clearly associated with the persona of its master, then some commercial uses of the animal might in fact identify the persona of the human master."[207] An even stronger argument could be made for virtual or AI Influencers who fit that criteria.

Turning first to the ability to protect the name of a virtual or AI Influencer, under the right of publicity of the human behind that virtual or AI Influencer, the existence of the underlying human would solve the problem in the many states discussed above that expressly limit the right of publicity to natural or living persons.[208] So now the question is: What can be included when the statutory right of publicity refers to a "name"?[209] Numerous courts have interpreted the protection of an individual's name in a right of publicity statute broadly as protecting names beyond legal or birth names.[210]

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205. Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 387 (1979).

206. *See* Gignilliat v. Gignilliat, Savitz & Bettis L.P., 684 S.E.2d 756, 760 (S.C. 2009) (holding that South Carolina recognizes a common law right of publicity); Hart v. Elec. Arts, Inc., 717 F.3d 141, 151 (3d Cir. 2013) (recognizing a common law right of publicity in New Jersey); Moore v. Sun Publ'g. Corp., 881 P.2d 735, 743 (N.M. 1994) (recognizing a common law right of publicity in New Mexico).

207. 1 MCCARTHY & SCHECHTER, *supra* note 18, § 4:37 n.8.

208. *See supra* notes 155–62 and accompanying text (citing some examples of statutes that specifically define person, individual, and another to preclude AI Influencer protection).

209. *See* VA. CODE ANN. §§ 8.01-40, 18.2-216.1 (West 2024) (using the term "name" in the statutory language); CAL. CIV. CODE § 3344 (West 2024) (using "name" in the language); HAW. REV. STAT. ANN. § 482P-2 (West 2024) (employing "name" in the language); KY. REV. STAT. ANN. § 391.170 (West 2025) (using "name" in the language); MASS. GEN. LAWS ANN. ch. 214, § 3A (West 2024) (using "name" in the language); OHIO REV. CODE ANN. § 2741.01 (West 2024) (using "name" in the "Definitions" section); OKLA. STAT. ANN. tit. 12, § 1449 (West 2024) (using "name" in the language); 9 R.I. GEN. LAWS ANN. § 9-1-28 (West 2024) (using "name" in the language).

210. *See* Abdul-Jabbar v. General Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996) ("We have frequently held that California's common law right of publicity protects celebrities from appropriations of

For example, one unpublished California court decision expressly held that California's statutory right of publicity in Section 3344 "will protect a pseudonym such as a nickname or pen name, so long as the pseudonym has become widely known to the public as closely identified with the plaintiff."[211] The court reasoned that the statute includes the term "names" and that language is broad enough to encompass both "pen names" and "nicknames" in the absence of a limiting modifier such as "birth name" or "legally adopted name."[212] Without any statutory limitations or legislative history restricting the meaning of "name" to birth name or legally adopted names, the court found that a pseudonym could be covered by the statute.[213]

By contrast, New York courts have interpreted its right of publicity statute more narrowly, construing the use of a person's name under the statute "nearly literally such that only use of a 'full' name, not just a surname, is actionable."[214] The court went on to explain that the use of the name under New York law must be the "true" name of the claimant, rather than a business, partnership, or assumed name.[215] Additionally, in New York, nicknames fail to qualify for statutory protection, with the exception of "stage, theatrical or fictious names that have 'become known to the public and identifies its bearer virtually to the exclusion of his true name.'"[216]

Several courts have also interpreted the state's common law right of publicity broadly enough to cover nicknames or other names beyond legal names. For example, the Wisconsin Supreme Court held that plaintiff Elroy Hirsch could recover under Wisconsin common law for the unauthorized use of his nickname, "Crazylegs" on a shaving gel.[217] The court wrote "[t]he fact that the name, 'Crazylegs,' used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action. All that is required is that the name clearly identify the wronged person."[218] The court quoted Prosser's law review article, stating "that a stage or other fictious name can be so identified with the plaintiff that he is entitled to protection against its use."[219] Furthermore, the Wisconsin Supreme Court pointed out Prosser had written that "it would be absurd to say that Samuel L. Clemens" would not have a cause of action for the use of "Mark Twain."[220]

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their *identity* not strictly definable as 'name or picture.'") (citations omitted); Ackerman v. Ferry, No. B143751, 2002 WL 31506931, at *19 (Cal. Ct. App. Nov. 12, 2002) ("It was clear to Prosser that a fictitious name can become so identified with an individual that he is entitled to protection against its use.") (citation omitted); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 137 (Wis. 1979) ("The fact that the name, 'Crazylegs,' used by Johnson, was a nickname rather than Hirsch's actual name does not preclude a cause of action.").

211. *Ackerman*, 2002 WL 31506931, at *19.

212. *Id.* at *18.

213. *Id.* at *19.

214. Champion v. Take Two Interactive Software, Inc., 100 N.Y.S.3d 838, 846 (Sup. Ct. 2019) (citation omitted).

215. *Id.*

216. *Id.*

217. Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129, 137 (Wis. 1979).

218. *Id.*

219. *Id.* (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 385 (1960)).

220. Id.

Regarding likeness, the strongest argument would be protection for digital replicas/avatars that resemble the actual human, whether created using CGI technology (virtual influencers) or AI technology (AI influencers). Most states that protect the right of publicity include protection for one's "likeness," which may extend to digital replicas/avatars that resemble the actual human. Most notably, in the famous Ninth Circuit case of *White v. Samsung*, the court held that a robot wearing a blonde wig and a dress was not Vanna White's likeness for purposes of California's right of publicity statute, but in so holding noted that the robot had "mechanical features, and not, for example, a manikin molded to White's precise features."[221] Although the court expressly refused to decide "for all purposes when a caricature or impressionistic resemblance might become a 'likeness,'" its analysis strongly suggests that a close enough digital replica of a real person would likely meet the statutory criteria for "likeness."[222] Indeed a few years later, the Ninth Circuit revisited a similar question, again mentioning they had previously noted a "manikin molded to [a person's] precise features, or one that was a caricature or bore an impressionistic resemblance to [a person] might become a likeness for statutory purposes."[223] Therefore, the court concluded that summary judgment on a statutory right of publicity claim was inappropriate because there remained genuine issues of material fact as to the degree with which animatronic robots that were based on actors' likenesses and placed in airport bars resembled, caricatured, or bore an impressionistic resemblance to appellants.[224] Furthermore, the Ninth Circuit held that even for the robot with mechanical features, Vanna White had "alleged facts showing that Samsung . . . had appropriated her identity" such that summary judgment was inappropriate on her common law right of publicity claim.[225] If someone were to use the digital replica/avatar without permission then the actual human behind that digital replica/avatar could sue for a violation of their own right of publicity. Therefore, there is a strong argument for protecting the name and likeness of virtual and AI influencers associated with a single human.

