Deepfakes and Private International Law

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As this Symposium has shown, the problems for intellectual property law caused by the creation and distribution of so-called "deepfakes" are many and the solutions to those problems remain speculative or, at best, inchoate. But any of the most plausible responses, all of which are developing at the national (or regional, as in the European Union) level, will inevitably raise difficult issues of private international law. In this Article, in assessing the likely role of private international law in resolving legal claims prompted by deepfakes, I stress the broader context in which those questions ought to be considered, building in part on several conceptual propositions contained in Edouard Treppoz's article on how such matters would be handled under EU law.[1] Then, I assess how U.S. courts might approach similar issues of private international law, arguing that existing U.S. rules are inadequate in a number of respects, hampered both by truncated treatment of choice of law in past cases involving publicity rights and outdated (but recently re-discovered) commitments by the U.S. Supreme Court to conduct-based notions of territoriality.

I. THE ROLE OF PRIVATE INTERNATIONAL LAW

A. THE BACKGROUND INTERNATIONAL PICTURE

Professor Treppoz starts from the observation that deepfakes are "inherently international."[2] As a result, he says that private international law plays a crucial role in addressing the problem of deepfakes. This statement clearly echoes claims made thirty years ago with the emerging social and commercial exploitation of the internet. That development prompted the first sustained attention by scholars, courts, and policymakers to the private international law of intellectual property,[3] as well as more radical forecasts about the development of governing rules detached from territorial

1. Eduoard Treppoz, *Deepfakes and Private International Law*, 49 COLUM. J.L. & ARTS 791 (2026)
2. *Id.* at 791.
3. *See* P.B. Carter, *Decisions of British Courts During 1990*, 61 BRIT. Y.B. INT'L L. 386, 401–02 (1991) (noting lack of private international law of intellectual property).

jurisdictions.[4] In fact, the importance of private international law for the deepfakes problem will be far greater, and the challenge far more difficult, than we faced thirty years ago with then-imminent digital copyright and trademark disputes. This is because of the different legal background that existed internationally in 1995.

Private international law is only one of various mechanisms by which territorial rights are reconciled. The system of *public* international intellectual property law contains a range of mechanisms that constrain—rather than referee between—variation in national norms. The extent to which those mechanisms exist will render the role of private international law relatively less—or more—influential.

With the emergence of digital copyright in the 1990s, we saw prompt recourse to the public international copyright system.[5] The resulting treaties (the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty) were neither comprehensive nor detailed.[6] But countries did come together on basic principles.[7] Those treaty commitments were soon bolstered with internationalization through private ordering, by takedown procedures implemented by platforms that transcended national borders.[8] That cross-border private ordering was constructed with the scaffolding of national legislative interventions offering conditional immunity to internet intermediaries (the Digital Millennium Copyright Act and the E-Commerce Directive).[9]

Despite the challenge to territorial rights presented by online uses of trademarks, claims that arose implicated long-standing substantive principles on which there was extensive international agreement. And any uncertainty created by the cross-border character of ubiquitous online uses was ameliorated by common principles of restraint contained in innovative soft law initiatives at WIPO, which quickly took root in parallel national jurisdictions.[10] Addressing the particular scourge of cybersquatting

4. *Cf.* David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that a body of laws separate from that which applied offline would need to arise to regulate cyberspace in part through new institutions not tied to traditional national lawmakers).

5. *See* Graeme Dinwoodie, *The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking?*, 57 CASE W. L. REV. 751 (2007).

6. WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121; WIPO Performances and Phonograms Treaty, Dec. 23, 1996, 2186 U.N.T.S. 203.

7. *See* Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 371–72 (1997); Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC'Y 265, 270–72 (2000).

8. Graeme B. Dinwoodie, *Private Ordering and the Creation of International Copyright Norms: The Role of Public Structuring*, 160 J. INSTIT. & THEORETICAL ECON. 161, 169–74 (2004).

9. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 512); Council Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular, Electronic Commerce, in the Internal Market, arts. 12–15, 2000 O.J. (L 178) 1, 12–13.

