UNITED STATES COPYRIGHT OFFICE

Copyright and Artificial Intelligence

Part 1: Digital Replicas

A REPORT OF THE REGISTER OF COPYRIGHTS

JULY 2024

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ABOUT THIS REPORT

This Report by the U.S. Copyright Office addresses the legal and policy issues related to artificial intelligence ("AI") and copyright, as outlined in the Office's August 2023 Notice of Inquiry ("NOI").

The Report will be published in several Parts, each one addressing a different topic. The first Part addresses the topic of digital replicas—the use of digital technology to realistically replicate an individual's voice or appearance. Subsequent Parts will turn to other issues raised in the NOI, including the copyrightability of works created using generative AI, training of AI models on copyrighted works, licensing considerations, and allocation of any potential liability. To learn more, visit www.copyright.gov/AI.

ABOUT THE U.S. COPYRIGHT OFFICE

The U.S. Copyright Office is the federal agency charged by statute with the administration of U.S. copyright law. The Register of Copyrights advises Congress, provides information and assistance to courts and executive branch agencies, and conducts studies on national and international issues relating to copyright, other matters arising under Title 17, and related matters. The Copyright Office is housed in the Library of Congress. Its mission is "to promotes creativity and free expression by administering the nation's copyright laws and by providing impartial, expert advice on copyright law and policy for the benefit of all." For more information, visit www.copyright.gov.

FOREWORD FROM THE REGISTER OF COPYRIGHTS

The recent emergence of sophisticated generative artificial intelligence ("AI") models available for use by consumers constitutes a major leap forward in technology. It presents both exciting opportunities and complex challenges for society as a whole, which have captured the attention of policymakers around the world, as well as the press and the public.

One of the areas affected is intellectual property. Copyright issues in particular have risen to the forefront, due to their visibility, immediacy, and relevance to the average person. By the fall of 2022, millions of Americans were utilizing generative AI systems and services to produce an astonishing array of expressive material, including visual art, text, and music. Almost weekly, tremendous strides have been announced in the technology's capabilities. Artists have harnessed the power of AI to find new ways to express themselves and new ways of connecting with audiences. At the same time, AI-generated deepfakes have proliferated online, from celebrities' images endorsing products to politicians' likenesses seeking to affect voter behavior. Over the past year or so, the resulting debates have intensified, with enthusiasm about the promise of extraordinary technical potential tempered by concern about the impact on individuals' livelihoods and reputations.

AI raises fundamental questions for copyright law and policy, which many see as existential. To what extent will AI-generated content replace human authorship? How does human creativity differ in nature from what AI systems can generate, now or in the future? What does this mean for the incentive-based foundation of the U.S. copyright system? In what ways can the technology serve as a valuable tool to amplify human creativity and ultimately promote science and the arts? How do we respect and reward human creators without impeding technological progress?

For copyright, this is the latest chapter in a symbiotic relationship with technology. Throughout history, technological innovation has shaped the evolution of copyright law and policy, with new forms of expression, such as photography, motion pictures, and computer programs; new methods of copying, such as photocopiers and video-cassette recorders; and new means of distribution, such as radio, television, and the internet. In recent decades, the pace of change has sharply accelerated, and today's generative AI tools have picked it up even further. The late 20th century saw the Copyright Act amended to respond to the challenge of digital networked technology. History has shown that the copyright system is resilient and continues to evolve as needed.

In response to the importance and urgency of the copyright issues, in early 2023 the Copyright Office initiated the study that led to this Report. Our work is just one part of a broader national and global conversation. In the United States, the Biden Administration's

October 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence addresses how AI technologies can be deployed safely and responsibly while taking into account concerns about fraud, bias, and transparency, as well as the impact on intellectual property rights. Other agencies are examining issues within their own areas of jurisdiction, and Congress is debating the need for legislation. Governments of other countries are similarly grappling with the potential impact of AI in all of its forms.

