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How Should U.S. Copyright and Right of Publicity Law Be Reformed to Address the Legal Risks Posed by AI-Generated Vocal Covers?

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ABSTRACT

This paper examines the structural weaknesses within the U.S. copyright and publicity rights frameworks exposed by Artificial Intelligence (AI)-generated vocal covers. Using the "Fake Drake" case as a focal point, the paper identifies gaps in the existing legal framework. It analyzes the frequent abuses and shortcomings of the Digital Millennium Copyright Act's (DMCA) notice-and-takedown system, which fails to protect fair use and enables censorship. Furthermore, the paper further highlights the fragmented, state-by-state nature of publicity rights in the U.S., which creates uneven protection for artists defending their identity. When technology replicates an artist's voice convincingly, existing laws struggle to respond effectively. Moreover, without stronger coherence across statutes, creators face uncertainty when imitated by technology. A feasible reform path would involve setting up an office tasked with reviewing DMCA complaints before they proceed—complete with penalties for those filed without genuine basis. Instead of piling on complexity, one path forward involves crafting a federal right of publicity guided by a consistent court-tested standard. This standard would weigh expressive freedoms against an individual's claim to their own image. Such steps to reform could provide a system where AI outputs don't override creator interests. Ultimately, fairness emerges when legal safeguards are aligned with contemporary modes of creative production and distribution.

Keywords: Artificial Intelligence; Copyright Law; Infringement; Publicity Rights; DMCA

INTRODUCTION

In April 2023, the viral emergence and abrupt removal of the AI-generated track "Heart on My Sleeve"—a convincing fake "collaboration" between Drake and The Weeknd—exposed a critical vulnerability in U.S. copyright law (1, 2). The pseudonymous creator, who goes by the name "Ghostwriter977" on TikTok, demonstrated how generative AI can convincingly replicate an artists' vocal identity. This ease brings friction: open access to music-making tools runs counter to entrenched ideas about authorship, profit, and rights. The "Fake Drake" case is a critical entry point to the following research question: How should U.S copyright and right of publicity law be reformed to address the legal risks posed by AI-generated vocal covers?

Answering this requires a three-part analysis. The "Fake Drake" case presents the issue that U.S. laws around creativity, likeness, and copying aren't holding up against AI-made voice replicas. This paper critiques the notice-and-takedown model of the Digital

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Millennium Copyright Act (DMCA) and the patchwork of state publicity laws, arguing that they appear ill-suited for the scale and speed of AI-generated content. Finally, the analysis proposes targeted legislative reforms. These proposals include amendments to the DMCA and the establishment of a federal right of publicity. The paper contends that without such modernization, the copyright system may fail to adequately balance artist protection with the inevitable proliferation of AI-empowered sound.

LITERATURE REVIEW

The "Fake Drake" case has raised discussions on how the U.S. copyright framework can be improved (3, 4). These discussions largely focus upon how to minimize the damage AI systems can do to an artist's image and has led to critiques of various acts and frameworks, including the Digital Millennium Copyright Act (DMCA) and the right of publicity. The DMCA is a U.S. law that protects copyright holders in the digital age by criminalizing the circumvention of copy-protection technologies and creating a "notice-and-takedown" system for online copyright infringement. The ambiguity of the DMCA is addressed as it is complicated for rights holders to establish that their work has been infringed. This is because it is difficult to determine which works trained the AI system to create an AI-generated song (3).

Jeffery Cobia reviews the DMCA's abuses and shortcomings (5). These shortcomings include the preemptive override of fair use, the false assertion of copyright ownership and the strategic misuse for censorship, and the difficulty of sending a counter-notice. Cobia provides solutions to solve problems in the DMCA takedown procedure. These solutions include establishing an examiner's office to examine takedown notices, and allowing those who send DMCA takedown notices to provide additional proof of copyright ownership and a statement asserting that there is no fair use. Hope Juzon then examines the incomplete protections of the right of publicity (3). In her work, Juzon explains that the incomplete protections are due to the patchwork of state laws and the laws' sole protection for recording artists but not composers. Emma Perot uses copyright case examples from the states of New York and California to illustrate the shortcomings mentioned by Juzon (6). Perot demonstrates that the absence of a unified federal standard leaves artists vulnerable to technological exploitation based on geographic location, complicating enforcement and allowing creations like the fake Drake song to exist in a legal grey zone.

Juzon suggests that a potential solution to the difference in state law is to introduce a federal act of publicity. In a debate for the best judicial test balancing free speech and an artist's control over their identity, Hope argues that the Missouri predominant use test is best suited, however Kruse (7), along with Yeo (8), and Georgescu (9) holds a differing opinion. Dora Georgescu then provides a possible solution of combining the transformative use test and the direct balancing test, arguing that they provide the necessary judicial flexibility that each separate test cannot provide on its own (9). The literature on U.S. copyright cases is therefore critical of the variation between state laws and advocates for federal legislation to establish a common standard.

