Reface/Off? Animating the Right of Publicity in the Dawn of Generative AI

With all of the hubbub surrounding the growing wave of generative artificial intelligence (AI) lawsuits, a recent court decision involving a generative AI-powered app has received surprisingly little attention, despite addressing issues that will be relevant in other, higher profile AI litigation.

The case, *Kyland Young v. NeoCortext, Inc.*, involved a photo-editing app, called Reface, that uses generative AI technology to allow users to manipulate photos and videos, including to swap faces with celebrities within photos and videos. A celebrity sued, and, in rejecting the app developer's motion to dismiss, the U.S. District Court for the Central District of California held that the developer's use of generative AI to superimpose user faces onto celebrity images could violate California's right of publicity law. While this case is ongoing, *Young* illustrates the potential liability companies face when developing and using generative AI based on images and videos of celebrities.

Trading Faces Using Generative AI

The face-swapping Reface app was developed by NeoCortext, Inc. (NeoCortext) and allows subscribers to upload pictures of their own face and then recast, with their own image, photos and videos of their favorite celebrities.

In April 2023, Kyland Young, a cast member of several reality TV shows, such as *Big Brother*, filed a putative class action against NeoCortext alleging that it violated California's Right of Publicity statute by knowingly using "another's name, voice, signature, photograph, or likeness, in any manner … for purposes of advertising or selling, or soliciting purchases of … services, without such person's prior consent."

In response, NeoCortext moved to dismiss the complaint for failure to state a claim upon which relief can be granted, and sought a special motion to strike under California's anti-SLAPP statute. In reviewing the motion, the court considered the two-step anti-SLAPP standard, which maintains an identical standard in its second step

as the standard for analyzing a motion to dismiss.

Regarding the first step of the anti-SLAPP standard, NeoCortext sufficiently showed that its use of plaintiff Young's name and image was in furtherance of free speech in connection with a public issue. The court provided several explanations. Most notably, plaintiff Young was a celebrity and the technology to alter images was a topic of public interest.

Two-Stepping Around the Motion to Dismiss

The court then turned to the second step of the anti-SLAPP standard, which is identical to the applicable standard for a motion to dismiss. For NeoCortext to succeed on its motion to dismiss, it must show that the plaintiff's suit could not succeed as a matter of law, even after considering the facts in the light that is most favorable to the plaintiff. NeoCortext presented the following three reasons—all of which are likely to be raised in other generative AI lawsuits alleging publicity rights violations—why Young's claim could not prevail:

- Young's right of publicity claim is preempted by the U.S. Copyright Act;
- NeoCortext's artistic work is so transformative that Young's claim is barred by the First Amendment; and
- Young has not shown that NeoCortext violated Young's right of publicity.

No Copyright Preemption

Regarding NeoCortext's first argument above, the court found no copyright preemption of Young's right of publicity claim. Under the U.S. Copyright Act, rights provided under state laws that are equivalent to copyright are preempted. Whether state law rights are so equivalent is determined using a two-part test. Relying on precedent, the court held that neither the subject matter in the present case was covered by the Copyright Act, nor were the rights being asserted equivalent to those provided by the Copyright Act. In particular, the court found that Young's right of publicity claim does *not* fall within the subject matter of copyright because the conduct at issues concerns the use of Young's likeness in advertising and merchandise, and not the reproduction or distribution of copyrighted material.

In particular, the court contrasted the current case with the cases referenced by NeoCortext, which focused on the improper distribution or sale of copyrighted materials. In one such case, a plaintiff sought to stop the defendant from selling a copyrighted picture under the right of publicity. There, that court held that the plaintiff's complaint made no reference to the identity or likeness of those in the picture and instead attempted to control the distribution of the picture; thus, preemption applies and the issue should be resolved under copyright law. In the Reface app suit, however, plaintiff Young's claim relies on the use of his likeness and not on ownership rights in the images themselves, leading the court to hold that Young's California Right of Publicity claim was *not* preempted by the Copyright Act.