As with all of the Copyright Office's studies, our analysis is guided by the Constitutional goal of promoting creativity in order ultimately to benefit the public. This requires an appropriate balance, enabling technology to move forward while ensuring that human creativity continues to thrive. It is our hope that this Report will further productive discussions in Congress, the courts, and the executive branch, to help achieve that balance.

Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office

PREFACE

In early 2023, the U.S. Copyright Office announced a broad initiative to explore the intersection of copyright and artificial intelligence.

In March of that year, the Office released a policy statement with registration guidance for works incorporating AI-generated content. Over the spring and summer, we hosted a series of online listening sessions, presented educational webinars, and engaged with numerous stakeholders to enhance our understanding of the technology and how it is used, the copyright implications, and the potential impact on businesses and individuals.

These activities culminated in an August 2023 Notice of Inquiry, formally seeking public input on the full range of copyright issues that had been raised. In response, we received more than 10,000 comments representing a broad range of perspectives, including from authors and composers, performers and artists, publishers and producers, lawyers and academics, technology companies, libraries, sports leagues, trade groups and public interest organizations, and even a class of middle school students. Comments came from all 50 states and from 67 countries. That valuable and extensive input, supplemented by additional Office research and information received from other agencies, forms the basis for the discussion and recommendations in this Report.

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EXECUTIVE SUMMARY

This first Part of the Copyright Office's Report on copyright and artificial intelligence ("AI")[1] addresses the topic of digital replicas. From AI-generated musical performances to robocall impersonations of political candidates to images in pornographic videos, an era of sophisticated digital replicas has arrived. Although technologies have long been available to produce fake images or recordings, generative AI[2] technology's ability to do so easily, quickly, and with uncanny verisimilitude has drawn the attention and concern of creators, legislators, and the general public.

As part of a broad AI Initiative, the Copyright Office sought comments on these developments. We asked whether existing laws provide sufficient protection against unauthorized digital replicas or if new protection is needed at the federal level. In response, numerous commenters called for a new federal law to protect individuals from the appropriation of their persona. They provided extensive input into the justifications for and the appropriate parameters of such a law.

In the months since the Office's inquiry was launched, unauthorized digital replicas have continued to make headlines, and have triggered Congressional activity. During this time, we analyzed the comments received, performed additional research, and consulted with other agencies on their relevant areas of expertise. Based on all of this input, we have concluded that a new law is needed. The speed, precision, and scale of AI-created digital replicas calls for prompt federal action. Without a robust nationwide remedy, their unauthorized publication and distribution threaten substantial harm not only in the entertainment and political arenas, but also for private individuals.

Section I summarizes the context and history of the Office's study of the digital replicas issue. Section II.A outlines the main existing legal frameworks: state rights of privacy and publicity, including recent legislation specifically targeting digital replicas, and at the federal level, the Copyright Act, the Federal Trade Commission Act, the Communications Act, and the Lanham Act.

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[1] For purposes of the Copyright Office's Report on Copyright and Artificial Intelligence, "AI" or "Artificial Intelligence" is a general classification of automated systems designed to perform tasks typically associated with human intelligence or cognitive functions. Artificial Intelligence Study: Notice of Inquiry, 88 Fed. Reg. 59942, 59948 (Aug. 30, 2023) ("NOI"). *See also* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115–232, § 238(g)(2), 132 Stat. 1636, 1697–98 (2018) (defining "artificial intelligence" to include systems "developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action").

[2] "Generative AI" refers to applications of AI used to generate outputs in the form of expressive material such as text, images, audio, or video. NOI at 59948–49.