10. *See* Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, adopted by Assembly of the Paris Union for the Protection of Industrial Property and General Assembly of the World Intellectual Property Organization, at 2, WIPO Doc. 845(E) (Oct. 2001) (principles for determining whether "use of a sign on the Internet has contributed to the acquisition, maintenance or infringement of a mark or other industrial property right in the sign, or whether such use constitutes an act of unfair competition.").

was one instance where prognostications about rules detached from territorial jurisdictions proved accurate.[11]

That is to say, the treatment of inherently cross-border problems is commonly a mix of private international law, public international law, and forms of private ordering that sideline the formal principle of territoriality.[12] In the 1990s, it was not always clear that these other institutions would step up and solve the problem. As a result, we saw an intensified effort to think through rules of private international law applicable to cross-border intellectual property disputes: first in the failed Hague Convention, then the American Law Institute ("ALI") Principles project in the United States and the counterpart Conflict of Laws in Intellectual Property ("CLIP") project in Europe.[13] The number of fully adjudicated private international law disputes in copyright and trademark law since that activity has been surprisingly small. But this is because the problems have been ameliorated by the early adoption of similar substantive copyright and trademark norms, jumpstarted by the public international process, and extensive cross-border private ordering.

The picture with the deepfakes dilemma is quite different in ways that make the challenge for private international law far more substantial and far more important than it was thirty years ago. This is because even if there is some international agreement on the basic contours of the problem, we do not even share conceptual starting points for the intellectual property part of the solution. This lack of a shared conceptual lens through which to view matters makes agreement on substantive international norms unlikely. Unlike copyright or trademark law in 1996, there are no basic international norms on personality or image protection to extend and adapt to the new factual setting.

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11. *See generally* Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141 (2001) (outlining the non-national character of the Uniform Domain Name Dispute Resolution Policy).

12. *See generally* Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHI.-KENT L. REV. 993, 1011 (2002) (describing the different mechanisms that intellectual property law had developed for addressing cross-border problems).

13. INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (A.L.I. 2008) [hereinafter "ALI PRINCIPLES"]; *See also* HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY DRAFT CONVENTION ON INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Oct. 30, 1999), http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf [https://web.archive.org/web/20240623132635/https://assets.hcch.net/upload/wop/jdgm2001draft_e.pdf] ; EUROPEAN MAX PLANCK GRP. ON CONFLICT OF L. IN INTELL. PROP., CONFLICT OF LAWS IN INTELLECTUAL PROPERTY: THE CLIP PRINCIPLES AND COMMENTARY (Oxford Univ. Press 2013) [hereinafter "CLIP PRINCIPLES"]; *see generally* Rochelle Cooper Dreyfuss, *An Alert to the Intellectual Property Bar: The Hague Judgments Convention*, 2001 U. ILL. L. REV. 42 (2001); Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 719 (2009) ("Those efforts [to negotiate a Hague Convention on Jurisdiction and Recognition of Judgments] floundered in 2000–2001, in large part due to disagreement over how to handle intellectual property cases, forcing the Conference to scale back its efforts and concentrate on a convention validating exclusive choice of court clauses in business-to-business contracts."); Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065 (2002).

Of course, divergence among substantive national rules is why we have private international law; it allows genuine differences to persist and conflicts to be resolved through (supposedly) value-neutral procedural rules. But the lack of a common conceptual understanding here is quite deep. The odd assortment of theories through which intellectual property rights against deepfakes might be asserted under different national laws *also* creates difficulties for private international law. Any sophisticated interest analysis of any choice of law issue in this field is likely to generate far more true conflicts than arose in the realms of copyright or trademark. As just one illustration, it is clear that publicity rights (sometimes called image rights or personality rights) will be at the forefront of deepfake-related intellectual property claims. But the leading private international law projects disagree on whether they even speak to such personality-grounded rights: The ALI Principles purport to apply to right of publicity, while the CLIP Principles explicitly exclude such claims from their scope.[14] Private international law applicable to deepfake claims is operating in a much different space than copyright and trademark laws were in the 1990s.