B. ANIMALS AND RIGHT OF PUBLICITY

While not a perfect analogy, looking to see whether courts have held that animals have a right of publicity might lend some useful insights into the related question of whether courts are likely to hold that the right of publicity can extend beyond living humans. Somewhat surprisingly, given the long history of celebrity animals from Lassie to Beethoven, to the modern-day Grumpy Cat, the case law answering this question is extremely sparse.[226]

221. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992).
222. Id.
223. Wendt v. Host Int'l, Inc., 125 F.3d 806, 810 (9th Cir. 1997).
224. Id.
225. White, 971 F.2d at 1399.
226. *See* Crissy Froyd, *Why Was Lassie Actually a Male Dog?*, SHOWSIGHT MAG. (Aug. 14, 2024), https://showsightmagazine.com/why-was-lassie-actually-a-male-dog/

Prominent treatise authors have also disagreed as to what the answer to this question ought to be. In his early foundational work on the right of publicity, Melville Nimmer ardently argued for a right to publicity for the human owners of animals, businesses, and other institutions.[227] By contrast, Thomas McCarthy's influential treatise has consistently opposed expanding the right of publicity beyond real humans to other categories, including animals.[228]

McCarthy's latest treatise update with Roger E. Schechter on the rights of publicity and privacy contains a section titled, "Do animals and pets have a right of publicity?"[229] Although the treatise devotes a few paragraphs to opining on what the authors feel ought to be the correct answer, ultimately they acknowledge that "there is no case law on a common law right of publicity for animals" and "there is probably still a clean slate as to their possible right of publicity."[230]

As McCarthy's treatise notes, there is a single New York case from 1945 that suggests that a human cannot invoke New York's right of publicity statute on behalf of her pet dog when her dog's photo was used without permission in an advertisement for the National Biscuit Company.[231] The majority of the extremely short decision focuses on the contractual relationship between the dog's owner and the photographer she had hired to photograph that dog.[232] With regard to her attempted lawsuit against the advertising agency that sold the photos of her dog, the National Biscuit Company that used the photograph in an ad campaign for their product, and the *New York Times* and *News Syndicate*, who had published the advertisement, the court simply stated in a single sentence: "[S]tatutory right of privacy concededly does not cover the case of a dog or a photograph of a dog."[233] While the court does not offer additional support for its

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[https://web.archive.org/web/20251108021903/https://showsightmagazine.com/why-was-lassie-actually-a-male-dog/] (noting that Lassie was not a single dog, but actually a series of dogs); Juliet Iacona, *Behind Closed Curtains: The Exploitation of Animals in the Film Industry*, 12 J. ANIMAL & NAT. RES. L. 25, 28–30 (2016) (detailing a brief history of animal actors in the film industry); Paula Stewart, *A History of the Evolution of Animals in Film and TV*, THE ANIMAL TALENT (Nov. 10, 2024), https://theanimaltalent.agency/the-evolution-of-animal-actors-in-film-and-advertising-then-vs-now/ [https://web.archive.org/web/20251109162105/https://theanimaltalent.agency/the-evolution-of-animal-actors-in-film-and-advertising-then-vs-now/] (describing the landscape of animal actors from the early days of film and TV to modern day, including how AI is impacting animal actors); Sanjana Varghese, *How Grumpy Cat Went From Feline Obscurity to Internet Sensation*, WIRED (May 17, 2019), https://www.wired.com/story/grumpy-cat-dead-history/ [https://web.archive.org/web/20251109162310/https://www.wired.com/story/grumpy-cat-dead-history/] (discussing the phenomenon that was Grumpy Cat); Elena Sokolova, *Lights, Camera, Bark! The Eight Stories of Famous Dog Actors*, FILMUSTAGE (Sep. 3, 2024), https://filmustage.com/blog/the-8-stories-of-famous-dog-actors/ [https://web.archive.org/web/20251108031638/https://filmustage.com/blog/the-8-stories-of-famous-dog-actors/] (discussing some of the most famous dog actors, including Chris, the St. Bernard who played Beethoven).

227. Nimmer, *supra* note 17, at 216.

228. 1 MCCARTHY & SCHECHTER, *supra* note 18, at § 4:37.

229. *Id.*

230. *Id.*

231. Lawrence v. Ylla, 55 N.Y.S.2d 343, 345 (Sup. Ct. 1945).

232. *Id.* at 343–46.

233. *Id.* at 345.

cursory conclusion, New York's statutory right of privacy at issue applies explicitly to a "living person," and therefore presumably not plaintiff's dog.[234]

The only other American case referenced in the McCarthy treatise's discussion is a Missouri case where the court reversed a $5,000 jury award to the plaintiff in a case involving taking a photograph of the plaintiff's horse and using it in an advertisement.[235] The court found that there was no invasion of plaintiff's privacy because there was nothing in the photograph to indicate that the horse belonged to the plaintiff.[236]

Therefore, while there is no definitive case law on the applicability of a common law right of publicity to animals, some related cases sound skeptical. Nonetheless, the question likely remains an issue of first impression in those jurisdictions identified above that do not specifically limit the right to "living persons."

C. CORPORATIONS AND RIGHT OF PUBLICITY

Unlike for animals, there is case law analyzing whether corporations can have a right of publicity, which may also provide some insight as to whether courts would extend the right of publicity beyond natural persons. Some of the language in these decisions suggests that the right of publicity ought to be limited to natural persons. For example, in 2015, the federal district court for the Northern District of California considered in an unpublished decision whether VIRAG, an Italian commercial flooring business that sponsors car races, had a California common law right of publicity that could be violated by a videogame showing the corporation's branding.[237] The district court dismissed the claim because it agreed with defendants that a corporation does not have a common law right of publicity under California law.[238]

The court began by noting that California's common law right of publicity derives from the fourth common law privacy tort of appropriation.[239] The court went on to rely heavily on McCarthy's treatise's statement that the "right of publicity is the inherent right of every *human being* to control the commercial use of his or her identity and that it is an "inherent right of *human* identity."[240] The court pointed out that "no court has held or even suggested that the right of publicity extends to non-human beings."[241] The phrasing of this dicta certainly calls into question whether the right of publicity can apply to non-humans. While the statement appears accurate, notably no court has held that the right of publicity does not extend to non-human beings.

234. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2003).

235. Bayer v. Ralston Purina Co., 484 S.W.2d 473, 473, 475 (Mo. 1972).

236. *Id.*

237. VIRAG, S.R.L. v. Sony Comput. Ent. Am. LLC, No. 3:15-CV-01729-LB, 2015 WL 5000102, at *4–6 (N.D. Cal. Aug. 21, 2015).

238. *Id.* at *4.

239. *Id.*

240. *Id.* (emphasis added) (quoting 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (4th ed. 2015)).

241. *Id.* at *5.

The *VIRAG* court notes that the few courts faced with the argument about extending the right of publicity to non-human beings have rejected it, but the two cases it cites in support of this claim both involve rejecting attempts by corporations to substitute the right of publicity for trademark law.[242] In the first, the Eastern District of Pennsylvania granted defendant's motion to dismiss an attempt to claim a violation of Pennsylvania's common law right of publicity for a corporation that holds the trademark.[243] The court concluded that "it is clear that the right of publicity inures to an individual who seeks to protect and control the commercial value of his name or likeness. This is to be distinguished from the facts at bar, in which a right of publicity is alleged to inhere in a corporate trademark."[244] The emphasis in this brief rejection of the claim appears to be that the corporation is trying to use the right of publicity to protect its name in a way that traditionally trademark law is supposed to do. Similarly, in the second case cited by the *VIRAG* court, a Missouri Court of Appeals found, without much analysis, that there is "no right of publicity in a corporation."[245] Thus, while this dictum may predict how courts are likely to treat such claims, it does not conclusively answer the question.