This review, using the "Fake Drake" case as a focal point, reveals that while scholarship expertly critiques either copyright or publicity law, a synthetic analysis linking these critiques is absent. To address this gap, this paper provides a holistic review that explicitly connects the deficiencies in the federal DMCA framework with the fragmentation of state publicity laws. This paper moves beyond isolated critiques to propose integrated solutions, including DMCA procedural reforms and a federal right of publicity standard, designed to create a coherent, adaptive U.S. copyright framework for AI.

AI COPYRIGHT LAWS IN THE MUSIC INDUSTRY

An examination of relevant AI copyright laws in music provides critical context for the detailed case study discussed in the following sections. This section provides an overview of the U.S. legal framework.

Definition

The United States does not have a single, consistent definition for an AI system. This paper uses the definition in the National AI Initiative Act, which describes AI as a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments" (10). The U.S. Copyright Act of 1976 offers composers, musicians, and music publishers protections for their musical creations. The initial copyright ownership is given to the author of a work. This includes the right to create new works; the right to make, sell, and distribute copies; and the right to publicly perform their works (11). The act protects "original works of authorship fixed in any tangible medium of expression" (11). The work must be an independent creation and have

a certain level of creativity to be deemed original. The originality of AI-generated works is legally uncertain because it is unclear whether the human user's prompt constitutes the minimal creative authorship required for copyright. Furthermore, even if a work demonstrates some originality, incorporating a simulated celebrity voice without permission violates separate rights of publicity and likely copyright, rendering the work infringing regardless of its novel elements. A work also must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" (11). The material in perceivable forms must be an expression instead of an idea.

A composition refers to the underlying music and any accompanying words. The U.S. Copyright Act of 1976 in 17 U.S.C § 102(a)(2) explicitly lists "musical works, including any accompanying words" as a category of works eligible for copyright protection.

A rearrangement is considered a type of derivative work. 17 U.S.C. § 101 defines a "derivative work" as one "based upon one or more preexisting works, such as a... musical arrangement..." 17 U.S.C. § 106(2) grants copyright owners the exclusive right "to prepare derivative works based upon the copyrighted work." Creating a fixed rearrangement without permission from the owner of the underlying musical work is considered copyright infringement. If rearrangements are authorized and contain sufficient original expression, the new material added by the arranger can be copyrighted.

Sampling is not defined by the U.S. copyright framework. However, sampling can be regarded as the act of taking a segment of a pre-existing sound recording and using it in a new song. This impacts both the sound recording and the underlying musical work. In the *Bridgeport Music, Inc. v. Dimension Films Inc*. case, the Sixth Circuit set a strict rule that asks people to acquire a license or do not sample (12). The court rejected a de minimis defense for sampling of a sound recording. The de minimis doctrine means that using a copyrighted work without permission in a way that's so minimal or insignificant it's not recognizable or impactful isn't considered infringement. In this case, a master use license and a mechanical license are required.

There is no statutory definition of "remix". Remixing falls under the broader legal category of derivative works. The U.S. Copyright Act defines a derivative work as "a work based upon one or more preexisting works, in which a work may be recast, transformed, or adapted" (11). Mixing is the act of playing pre-recorded music or creating a new, fixed recording by blending existing tracks, and a remix is a work that recasts, transforms, or adapts a preexisting work. When a DJ plays music in a public venue, such as a club or festival, it is a public performance. The venue acquires blanket licenses from Performance Rights Organizations, which represent composers and publishers, who hold copyright on the musical work. For playing sound recordings, a license is needed for non-interactive digital transmissions, such as the radio, but not for live venues. Creating a fixed mix is creating derivative work and requires both a master use license and a mechanical license.

The existing legislation protects only fixed works and identifiable authorship. However, the technique of AI vocal imitation harms performative identity and auditory persona, which is not protected by the legislation. This results in a mismatch, as the legislation does not solve issues that concern AI vocal imitation.

The Copyright Act for Music

The Copyright Act entails protection for music, including musical works and sound recordings. It is common that musical works and sound recordings are owned separately. A single piece of music can involve multiple right holders. The protection of musical works covers the musical composition, while the protections of sound recordings apply to recorded performances. The melody, harmony, rhythm and lyrics are all protected. As a result, owners of musical works are usually composers and music publishers. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds" (11). In addition, the sound produced by a performer's rendition of a composition is copyrightable. The right holders of sound recordings have the exclusive right to reproduce these sound recordings.

The Right to Create Derivative Musical Works and Sound Recordings

All copyright holders have the exclusive right to create derivative works. Derivative works are defined as works that are based on pre-existing work (11). The derivative works will also be protected by copyright. It is important to note that the definition of derivative works for sound recordings is limited. Derivative rights for copyright holders of sound recordings extend only to works in which the actual sounds fixed in the sound recording are rearranged, remixed, or altered in sequence or quality. The Copyright Act does not protect a style or a voice, only the sound recording itself. This creates problems as AI-generated voice clones become more and

more accessible. If the framework does not change, more and more artists' voices and styles will be exploited. In addition, courts have not yet addressed the issue of a third party utilizing copyrighted music in AI programs to generate new works. If courts determine that this action is an infringement, the AI music industry could experience a strike in productivity. Conversely, if courts find the action non-infringing, rights holders may lose control over their works and fail to receive compensation for their use.

