

Celebrity Disinformation Victims Have Panoply Of Remedies

By **Matthew Ferraro and Louis Tompros** (September 29, 2020)

Last month, the tea party-affiliated political group FreedomWorks sought to drive social media users to a website peddling unsubstantiated fears of mail-in voting.

To lend an air of authenticity to its message, FreedomWorks posted a photograph of National Basketball Association superstar LeBron James. FreedomWorks included a misleading quote from James that suggested that when he condemned polling place closures as "systemic racism and oppression," he opposed mail-in voting.[1]

Before the page was shuttered, James took to Twitter to criticize the misappropriation of his image. "Nobody should be able to use my name (or anyone else[s] name) to lie and deceive about the election," he tweeted. Although he was "[n]ot sure what we can do legally," he was "definitely trying to figure it out!"[2]

James isn't the only celebrity plagued by the false use of his image. Deepfake pornography — when artificial intelligence is used to superimpose a nonconsenting celebrity's face onto the nude body of a pornographic performer — is becoming commonplace on mainstream, advertiser-supported websites.

According to one report, up to 1,000 sexually explicit deepfake videos are being added to pornographic websites every month.[3] While many of those videos are today of famous actors, almost always women, the technology poses a threat to the privacy and dignity of anyone who has ever been photographed.

The good news for James — and all of us — is that U.S. laws do offer protection to victims of such abuses. Here are some options someone in a similar position can consider.

Intellectual Property Law

All visual works are, by default, protected by copyright. The person who created them has the right to control their use. And no matter how viral an image becomes, a visual work does not fall into the public domain. Recently, in *Furie v. Infowars LLC*, a case our firm handled for artist Matt Furie, media platform Infowars unsuccessfully argued that because Furie's famous Pepe the Frog character had become a meme, it had entered the public domain, and thus was outside of Furie's copyright control.[4]

The U.S. District Court for the Central District of California rejected that argument, holding that the supposed memification of an image or character does not destroy or diminish the original author's copyright interest.[5] The fact that a character, an image, a photograph or a famous face is popular doesn't make it public domain.

Copyright can also be used to battle manipulated or deepfake media under the Digital Millennium Copyright Act, which requires social media companies to remove posts that infringe on intellectual property.



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For example, in 2019, anti-advertising activists uploaded to a social media platform a manipulated deepfake video of Kim Kardashian West appearing to say things she never said. Vogue magazine had posted the original video on which the deepfake was based a few weeks earlier, and on that basis, Vogue's publisher Condé Nast was able to lodge a copyright complaint on the manipulated video and have it taken down.[6]

Similarly, had FreedomWorks misappropriated a promotional photograph of James that had been taken by the LA Lakers, the team may have had a copyright claim against the misappropriator based on the misuse of that particular photo. The team could also have sought to take down that photo from social media platforms under the DMCA.

False Light

Many states, including California, recognize legal claims of false light, where a person can bring a claim when something highly offensive is falsely implied to be true about them.[7] The classic mid-20th century case in California concerned a couple whose photo appeared in the Ladies' Home Journal above a caption about the "wrong kind of love." [8] The couple won the case by showing the magazine created a mistaken impression of them.

More recently, in 1999, "Baywatch" actor Jose Solano Jr. brought a successful false light claim against Playgirl magazine after the magazine published his bare-chested photo on the cover with headlines that created the false impression that nude photos of the actor appeared inside. Solano claimed to have been humiliated and embarrassed by the implication that he had posed naked and had suffered a decline in job offers and invitations to charity events and social contacts.[9]

The same analysis could well govern claims involving a victim's face that was manipulated by AI to create explicit content — creating an insinuation that the victim created the pornographic content, which would be "unquestionably degrading to a normal person." [10]

Right of Publicity

In California, the statutory right of publicity protects a person's right in his or her name, voice, signature, photograph and likeness from being used without one's consent for advertising and commercial purposes.[11]

For example, in August 2019, in *Kimsaprincess Inc. v. Misguided USA Finance Inc.*, Kim Kardashian West won a multimillion-dollar default judgment in the Central District of California against an online clothing retailer named Misguided, which allegedly used her persona and likeness to sell its wares, in part by tagging her Instagram account and linking to its website.[12]