D. CHARACTERS AND RIGHT OF PUBLICITY

Right of publicity protection for fictional characters could also provide helpful insight into the question of whether the existing right of publicity doctrine can provide protection for virtual or AI influencers. In many ways, virtual or AI influencers are fictional characters, in that someone (with various degrees of input from AI) is creating the fictional story behind the person. One series of cases looks at whether actors can assert a right of publicity claim for characteristics associated with a fictional character that they played.

For example, in a California Supreme Court case involving the right of publicity for the comedy act known as The Three Stooges, the court found that under California law there is a right of publicity for "personalities," which includes actors portraying themselves and developing their own characters.[246] Similarly, in a concurring opinion in an earlier California Supreme Court decision, Justice Mosk discussed the circumstances under which an actor could have a right of publicity claim to a character played by that actor.[247] He rejected plaintiff's claim to the rights to the character Count Dracula, played by numerous actors over the years, but clarified "I do not suggest that an actor can never retain a proprietary interest in a characterization. An original creation of a fictional figure played exclusively by its creator may well be protectible."[248] He provided the examples of Groucho Marx, Red Skelton's self-devised roles, and the

242. *Id.*
243. Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc., 627 F. Supp. 856, 862 (E.D. Pa. 1985).
244. *Id.*
245. Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998).
246. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 800 (Cal. 2001).
247. Lugosi v. Universal Pictures, 603 P.2d 425, 432 (Cal. 1979) (Mosk, J., concurring).
248. *Id.* (Mosk, J., concurring).

"unique personal creations of Abbott and Costello, Laurel and Hardy and others of that genre."[249]

Additionally, the Third Circuit held that under New Jersey law an actor may have a right of publicity in a character that is "so associated with him as to be indistinguishable from him in public perception."[250] The court explained that the test is whether the actor is "inextricably linked" to the name and image of the character.[251] This would limit protection for virtual and AI influencers to those that have been inextricably linked to the human associated with the influencer. The court went on to hypothesize, however, that the studio "may be able to claim that they were entirely responsible for the value of the name and image or, by assignment, own the right to exploit the publicity value of the name and image of Spanky," but that the court need not resolve that question because the studio was not before the court.[252]

III. SHOULD THE RIGHT OF PUBLICITY APPLY TO VIRTUAL AND AI INFLUENCERS?

In Joseph Beard's 2001 prognosticating article predicting the rise of virtual humans, he assumes without much explanation that virtual humans require legal protection "for the same reasons humans do."[253] Unfortunately, his prescient article does not dive deeper into this conclusion, and it seems far from obvious that rights given to living humans automatically ought to extend to virtual humans. This section seeks to unpack that normative question that has not yet been considered in the law review literature of whether the right of publicity ought to apply to virtual and AI influencers.

The answer is complicated by the fact that courts, legislators, and scholars have not coalesced around a consensus for the policy justifications for having a right of publicity in the first place. As Stacey Dogan and Mark Lemley put it, there is "an absence of any clear theoretical foundation for the right of publicity," which rests "upon a slew of sometimes sloppy rationalizations."[254] Dogan and Lemley argue that "[t]he need for a normative account is critical, not only to explain why we have the right, but also to understand its scope."[255] Answering the question of whether the right of publicity ought to apply to virtual and AI influencers supports this urgent need for a normative account for the right of publicity. However, this Article will not attempt to resolve that normative debate. Instead, this section identifies the plethora of policy justifications for protecting a right of publicity and then examines the implications of each justification for whether it makes sense to apply the right of publicity to virtual and AI influencers.

249. *Id.* (Mosk, J., concurring).
250. McFarland v. Miller, 14 F.3d 912, 914 (3d Cir. 1994).
251. *Id.*
252. *Id.* at 921.
253. Beard, *supra* note 49, at 1170.
254. Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006).
255. *Id.* at 1180.

Roberta Kwall has catalogued a number of justifications for the right of publicity, dividing them into avoiding harms to right of publicity plaintiffs and avoiding harms to society that would occur in its absence.[256] By contrast, Stacey Dogan and Mark Lemley place the explanations offered for the publicity right into four buckets: the moral or natural rights story, the exhaustion or allocative-efficiency account, the incentive-based rationale, and—the rationale they advocate—the consumer confusion trademark rationale.[257] Jennifer Rothman and Robert Post divide right of publicity cases into four categories: vindicating the right of performance, the right of commercial value, the right of control, and the right of dignity, although the right of commercial value is further subdivided into the three categories of protecting against confusion, diminishment, and unjust enrichment.[258] The Tenth Circuit placed the justifications offered for the right of publicity into two categories: economic and noneconomic.[259] None of these taxonomies resolve the question posed here. Thus this section individually considers each possible justification for the right of publicity beginning with those that appear to offer the strongest and most straightforward case for extending the right of publicity to virtual and AI influencers before moving to the more challenging justifications.

A. LABOR-REWARD/LOCKEAN THEORY[260]

In his influential article, *The Right of Publicity*, Melville Nimmer articulated a labor-reward rationale for the right of publicity.[261] He wrote: "It would seem to be a first principle of Anglo-American jurisprudence, an axiom of the most fundamental nature, that every person is entitled to the fruit of his labors."[262] But in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court seemed to recognize that labor theory alone was not enough of a rationale to root the right of publicity, writing, "petitioner's right of publicity here rests on *more than* a desire to compensate the performer for the time and effort invested in his act."[263]

Many scholars have expressed concerns with this labor theory approach. Notably, the theory rests on the idea that one should possess the rights to something that requires hard work.[264] However, Michael Madow has considered whether becoming a celebrity is actually the result of hard work, or at least in part a matter of luck, and if so

256. Roberta Rosenthal Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 IND. L.J. 47, 69 (1994).

257. Dogan & Lemley, *supra* note 254, at 1180–1190.

258. *See generally* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020).

259. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996).

260. *See* Dogan & Lemley, *supra* note 254, at 1163, 1180–84 (grouping moral and natural rights into a single "category").

261. Nimmer, *supra* note 17, at 216.

262. *Id.*

263. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (emphasis added).