Infringement

Copyright infringement occurs when someone interferes with a copyright holder's rights without permission. In order to make an infringement claim, one has to prove that they have the ownership of a valid copyright and that there has been unauthorized copying of the copyrighted work. Copying can be proven by direct or indirect evidence. When there is no direct evidence, copying can be inferred if the defendant had access to the copyrighted work and the defendant's work has considerable similarities that signals non-independent creation. Courts then use both an objective extrinsic test and a subjective intrinsic test to clarify if it is a work of non-dependent creation (4). The objective extrinsic test examines elements of the song, broken down and compared, to determine whether protected elements of a work have been copied. The subjective intrinsic test requires an ordinary, reasonable person to find considerable similarities in the concept and feel of the two works. Ordinary listeners' impressions regarding whether copying has occurred do not necessarily prove that a violation of the copyright act has taken place. Both tests assume that infringement is the replication of protected expression, but AI voice cloning operates through non-literal mimicry. AI voice cloning produces similar voices and styles, but they do not directly copy existing composition and lyrics. This reflects a doctrinal misfit: infringement tests are calibrated to detect expressive copying, but AI-generated vocal covers cause harm through non-literal mimicry of identity. In terms of sound recording, different circuit courts have different rulings on infringement. The Ninth Circuit recognizes the de minimis exception (13) and the Third Circuit does as well (14), while the Sixth Circuit does not (12). This creates a disparate level of protection for artists, as the more lenient application of the infringement test in the Ninth and Third Circuits places rights holders at a disadvantage compared to the stricter standard applied in the Sixth Circuit. In addition, the uncertainty created by circuit split may also drive up creation costs. Producers unable to confidently determine whether a sample falls under the de minimis exception will likely secure a license. This practice, reinforced by the strict liability standard in the Sixth Circuit, perpetuates a "clearance culture" that imposes a disproportionate financial burden on independent artists with limited resources."

Controversy Surrounding Ownership of AI-generated Works

Artificial Intelligence is a technology that has developed rapidly in recent years. Because of the rapid development, copyright law is falling behind in resolving ambiguity around AI generated works. Consequently, there are disputes around the ownership of AI-generated works. In March 2023, the United States Copyright Office provided guidance on whether AI-generated works could be copyrighted, claiming that works created with the assistance of AI may be copyrightable if the work involves sufficient human authorship (15). The human authorship must be creative enough to produce a work that can be determined "original". AI-generated works can also be copyrighted if the modified work meets the standard for copyright protection. However, the protections for copyrighted works later modified by AI remains unclear.

The Digital Millennium Copyright Act and Fair Use

The DMCA was enacted in 1998 following the growing relationship between copyright and the internet. The DMCA provides a takedown remedy, in which infringing material can be removed from the internet. A copyright holder must "send a takedown notice to a service provider hosting the allegedly infringing material" (16). The DMCA provides no uniform answer on what defines "fair use", even though fair use is an affirmative defense to copyright infringement. Fair use is decided on a case-by-case basis since having a uniform law would be inefficient and inapplicable. It is important to note that there are many abuses of the DMCA, such as takedown notices often superseding the fair use doctrine, a person who is not the copyright holder sending a takedown notice, and parties abusing the DMCA by using it for censorship instead of its purpose, which is to protect copyright holder's rights online. Cobia, in February 2009, suggested that "even the ten-year-old DMCA is hopelessly out of date". This strongly supports the idea that in the current time, the act is extremely out of date, especially considering the advancements of artificial intelligence.

Copyright Law Implications on AI-generated Music

Another open question is whether copyright law is implicated in the infringing use of inputs used to develop AI. In June 2024, Universal Music Group (UMG), Sony Music, and Warner Music Group filed complaints against two online AI music generators, Sudo and Udio, alleging infringement of the record companies' sound recordings (17). The complaints focus on the infringing nature of the inputs, alleging that Suno and Udio trained their AI models on copyrighted sound recordings. The AI companies argued that using copyrighted works for AI training constitutes "fair use" under U.S. copyright law. They claimed that their models produce entirely new, non-infringing sounds, which are not direct copies or samples of the original music. In October 2025, Universal Music Group and Udio announced a collaboration, settling copyright infringement litigation. They will be launching a new platform in 2026, which "will be powered by new cutting-edge generative AI technology that will be trained on authorized and licensed music" (18). UMG is still in litigation with Suno. Warner Music Group has settled a partnership with both Udio and Suno in November 2025 and started a collaboration (18, 19). Sony and the two AI companies are still in ongoing litigation. Because some of the litigation is settled and the existing ones are still ongoing, there is no answer from the court about whether copyright law is implicated on the infringing use of inputs used to develop AI.

Limitations of Copyright Act Reform

The Copyright Act does not include AI-generated works in the definition of the "derivative work" (21, 3). However, including AI-generated works as "derivative works," while ensuring the protection of sound recording inputs, could inhibit innovation (3). If the record label is the copyright owner of the sound recordings, musicians may have barriers to using their "own" recordings.