West brought claims under California's statutory and common law rights to publicity, among others, and alleged that Misguided willfully and without authorization used her likeness "for commercial purposes, to advertise the Misguided brand and website, and to promote the sale of clothing" on its site.[13]

Because the internet does not obey international borders, and misappropriated likenesses may be posted by defendants overseas, it is notable that the court granted the judgment against both Misguided's U.S. entity and its British corporation, Misguided UK, and enjoined them both from using West's trademarks in connection with sale, marketing or distribution of its products once West showed that Misguided UK had been properly served with process under U.K. law.[14]

Likewise, if FreedomWorks had gained a commercial benefit from James' quotes and likeness — perhaps by driving visitors to a website that sold mail-ballot-skeptical t-shirts — he may have had a claim under this theory. Similar arguments may work against websites whether domestic or abroad that use a person's likeness, like in manufactured pornographic imagery, to drive advertising revenue.

Defamation

It is illegal in California to defame someone, which means to negligently publish a false statement of fact that causes damages and is not privileged by, say, being part of a government report.[15] Successful defamation claims have been brought by the famous and the ordinary.

Again, West's experience provides an illustrative case. In 2016, in *Kim Kardashian West v. Mediatakeout.com LLC*, West brought a libel suit in the U.S. District Court for the Southern District of New York against a website that published three articles that suggested she staged as a publicity stunt being the victim of a violent robbery and assault in Paris.

She alleged that the website, MediaTakeOut.com, published articles that claimed she faked the robbery and assault and filed a fraudulent claim with her insurance company, thus committing a federal crime.

She also alleged that the defendants acted with malice because they knew the posts were false — they cited no credible authority and ignored her requests for retractions — but published the "blatant defamatory lies" anyway "in an effort to commercially exploit Kardashian's valuable image for advertising or trade purposes (i.e. to drive Website traffic)."[16]

After filing the suit, West settled with the defendant, who then posted a retraction and apology on its website.[17]

And in 2013, in *Albert v. Yelp Inc.*, a California apartment building sued a former tenant who posted a searing anonymous Yelp review in which he called the landlord a "sociopathic narcissist" who "celebrates making the lives of tenants hell" and alleged that the plaintiffs sought to evict six tenants after the tenants invested into their apartments and that the plaintiffs' activities likely contributed to the deaths of three tenants.[18]

The California trial court denied the defendant's motion to strike the plaintiffs' defamation claim under California's anti-strategic lawsuit against public participation, or SLAPP, statute, which is designed to provide for early dismissal of meritless lawsuits filed against those exercising their First Amendment rights.[19]

The California Court of Appeals affirmed the lower court's ruling, allowing the defamation claim to proceed, because "Internet commentary does not ipso facto get a free pass under defamation law." [20] The defendant's post was susceptible of being read to contain provably false assertions of fact, not mere opinion, and the plaintiffs submitted sufficient evidence to meet a minimal showing of a probability of prevailing on at least some aspect of their libel claim.[21]

Intentional Infliction of Emotional Distress

A victim can successfully sue for the intentional infliction of emotional distress in California

when someone intentionally or with reckless disregard inflicts emotional distress on a plaintiff through outrageous conduct. The victim does not need to show physical injury. It is sufficient for the victim to suffer severe emotional distress, like shame, humiliation or embarrassment.[22]

This claim may be particularly appropriate for victims of deepfake pornography, where manufactured sexually explicit content causes them significant emotional distress. That's not hard to imagine happening, in part because courts have long held that the internet posting of private sex videos without the consent of a depicted person constitutes the intentional infliction of emotional distress.

