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New Legislation Proposed in Tennessee to Protect Against Deepfakes: ELVIS Act

Authors: Edward D. Lanquist, Jr, Jeremy Dale Ray, Lang Wiseman, Jacob D. Baggett
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Recent advances in technology and artificial intelligence have the power to completely disrupt the world of advertising, media, music, sports, and entertainment by manipulating digital content to create synthetic photos and videos that are virtually indistinguishable from real life. These so-called "deepfakes" can be used to misappropriate virtually anyone's image and likeness for unlawful commercial gain, embarrassment, or other nefarious purposes.

For a public figure or entertainer who has spent a lifetime developing their unique talents and building a carefully crafted public image and brand, it is unsettling to know that someone can digitally misappropriate the fruits of their hard work and discipline with fake and uncompensated endorsements, bogus creative works (e.g., songs or videos), or simulations involving pornography or fabricated messages regarding controversial cultural or political matters they do not agree with.

Enter Tennessee law. In 1984, the State of Tennessee enacted the Personal Rights Protection Act which recognized a right of publicity. Even prior to that, Tennessee courts recognized a common law right of publicity emphasizing the recognition of individual property rights under Article I, § 8 of the Tennessee Constitution. *State ex Rel. Elvis Presley International Memorial Foundation v. Cromwell*, 733 S.W.2d 89, 96-97 (Tenn. Ct. App. 1987). Current law recognizes that every individual has a proprietary right to their name and likeness and that such rights may be assigned, licensed, and do not expire upon death. Tenn. Code Ann. § 47-25-1103. A person who knowingly uses or infringes on another's name, photograph, or likeness can be held liable in a civil action.

In an effort to complement and amplify existing protections, Tennessee Governor Bill Lee recently announced new legislation – the [Ensuring Likeness Voice and Image Security \(ELVIS\) Act](#) – which would add sound and voice to Tennessee's right of publicity. Sound and voice protections are especially necessary in a state known for producing world-class musicians and recording artists.

This legislation is the first of its kind in the nation, and it is an obvious and important step in the age of deepfakes and artificial intelligence models that can create soundalikes. Of course, the devil will be in the details on how the proposed law evolves as it makes its way through the legislature – for example, will it allow or not allow things that are currently standard within the music industry, such as sampling?

Additionally, there will be issues of federal preemption that the legislation will need to carefully navigate and sidestep in order to provide effective protection. Currently, the use of someone else's photograph is preempted by Article I Section 8 of the United States Constitution by providing Congress the sole ability to regulate under federal Copyright Law. As a result, for the right of publicity to attach, courts generally have required a heightened showing of actual fame and recognition by consumers.

There are also other potential ways to protect against a soundalike. For example, the Lanham Act Section 43(a) provides protection against unfair competition. The Act's protections were successfully asserted by Bette Midler against Ford Motor Company in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). Midler, an

already successful singer and actress, was asked by the car company's advertising agency to voice an original song for a television commercial, but she declined. Instead, the agency hired one of Midler's backup singers and asked her to impersonate Midler. Midler prevailed under the Lanham Act and solidified the principle that the voice of a famous singer is a distinctive aspect of their identity and is therefore protected from unauthorized use.

Other situations and risks will also need to be considered. For instance, what if a sound engineer uses autotune not just to clean up a singer's voice but also to make them sound a bit more like a well-known artist? What degree of change or likeness will give rise to a cause of action?

In sum, anyone who enjoys even a modicum of fame or public notoriety – e.g., athletes, entertainers, media, and even politicians – needs and deserves protection against deepfakes. And in the borderless age of the internet, this first-of-its-kind Tennessee legislation may allow the state to serve as a useful venue to prosecute claims both by and against residents and non-residents alike.

If you have any questions or need any additional information about the ELVIS Act, please contact [Lang Wiseman](#), [Ed Lanquist](#), [Jeremy Ray](#), [Jacob Baggett](#), or any of our [State Public Policy Team](#) and [Intellectual Property Attorneys](#). We will be closely monitoring this legislation and are available to discuss these developments and offer you and your clients the opportunity to engage in the legislative process as it unfolds to ensure the final product adequately takes into account your needs and concerns.