264. *See* Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 VILL. SPORTS & ENT. L.J. 481, 503 (2012).

whether celebrities should be afforded a right of publicity under the labor theory justification.[265] Further, F. Jay Dougherty noted that artists tend to build upon other work, not necessarily creating completely from scratch, therefore, the labor theory may support opposing claims by artists because of this common practice, making the labor theory an inadequate rationale for right of publicity.[266]

A labor-reward Lockean theory counterintuitively provides a stronger justification for right of publicity protection for virtual and AI influencers than for non-celebrity humans who are given right of publicity protection in many states. As explained above, many of the human creators involved with virtual and AI influencers do a great deal of work in designing, creating content for, and carefully refining the personas of the influencers.[267] To the extent that the right of publicity is intended as a reward for such hard work, there is nothing about the fact that the result of the work is a virtual or AI influencer rather than the identity of the creator itself that ought to change the analysis for the worse. The selection of the names, likenesses, and other aspects of identity of virtual and AI influencers are very much the result of work on the part of the creator(s). By contrast, the names and likenesses of most ordinary humans are the result of forces outside of their control, and did not require hard work. Names are often given by parents, and likenesses are (at least initially) the result of genetic factors. Therefore, a Lockean theory for the right of publicity provides stronger support for protecting the identities of virtual and AI influencers than it does for protecting the identities of many humans who do not put work into creating their own likenesses or names.

B. A CONSUMER CONFUSION/DECEPTION JUSTIFICATION

Both courts and scholars have identified the societal concern with the potential for consumer confusion and deception as a prominent justification for protecting the right of publicity.[268] For example, Kwall writes that tolerating unauthorized uses of persona would cause a harm to society in the form of the increased potential for consumer deception.[269] She explains that if advertisers were given legal permission to appropriate someone's identity "in an explicitly false endorsement, consumers are misled and society as a whole suffers."[270]

Many right of publicity cases fit the fact pattern of a defendant who used the celebrity's identity in a manner that caused the viewers to believe that the celebrity had

265. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 18 CAL. L. REV. 125, 188–89 (1993).

266. F. Jay Dougherty, *All the World's Not a Stooge: The "Transformativeness" Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 63–64 (2004).

267. *See* discussion *supra* Section I.B.4.

268. *See* James Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories*, 51 TEX. L. REV. 637, 647 (1973); Post & Rothman, *supra* note 258, at 110–11.

269. Kwall, *The Right of Publicity vs. The First Amendment*, *supra* note 256, at 74.

270. *Id.* at 76.

endorsed the product being advertised.[271] Some scholars have pointed to various court holdings they see as unambiguously asserting an underlying confusion theory, but this Article is unconvinced by their readings of those cases.[272]

Because consumer confusion also forms the primary justification for trademark law,[273] scholars such as Dogan and Lemley have focused on the similarities between trademark and the right of publicity and how trademark law doctrine may be instructive for right of publicity doctrine.[274] They see trademark law, which aims to protect business names, as akin to the right of publicity, which aims to protect celebrity names and likenesses.[275] They state that confusion surrounding "affiliation or sponsorship" is likely the most parallel principle between trademark and right of publicity.[276] Nonetheless, scholars recognize the dangers of taking the comparison too far. In McCarthy's treatise *The Rights of Publicity and Privacy*, he emphatically noted that "the right of publicity is only *analogous*, not *identical*, to the law of trademarks."[277] Dogan and Lemley would likely agree, maintaining that the two should remain separate, and the right of publicity should not be absorbed into trademark law.[278]

Some courts have embraced this trademark analogy.[279] In *Hepp v. Facebook*, the Third Circuit recognized the right of publicity as analogous to trademark law because they both seek to "secure commercial goodwill," yet did not mention confusion specifically.[280] Interestingly, the Third Circuit has also admonished the idea of consumer confusion as an underlying theory for right of publicity, stating: "[W]e do agree with the *Rogers* court in so far as it noted that the right of publicity does not implicate the potential for consumer confusion and is therefore potentially broader than the protections offered by the Lanham Act."[281] Differently, in *Toney v. L'Oreal USA, Inc.*, the Seventh Circuit explained that the right of publicity concerns messaging,

271. *See, e.g.*, Henley v. Dillard Dep't Stores, 46 F. Supp. 2d 587, 589 (N.D. Tex. 1999) (blocking defendant from selling shirts with the phrase "this is Don's henley" because consumers would be confused into thinking musician Don Henley was associated with the shirts); Nat'l Bank of Com. v. Shaklee Corp., 503 F. Supp. 533, 541–42 (W.D. Tex. 1980) (prohibiting uses of "Hints from Heloise" that misled consumers into believing defendant was associated).

272. *See* Dogan & Lemley, *supra* note 254, at 1193–94 (asserting that three cases—*Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), and *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974)—demonstrate an underlying confusion principle in a right of publicity claim without the court expressly saying so); Post & Rothman, *supra* note 258, at 110 (inferring that the court in *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) considered consumer confusion in deciding the case).

273. 15 U.S.C. § 1114(1)(a).

274. Dogan & Lemley, *supra* note 254, at 1166.

275. *Id.* at 1164.

276. *Id.* at 1192.

277. 1 MCCARTHY & SCHECHTER, *supra* note 18, § 5:6.

278. Dogan & Lemley, *supra* note 254, at 1210–13 (noting that unlike trademark law, the right of publicity should not require use in commerce and mentioning that trademark dilution cases are markedly different from right of publicity dilution cases).

279. *See, e.g.*, Grant v. Esquire, Inc., 367 F. Supp. 876, 879 (S.D.N.Y. 1973) (calling the right of publicity "somewhat akin" to trademark law).

280. Hepp v. Facebook, 14 F.4th 204, 213–14 (3d Cir. 2021).

281. Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3d Cir. 2013).

principally whether a product is endorsed, or seems to be endorsed, by the plaintiff, similar to trademark law which aims to clarify endorsements.[282] Dogan and Lemley interpreted this to mean the Seventh Circuit was pointing to consumer confusion.[283] But like the Third Circuit in *Hart*, the Second and Sixth Circuits have both refused to import consumer confusion into the right of publicity.[284]

The consumer confusion/deception justification for the right of publicity offers strong theoretical support for protecting virtual and AI influencers using the right of publicity. Consumers who follow virtual and AI influencers and who are familiar with their image and brand endorsements would be confused if someone else were permitted to use the name and likeness of the virtual influencers to suggest an endorsement. Admittedly, this argument is tricky because virtual and AI influencers are not really endorsing products at all, in the sense that Lil Miquela is not truly walking around wearing Calvin Klein. However, as noted above, the virtual and AI influencer phenomenon undermines the idea that consumers pay attention to influencer endorsements solely because they believe that the influencer really wears the clothes or drives the car. After all, even after it was revealed that Lil Miquela was a virtual influencer, she continues to have a huge following and continues to represent brands. This suggests that consumers may be paying attention to a particular lifestyle or image that the consumer wants to be a part of. False associations with the identities of virtual or AI influencers that would be permitted absent right of publicity protection, can still confuse consumers into thinking that the lifestyle associated with the virtual or AI influencer had expanded into an area not part of that influencer's identity.

C. UNJUST ENRICHMENT

Both courts and scholars have identified a concern with unjust enrichment as an alternative rationale for right of publicity laws.[285] The basic idea is that absent right of publicity laws, others could usurp someone's name, image, or identity for their own commercial advantage in a way that would constitute unjust enrichment. In other words, the party using someone else's identity without permission would "effectively appropriate[] whatever economic value he would otherwise have had to pay for the use of that identity."[286] Although later cases have limited its reach to its precise facts, in the

282. Toney v. L'Oreal USA, Inc., 406 F.3d 905, 910 (7th Cir. 2005) ("The basis of a right of publicity claim concerns the message—whether the plaintiff endorses, or appears to endorse the product in question.").