State Laws

The copyright laws in each state differ significantly, which exacerbates the legal uncertainty surrounding AI-generated works. For example, right of publicity laws vary from state to state (22). The law of publicity differs widely in scope and application. Indiana has a broad right of publicity that extends to personality, name, likeness, signature, voice, image, gestures, appearances, and mannerisms (23), while New York has protection only for name, portrait, picture, and voice (6). The preferred tests for determining whether the right of publicity has been violated also differ among states, with California using the transformative use test and Missouri using the predominant use test (6). The transformative use test questions whether significant new expression has been added to a depiction of a celebrity such that the interest in promoting free speech concerns outweighs the celebrity's commercial interest in their personas, whereas the predominant use test examines the predominant purpose of the use in where both expressive and commercial elements are expressed. If the predominant purpose behind work was to exploit the commercial value of another's identity, the use should not be protected even if expressive content is expressed (8).

In summary, the U.S. approach to AI and music is characterized by statutory ambiguity, doctrinal uncertainty, and jurisdictional inconsistency. The "Fake Drake" case study that follows is a direct product of this environment. This case study serves as a critical lens to analyze these systematic failures and to evaluate potential solutions.

THE "FAKE DRAKE" CASE

In April 2023, "Heart on My Sleeve" went viral on TikTok, with over 250,000 Spotify streams and 10 million views on TikTok (1). Many viewers believed the song to be an unreleased collaboration between Drake and The Weeknd (1). The song sounded extremely familiar to both vocalists' voices and music styles, with lyrics reflecting people and events relevant to their lives (4). However, this song was in fact the product of AI, generated by TikTok user Ghostwriter977, who posted the video. After attracting millions of views, the video got taken down for being "no longer available due to a copyright claim by Universal Music Group" (2). Ghostwriter977 wrote in a TikTok comment: "i was a ghostwriter for years and got paid close to nothing just for major labels to profit. the future is here." Later, Ghostwriter977 said "add your number to the link in my bio & ill text u when it's back on Apple Music & Spotify. you can't kill a ghost". Ghostwriter977 appears to recognize the infringing nature of the AI-generated track while simultaneously promoting the view that such unauthorized covers represent a future direction for music. This creator expresses high hopes for AI covers, claiming to be "just getting started" (2).

This case is suitable as the foundation for the discussion in this paper as it highlights the growing gap between the rapid evolution of artificial intelligence and the comparatively slow pace of legal adaptation. One could argue, to echo Audrey Benoualid, an entertainment

lawyer based in Los Angeles, that "Heart on My Sleeve" is not an infringement of copyright but rather an "original composition" (24).

The Ambiguity of the DMCA and its Abuses and Shortcomings

The DMCA's outdated framework appears ill-suited for governing AI-generated content. The current framework's procedural ambiguities and structural flaws present challenges in addressing novel infringement and create the potential for abuse.

Juzon argues that Drake and Universal Music Group most likely took down the video using the DMCA. This act, passed in 1998, was designed to balance the rights of copyright holders online with the rights of hosts who have no responsibility for, or knowledge of, third-party material (16). However, the extent to which the DMCA can be enforced is ambiguous and its shortcomings have often led to abuse. Fortunately, there are potential solutions to tackle the problems in the DMCA takedown procedure.

The ambiguity of the DMCA revolves around the fact that it is complicated for rights holders to establish that their work has been infringed upon in the context of AI-generated works. This is because it is difficult to determine which works were used to train the AI system to create an AI-generated song. In addition, the output may be considered "transformative" (even though this is highly subjective), rendering the copyrighted input vulnerable to a fair use defense. However, in general, the DMCA takedown remedy for AI-generated works is unreliable, as it depends on unanswered questions surrounding infringement by the courts. These include determining direct liability among the user, developer, and platform; defining whether AI training constitutes infringement; and applying copyright's "substantial similarity" test to non-literal style mimicry. Furthermore, the DMCA addresses only copyright, leaving harms from violated publicity rights—arguably the core injury in cases like "Fake Drake"—without a clear takedown path.

The DMCA's notice-and-takedown mechanism is subject to systematic abuse. This analysis adopts Cobia's framework to examine three principal abuses to the DMCA's notice-and-takedown regime: the preemptive override of fair use, the false assertion of copyright ownership, and the strategic misuse for censorship (5).

The DMCA's notice-and-takedown process often supersedes the fair use doctrine and compels removal before any legal assessment can occur. In *Lenz v. Universal Music Group*, Lenz uploaded a 29-second home video in 2007 on YouTube showcasing her toddler children dancing in her kitchen to Prince's song "Let's Go Crazy". Universal Music Group, which administered the copyright for Prince's song, discovered the video and sent a DMCA takedown notice to YouTube. YouTube removed the video to avoid potential liability, but there was no independent review for fair use. Lenz argued that her use of the song was non-infringing and filed a counter-notice. The video was reinstated six weeks later, with Lenz also suing Universal for misrepresentation under the DMCA, arguing that it failed to consider fair use before issuing the takedown. In 2015, the Ninth Circuit ruled that copyright holders "must individually consider whether a work is a fair use before representing that the work is infringing in a takedown notice" (25). This ruling applies only within the Ninth Circuit, as circuit courts decisions are not binding on other circuits. Because of this, there are still issues with takedown notices superseding the fair use doctrine in other circuits. This precedent is critically relevant to AI-generated music, where the line between infringing use and protected, transformative fair use is even more ambiguous and subjective. For AI tracks like "Heart on My Sleeve," a copyright holder's obligation to conduct a good-faith fair use analysis before issuing a takedown becomes more complex and legally uncertain, increasing the risk that legitimate AI expression will be prematurely silenced under the same procedural flaw exposed in *Lenz*.