In Section II.B, we explain why existing laws do not provide sufficient legal redress for those harmed by unauthorized digital replicas and propose the adoption of a new federal law. We make the following recommendations regarding its contours:

- Subject Matter. The statute should target those digital replicas, whether generated by AI or otherwise, that are so realistic that they are difficult to distinguish from authentic depictions. Protection should be narrower than, and distinct from, the broader "name, image, and likeness" protections offered by many states.
- Persons Protected. The statute should cover all individuals, not just celebrities, public figures, or those whose identities have commercial value. Everyone is vulnerable to the harms that unauthorized digital replicas can cause, regardless of their level of fame or prior commercial exposure.
- Term of Protection. Protection should endure at least for the individual's lifetime. Any postmortem protection should be limited in duration, potentially with the option to extend the term if the individual's persona continues to be exploited.
- Infringing Acts. Liability should arise from the distribution or making available of an unauthorized digital replica, but not the act of creation alone. It should not be limited to commercial uses, as the harms caused are often personal in nature. It should require actual knowledge both that the representation was a digital replica of a particular individual and that it was unauthorized.
- Secondary Liability. Traditional tort principles of secondary liability should apply. The statute should include a safe harbor mechanism that incentivizes online service providers to remove unauthorized digital replicas after receiving effective notice or otherwise obtaining knowledge that they are unauthorized.
- Licensing and Assignment. Individuals should be able to license and monetize their digital replica rights, subject to guardrails, but not to assign them outright. Licenses of the rights of minors should require additional safeguards.
- First Amendment Concerns. Free speech concerns should expressly be addressed in the statute. The use of a balancing framework, rather than categorical exemptions, would avoid overbreadth and allow greater flexibility.
- Remedies. Effective remedies should be provided, both injunctive relief and monetary damages. The inclusion of statutory damages and/or prevailing party attorney's fees provisions would ensure that protection is available to individuals regardless of their financial resources. In some circumstances, criminal liability would be appropriate.
- Relationship to State Laws. Given well-established state rights of publicity and privacy, the Office does not recommend full federal preemption. Federal law should provide a floor of consistent protection nationwide, with states continuing to be able

to provide additional protections. It should be clarified that section 114(b) of the Copyright Act does not preempt or conflict with laws restricting unauthorized voice digital replicas.

Section III discusses protection against AI outputs that deliberately imitate an artist's style. We acknowledge the seriousness of creators' concerns and identify legal remedies available to address this type of harm. We do not, however, recommend including style in the coverage of new legislation at this time.

The Office appreciates and has benefitted from the extensive and thoughtful comments we received on this important topic. We remain available to assist as Congress continues to consider legislative solutions.

I. INTRODUCTION

In April of 2023, a new song featuring the voices of Drake and The Weeknd drew over fifteen million views on social media and six hundred thousand listens on Spotify.[3] Yet neither artist was aware of the song before its release, because the vocals were unauthorized, AI-generated replicas.[4]

The viral hit "Heart on My Sleeve," commonly referred to as the "Fake Drake" song, is a high-profile example of a burgeoning subgenre of sound recordings using generative AI systems[5] to create vocals that can pass for those of a favorite artist.[6] Vocal tracks are merely one form of increasingly realistic replicas of individuals' voices, images, and artistic styles.[7] In a short period of time, generative AI technology has become so sophisticated, and so accessible, that minimal expertise is required to rapidly produce such replicas.[8] On social media and other internet platforms, their volume has skyrocketed.[9]

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[3] Bill Donahue, *Fake Drake & The Weeknd Song — Made With AI — Pulled From Streaming After Going Viral*, BILLBOARD (Apr. 17, 2023), https://www.billboard.com/pro/fake-ai-drake-the-weeknd-song-pulled-streaming/.

[4] Colin Stutz, *The Fake Drake AI Song Earned Millions of Streams — But Will Anyone Get Paid?*, BILLBOARD (Apr. 19, 2023), https://www.billboard.com/pro/fake-drake-ai-song-earned-millions-streams-get-paid/.

[5] An "AI System" is a software product or service that substantially incorporates one or more AI models and is designed for use by an end-user. NOI at 59948; *see also* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117–263, § 7223(4)(A), 136 Stat. 2395, 3669 (2022) (defining "artificial intelligence system" as "any data system, software, application, tool, or utility that operates in whole or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence").