283. *See, e.g.*, Dogan & Lemley, *supra* note 254, at 1194 ("The use of a celebrity's name or likeness to falsely suggest she is affiliated with or has sponsored the defendant's goods seems problematic for the same reasons as false designation of origin in the trademark context, and it provides a valid justification for the right of publicity.").

284. Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989) ("Because the right of publicity, unlike the Lanham Act, has no likelihood of confusion requirement, it is potentially more expansive than the Lanham Act."); Parks v. LaFace Recs., 329 F.3d 437, 460 (6th Cir. 2003) ("However, a right of publicity claim does differ from a false advertising claim in one crucial respect; a right of publicity claim does not require any evidence that a consumer is likely to be confused.").

285. *See* Post & Rothman, *supra* note 258, at 114–16.

286. *Id.* at 115.

Supreme Court's only case addressing the right of publicity, *Zacchini*, the Court included in a list of possible justifications for right of publicity laws that "[t]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will."[287] The Tenth Circuit also recognized the prevention of unjust enrichment in a long list of possible justifications for publicity rights that it examined before finding them all insufficient to overcome First Amendment concerns for a parody.[288] The court explained that under the unjust enrichment view, "whether the commercial value of an identity is the result of a celebrity's hard work, media creation, or just pure dumb luck, no social purpose is served by allowing others to freely appropriate it."[289]

Kwall posits that "unjust enrichment is one of the fundamental rationales underlying the right of publicity."[290] She argues that unjust enrichment harms not only the right of publicity plaintiff and her relatives and assignees, but less obviously also harms society as a whole.[291] Other scholars have questioned whether unjust enrichment offers an adequate justification for the right of publicity.[292] Wee Jin Yeo addressed the various concerns scholars have raised regarding applying an unjust enrichment rationale, and reasoned that the problems scholars have with the unjust enrichment theory speak to the "scope of the right" rather than its very existence, concluding that unjust enrichment remains a compelling justification for the existence of right of publicity law.[293]

An unjust enrichment justification for the right of publicity offers a strong rationale for extending the right of publicity to virtual and AI influencers. Just as usurping the identity of human influencers without compensation constitutes unacceptable unjust enrichment, the same is true for usurping the identity of virtual or AI influencers without compensation. The would-be-infringer in this circumstance is unjustly enriched by free-riding on the developed identity of the virtual or AI influencer in much the same way as they would be by free-riding on a human influencer. The normative desire to prevent unjust enrichment is in no way diminished because the person or company being unjustly enriched did so by using the identities of virtual or AI influencers. This is because the normative core of this rationale is not focused on

287. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (quoting Harry Kalven Jr., *The Right of Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 331 (1966)).

288. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 976 (10th Cir. 1996).

289. *Id.*; *see also* Bear Foot, Inc. v. Chandler, 965 S.W.2d 386, 389 (Mo. Ct. App. 1998) (distinguishing between a right of privacy and a right of publicity by noting that "the right of publicity is not intended to protect a person's feelings, but provides a cause of action where a defendant has been unjustly enriched by misappropriation of the person's valuable public persona or image").

290. Kwall, *The Right of Publicity vs. The First Amendment*, *supra* note 256, at 62.

291. *Id.* at 85.

292. *See, e.g.*, Dogan & Lemley, *supra* note 254, at 1182–83 (critiquing the unjust enrichment rationale on the basis that it assumes without justification that someone must have property rights in the value of an identity, and, if so, the property right ought to be assigned to the identity holder rather than a third party).

293. Wee Jin Yeo, *Disciplining the Right of Publicity's Nebulous First Amendment Defense with Teachings from Trademark Law*, 34 CARDOZO ARTS & ENT. L.J. 401, 411–14 (2016).

either consumer confusion or harm to the person whose identity was taken, but rather on disgorging the unfair benefits received.

D. EXHAUSTION OR ALLOCATIVE EFFICIENCY

Allocative efficiency theory suggests that to ensure a persona is not overused and quickly tossed aside, "the law should grant an individual exclusive rights in her identity so that she can control uses of the identity and maximize its advertising value."[294] Mark F. Grady is an advocate of this perspective.[295] To illustrate this rationale, Grady explained this theory through *White v. Samsung Electronics America*.[296] He hypothesized that the reason the court was inclined to protect Vanna White's image was because the value of her image was so great, that it was highly susceptible to dissipation of value if her image were to be overused without her permission.[297] Additionally, Richard Posner articulated this idea by saying, "[T]he multiple use of the identical photograph to advertise different products would reduce its advertising value, perhaps to zero."[298] Vincent M. de Grandpré expanded this theory of efficiency by agreeing with his colleagues regarding protection to prevent dilution, and proposing new economic rules to promote efficiency and combat the over broadness.[299]

Turning to case law, at least two circuits—the Fifth and Tenth Circuits—have explicitly articulated this theory of efficiency, with the Fifth Circuit stating: "Without the artificial scarcity created by the protection of one's likeness, that likeness would be exploited commercially until the marginal value of its use is zero."[300] Moreover, the Tenth Circuit reasoned that this justification was persuasive in the context of advertising, but not necessarily in other circumstances.[301] But some scholars are skeptical. For example, Mark McKenna argued that identities and physical resources are necessarily different because identities are not "rivalrous [or] exhaustible."[302] Further, he argued that while certain physical commodities can be exhausted from

294. Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 269 (2005).

295. *See* Mark F. Grady, *A Positive Economic Theory of the Right of Publicity*, 1 UCLA ENT. L. REV. 97, 126 (1994) ("Under this theory the courts create liability in publicity cases so as to prevent too rapid a dissipation of the value of socially valuable publicity assets.").

296. *Id.* at 117–18; *see generally* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (evaluating a right of publicity claim for Vanna White over Samsung's use of a robot resembling White next to a game board).

297. Grady, *supra* note 295, at 117–18.

298. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 411 (1978).

299. *See* Vincent M. de Grandpré, *Understanding the Market for Celebrity: An Economic Analysis for the Right of Publicity*, 12 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 73, 101–08, 114–22 (2001) (outlining a robust efficiency argument as a driving force for right of publicity); *see also* Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L.J. 419, 453 n.246 (2020) ("A lesser-used alternative economic justification for the right of publicity is allocative efficiency, a variation on the "'tragedy of the commons'" argument for private property" (citing Grady, *supra* note 295, at 99)).

300. Matthews v. Wozencraft, 15 F.3d 432, 437–38 (5th Cir. 1994).

301. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 975 (10th Cir. 1996).

302. McKenna, *supra* note 294, at 269.

overuse, most cultural phenomena fizzle out because something more compelling comes along—not because of exhaustion.[303] Similarly, Michael Madow takes issue with Posner's claims—and seemingly the Tenth Circuit's perspective—in the advertising context, citing various instances where over-advertising proved to be economically beneficial.[304]

This scarcity theory appears to apply equally to the use of identities of virtual or AI influencers as well. If Lil Miquela were to be perceived as endorsing thousands of products, it would necessarily dilute the value of her endorsement and therefore likely what collaborators would be willing to pay for that endorsement.