The DMCA's framework enables abuse through the fraudulent assertion of copyright ownership in takedown notices. Christopher Knight, an independent filmmaker, posted a video that was featured on a Viacom show on cable television (5, 26). He reposted a section of that video, which included commentary from the Viacom show. The video featured on the show was used without Knight's permission, making it ironic that Viacom claimed copyright infringement for the clip Knight uploaded. Viacom sent a takedown notice to YouTube, but Knight filed a counterclaim, and the video was restored. This example shows how the DMCA practically allows anyone to claim copyright for anything and therefore is not effective in its original aim to protect copyright holders.

The DMCA is frequently weaponized as a tool of censorship, rather than serving its purpose of copyright enforcement (27). Akon, a rapper, and his record label United Music Group issued a takedown notice to Michele Malkin, a blogger who spoke negatively of Akon (5). Malkin criticized Akon, calling him a "misogynist"

and his antics "vulgar and degrading." She based her criticism on excerpts from Akon's music videos as well as controversial onstage video footage showing Akon with a teenage girl at a nightclub in Trinidad. Malkin condemned both Akon's lyrics and his behavior (28). The DMCA, when abused, is similar to censorship. If the material is taken down and no counter-notice is sent, the perjurer gets away with the lie that he/she owns the copyrighted content. If a counter-notice is sent, and the perjurer chooses not to file a lawsuit, the perjurious statement is never challenged. The action of filing for counter-notices is extremely rare (which will be explained in the next passage), so the DMCA encourages perjury to censor critiques even though that was not its directed purpose. Above all, there are few consequences for the abuses of the DMCA.

In addition, a specific shortcoming of the DMCA revolves around the fact that counter-notices are rarely filed. This is not due to the difficulty of identifying improper takedowns, but rather the procedural and legal burdens placed on the individual filing the counter-notice. A counter-notice is a response sent from an individual to ask for their content to be restored, after it has been removed due to a copyright holder's takedown notice. The procedure requires a sworn statement and to consent to personal jurisdiction in federal court, exposing them to the threat of costly litigation should the original claimant choose to sue (16). For an individual creator, an independent AI developer, or a platform user, this constitutes a financial and legal risk, especially when contesting a claim from a well-resourced entity like a major record label. Consequently, claims with substantial fair use or non-infringement arguments go unchallenged. The DMCA's remedy is theoretically available but practically inaccessible, allowing the takedown mechanism to operate without meaningful due process for the alleged infringer.

Solutions to Improve the DMCA

Cobia provides two solutions, one to create a process of examining the validity of the takedown claim, and the other to allow those who are sending takedown notices to provide additional proof of copyright ownership and a statement asserting that there is no fair use.

One possible solution is that the takedown notices should first be sent to the copyright office where an examiner should analyze the claim to determine its validity. An examiner should check whether the takedown notice is filed by the rightful copyright owner and whether the use of the work requested to be taken down qualifies as fair use. By checking copyright ownership, the issues of the illegitimate takedown notice would be overcome. The issue with censorship would also be addressed when fair use is looked at.

This solution would require additional staff and funding. However, these searches are not labor intensive and do not require much training. These jobs can also provide more work opportunities. The benefits of this solution, such as a better enforced fair use policy and decreased exploitation through censorship, protect the rights of creators. This outweighs the costs, as AI technology, along with the internet, is improving at incredible speed. It is important to acknowledge that the advancements of AI technology will create and encourage more people like Ghostwriter977 to exploit other's voices and spread deepfake audios, and that mass productions of songs similar in nature to "Heart on My Sleeve" will occur. The DMCA takedown procedure will only worsen as more abusers realize there are no consequences for its abuse. There may be possible limitations, as it is uncertain how much funding the government will give to such a solution. Although the job does not require much training, workers in this position have to be literate. Therefore, college graduates may likely take up most vacancies and those who are deprived and desperate for jobs may not qualify.

In addition, those who send DMCA takedown notices should be able to provide additional proof of copyright ownership and a statement asserting that there is no fair use. This allows a defendant in DMCA litigation to point to the proof and establish the abuse inflicted by the takedown notice sender. This allows the defendant to be more successful in court if legal actions are taken. It would also encourage those who are filing takedown notices to pay attention to whether the claim is legitimate.

Furthermore, legal consequences are necessary to prevent misleading or false takedown notices. Although the DMCA includes a provision intended to penalize abuse, under 17 U.S.C. § 512(f), a party that "knowingly materially misrepresents" that material is infringing can be held liable for the damages of the alleged infringer (16). In theory, this should deter frivolous takedowns. In practice, however, the difficulty of proving knowledge and the burden of litigation have rendered § 512(f) an ineffective shield (5). Consequently, the threat of a takedown carries little counter-threat, creating the power imbalance central to the "Fake Drake" incident.