[6] Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html.

[7] *See, e.g.*, Melissa Heikkilä, *This Artist Is Dominating AI-Generated Art. And He's Not Happy About It*, MIT TECH. REV. (Sept. 16, 2022), https://www.technologyreview.com/2022/09/16/1059598/this-artist-is-dominating-ai-generated-art-and-hes-not-happy-about-it/; Jane Friedman, *I Would Rather See My Books Get Pirated Than This (Or: Why Goodreads and Amazon Are Becoming Dumpster Fires)*, JANEFRIEDMAN BLOG (Aug. 20, 2023), https://janefriedman.com/i-would-rather-see-my-books-pirated/.

[8] *See* Federal Trade Commission ("FTC") Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Oct. 30, 2023) ("FTC Initial Comments") ("Although policymakers have debated the disruptive potential of AI for decades, the pace of the technology's development and rollout has accelerated in recent years . . . ."); *Fast, Relax, & Turbo Modes*, MIDJOURNEY, https://docs.midjourney.com/docs/fast-relax ("Wait times for Relax are dynamic but generally range between 0–10 minutes per job. . . . Turbo Mode is available for subscribers who want extremely quick image generation. . . . Jobs run in Turbo mode generate up to four times faster. . . .") (last visited July 21, 2024); Karen X. Cheng (@karenxcheng), INSTAGRAM (Apr. 11, 2022), https://www.instagram.com/p/CcN5nBSpO9W/ (demonstrating how to generate an image in seconds using DALL·E).

[9] *E.g.*, Don Philmlee, *Practice Innovations: Seeing is no longer believing — the rise of deepfakes*, THOMSON REUTERS (July 18, 2023), https://www.thomsonreuters.com/en-us/posts/technology/practice-innovations-deepfakes/.

A. AI and Digital Replicas

This Report uses the term "digital replica" to refer to a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual. A "digital replica" may be authorized or unauthorized and can be produced by any type of digital technology, not just AI. The terms "digital replicas" and "deepfakes" are used here interchangeably.[10]

Digital replicas may have both beneficial and harmful uses. On the positive side, they can serve as accessibility tools for people with disabilities,[11] enable "performances" by deceased or non-touring artists,[12] support creative work,[13] or allow individuals to license, and be compensated for, the use of their voice, image, and likeness.[14] In one noted example, musician

[10] Although the term "deepfake" is often associated with unauthorized or deceptive uses, especially in explicit imagery, *see infra* notes 22–23, some dictionary definitions are broader. *See deepfake*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/deepfake ("an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said") (last updated July 20, 2024); *deepfake*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/deepfake ("a video or sound recording that replaces someone's face or voice with that of someone else, in a way that appears real"). In popular media too, the term has been used to describe authorized uses as well as malicious ones. *See* Nilesh Christopher & Varsha Bansal, *Indian Voters Are Being Bombarded With Millions of Deepfakes. Political Candidates Approve*, WIRED (May 20, 2024), https://www.wired.com/story/indian-elections-ai-deepfakes/ ("Politicians are using audio and video deepfakes of themselves to reach voters—who may have no idea they've been talking to a clone.").

[11] *E.g.*, Press Release, Office of Congresswoman Jennifer Wexton, Wexton Shares Video Debuting New AI Voice Model (July 10, 2024), https://wexton.house.gov/news/documentsingle.aspx?DocumentID=952 ("Today, Congresswoman Jennifer Wexton (D-VA) shared a video debuting a new Artificial Intelligence-generated model of her voice as it was before being impacted by her Progressive Supranuclear Palsy (PSP) condition.").

[12] Universal Music Group ("UMG"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5–6 (Oct. 30, 2023) ("UMG Initial Comments"); *see also* Elias Leight, *Will AI Be Used to Raise Musicians From the Dead*?, BILLBOARD (Nov. 29, 2023), https://www.billboard.com/pro/ai-bring-back-dead-artists-musicians-estate-managers/.