B. THE DUALITY OF (LIKELY) RELEVANT LEGISLATION

One of the other challenges for private international law in assessing deepfake-related claims is that, based on the current legislative outlook, it will have to tackle two different forms of relevant law. First, we have public law regulation, typified by the AI Act in Europe (but with likely counterparts in the United States).[15] Second, we have

14. *See* ALI PRINCIPLES, *supra* note 13, § 102, cmt. b ("it may even become appropriate for courts to apply the Principles in a case in which not all countries in the world recognize the right claimed" and giving as a leading example the "right of publicity" and which in many European countries under the name "right to one's own image); CLIP PRINCIPLES, *supra* note 13, art. 1:101.C03 ("[T]he right to a person's voice or image, sometimes designated as the right of publicity, is not included in the scope of Article 1:101. While such rights could also be classified as property rights and are in fact often exploited in a similar commercial way, the group did not want to interfere with the prevailing approach in Europe, which considers the protection of these rights and of personality rights in general as a matter of the law of tort or delict.").

15. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L 1689) [hereinafter "EU AI Act"]. The U.S. approach remains in flux. *See* WHITE HOUSE, A NATIONAL POLICY FRAMEWORK FOR ARTIFICIAL INTELLIGENCE (Mar. 19, 2026), https://www.whitehouse.gov/wp-content/uploads/2026/03/03.20.26-National-Policy-Framework-for-Artificial-Intelligence-Legislative-Recommendations.pdf [https://web.archive.org/web/20260325220307/https://www.whitehouse.gov/wp-content/uploads/2026/03/03.20.26-National-Policy-Framework-for-Artificial-Intelligence-Legislative-Recommendations.pdf]. This is also true elsewhere. *See* H.M. GOVERNMENT, REPORT ON COPYRIGHT AND ARTIFICIAL INTELLIGENCE (U.K.) (Mar. 18, 2026), https://assets.publishing.service.gov.uk/media/69ba692226909a14239612e4/CP2602959_-_Report_on_Copyright_and_Artificial_Intelligence_web.pdf [https://web.archive.org/web/20260325182539/https://assets.publishing.service.gov.uk/media/69ba692226909a14239612e4/CP2602959_-_Report_on_Copyright_and_Artificial_Intelligence_web.pdf].

private causes of action that look, with varying degrees of resemblance, more like claims based on traditional intellectual property rights.

This makes private international law analysis more complex. The geographic scope of any public law regulation will be determined differently than the way courts assess the law applicable to a private IP infringement claim. At the very least, U.S. courts are unlikely to directly enforce norms contained in any foreign public law regulation (such as the EU AI Act), though they may in certain circumstances assume jurisdiction over foreign IP law claims.[16] With that said, if U.S. courts engage in a full-blown modern interest analysis to determine applicable law, existence of parallel regulatory regimes may well inform how they define the relevant governmental interests.[17]

C. TERRITORIALITY VERSUS EXTRATERRITORIALITY

It is clear that many of these new laws will (quite intentionally) have some extraterritorial effect. For example, the EU AI Act will impose obligations on those providers located in the EU as well as those outside the EU who target the EU.[18] But I strongly endorse Professor Treppoz's observation that critiques of the EU AI Act based on the allegedly extraterritorial scope of the Regulation are not convincing since, as he puts it, "extraterritoriality is not a problem for [private international law] but part of the solution."[19]

This is a bold assertion, especially when working close to the field of intellectual property where territoriality has an almost talismanic quality.[20] But it is surely correct. Extraterritoriality is inevitable in this context.[21] It is unhelpful to reflexively apply the label of "extraterritoriality" to disapply national laws with unavoidable intrusions on competing sovereignties. We need to view these questions in the context of transborder activity that might render a country's sovereign choices ineffective by making it impossible to effectively prescribe within one's own borders.

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16. *See* Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255 (1999).

17. Bernhard v. Harrah's Club, 546 P.2d 719, 720–725 (Cal. 1976).

18. *See* EU AI Act, *supra* note 15, art. 2(1)(c) (applying to providers and deployers of AI systems located in a third country where the output produced by the system is used in the EU).