When a takedown notice is sent by one who is aware that he/she is not the owner of the copyright, the actual owner should be able to sue for damages. While damages

are admittedly hard to quantify, a more systematic approach to estimating damages is possible. Damages can be quantified and divided into four categories: direct financial losses, proven opportunity costs, non-economic and legal costs, and statutory damages.

Direct financial losses can be calculated through contractual penalties, lost sales, and advertising revenue. In terms of contractual penalties, if the takedown caused a creator to miss a deadline for a sponsored contract, the liquidated damages or lost fee from that contract are direct losses. For content creators, lost sales and ad revenues are the most direct metrics. YouTube has already utilized content technology to help copyright owners manage their rights (29). The YouTube Partner Program allows creators to earn money from their videos by sharing ad revenue and accessing other monetization features, such as memberships (30).

The procedure is as follows (31):

1. A rights holder discovers one example of their work being used without permission and submits a formal notification to the Internet Service Provider (ISP). This notification must include official copies of the original copyrighted material, known as "reference files".
2. After receiving the reference files, the ISP adds them to a centralized database. Automated content recognition technology such as digital fingerprinting allows the ISP's system to continuously scan for all user-uploaded content on its platform, comparing it against the database to identify potential matches.
3. After a match between the content and the copyrighted reference material is made, the ISP automatically alerts the copyright owner of the detected instance.
4. The copyright owner can choose how to manage the flagged content. This includes monetization, analytics and restriction. Monetization is when the copyright owner chooses to run advertisements against the video or audio, thereby generating revenue from its views. Analytics is simply tracking the viewership and performance data of the content, and restriction is instructing the ISP to block access to the content entirely or mute the copyrighted audio portion.
5. The individual who uploaded the content is notified that a copyright claim has been made against it. They either choose to accept the rights holder's chosen action (monetization, tracking, or restriction), edit or remove the infringing material, or if eligible share revenue by entering into a formal agreement to split advertising earnings generated from the content with the copyright owner.
6. If the uploader believes their content was mistakenly flagged, for example if they hold a license, the use qualifies as fair use, or it is an original creation, they retain the right to formally dispute the infringement claim, initiating a review process.

This approach supports both rights holders and internet users and is additionally attractive because it offers both parties the opportunity to profit from infringement (29).

Proven opportunity costs, as the name suggests, require strong evidence linking the takedown to the lost opportunity. This is more prevalent in lost business opportunities, as one needs to argue that the takedown of the work cost them, for example, a distribution deal. The cost of campaigns to regain lost audience traction after the reinstatement of the work is, compared to lost business opportunities, easier to claim. However, one should be wary of the defendant potentially exploiting the right to claim campaign costs.

Regarding non-economic and legal costs, under § 512(f), attorneys' fees and costs are recoverable (16). Although reputation harm is more difficult to prove, expert testimony from a reputation management specialist can provide the relevant quantification of compensation.

Lastly, a statutory damages provision for knowingly false takedowns would be the most effective quantification mechanism for the DMCA. Congress could amend § 512(f) to allow a plaintiff to elect statutory damages (e.g., a range of $5,000 to $150,000 per work, similar to copyright infringement statutory damages) in lieu of proving actual damages. This creates a predictable, meaningful financial risk for bad actors. Under the current act, the most successful § 512(f) cases result in the recovery of attorneys' fees and sometimes minimal proven direct damages (e.g., a few hundred dollars in lost ad revenue). The lack of significant statutory damages means there is little economic incentive for the rightful copyright owner to sue, and little deterrent for large entities to send overbroad takedowns.

This system of quantifying damages will lead to disputes between both parties, the rights holder and the infringer. The statutory damages provision is less

controversial, as it is existing law. It is impossible to quantify damages to the exact monetary value, and parties need to compromise. This is undoubtedly hard to do, yet the law can only build a general structure of how to monetize damages instead of providing case-by-case guidance.

The Incomplete Protections of the Right of Publicity

The Right of Publicity is the legal right of an individual to control the commercial use of their identity, including their name, image, likeness, and voice, and it serves as the basis for artists challenging the use of their voices in AI-generated works. However, this right provides incomplete protection, due to the lack of harmonization of state laws and its sole protection for recording artists as opposed to composers.

States' Patchwork Right of Publicity Laws

The fragmented and non-federal nature of U.S. publicity law creates a jurisdictional gap that directly enabled the "Fake Drake" incident. With only 35 states recognizing a right of publicity by statute or common law (32), their widely differing statutes allow for an AI-generated track to be legal in one jurisdiction and infringing in another. In addition to the examples given in 2.2.6, this patchwork is exemplified by comparing the key states of New York and California.