E. A PRIVACY JUSTIFICATION

A privacy justification is one of the most supported theories of right of publicity in the literature, historically, and through case and statutory law. In her paradigm-challenging book, Jennifer Rothman notes the right of publicity was born out of the right of privacy and the split was "not driven by essential differences."[305] Moreover, she has made the case that the right of publicity ought to be considered a privacy-based cause of action, arguing that "[t]he right of publicity got off track when it transformed from a personal right, rooted in the individual person (the 'identity-holder'), into a powerful intellectual property right, external to the person, that can be sold to or taken by a non-identity-holding 'publicity-holder.'"[306] William L. Prosser, in his influential article *Privacy*, broke the privacy tort into four subsections, with the right of publicity stemming from the fourth.[307] Later, Robert T. Thompson III argued that infusion of a privacy rationale is necessary to legitimize the right of publicity.[308]

It took courts a while to accept a right of publicity, instead sticking with the familiar right of privacy.[309] Many courts continue to consider the right of publicity as stemming from privacy. For example, in *Lugosi v. Universal Pictures*, the California court, seemingly skeptical of the right of publicity and its power, found that because the right of publicity's roots are in privacy law, those rights cannot extend beyond death.[310] But after *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* was decided, finding that the

303. *Id.* at 270.

304. Madow, *supra* note 265, at 221–23.

305. JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 30 (2018).

306. *Id.* at 7.

307. Prosser, *supra* note 219, at 389, 406–07.

308. Robert T. Thompson, III, *Image as Personal Property: How Privacy Law Has Influenced the Right of Publicity*, 16 UCLA ENT. L. REV. 155, 170–72, 175–77 (2009).

309. *See* ROTHMAN, *supra* note 305, at 75 ("From 1953 to 1970 few cases actually held that there was an independent right of publicity. The vast majority of cases during this era . . . continued to be considered under privacy law.").

310. *See* Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979) (using language like "[t]he so-called right of publicity[,]" seemingly suggesting skepticism with the right on its face).

right of publicity might be transferable,[311] the right of publicity began to take on a more property-based rationale, stepping away from its roots in privacy law.[312]

However, some statutory rights of publicity continue to have an underlying privacy rationale simply by the way they are situated. For example, New York's right of publicity law is categorized under "Article 5—Right of Privacy," even though, functionally, it is a right of publicity and is titled "Right of Publicity."[313] Therefore, it appears that the right of privacy and the right of publicity might be intertwined through language and placement for some states.

At first glance, it seems a privacy-based justification is inconsistent with right of publicity protection for virtual and AI influencers. After all, virtual and AI influencers are not human and do not have their own privacy concerns. It is worth considering, however, that right of publicity protection for virtual and AI influencers may be beneficial to protect the privacy considerations of the humans behind them. Some subcategories of virtual and AI influencers, as discussed above, may be ways for human influencers to experiment with their own identities in ways that would not be possible absent the digital space. Allowing protection for their digital identities even when they have not publicly linked the virtual or AI influencer to their human identity, protects the human's privacy and the ability to experiment with identity in ways that may be societally beneficial. Furthermore, to the extent that social media users cannot tell who is a human versus a non-human influencer, a rule that allows the identities of virtual and AI influencers to be freely exploited without legal consequence would likely lead to accidentally violating the rights of the human influencers as well. This would suggest that it may make sense to extend right of publicity protection to virtual and AI influencers to protect the privacy interests of humans, even while continuing to hold the line regarding corporations or animals where such a slippery slope is far less likely.

F. MORAL/NATURAL RIGHTS

Another related justification offered for protecting the right of publicity is a "moral rights" or natural rights based theory.[314] Moral or natural rights refer to rights that are considered inherent to humans by virtue of their very nature, and which exist independently of any specific laws or societal customs.[315] They are considered universally applicable, and are used to justify claims about universally held human

311. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

312. ROTHMAN, *supra* note 305, at 86.

313. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2022).

314. *See* Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-first Century*, 2001 U. ILL. L. REV. 151, 158 (2001). Kwall points out that translating the concept of *droit moral* as "personal rights" is more accurate than "moral rights" because it is more reflective of the theoretical basis underlying the concept based on protection of reputation and personality. *Id.*

315. *See* 1 MCCARTHY & SCHECHTER, *supra* note 18, § 1:3 (describing the right of publicity as the inherent right of every human being to control the commercial use of his or her identity, which suggests that such a right is inherent in their humanity).

rights such as the right to life and liberty.[316] This normative justification seems to be envisioned by the McCarthy treatise when he defines the right of publicity as "the inherent right of every human being to control the commercial use of his or her identity."[317] Kwall is one the leading proponents for moral rights as a rationale for right of publicity and has argued that moral rights provide a theoretical framework for right of publicity that balances First Amendment issues, eliminates confusion regarding "commercial/noncommercial distinction," and provides "much needed uniformity" in the law.[318] Lemley and Dogan reject this moral rights theory, arguing, "[t]he fact that people who claim ownership rights over their personalities are willing to sell their dignity for a fairly low price in many cases should make us skeptical of a claim that this is really a form of paternalism designed at protecting individuals from commercialization."[319]

Courts have been hesitant to apply a moral or natural rights rationale in their right of publicity holdings. In fact, in *Zacchini*, the Supreme Court seemed to decidedly push against a moral right underlying the right of publicity, writing that "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.*"[320] Additionally, the Tenth Circuit considered McCarthy's advocacy for natural rights as an underlying theory for right of publicity, and expressly rejected the notion because he "offer[ed] little reason for [his] assertion."[321]

Along with privacy, natural/moral rights initially appear to be one of the weakest theoretical justifications for extending right of publicity protection to virtual and AI influencers. The very nature of this category of justifications presupposes rights inherently linked to a human. However, as with the privacy rationale, for the subset of virtual or AI influencers who represent a way for humans to experiment with identity in a digital format, there may be a stronger argument under a natural/moral rights theory. To the extent that this theory suggests that every human has the inherent right to control the commercial use of his or her identity, that ought to still apply when that identity takes the form of a digital avatar.

Furthermore, as with the privacy rationale, even under a natural/moral rights justification, there may be prophylactic reasons to extend right of publicity to

316. *See* Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105, 1132 (2012) ("One feature of Locke's theory is crucial to note. Locke believes that in the state of nature one has a moral right to defend oneself against threatened violations of one's moral rights to life, liberty, and property.").

317. 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (5th ed. 2015).

318. Kwall, *Preserving Personality*, *supra* note 314, at 159, 170.

319. Dogan & Lemley, *supra* note 254, at 1182.

320. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977) (emphasis added).

321. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 975 (10th Cir. 1996); *but see* Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001) ("[S]ociety may recognize . . . that a celebrity's heirs and assigns have a legitimate protectible interest in exploiting the value to be obtained from merchandising the celebrity's image, whether that interest be conceived as a kind of natural property right or as an incentive for encouraging creative work.").

virtual/AI influencers. As demonstrated by the early days of Lil Miquela, individuals operating in the social media space cannot always tell which influencers are human, virtual, or AI.[322] To the extent that natural/moral rights suggest that the names, likenesses, and identities of human influencers ought to be protected, there may also be good reason to protect the names, likenesses, and identities of all influencers in order to avoid challenging questions such as how users are supposed to know which influencers' names and likenesses are fair game for exploitation and which are not.