19. *See* Treppoz, *supra* note 1, at 798.

20. *See* Dinwoodie, *supra* note 13 at 714–15 ("Territoriality is a principle that has always received excessive doctrinal purchase in intellectual property law. One can adhere to the basic premises that underlie territoriality without supporting the full range of rules of intellectual property law that are said to reflect the principle."); Rochelle Dreyfuss, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT'L L. 819, 848 (2005) ("In an early presentation of the ALI Principles to the Advisers, a prominent jurist argued that there was no need for choice of law rules because the territorial principle was so obviously applicable.").

21. Dinwoodie, *supra* note 13 at 715 ("Contemporary multi-territorial intellectual property disputes are characterized by an excess of shared but weaker prescriptive and adjudicatory authority. The Article suggests a restrained concept of territoriality that reflects that reality, drawing in particular from the treatment of extraterritoriality in trademark law.").

That is, there is a tussle between territoriality and extraterritoriality as the lens through which to view these questions. The challenge is not to try and isolate nation-state laws as though we are living in 1925, but to identify the range of circumstances in which a particular assertion of one law over another is acceptable or unacceptable.

II. APPLICABLE LAW IN U.S. COURTS

With these systemic observations in mind, what of the private international law issues as U.S. courts would confront them? I will focus on questions of applicable law. In this regard, one must differentiate between how U.S. courts would determine the law applicable to a publicity rights violation under state law, on the one hand, and a claim under section 43(a) of the Lanham Act or a new federal statute (such as the proposed NO FAKES Act) on the other hand.[22]

A state publicity claim would be analyzed using one of several choice of law methods familiar to U.S. courts. Prevailing approaches vary widely. But they include contemporary interest analysis as well as the more traditional adoption of a single localization factor such as *lex loci protectionis*, *lex loci delicti*, or law of the plaintiff's domicile.[23] By contrast, the federal claims would likely turn at least in part on the application of the two-step test first articulated by the U.S. Supreme Court outside intellectual property law in *Morrison v. National Australia Bank*.[24]

A. STATE PUBLICITY RIGHTS CLAIM

One existing form of intellectual property most directly implicated by the distribution of deepfakes is state publicity law. Professor Kim Roosevelt in 1999 famously wrote that "[c]hoice of law is a mess."[25] Maybe it is. But choice of law in publicity cases is *really* a mess. To be sure, there are a good number of reported decisions. But there is nothing approaching a consensus (or even a basic method) that holds that case law together.

Despite that, there are a couple of observations one can make about the body of case law and the relatively light scholarly commentary.[26] First, the case law highlights a relatively greater role for the law of the domicile[27] than one would typically find in

22. *See* NO FAKES Act of 2025, S. 1367, 119th Cong. (2025); *see* Jennifer E. Rothman, *Reframing Deepfakes*, 49 COLUM. J.L. & ARTS 685 (2026).

23. *See* Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437 (2000).

24. Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255, 266 (2010).

25. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999).

26. For a helpful attempt to pull some of the case law together, see Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule,* 37 CARDOZO ARTS & ENT. L.J. 1, 6–19 (2019).

27. *See, e.g.*, Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149 (9th Cir. 2002); Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989); Southeast Bank, N.A. v. Lawrence, 489 N.E.2d 744, 745 (N.Y. 1985); J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 11:15 (2d ed. 2025).

transnational intellectual property disputes.[28] Several cases in U.S. courts have examined whether publicity right protections are available to foreign plaintiffs.[29] In some of those cases, courts answered that question by asking whether the plaintiff had such rights under the law of the place of his or her residence or domicile (at death, where relevant).[30]

This choice of connecting factor may have been consistent with trends in the Brussels jurisdictional rules after *eDate* and *Martinez*,[31] and indeed Italian choice of law rules under article 24, or article 95 of the pending French codification project.[32] This is arguably justified because of the personal nature of the image rights or publicity rights, which are understood conceptually as emanating from privacy concerns. So, it is tempting to see a shared transatlantic focus on the place of domicile in these types of cases, reflecting a common view of the types of governmental interest at stake in publicity cases.