[13] *See, e.g.*, Letter from Motion Picture Association ("MPA"), Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (May 20, 2024) ("MPA highlighted the importance of this issue to our members, given the ubiquity of depiction of individuals in docudramas, biopics, and similar works. And we argued that use of digital-replica technology is simply an evolution of the type of technology our members have long used to make actors more closely resemble the people they portray, including make-up and prosthetics.").

[14] *See, e.g.*, American Association of Independent Music ("A2IM") et al., Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1–2 (Dec. 6, 2023) ("A2IM-Recording Academy-RIAA Joint Reply Comments"); William Morris Endeavor Entertainment, LLC ("WME"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2 (Oct. 30, 2023) ("WME Initial Comments").

Randy Travis, who has limited speech function since suffering a stroke, was able to use generative AI to release his first song in over a decade.[15]

At the same time, a broad range of actual or potential harms arising from unauthorized digital replicas has emerged. Across the creative sector, the surge of voice clones and image generators has stoked fears that performers and other artists will lose work or income.[16] There have already been film projects that use digital replica extras in lieu of background actors,[17] and situations where voice actors have been replaced by AI replicas.[18] Within the music industry, concerns have been raised that the use of AI in sound recordings could lead to the "loss of authenticity and creativity" and displacement of human labor.[19] Numerous commenters,

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[15] Dylan Smith, *Randy Travis Harnesses AI to Release His 'First New Music in More Than a Decade' – Another Song Is Already Being Created*, DIGIT. MUSIC NEWS (May 6, 2024), https://www.digitalmusicnews.com/2024/05/06/randy-travis-new-song.

[16] *See, e.g.*, Screen Actors Guild-American Federation of Television Artists ("SAG-AFTRA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 4 (Oct. 30, 2023) ("SAG-AFTRA Initial Comments"); Writers Guild of America ("WGA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 30, 2023) ("WGA Initial Comments"); Christi Carras, *Which Entertainment Jobs Are Most Likely to Be Disrupted by AI? New Study Has Answers*, L.A. TIMES (Jan. 30, 2024), https://www.latimes.com/entertainment-arts/business/story/2024-01-30/ai-artificial-intelligence-impact-report-entertainment-industry; Sam O'brien, *AiArt: Why Some Artists Are Furious About AI-Produced Art*, IEEE COMPUT. SOC'Y (Nov. 29, 2023), https://www.computer.org/publications/tech-news/trends/artists-mad-at-ai; Ari's Take, *Is AI Music Taking Royalties From Musicians and Composers? — The New Music Business Podcast*, YOUTUBE, at 20:57 (Jan. 17, 2024), https://www.youtube.com/watch?v=3I9dnxzjEzg.

[17] Jeremy Dick, *Disney Gets Roasted for 'Creepy' AI Extras in Disney+ Movie Prom Pact*, CBR (Oct. 12, 2023), https://www.cbr.com/disney-prom-pact-ai-actors/; *see also* Bobby Allyn, *Movie Extras Worry They'll be Replaced by AI. Hollywood Is Already Doing Body Scans*, NPR (Aug. 2, 2023), https://www.npr.org/2023/08/02/1190605685/. As we discuss below, there have been steps taken to address these concerns through private and collective bargaining agreements. *See infra* Section II.A.3.

[18] *See, e.g.*, FTC Initial Comments, Attach. at 37 (statement of Tim Friedlander, Nat'l Ass'n of Voice Actors); Cade Metz, *What Do You Do When A.I. Takes Your Voice?*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/technology/ai-voice-clone-lawsuit.html; Ed Nightingale, *Baldur's Gate 3 Actors Reveal the Darker Side of Success Fuelled by AI Voice Cloning*, EUROGAMER (Apr. 12, 2024), https://www.eurogamer.net/baldurs-gate-3-actors-reveal-the-darker-side-of-success-fuelled-by-ai-voice-cloning (addressing concerns by video game voice actors).