For example, in one 2015 case, a woman prevailed on an international infliction of emotional distress claim against a former boyfriend who, without her knowledge or consent, published a private sex video of her to a pornographic website, listed her maiden and married names, and tagged the video as "amateur / ex-girlfriend." [23]

California's Revenge Porn Law

California in 2013 made it a crime to disseminate revenge porn — a short-hand term for sexually explicit images of a person posted on the internet, typically by a former sexual partner, without the consent of the subject. California requires the perpetrator to "know or should know that distribution of the image will cause serious emotional distress" to the victim and requires the victim to suffer such distress.[24]

For example, the first person convicted under the statute had posted a topless photograph of his ex-girlfriend on her employer's social media page with messages calling her names and for her to be fired.[25] This law addresses true content — explicit material made in private disseminated without the consent of one party — and not images manipulated to look like pornography, but it provides another potential avenue for those who are victimized by the nonconsensual use of their images online.

California's Deepfake Porn Law

In October 2019, California became the first state in the nation to adopt a law that allows a victim of nonconsensual deepfake pornography to sue anyone who intentionally distributes it, under certain conditions and with a few exceptions. It doesn't matter if there is a disclaimer on the imagery acknowledging that it is fake or unauthorized.[26]

Celebrity groups like the Screen Actors Guild-American Federation of Television and Radio Artists strongly supported passage of the law, which provides for the recovery of statutory and punitive damages as well as attorney fees.[27] While there is no case law yet on this new statute, it is a potential weapon against the mass of deepfake pornography that increases online every month.

This is not an exhaustive list of the tools victims of disinformation have to vindicate their rights.[28] And while the specifics of any case will dictate the proper approach, innovative attorneys should be able to help anyone — whether or not they are sports royalty — protect themselves in our new information age.

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[1] Isaac Stanley-Becker, Facebook Removes Page Using Image of LeBron James Over 'Voter Suppression Tactics', Washington Post (Aug. 22, 2020), <https://www.washingtonpost.com/politics/2020/08/21/facebook-removes-page-with-deceptive-lebron-james-ads-voter-suppression/>.


[2] @KingJames, Twitter (Aug. 21, 2020, 11:55 AM), <https://twitter.com/KingJames/status/1296838305489846272>.


[3] Matt Burgess, Deepfake Porn is Now Mainstream. And Major Sites are Cashing In, Wired (Aug. 27, 2020), <https://www.wired.co.uk/article/deepfake-porn-websites-videos-law>.

[4] Liam Stack, Infowars Agrees to Part Ways With Pepe the Frog, N.Y. Times (June 10, 2019), <https://www.nytimes.com/2019/06/10/us/pepe-frog-infowars-alt-right.html>.

[5] Ross Todd, 'Feels Good Man' Wilmer Lawyers Play Key Supporting Role in New Doc About the Travails of Pepe the Frog Creator, AM Law Litigation Daily (Sept. 2, 2020), <https://www.wilmerhale.com/en/insights/news/20200903-wilmerhale-lawyers-featured-in-sundance-award-winning-documentary-feels-good-man>.

[6] Matthew Katz, Kim Kardashian Can Get a Deepfake Taken Off YouTube. It's Much Harder For You, Digital Trends (June 17, 2019), <https://www.digitaltrends.com/social-media/kim-kardashian-deepfake-removed-from-youtube/>.

[7] Jackson v. Mayweather , 217 Cal. Rptr. 3d 234, 256 (Cal. Ct. App., 2017), <https://casetext.com/case/jackson-v-mayweather>.

[8] Gill v. Curtis Publ'g Co. , 239 P.2d 630, 632 (Cal. 1952), <https://www.courtlistener.com/opinion/1180772/gill-v-curtis-publishing-co/>.

[9] Solano v. Playgirl, Inc. , 292 F.3d 1078, 1081 (2002), <https://cite.case.law/f3d/292/1078/>.

[10] Id. at 1083 (quoting Douglass v. Hustler Magazine, 769 F.2d 1128, 1136 (7th Cir. 1985)).

[11] Cal Civ. § 3344, <https://codes.findlaw.com/ca/civil-code/civ-sect-3344.html>; Newcombe v. Adolf Coors Cos., 157 F.3d 686, 692 (9th Cir. 1998), <https://casetext.com/case/newcombe-v-adolf-coors-company>.