But that would be a mistake. As a descriptive matter, the apparent emphasis on domicile might result from the types of issues that have received the attention of U.S. courts. In many of these domicile-grounded opinions, the particular question before the court was whether *post-mortem* publicity rights were available.[33] Courts in those cases might naturally seek to apply the law of a single state to the property of an estate and thus to elevate place of domicile as a localization rule that can achieve that goal.

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28. The nationality of the author of a work, or the owner of a trademark, can be relevant to the country origin of a work. In turn this can affect the scope of protection of the international system. Despite that, the plaintiff's domicile might at first glance appear to be the third rail in transborder intellectual property litigation, because public international treaties require national treatment. *See* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm art. 22, July 14, 1967, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works (1971 Paris text) [hereinafter "Berne Convention"], art. 5, July 24, 1971, 1161 U.N.T.S. 3; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 31, 33 I.L.M. 81 (1994) [hereinafter "TRIPS"]. Generally, that commitment imposes upon nation-states the obligation to treat foreign right holders at least as favorably as they treat local authors. Despite that, private international law analysis in the United States has managed to take nationality of the plaintiff into account both in regard to the applicable law and the application of *forum non conveniens*. This has conventionally been thought not to implicate the national treatment obligation. *See* Murray v. Brit. Broad. Corp., 81 F.3d 287, 291 (2d Cir. 1996); Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd., 61 F.3d 696, 699 (9th Cir. 1995); Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90–91 (2d Cir. 1998) (considering nationality as relevant to the law applicable to the question of copyright ownership). Recent developments in the World Trade Organization might, if followed, suggest a greater willingness to subject national rules of private international law to the discipline of public international law. *See* Award of the Arbitrators, China—Enforcement of Intellectual Property Rights, Arbitration Under Article 25 of the DSU, ¶ 4.72, WTO Doc. WT/DS611/ARB25 (July 21, 2025) (rejecting the arguments made by China that the TRIPS Agreement does not address issues of private international law).

29. *Cairns*, 292 F.3d at 1149.

30. *Id.*

31. Judgement for the Grand Chamber ¶¶ 1, 7, 13, Joined Cases C-509/09 & C-161/10, eDate Advert. GmbH v. X and Martinez v. MGN Ltd., 2011 E.C.R. 2011 I-10269.

32. *See* Treppoz, *supra* note 1, at 795-796.

33. *See, e.g.*, *Cairns*, 292 F.3d at 1146–47.

Thus, courts and commentators in turn have noted the centrality of domicile in publicity choice of law analyses.[34] It's a natural common law method to extrapolate from a series of similar instances. But it might distort principles, just as some conflicts scholars have argued that contemporary U.S. tort choice of law rules have been unduly shaped by working out whether guest statutes should preclude liability when New Yorkers crash their cars while driving neighbors to Canada.[35]

A fuller assessment of applicable law in publicity law would better embrace the more nuanced and contemporary approach to choice of law followed in most states of the United States. In the United States, publicity rights are clearly now seen as a property law concept.[36] The philosophical roots are complex and did indeed include privacy impulses and values tied to the person.[37] Over time, however, they have come to be seen as a conceptually distinct cause of action focused on commercial exploitation of identity. Publicity clearly has some of the characteristics of intellectual property and is understood by many as being subsumed within that category. If that were the case, we would not typically make the existence of a claim turn on the country of origin, in part because of national treatment commitments in public international treaties.[38]

Although the ALI Principles do not embrace a full governmental interest analysis, they clearly endorse an approach that broadens the range of relevant connecting factors. Thus, in section 301(2) the Principles suggest that the applicable law in a publicity case be "the law of each State in which direct and substantial damage results or is likely to result, irrespective of the State or States in which the act giving rise to the damage occurred."[39] In adopting this rule, the ALI assimilated publicity rights to "a noncontractual obligation arising out of an act of unfair competition."[40] The Reporters recognized that this departed from the approach in true privacy cases because "[t]he better view is to consider the right of publicity as an economic rather than a personal right, because its essence is to control exploitation."[41]

The ALI Reporters are surely correct that publicity rights now differ from "privacy rights [which] seek to prevent intrusion."[42] This is a persuasive assessment of the

34. *See* LaFrance, *supra* note 26, at 2; ALI PRINCIPLES, *supra* note 13, § 301, reporter's note 5 .