[19] *See, e.g.*, CVL ECONOMICS, FUTURE UNSCRIPTED: THE IMPACT OF GENERATIVE AI ON ENTERTAINMENT INDUSTRY JOBS 39–40 (Jan. 2024), https://animationguild.org/wp-content/uploads/2024/01/Future-Unscripted-The-Impact-of-Generative-Artificial-Intelligence-on-Entertainment-Industry-Jobs-pages-1.pdf ("With the capability to recreate melodies and replicate musicians' voices convincingly and quickly, it is becoming easier than ever to generate a music track without any direct human involvement."); Jem Aswad, *Billie Eilish, Nicki Minaj, Stevie Wonder, Dozens More Call on AI Developers to Respect Artists' Rights*, VARIETY (Apr. 2, 2024), https://variety.com/2024/music/news/billie-eilish-nicki-minaj-ai-respect-artists-rights-1235957451/.

among them many SAG-AFTRA members, stressed the importance of performers being able to prevent such displacement as well as the resulting impacts on their careers and livelihoods.[20]

While digital replicas depicting well-known individuals often attract the most attention, anyone can be vulnerable.[21] Beyond the creative sector, the harms from unauthorized digital replicas largely fall into three categories. First, there have been many reports of generative AI systems being used to produce sexually explicit deepfake imagery.[22] In 2023, researchers concluded that explicit images make up 98% of all deepfake videos online, with 99% of the individuals represented being women.[23] Instances of students creating and posting deepfake explicit images of classmates appear to be multiplying.[24]

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[20] *See, e.g.*, Morgan Keaton, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 30, 2023); Allie Radice, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 29, 2023); Gregory Schott, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry (Oct. 23, 2023).

[21] *E.g.*, Arian Garshi, *Deepfakes in 2022: How individual non-celebrities are targeted,* MEDIUM (Oct. 17, 2022), https://ariangarshi.medium.com/deepfakes-in-2022-how-individual-non-celebrities-are-targeted-a7dab59cac3a.

[22] *See, e.g.*, Caroline Haskins, A *Deepfake Nude Generator Reveals a Chilling Look at Its Victims*, WIRED (Mar. 25, 2024), https://www.wired.com/story/deepfake-nude-generator-chilling-look-at-its-victims/; Katherine Noel, *Journalist Emanuel Maiberg Addresses AI and the Rise of Deepfake Pornography*, INST. OF GLOBAL POL. (Apr. 22, 2024), https://igp.sipa.columbia.edu/news/rise-deepfake-pornography. On social media platform X alone, one sexually explicit deepfake image of Taylor Swift was "viewed 47 million times before the account [where the image was posted] was suspended." Kate Conger & John Yoon, *Explicit Deepfake Images of Taylor Swift Elude Safeguards and Swamp Social Media*, N.Y. TIMES (Jan. 26, 2024), https://www.nytimes.com/2024/01/26/arts/music/taylor-swift-ai-fake-images.html; Ashley King, *Megan Thee Stallion the Latest Victim of Deepfake Porn — X/Twitter 'Proactively Removing' Clips*, DIGI. MUSIC NEWS (June 14, 2024), https://www.digitalmusicnews.com/2024/06/14/megan-thee-stallion-deepfake-porn-x-twitter-removing.

[23] HOME SECURITY HEROES, 2023 STATE OF DEEPFAKES at Key Findings 2–3 (2023), https://www.homesecurityheroes.com/state-of-deepfakes/#key-findings. *See also* Katherine Noel, *Journalist Emanuel Maiberg Addresses AI and the Rise of Deepfake Pornography*, INST. OF GLOBAL POL. (Apr. 22, 2024), https://igp.sipa.columbia.edu/news/rise-deepfake-pornography ("It is almost exclusively young women who are nonconsensually being undressed and put into AI-generated porn.") (internal quotation marks omitted).