New York's post-2021 law explicitly includes "digital replica" as a protected element of persona. This is defined in Civil Rights Law §50-f(1)(c) as "a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other" (33). The scope of the protection includes deepfakes, holograms, Computer-generated imagery (CGI) performances, and AI-generated likenesses used in commercial or entertainment contexts. It specifically prohibits use in scripted audiovisual works or live music performances if the public is deceived into thinking consent was given. However, expressive works (e.g., documentaries, parodies) remain protected under First Amendment exemptions. This provision was added to address modern technological threats, which include the threat of AI and more specifically, unauthorized digital resurrection of deceased celebrities in ads, films, or concerts without estate permission. This law would likely cover an AI-generated vocal performance like "Heart on My Sleeve," as it deceives listeners into believing it is a genuine Drake performance. However, its protection is confined to its specific statutory list (6).

In comparison, California's statute does not explicitly mention "digital replica". The protection falls under statutory "likeness" and also common law "identity". California courts view a digital replica as a technological extension of "likeness". The law of California offers broader protection, and courts can protect against emerging forms of appropriation before the legislature acts. In *Motschenbacher v. RJ Reynolds Tobacco Co,* a tobacco ad featured a distinctive race car with unique markings that viewers associated with driver Motschenbacher, although his face was not shown (34). The court found that the car's distinctive markings were enough to appropriate his identity, even without name or likeness. California's common law right protects identity broadly, not just name or image. Applying this reasoning, a court would likely find that an AI clone of Drake's distinctive vocal style and persona appropriates his identity, even without a visual image, much as a uniquely marked race car was found to represent its driver. This distinction illustrates the significant difference between state approaches on identity protection (6).

The inconsistency between how courts would judge the "Fake Drake" incident underscores the core of the problem: the absence of a unified federal standard produces different geographically fragmented outcomes, , while leading to unitary harm to the artists, complicating enforcement and allowing creations like the fake Drake song to exist in a legal grey zone.

Enacting a Federal Right of Publicity as a Solution to the Current Patchwork of Laws

A federal right of publicity can provide uniform protection and relief for those whose publicity rights have been violated (35). Congress should utilize its Commerce Clause power, which affords Congress the power to enact a right of publicity because infringing acts are frequently disseminated through the Internet, television, and radio-forms of media that are dispersed across states (3). The right of publicity framework should incorporate New York's explicit enumerated list, but also draw upon California's broad protection and ability to protect emerging forms of appropriation. The suggested improvements to the DMCA should be taken into account, and compensation can follow the suggested DMCA framework in 3.2.

Debate on Tests

There are three tests that are most commonly used in courts today: the predominant use test, the direct

balancing test and the transformative use test. The predominant use test asks whether the work in question is primarily expressive or primarily commercial. If the "predominant use" of the work is expressive—such as in a film, book, or news report—then the First Amendment will typically shield it from a right of publicity claim, even if it uses a person's identity without permission. If, however, the use is deemed predominantly commercial, like in a straightforward advertisement or merchandise, the right of publicity will likely prevail. The direct balancing test is frequently applied in cases involving artistic titles and expressive works. It holds that the use of a person's identity is protected by the First Amendment unless it has no artistic relevance to the underlying work whatsoever, or if it explicitly misleads consumers as to the work's source or content. This test provides a high level of protection for creators by placing a heavy burden on the plaintiff to show a complete lack of relevance or explicit deception. It is commonly used in federal circuits, especially for films, books, and songs. The transformative use test focuses on whether the defendant has added significant creative elements to the depiction of the plaintiff. The question is not merely whether the work is expressive, but whether the defendant's work has transformed the celebrity's likeness into something more than a mere likeness—into a new expression, message, or meaning. If the work is deemed transformative, it receives First Amendment protection. If it is a mere "literal depiction" or commercial likeness (like a portrait on a t-shirt), the right of publicity wins. This test is now the dominant framework in California and has been highly influential in other jurisdictions, as it attempts to navigate the nuanced space between imitation and innovation.

Juzon suggests that courts should model their analysis on Missouri's predominant use test to evaluate if the right of publicity has been violated by AI vocal imitations. If the predominant purpose behind a work is to exploit the commercial value of another's identity, the use should not be protected even if expressive content is present. If the predominant purpose behind the work is expressive commentary, it would be a better argument for First Amendment protection. However, Wee Jin Yeo proposes that while the motivation behind the predominant use test is "legitimate and theoretically defensible," the implementation of the test is "practically impossible" because it is impossible to determine the predominant purpose of a use where both expressive and commercial elements are present (8). Dora Georgescu also notes that "artists are often motivated by profit, yet this does not reduce the expressive value of their works" (9). Michael Kruse criticizes the predominant use test for the same reasons as Yeo and Georgescu (7).

In *ETW Corp. v. Jireh Publishing,* Artist Matt Rush created a painting titled "The Masters of Augusta," which depicts Tiger Woods' 1997 Masters victory. Rush made copies of the painting to sell as limited-edition prints. The Sixth Circuit recognized that viewing the painting as unprotected speech would be unjust because of Rush's intent to profit from the limited prints. The court reasoned that "permitting Woods's right of publicity to trump Rush's right of freedom of expression would extinguish Rush's right to profit from his creative enterprise" (36). However, the predominant use test itself suggests that, in this situation, the painting is not protected speech if Rush created the work with the ultimate goal of earning a profit. The test, if implemented by courts in cases such as this one, would undermine legitimate artistic works created for profit.