35. *See* Babcock v. Jackson, 12 N.Y.2d 473 (1963); Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 199 (1985) ("Although most of our major choice-of-law decisions after *Babcock* involved foreign guest statutes in actions for personal injuries, we have not so limited them, but have applied the *Babcock* reasoning to other tort issues as well."); Friedrich K. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202 (1969) (critiquing what the obsession with guest statutes had wrought).

36. *Cf.* Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) (drawing on modern choice of law rules applicable to property claims to develop for the first time a federal choice of law rule determining applicable law for issues of initial ownership of copyright).

37. *See* JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018) (offering the authoritative account).

38. *See* TRIPS, *supra* note 28, art. 3 (national treatment obligation); Berne Convention, *supra* note 28, art. 5(1) (national treatment obligation).

39. ALI PRINCIPLES, *supra* note 13, § 301(2).

40. *See id.*

41. *Id.* at cmt. e.

42. *Id.*

governmental interests that have driven the evolution of publicity rights in the United States over the last seventy-five years. But whether that is true of what drives efforts behind the use of publicity rights to preclude deepfakes is, however, a closer case. One could detect an array of governmental interests in these putative cases, including autonomy, dignity, market harm, deception, and the erosion of social fabrics.[43] Regulating these harms implicate a wide range of governmental interests.

Given this messy multivalence, it might well be that we also should consider a more general tort approach and apply the law of the most significant relationship, while recognizing that one of the dominant connecting factors is place of damage.[44] This would not entirely undermine the prospect of a single law being applied to an entire transborder dispute, and thus would retain some of the benefits of a country of origin (or domicile)_rule.

An interest analysis would also allow courts room to recognize the different range of values that might be presented by publicity cases and also would place less dispositive weight on identifying the place of damage. Notably, the ALI did not say anything further about where the "the place of damage" would be. The illustration in the ALI Principles assumes multiple places of damage, all where the act occurred, bringing it closer to endorsing the *lex loci protectionis* than supporting the law of a single place of localized reputation.[45]

B. TRADEMARK AND UNFAIR COMPETITION (FALSE ENDORSEMENT) CLAIMS

The other most likely claim that might be asserted under current U.S. law would be false endorsement under section 43(a) of the Lanham Act.[46] This claim has its substantive weaknesses, and the likely relief (a disclaimer) may cause it to sound more in transparency values. But many of the leading publicity rights cases have parallel section 43(a) claims.[47]

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43. *See* Rothman, *supra* note 22.

44. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (A.L.I. 1971) ("The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."); *id.* at § 145(2) ("Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.").

45. ALI PRINCIPLES, *supra note* 13, § 301(2), illustration 1. Oddly, in the "Rights of publicity" section, the ALI includes an illustration which assumes a court uses Section 301(1)(b), which applies the *lex loci protectionis*. *See id.* at § 403, cmt. c, illustration 2 (If "an advertisement for a UK company is broadcast in the United States using a picture of the United Kingdom's Prince Charming without his permission. Prince Charming sues for violation of his U.S. right of publicity. A U.S. court, following § 301(1)(b), applies U.S. law and awards damages . . . .").

46. *See* Rothman, *supra* note 22.

47. *See, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1396 (9th Cir. 1992); *see also* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096 (9th Cir. 1992).

