Blogs
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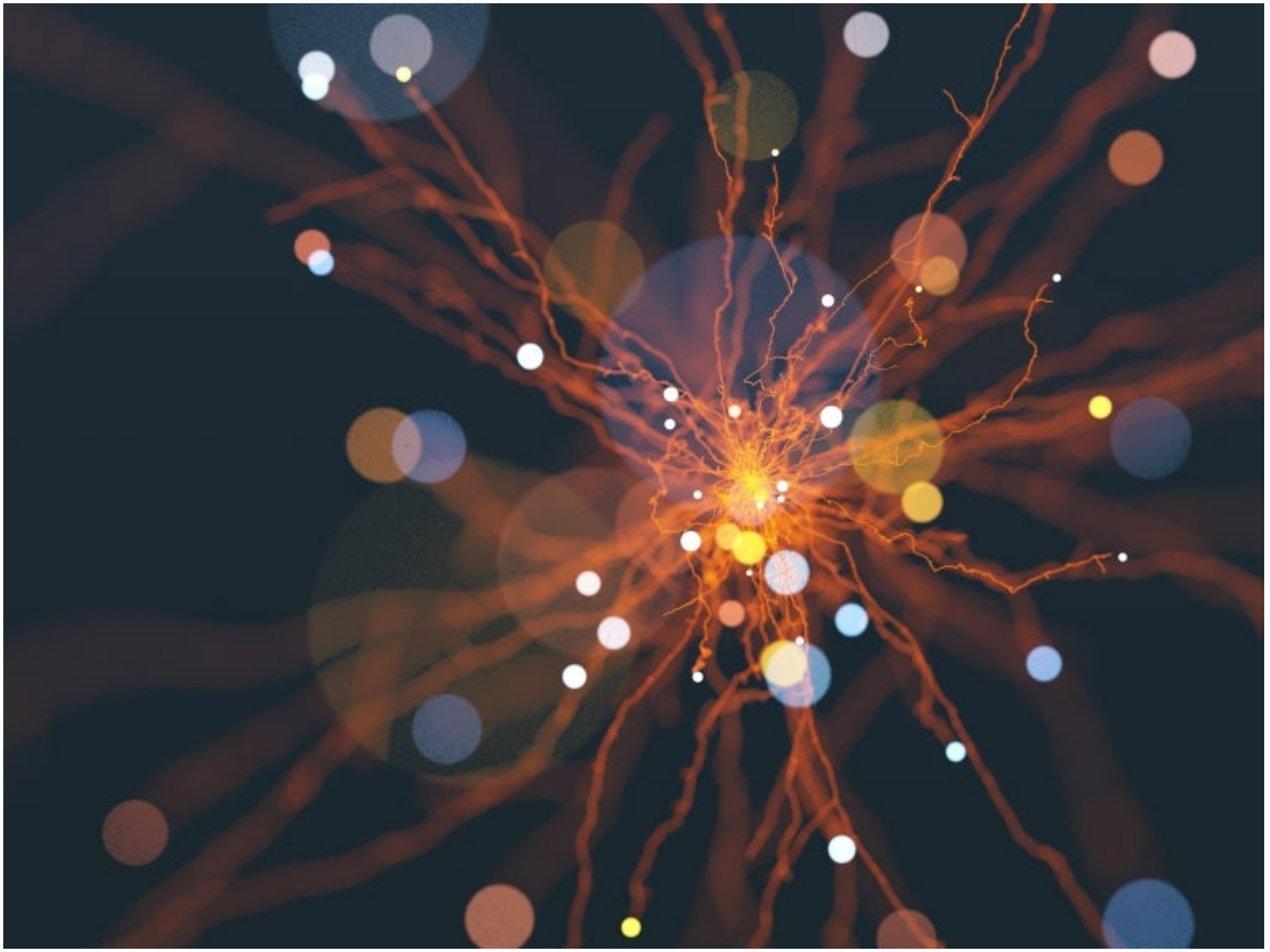

A surprising, unannounced collaboration between Drake and The Weeknd—a song called "Heart on My Sleeve "—went viral on social media a few weeks ago. It generated millions of streams across music and social media platforms, but it wasn't Drake and The Weeknd singing on the track; rather, it was an AI-generated simulation of the two.

Here's what happened: "Heart on My Sleeve" was written and produced by TikTok user ghostwriter977, who released the track on Spotify, YouTube, and several other platforms on April 4, 2023. The track really took off after a one-minute snippet of the song was shared on TikTok on April 15, where it would go on to receive over 15 million views. ghostwriter977 reported creating the track by using AI to replace their voice on the track with vocals that sounded like Drake and The Weeknd.

Universal Music Group (UMG), the record company with whom both Drake and The Weeknd are associated, soon rushed in to have the track taken down. UMG's takedown request was reportedly based *not* on the simulated voices of the two UMG-affiliated artists, but rather on a two-second audio tag owned by UMG that had been incorporated into the song's opening.