Lack of First Amendment Transformative Use as a Matter of Law

Regarding NeoCortext's second argument, California law provides that, where an artist's creative work gives rise to a right of publicity claim, the artist may assert an affirmative defense that the First Amendment protects such creative work where it (1) contains significant transformative elements or (2) does not derive value primarily from the plaintiff's fame.

The key consideration is whether the celebrity likeness is fundamental to the original work or merely a "raw material" used in creating something truly novel. NeoCortext argued that the Reface app's purpose is to transform photos or videos by swapping a user's face with the selected celebrity's faces, creating a completely new work. Despite NeoCortext's use of AI to streamline the visual editing process, the court ultimately held that NeoCortext failed to demonstrate that its use of Young's likeness was transformative as a matter of law such that

NeoCortext's use was protected under the First Amendment.

Specifically, Young's face is the primary change in the end product, which was not enough to be considered a significant transformation. In reaching this conclusion, the court compared the current case to *Hilton v. Hallmark Cards*, where Hallmark sold greeting cards depicting Paris Hilton as a waitress, based on her appearance on the show, the "Simple Life." There, the U.S. Court of Appeals for the Ninth Circuit ruled that introducing additional artistic expressions to differentiate the artwork from the original depiction, such as drawing Hilton's body in a cartoonish manner, restyling Hilton's uniform, and changing the setting of the restaurant, was not enough to conclude such expression was transformational as a matter of law. Thus, the defendant was not successful in dismissing the plaintiff's right of publicity claim.

The *Young* court stated that the adaptation in *Hilton* was arguably more transformative than Reface's function of merely swapping a user's face with Young's face. Further, the replacement of Young's face was in an actual photograph, and not in the cartoonish style of the *Hilton* greeting card. The court found that NeoCortext failed to show, as a matter of law, the transformative nature of its use of Young's picture in relation to the Reface app. Therefore, NeoCortext could not successfully dismiss the plaintiff's right of publicity claim under the First Amendment's protection of artistic expression.

Proceeding Under the Right of Publicity

Finally, NeoCortext challenged Young's ability to prove that all the elements of the right of publicity claim could be satisfied given the facts. Under California law, a right of publicity claim requires that the plaintiff establish the following:

- The defendant's knowing use of the plaintiff's identity;
- Appropriation of the plaintiff's name or likeness for the defendant's advantage;
- Direct connection between the use and commercial purpose;
- Lack of consent; and
- Resulting injury.

NeoCortext contended that plaintiff Young could not show that NeoCortext "knowingly" used Young's identity in the Reface application.

Young countered by asserting that his allegations suggested a reasonable inference of NeoCortext's knowing use of Young's image. Young emphasized that the app was programmed to scrape video clips of him, index those clips in a database, and enable users to adapt those clips by swapping one's face with Young's face for NeoCortext's profit.

The court found that NeoCortext failed to provide substantial support such that "knowingly" should be limited only to instances of "affirmative knowledge," as opposed to "constructive knowledge." Because the court must view the facts of a complaint in the light most favorable to the defendant when deciding a motion to dismiss, the court concluded that Young had sufficiently alleged that NeoCortext knowingly used his identity when it compiled his images and name in the Reface application for users to manipulate. Thus, the court denied NeoCortext's motion to dismiss and motion to strike.

Generative AI: A New (Legal) Frontier in AI

Although the *Young* decision has attracted scant attention, it addresses issues that will be relevant to more closely watched generative AI lawsuits involving right of publicity claims. In particular, the court's analysis of NeoCortext's copyright preemption, First Amendment, and the "knowledge" requirement of California's Right of Publicity statute is likely to be studied and referenced by litigants and courts as the growing number of

generative AI disputes work their way through the court system. And, for companies developing or using generative AI tools that implicate the name, image, likeness, or persona of third parties, there are important risk mitigation lessons to be learned from the *Young* decision.

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