Publicity rights are not the only example of the unfair competition provision of the statute, section 43(a), being deployed to vindicate personality concerns. For example, in *Gilliam v. ABC*, the Second Circuit allowed Monty Python relief under section 43(a) for what was essentially a moral rights violation (another personality grounded claim).[48] Analogously, passing off (the core of English unfair competition law) was how the English court in *Fenty v. Arcadia* was able to fashion something approaching an image right.[49]

The territorial scope of federal legislation is these days determined under the Supreme Court's *Morrison* framework.[50] This created a two-step test. First, Congress is presumed to have intended statutes to apply only within the United States because Congress is generally concerned only with local conditions. Thus, unless the statute explicitly indicates a broader reach, it will have only domestic scope. Second, if a statute is not extraterritorial, a court must consider the "focus" of the statutory provision. If the focus is on activity (such as a particular act, injury, or effect) that occurred in the United States, then the application of the statute should not be regarded as extraterritorial. However, if the focus is on a particular activity that takes place abroad, then it is an impermissible extraterritorial application.[51] That test is unilateralist, interpreting the scope of the legislation within the confines of default assumptions including a renewed presumption against extraterritoriality that had slowly been weakened over the course of the twentieth century.[52]

The *Morrison* framework has in the past two years been applied by the U.S. Supreme Court in a Lanham Act case, *Abitron v. Hetronic*.[53] The effect of that case was substantially to curtail the extraterritorial application of the Lanham Act.[54] All Justices agreed that the Act did not apply extraterritorially.[55] Moreover, all Justices agreed that the statute could not reach foreign conduct such as sales of products abroad to foreign customers.[56] The plaintiff had sought to bring wholly foreign sales within the scope of the U.S. statute by asserting that the damage to its goodwill caused by such conduct occurred in the United States, where it was domiciled.

But beyond these questions the Court splintered quite badly. On the question of whether U.S. law reached conduct abroad that had effects on consumers in the United States, the Court nominally split 5–4 in favor of requiring some conduct in the United States. However, that majority was secured by the vote of Justice Jackson, whose opinion raised some doubt as to whether she might under different circumstances have

48. *See* Gilliam v. Am. Broad. Cos., 538 F.2d 14, 24 (2d Cir. 1976).
49. Fenty v. Arcadia Grp. [2015] EWCA (Civ) 3 (UK).
50. *See* Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).
51. *See* Spanski Enters., Inc. v. Telewizja Polska, S.A., 883 F.3d 904, 909, 913 (D.C. Cir. 2018).
52. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020).
53. Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 412 (2023).
54. Steele v. Bulova Watch Co., 344 U.S. 280, 282, 286–87 (1952).
55. *See Abitron*, 600 U.S. at 412, 417, 424, 428.
56. *See Abitron*, 600 U.S. at 412, 437 (Sotomayor J., concurring in the judgment).

agreed with Justice Sotomayor's rival opinion.[57] Justice Sotomayor's opinion for four Justices would have allowed the U.S. statute to reach conduct abroad if it caused consumer confusion in the United States.[58]

Earlier non–Lanham Act case law clearly stated that "the focus of a statute [which had to occur in the U.S. for the statute to apply] was 'the object of its solicitude,' which can *include* the conduct it 'seeks to "regulate,"' *as well* as the parties and interests it "'seeks to 'protect' or 'vindicate.'"[59] But Justice Alito held that step two does not end with identifying statutory focus and instead courts must "as[k] whether *the conduct* relevant to that focus occurred in United States territory."[60]

Formally, Justice Jackson's joining of the Alito opinion means that a third step was added to *Morrison*'s two step test—a court must ask whether the "*conduct* relevant to [the focus of the statute] occurred in United States territory."[61] That test would on its face substantially limit the capacity to apply the Lanham Act to a deepfake created abroad that harmed the plaintiff within the United States.

However, Justice Jackson does acknowledge in footnote 2 of her concurring opinion, that uses on a server abroad might be within the scope of the statute.[62] She was clearly very much on the fence between the dueling opinions, and it does not require much judicial imagination to define the relevant conduct—use of the mark—as involving effects in the United States. This is explicitly what the WIPO Joint Recommendation on use on the internet did in 2001, a shift that has also been reflected in numerous jurisdictional and substantive assessments of trademark claims online.[63]

At the time the opinion was handed down, I thought that Justice Sotomayor would eventually prevail. But the lower courts have thus far stuck quite closely to Justice Alito's line. On remand in *Abitron* itself, for example, the Tenth Circuit reversed (as the Supreme Court plainly required) its earlier decision to apply the Lanham Act to foreign sales of goods that did not reach the United States but which diverted customers from the US producer (and thus harmed the US economy).[64] But the court also stressed that

57. *Id.* at 430–31 (Jackson, J., concurring)

58. *Id.* at 433 (Sotomayor, J., concurring in the judgment).

