Abstract

Appropriation of Data-Driven Digital Persona

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Artificial Intelligence (AI) based companies are relying on massive amount of data generated daily to create new machines and software. Consequently, the hype of AI and big data has put privacy under attack. Debates about privacy protection in the U.S Congress have become predominant. Attorney generals on the state level and private parties are also trying different strategies in suing companies for privacy harms. However, the efforts have largely been so far unsuccessful. One of the biggest challenges for plaintiffs have been proving privacy harm associated with data collection in a way that would also give them standing to sue. In light of the recent Supreme Court decision in *TransUnion LLC v. Ramirez*, this article offers a unique path forward grounded in the common law in protecting individuals from privacy harms associated with personal data collection. It argues that the recent trend in lawsuits asserting the common law privacy tort of publication of private facts for arguing a privacy harm is not the best strategy in suing for privacy harms. This article proposes extending the traditional and well-established tort of appropriation of likeness to personal data protections. Grounding its argument on the history of the evolution of the tort of appropriation of image and likeness, it argues that in a data-driven AI world, digital personas of individuals created by AI based companies are the modern-day version of the traditional persona historically protect by this privacy tort. Similar to protections granted to voice and lookalikes in the evolution of the appropriation tort, the natural language technologies in AI and the data-driven digital persona created by AI companies can amount to the tort of appropriation of likeness under certain circumstances. Examples of digital personas that warrant privacy protection can be a profile of an individual that an advertising company uses or the unwanted creation of a full human avatar in the augmented reality world that technological companies such as Meta are currently working on.

As such, while traditionally the publication of an image to third parties could amount to a right to sue under the appropriation tort, the publication and sale of digital persona profiles of individuals should also give rise to a right of action under the old common law privacy tort. As this paper illustrates, understanding the evolving nature of tort law, and in particular privacy torts in recognizing harms, offers a way forward in solving the

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current gridlock on data protection measures. Until the Federal government reaches a consensus on a legislative act for such harms, individuals can rely on the common law appropriation tort to sue companies that select their data and build individual profiles to sell to a wide range of companies for commercial purposes. Importantly, unlike the unpopularity of the *TransUnio* decision amongst some privacy scholars, the approach in this article is well in line with this Supreme Court's decision that gives a narrow view towards standing for privacy harms and requires plaintiffs to identify a close historical or common-law analogue for their asserted privacy injury.