[12] Lauren Berg, Kim Kardashian West Wins \$2.7M In Fast Fashion TM Suit, Law 360 (July 3, 2019), <https://www.law360.com/articles/1175387>; Default Judgment, Kim Kardashian West v. Misguided Limited, et al., No. 19-cv-01258 (C.D. Cal., Jul. 2, 2019), at 1-

2, <https://www.courtlistener.com/recap/gov.uscourts.cacd.737465/gov.uscourts.cacd.737465.22.0.pdf>.

[13] Complaint, *Kim Kardashian West v. Misguided Limited, et al.*, No. 19-cv-01258 (C.D. Cal., Feb. 20, 2019), at 10, <https://www.courtlistener.com/docket/14562282/1/kimsaprincess-inc-v-misguided-usa-finance-inc/>.

[14] Order Granting Plaintiff's Motion for Reconsideration, *Kim Kardashian West v. Misguided Limited, et al.*, No. 19-cv-01258 (C.D. Cal., Jul. 16, 2020), at 5-6, <https://www.courtlistener.com/docket/14562282/kimsaprincess-inc-v-misguided-usa-finance-inc/>.

[15] Cal Civ. §§ 44-48, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CIV&ionNum=44.

[16] Complaint, *Kimberly Kardashian West v. MediaTakeOut.com LLC et al.*, No. 16-cv-7929 (S.D.N.Y., Oct. 11, 2016), at 3-5, <https://www.courtlistener.com/docket/4524747/1/kardashian-west-v-mediatakeoutcom-llc/>.

[17] Hilary Weaver, *Kim Kardashian Settles Lawsuit with MediaTakeOut, Vanity Fair* (Oct. 25, 2016), <https://www.vanityfair.com/style/2016/10/kim-kardashian-settles-lawsuit-with-mediatakeout>.

[18] *Bently Reserve LP v. Papaliolios*, 160 Cal. Rptr. 3d 423, 426 (Cal. Ct. App., 2013), <https://caselaw.findlaw.com/ca-court-of-appeal/1640966.html>.

[19] Cal. Civ. Code. § 425.16, <https://codes.findlaw.com/ca/code-of-civil-procedure/ccp-sect-425-16.html>. SLAPP stands for Strategic Lawsuit Against Public Participation.

[20] *Bentley Reserve*, 160 Ca. Rptr. 3d at 425.

[21] *Id.* at 430.

[22] *Wong v. Jing*, 117 Cal. Rptr. 3d 747, 766 (Cal. Ct. App., 2010), <https://www.casp.net/california-anti-slapp-first-amendment-law-resources/caselaw/california-courts-of-appeal-cases/wong-v-jing/>.

[23] *In re Grossman*, 538 B.R. 34, 45 (E.D. Cal. 2015), <http://www.caeb.uscourts.gov/documents/Judges/Opinions/Published/14-02140.pdf> (holding boyfriend's publication of video was non-dischargeable in bankruptcy because it constituted an actionable intentional infliction of emotional distress).

[24] Cal Penal § 647(j)(4), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=647.&lawCode=PEN.

[25] Veronica Rocha, 'Revenge Porn' Conviction is a First Under California Law, *L.A. Times* (Dec. 4, 2014), <https://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html>.

[26] Cal. Civ. Code § 1708.86, <https://casetext.com/statute/california-codes/california-civil-code/division-3-obligations/part-3-obligations-imposed-by-law/section-170886>.

[27] Matthew F. Ferraro, Deepfake Legislation: A Nationwide Survey—State and Federal Lawmakers Consider Legislation to Regulate Manipulated Media, WilmerHale Client Alert (Sept. 25, 2019), <https://www.wilmerhale.com/en/insights/client-alerts/20190925-deepfake-legislation-a-nationwide-survey>.

[28] Matthew F. Ferraro, Jason C. Chipman, Stephen W. Preston, Identifying the Legal and Business Risks of Disinformation and Deepfakes: What Every Business Needs to Know, 6 Pratt's Privacy and Cybersecurity Law Report 142, 152-154 (2020), <https://www.wilmerhale.com/en/insights/publications/20200622-wilmerhales-ferraro-chipman-and-preston-explain-in-article-what-companies-should-know-about-disinformation>.