59. WesternGeco LLC v. ION Geophysical Corp., 585 U.S. 407, 414 (2018) (emphasis added).

60. *Abitron*, 600 U.S. at 418 (emphasis added).

61. *Id.*; see also *id.* at 430 (Jackson, J., concurring) ("[I]f the mark is not serving that function in domestic commerce, then the conduct Congress cared about is not occurring domestically, and these provisions' purely domestic sweep cannot touch that person."); *see also id.* at 439 (Sotomayor J., concurring in the judgment) ("[I]nstead of discerning the statute's focus and assessing whether that focus is found domestically, as the Court's precedents command, the majority now requires a third step: an assessment of whether the 'conduct relevant to the focus' occurred domestically, even when the focus of the statute is not conduct.").

62. *Abitron*, 600 U.S. at 432 n.2 (Jackson, J., concurring) ("[I]n the internet age, one could imagine a mark serving its critical source-identifying function in domestic commerce even absent the domestic physical presence of the items whose source it identifies.") (citing 5 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 29:56 (5th ed. Supp. 2023) ("The use of an infringing mark as part of an Internet site available for use in the United States may constitute an infringement of the mark in the United States.")).

63. *See* Joint Recommendation (WIPO), *supra* note 10.

64. Hetronic Int'l, Inc. v. Hetronic Ger. GmbH, 99 F.4th 1150 (10th Cir. 2024).

the Supreme Court opinion "counsels against our assigning significance to the ultimate destination of the infringing goods. . . . What matters is 'the location of the conduct relevant to the focus.'"[65] Thus, foreign sales of goods that ended up in the United States because of some later downstream sales by others could not render the foreign distributor liable under the Lanham Act. The court explained that "products bound for the United States but sold abroad cannot premise a Lanham Act claim without some domestic conduct tying the sales to an infringing use of the mark in U.S. commerce."[66] This conclusion was not altered by the fact that Abitron "took steps to facilitate [the] sales" in the United States—namely, by obtaining FCC licenses and hiring a U.S.-based distributor."[67] The only glimmer of hope that Justice Sotomayor's view would carry the day in the long-term was that the Tenth Circuit remanded to the district court to consider whether the plaintiff could establish domestic advertising, leaving it open for lower courts to explore the tension in Justice Jackson's footnote 2 by probing further where online advertising "occurs."

But it is a glimmer only. In a recent Ninth Circuit opinion, in *Doctor's Best, Inc. v. Nature's Way Products,* the Court blended the requirement of U.S. *conduct* for subject matter jurisdiction with the element of U.S. *effects* (namely, confusion) in the liability standard.[68] As a result, the case was summarily dismissed. A concurring judge went so far as to say that "Lanham Act only applies where there is a domestic use in commerce that would cause a domestic likelihood of confusion."[69] So, we have reached the stage where the application of the statute is not a contest between conduct and effects, but rather a demand for both.

This substantially weakens the ability of the Lanham Act to assist. And if a similar framework were to be applied to any future federal legislation such as the NO FAKES Act, it could make it quite toothless, which is something I hope drafters of any such legislation bear in mind. Some extraterritorial effects are inevitable in the deepfakes context. And as the drafters of the EU AI Act have shown, no one can reasonably be offended if the U.S. Congress wishes to enter that arena to protect important values.

65. *Id.* at 1166.
66. *Id.* at 1169.
67. *Id.*
68. Doctor's Best, Inc. v. Nature's Way Prods., LLC, 143 F.4th 1101, 1105, 1107–08 (9th Cir. 2025).
69. *Id.* at 1114 (Ikuta, J., concurring).