Instead of using the predominant use test, the Sixth Circuit balanced the right of publicity against First Amendment interests by relying on the direct balancing test and the transformative use test. The court adopted the direct balancing test when it came to the evaluation of Wood's interests against free speech restrictions. Wood makes his income through professional golf, which is unrelated to his right of publicity. The painting made by Rush was found not likely to "reduce the commercial value of his likeness". In addition, the court noted that Rush had "added a significant creative component of his own to Woods's identity" (36). Rush's freedom of artistic expression therefore outweighed Woods' right of publicity.

Next, the court drew on the transformative use test adopted by the Supreme Court of California in *Comedy III*. The court compared Rush's work with the work of the artist in *Comedy III.* The artist in Comedy III had created a "nearly photographic reproduction of the faces of The Three Stooges," while Rush's prints combined images to "describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event" (36). On this basis, the court found that Rush's work was transformative enough to warrant First Amendment protection.

The direct balancing test and the transformative use test both have shortcomings. The direct balancing test, adopted only in the Tenth Circuit, produces a nuanced weighting of all relevant interests to produce the "most

normatively desirable result for all possible factual matrices," as it weights the justifications for protecting free speech against the justifications for right of publicity protection to determine which justifications are more compelling (8). The transformative use test, adopted mostly in California and the Ninth Circuit, questions whether significant new expression has been added to a depiction of a celebrity such that the interest in promoting free speech concerns outweighs the celebrity's commercial interest in their persona. Yeo addresses the deficiency of this test: it overprotects artistic speech and under protects political speech, which does not protect the whole range of speech interests; it also does not provide enough protection for passive uses of a celebrity persona, with its focus on recorded uses (8).

Noting the various shortcomings of all three tests, the Sixth Circuit's use of both tests to determine a single issue shows that the two tests working in conjunction can create a predictable and implementable standard for balancing the First Amendment against the right of publicity (9).

The court should begin by analyzing the right of publicity using the transformative use test, which directly evaluates whether a work undermines the core rationales of the right of publicity. The transformative use test evaluates whether a new work significantly alters or adds creative expression to a celebrity's likeness, rather than merely exploiting their image for commercial gain. If a work is deemed transformative, reflecting the artist's own creative labor, it lessens the threat to the economic and moral interests the right of publicity seeks to protect, such as a celebrity's control over commercial value and protection against unjust enrichment. Consequently, transformative works tip the legal balance toward free expression. Conversely, non-transformative, literal depictions favor the celebrity's publicity rights. This framework also addresses consumer protection concerns, as highly transformative works are less likely to mislead the public into believing a celebrity has endorsed the product or content. After using the transformative use test, the court would then weigh the interests of free speech in the case. Speech that provides greater social value is given more weight under the First Amendment, often overriding publicity rights.

The transformative use and direct balancing tests provide necessary judicial flexibility, a crucial feature for adjudicating novel, artistically complex cases the AI-generated "Fake Drake" track. However, their individual flaws, the transformative test's vague standards and the balancing test's lack of structure, create significant unpredictability. This legal uncertainty is particularly damaging in the AI context, where creators and platforms require clearer guidelines.

A unified test, which incorporates transformative analysis into a structured balancing framework, would directly address the ambiguities presented by AI voice cloning. For the "Fake Drake" song, this would first require a court to assess whether the AI vocal is a transformative artistic expression or merely a substitutable commercial impersonation. This focused inquiry determines if Drake's commercial and dignitary interests are truly threatened. Second, the test would weigh the speech value of the work itself, perhaps evaluating its role in public commentary on AI, art, and celebrity. This two-step approach would provide a more predictable and equitable framework for balancing Drake's right of publicity against the creator's First Amendment interests, offering clearer precedent for future cases involving AI-generated content.

CONCLUSION

The "Fake Drake" case illustrates the difficulty of the current U.S. legal framework in effectively regulating AI-generated vocal imitation. This analysis identifies two systemic weaknesses: the procedural limitations of the DMCA's notice-and-takedown system and the fragmented nature of state-level publicity rights.

This paper proposes two reform pathways. First, the DMCA could be updated to incorporate a pre-screening mechanism for takedown notices and meaningful statutory damages for bad-faith claims. Second, Congress could enact a federal right of publicity to provide uniform national protection, applied through a clear judicial test that balances free expression with an artist's control over their identity. Together, these reforms would create a more resilient framework that protects creators, preserves expressive freedom, and provides clearer legal standards in the age of AI.

This analysis is primarily doctrinal and case-based. It does not incorporate empirical data on the volume or economic impact of AI-related DMCA takedowns, nor does it provide an exhaustive comparative survey of global regulatory approaches. Additionally, while the reform proposals draw on leading scholarly critiques, they do not encompass every proposed avenue for DMCA modernization. Future scholarship may benefit from empirical analysis of platform enforcement patterns, comparative international models, and constitutional scrutiny of proposed reforms.

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CONFLICT OF INTEREST

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