G. AUTONOMY/CONTROL

Scholars have also suggested autonomy/control as another underlying theory of right of publicity that is closely related to, but nonetheless distinct from privacy. For example, in 1999, Alice Haemmerli proposed an autonomy-based theory, rooted in "idealist philosophy."[323] Haemmerli believed this theory balances and merges other justifications—labor, economic, property, moral—which alone fall short of providing a comprehensive rationale for a right of publicity.[324] Additionally, Mark McKenna asserted that the right of privacy theory is inadequate to support the right of publicity, and instead argued for an autonomy theory.[325] He wrote, "[B]ecause an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning."[326] Further, Kwall stated: "[T]he right of publicity safeguards the right-of-celebrity personas to control the commercial contexts in which their images are used and allows them to decide how their images are presented to the public."[327] The Restatement (Third) of Unfair Competition, in describing the rationale for a right of publicity, notes that it "protects an individual's interest in personal dignity and autonomy."[328] Moreover, in the Restatement (Second) of Torts, the right of publicity is defined as an "interest of the individual in the exclusive use of his own identity," speaking to a theory of control and autonomy.[329] Some cases have cited the Restatements as justification for right of publicity, yet do so while also mentioning other underlying theories such as property rights and unjust enrichment.[330]

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322. *See supra* note 9 and accompanying text.

323. Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 411, 413 (1999).

324. *See id.* at 411–13 ("[The idealist philosophy] views the individual as an autonomous being preceding the creation of property, a notion that resonates fairly strongly with our cultural mores.").

325. McKenna, *supra* note 294, at 279.

326. *Id.*

327. Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 19 (1997).

328. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (A.L.I. 1995).

329. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (A.L.I. 1977).

330. *See, e.g.*, In re Estate of Reynolds, 327 P.3d 213, 215, 217 (Ariz. Ct. App. 2014) (defining the right of publicity under the Restatement, and noting the autonomous justification cited therein, but also specifically calling the right of publicity a "property right"); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1089–90 (E.D. Mo. 2006) (mentioning that the right of publicity is justified by the Restatement under an autonomy theory, but also citing other justifications like efficiency and unjust enrichment); Hebrew Univ. of Jerusalem v. Gen. Motors LLC, 903 F. Supp. 2d 932, 937 (C.D. Cal.

Like the natural rights and privacy justifications, the autonomy justification for the right of publicity does not initially appear to support extending protection to virtual or AI influencers. There is not as strong of an inherent idea that virtual and AI influencers ought to have the autonomy to make decisions about their own identity. There is in fact an autonomy rationale for extending protection to virtual and AI influencers that comes out of slippery slope arguments regarding the blurry line between a human and a virtual influencer. For example, an exact photograph of a human would be protected. Presumably, so would a photograph where the human is wearing makeup. Almost certainly so would a photograph where the human has used some photoshop to enhance their appearance. Presumably no one would argue that a human would lose right of publicity protection just because they have chosen to engage in plastic surgery. In a virtual world, the autonomy right of individuals to develop and explore aspects of identity are not limited by photoshop or plastic surgery, but only by the imagination. Avatars that do not resemble the underlying person can be a critical part of the autonomy to explore notions of self in ways not as limiting as the real world.[331] This spectrum can continue until we reach the point where the virtual influencer may have minimal resemblance to the humans behind it. Rather than try and determine where on that spectrum identity ends, protecting the identities of all influencers would allow for full protection for the human influencers and their rights to autonomy in experimenting with aspects of identity beyond those available in the real world.

H. INCENTIVE-BASED RATIONALE

Whereas incentive theory constitutes the dominant justification for American copyright and patent law, it is also a justification offered for the right of publicity. Incentive theory suggests that people will only invest in cultivating their own commercially valuable identities if there is an economic incentive to do so.[332] David Franklyn and Adam Kuhn argue that incentive theory is an especially compelling justification for the right of publicity because it has roots in the Progress Clause of the Constitution.[333] However, they identify three problems with incentive theory—it necessitates the notion that people do not seek fame for a noneconomic reason; it assumes "fame and celebrity status is not a sufficient reward in and of itself"; and it fails to consider non-famous people into its justification.[334]

The Supreme Court discussed incentive theory in its *Zacchini* decision, writing that the right of publicity "provides an economic incentive for him to make the investment

2012), *vacated pursuant to settlement*, No. CV-10-3790-AB (JCX) 2015 WL 9653154 (C.D. Cal. Jan. 12, 2015) (affirmatively recognizing autonomy as an underlying rationale for right of publicity and quoting the Restatement as support, but also noting the right is wrapped up in a property theory).

331. *See* Antognini & Woods, *supra* note 19, at 95 ("[T]here might be real value in protecting the decision to assume a virtual identity as an important aspect of self-discovery or self-control.").

332. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

333. David Franklyn & Adam Kuhn, *Owning Oneself in a World of Others: Towards a Paid-for First Amendment*, 49 WAKE FOREST L. REV. 977, 991 (2014); U.S. CONST. art. I, § 8, cl. 8.

334. *Id.* at 991–92.

required to produce a performance of interest to the public."[335] Moreover, in *Comedy III Productions v. Gary Saderup, Inc.*, the California Supreme Court noted that an incentivization theory is as legitimate as a "natural property right" in rationalizing the right of publicity.[336]

Incentive theory is more of a natural fit for providing right of publicity protection to virtual influencers or AI influencers with human involvement than for pure autonomous AI influencers. The individuals and/or businesses behind virtual/AI influencers are incentivized to invest the time and effort to create a virtual/AI influencer with a sufficiently compelling story or identity to breakthrough to consumers in a crowded social media space. Just like with other forms of incentive theory, the logic goes if others are permitted to copy or use the name, image, or likeness of the virtual/AI influencer without permission or licensing, then there will be little incentive for the original creator(s) to spend time and effort in the creation. This logic decreases if society were to get to the far end of the spectrum with entirely autonomous AI influencers as it is not clear that AI requires financial compensation to incentivize creation.

IV. CONCLUSION

Overall, looking more closely at the potential theoretical justifications underlying the right of publicity there are strong arguments available for extending right of publicity to virtual and AI influencers. The Labor-Reward/Lockean Theory justification for right of publicity is arguably even stronger for virtual and AI influencers that require a good deal of human labor than for protecting the right of publicity of ordinary humans. The consumer confusion and unjust enrichment rationales, which have as their primary focus harms to or unfair benefits to others, apply equally to virtual and AI influencers as to their human counterparts. The exhaustion or allocative efficiency theory also seems to apply equally as well to virtual and AI influencers as to humans. The privacy, moral/natural rights, and autonomy/control justifications for the right of publicity all appear focused on furthering human-specific goals. Nonetheless, they all are still a good fit for right of publicity protection for the subset of virtual/AI influencers who act as an opportunity for a human to explore identity without the limitations of the real world. Furthermore, there are prophylactic reasons under these theories to protect all virtual and AI influencers since it is impossible and perhaps undesirable for would-be infringers to be able to tell the exact human role behind virtual or AI influencers, or even, as Lil Miquela demonstrated, whether the influencer is even human. Finally, the incentive theory rationale is weakest for pure AI influencers but still has traction for the rest of the influencer spectrum.