But what if the track had not incorporated the UMG-owned sample? Would UMG still have been able to have the song removed from the platforms on which it appeared?

Under the Digital Millennium Copyright Act (DMCA), online platforms are shielded from copyright liability for hosting infringing user-generated content so long as they expeditiously remove such content following receipt of a DMCA-compliant takedown notice from the applicable rightsholder. However, this protection for online platforms *is limited to copyright infringement claims*; if the online platform is hosting user-generated content that violates other rights, such as the right of publicity, the DMCA does *not* shield the platform from liability as to such other rights.

While the UMG-owned sample incorporated into "Heart on My Sleeve" constitutes copyrightable subject matter and can serve as the basis of a DMCA notice, the sound of Drake and The Weeknd's voices are *not* protected by copyright; rather, their voices are protected under the right of publicity, and, as noted, the DMCA's notice-and-takedown requirements do not apply to publicity rights.

Accordingly, if ghostwriter977 had omitted the problematic sample, objections to "Heart on My Sleeve" would need to focus on whether the track's unauthorized commercial use of Drake's and The Weeknd's voices (or at least uncanny reproductions of the same) violated the two artists' respective rights of publicity in the sound of their voices.

Although there may be a technical legal issue as to whether UMG could enforce publicity rights on the artists' behalf, certainly Drake and The Weeknd could have directly demanded that the platforms hosting "Heart on My Sleeve" remove the song on right of publicity grounds, right? It turns out that it's not that simple due to a *different* safe harbor for online platforms, Section 230 of the Communications Decency Act.

Section 230 generally shields online companies from liability as the speaker or publisher of content posted to their platforms by consumers and other third parties. While a platform can lose its DMCA copyright safe harbor related to hosting user content if the platform fails to remove content after receiving a rightsholder request, the platform's immunity under Section 230 is not conditioned on removing user content in response to takedown requests. In other words, if Section 230 is applicable, it protects a platform from liability *even if the user content at issue is never removed from the platform*.

Section 230 does not, however, shield platforms from intellectual property (IP) infringement claims—so an online platform presumably would not be shielded by Section 230 from right of publicity claims, right? Well, it's complicated.

The U.S. Court of Appeals for the Ninth Circuit—in *Perfect 10 v. CCBill*—interpreted Section 230's IP infringement carve-out as only applying to *federal* IP claims. Right of publicity claims are state law claims; as a result, in the Ninth Circuit, platforms would be immune from right of publicity claims based on AI-generated voices incorporated into musical works, such as "Heart on My Sleeve," created and uploaded by platform users.

Platforms may also be shielded from right of publicity claims under Section 230 to the extent such claims do not constitute IP claims. Earlier this year, in *Ratermann v. Pierre Fabre*, the U.S. District Court for the Southern District of New York reached such a conclusion, finding that claims under New York's Right of Publicity Law (NY Civil Rights Law §§ 50 and 51) are *privacy claims* and *not IP claims*. As a result, in the Southern District of

New York, as in the Ninth Circuit (albeit for a different reason), Section 230 immunizes online platforms from right of publicity claims, and such platforms have no obligation to remove user content alleged to violate publicity rights.

Not all jurisdictions shield platforms from right of publicity claims under Section 230, however. The U.S. Court of Appeals for the Third Circuit, in *Hepp v. Facebook*, interpreted Section 230's IP infringement carveout *as applying to both federal and state IP claims*. Moreover, unlike New York's right of publicity, the Third Circuit held that the right of publicity under Pennsylvania law is an IP right (and not, as in New York, a privacy right). As a result, the court concluded that the plaintiff's publicity rights claims against several online platforms were *not* barred by Section 230.

Many online platforms may have license agreements in place with record companies that would require such platforms to remove content that violates artists' rights of publicity even when the platforms may not otherwise be legally obligated to do so. But there will always be artists and platforms not covered by such agreements. Given how many artists and celebrities reside in California (within the Ninth Circuit) or New York City (within the Southern District of New York) and the fact that publicity rights are typically tied to one's place of residence, CCBill and Ratermann are likely to create significant hurdles for rights holders in their efforts to force platforms to remove generative AI-created works that make unauthorized commercial use of a person's name, image, voice, or likeness but that do not actually incorporate any infringing materials—at least until the U.S. Supreme Court gets around to resolving the split that has emerged among the circuits on this subject.

Follow us on social media @PerkinsCoieLLP, and if you have any questions or comments, contact us here. For more on IP issues raised by generative AI, check out part one and part two of our three-part series on the subject. We invite you to learn more about our Digital Media & Entertainment, Gaming & Sports industry group and check out our podcast: *Innovation Unlocked: The Future of Entertainment*.

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