Before turning to the implications of extending the right of publicity to virtual or AI influencers, it is important to briefly explore why the right of publicity even matters

335. *Zacchini*, 433 U.S. at 576.

336. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001).

in this space rather than other forms of intellectual property. Turning first to copyright law, names are not copyrightable.[337] Therefore, copyright law would not protect against the unauthorized use of the virtual or AI influencer's name in promoting a product or service. Copyright also likely would not protect virtual or AI influencers who are digital clones of an actual human.[338] Copyright might protect some aspects of the virtual or AI influencer to the extent that such influencers may constitute fictional, copyrightable characters. Although there is no Supreme Court definitive test for the copyrightability of characters, the Ninth Circuit's test requires that the characters must generally have "physical as well as conceptual qualities," be "'sufficiently delineated' to be recognizable as the same character whenever it appears" and also must be "'especially distinctive' and 'contain some unique elements of expression.'"[339] Other than the first prong, it is not clear whether most virtual and AI influencers would meet that standard, which in practice usually appears to be applied to famous characters. Finally, the Copyright Office has taken the position that fully AI-created works cannot register for a copyright and that works with human involvement can only register for a copyright for the human contribution and must disavow those aspects that are contributed by the AI.[340] Potentially, that can create challenges for protection for AI influencers that involve both human and AI contributions.

Similarly, trademark law does not sufficiently cover this space. After all, if it did there would be no need for the right of publicity for humans either. Traditional trademark law cases require a showing of likelihood of consumer confusion.[341] While one of the normative theories for protecting right of publicity involves consumer confusion, there are other reasons to protect right of publicity, as suggested by the numerous other theories, that do not rely on consumer confusion.

Policymakers considering enacting a federal right of publicity or revising a state right of publicity may wish to address its applicability to virtual or AI influencers. Similarly, courts applying existing statutory or common law regimes, may face a situation where they have to decide whether the right of publicity applies to virtual or AI influencers. In either circumstance, there are some secondary implications that need to be considered. One of the biggest questions to grapple with will be who will have standing to assert the right of publicity on behalf of the virtual/AI influencer. Many states already allow the right of publicity to be transferred to individuals besides the human whose right of publicity is being asserted.[342] Policymakers or courts will have

337. U.S. COPYRIGHT OFF., CIRCULAR 33: WORKS NOT PROTECTED BY COPYRIGHT (2021), https://www.copyright.gov/circs/circ33.pdf. [https://web.archive.org/web/20251009095215/https://www.copyright.gov/circs/circ33.pdf].

338. *See* Jennifer E. Rothman, *Copyrighting People*, 72 J. COPYRIGHT SOC'Y 1, 8–9, 15, 26–28 (discussing digital replicas and voice clones in the copyright space).

339. DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).

340. *See* U.S. COPYRIGHT OFF., Letter Re: *Zarya of the Dawn* (Registration #VAu001480196) (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf [https://web.archive.org/web/20251008015545/https://www.copyright.gov/docs/zarya-of-the-dawn.pdf].

341. *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:1 (5th ed. 2025) (noting trademark law is meant to protect against consumer confusion).

342. *See, e.g.*, CAL. CIV. CODE § 3344.1 (West 2024) (noting right of publicity is transferable).

to consider who should have standing to assert the right of publicity for virtual or AI influencers.

States may also have to reconsider the length of the right of publicity. As opposed to the right of publicity lasting a set number of years, many states borrowed the method for calculating the length of the right of publicity from copyright law, which links the length of copyright to the length of human life. In the case of copyright the applicable term is lifetime plus seventy years for human-creations, and many states have adopted terms linked to the lifetime of the rightsholder with lifetime plus fifty years,[343] and lifetime plus seventy years being two common examples.[344] Since virtual or AI influencers do not necessarily age—note that Lil Miquela remained the same age for years—and certainly do not necessarily die, then linking the length of the right to lifetime does not seem appropriate. Those states that wish to continue to borrow from copyright law may instead need to turn to the copyright term for works created under a pseudonym or by a corporation, which is ninety-five years from the year of first publication (or 120 years from the year of creation, but that is harder to determine) for the length of the right of publicity for a virtual or AI influencer. Alternatively, states can borrow from trademark law where trademarks can last forever as long as the trademark continues to be used by the owner. If so, then the right of publicity would last only as long as the virtual or AI influencer continues to post on social media, which could end up being a shorter term than the copyright version linked to human lifetime.

Finally, since the choice of law analysis between different state right of publicity regimes often depends on where the human rightsholder lives, that method of analysis may need to be reconsidered for virtual or AI influencers who do not actually live anywhere besides the internet. Where they choose to live in their fictional identities does not seem important to the choice of law analysis. Otherwise, one would expect to see a trend with all virtual and AI influencers fictionally living in the most protective state.

Additionally, it is important to emphasize that if legislatures and courts decide that virtual or AI influencers may have a right of publicity, that does not answer the question of whether they will have a successful cause of action under the right of publicity in any particular case. Rather, just like their human counterparts, their right of publicity would be limited by the various doctrines that have developed to limit the doctrine, and especially those doctrines, such as transformativeness, that work to ensure that the right of publicity does not impermissibly interfere with free speech

343. *See, e.g.*, 765 ILL. COMP. STAT. 1075/30 (2024); KY. REV. STAT. ANN. § 391.170 (West 2024); NEV. REV. STAT. § 597.790(1) (2024); ARK. CODE. ANN. § 4-75-1107 (2024); TEX. PROP. CODE. ANN. § 26.012 (West 2024) ("A person may use a deceased individual's name, voice, signature, photograph, or likeness in any manner after the 50th anniversary of the date of the individual's death.").

344. *See,* CAL. CIV. CODE § 3344.1 (West 2024) (noting right of publicity protection of the deceased individual lasts only seventy years past death); HAW. REV. STAT. § 482P-4 (2024); S.D. CODIFIED LAWS § 21-64-2 (2024).

rights.[345] For example, California has developed a transformativeness test in order to balance first amendment interests with right of publicity interests.[346]

All of these nuances are questions for another day as they do not become relevant unless policymakers, legislators, and judges decide to extend the right of publicity to virtual and AI influencers. To do so it is first necessary to add analytical coherency to the right of publicity doctrine in order to decide why protecting it is important. Doing so will help answer whether it makes sense to extend it to virtual or AI influencers.

345. See Kwall, *The Right of Publicity vs. The First Amendment*, *supra* note 256; Post & Rothman, *The First Amendment and the Right(s) of Publicity*, *supra* note 258.

346. Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808–810 (Cal. 2001); *see also* Rebecca Schoff Curtin, *Transformative Celebrity* (draft on file with author) (discussing the relationship between the transformative test in right of publicity and copyright doctrines).