[24] *E.g.*, Natasha Singer, *Teen Girls Confront an Epidemic of Deepfake Nudes in Schools*, N.Y. TIMES (Apr. 8, 2024), https://www.nytimes.com/2024/04/08/technology/deepfake-ai-nudes-westfield-high-school.html; Caroline Haskins, *Florida Middle Schoolers Arrested for Allegedly Creating Deepfake Nudes of Classmates*, WIRED (Mar. 8, 2024), https://www.wired.com/story/florida-teens-arrested-deepfake-nudes-classmates/; Cameron Sires, *Schools Navigate The New World of Explicit AI-Generated Images*, ISSAQUAH REPORTER (Apr. 16, 2024), https://www.issaquahreporter.com/news/schools-navigate-the-new-world-of-explicit-ai-generated-images/; Miranda Ceja, *AI-Generated Nude Photos Of High Schoolers Investigated In South OC*, MSN NEWS (Apr. 2, 2024), https://www.msn.com/en-us/news/us/ai-generated-nude-photos-of-high-schoolers-investigated-in-south-oc/ar-BB1kXrkt.

Second, the ability to create deepfakes offers a "potent means to perpetrate fraudulent activities with alarming ease and sophistication."[25] The media has reported on scams in which defrauders replicated the images and voices of a multinational financial firm's CEO and its employees to steal $25.6 million;[26] replicated loved ones' voices to demand a ransom;[27] and replicated the voice of an attorney's son asking him to wire $9,000 to post a bond.[28] Digital replicas of celebrities have been used to falsely portray them as endorsing products.[29]

Finally, there is a danger that digital replicas will undermine our political system and news reporting by making misinformation impossible to discern. Recent examples involving politicians include a voice replica of a Chicago mayoral candidate appearing to condone police brutality;[30] a robocall with a replica of President Biden's voice discouraging voters from participating in a primary election;[31] and a campaign ad that used AI-generated images to depict former President Trump appearing with former Director of the National Institute of Allergy and Infectious Diseases, Anthony Fauci.[32] Deepfake videos were even used to influence a high

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[25] Giuseppe Ciccomascolo, *Deepfakes Make Up 66% of AI Fraud While Crypto Scams Halved*, CCN (Apr. 25, 2024), https://www.ccn.com/news/technology/deepfakes-ai-fraud-crypto-scams/.

[26] Heather Chen & Kathleen Magramo, *Finance worker pays out $25 million after video call with deepfake 'chief financial officer'*, CNN (Feb. 4, 2024), https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html ("The elaborate scam saw the [finance] worker duped into attending a video call with what he thought were several other members of staff, but all of whom were in fact deepfake recreations . . . . [T]he worker put aside his early doubts after the video call because other people in attendance had looked and sounded just like colleagues he recognized . . . .").

[27] Charles Bethea, *The Terrifying A.I. Scam That Uses Your Loved One's Voice*, NEW YORKER (Mar. 7, 2024), https://www.newyorker.com/science/annals-of-artificial-intelligence/the-terrifying-ai-scam-that-uses-your-loved-ones-voice.

[28] Samantha Manning, *Father Warns Congress About AI scammer Who Sounded Just Like His Son*, KIRO7 (Nov. 16, 2023), https://www.kiro7.com/news/local/father-warns-congress-about-ai-scammer-who-sounded-just-like-his-son/KA7BXJJ2OJB3NHDDM4EGB5L24M/.

[29] *See, e.g.*, Megan Cerullo, *AI-generated Ads Using Taylor Swift's Likeness Dupe Fans With Fake Le Creuset Giveaway*, CBS NEWS (Jan. 16, 2024), https://www.cbsnews.com/news/taylor-swift-le-creuset-ai-generated-ads/; *Tom Hanks Says AI Version of Him Used In Dental Plan Ad Without His Consent*, THE GUARDIAN (Oct. 1, 2023), https://www.theguardian.com/film/2023/oct/02/tom-hanks-dental-ad-ai-version-fake; Jamey Tucker, *Fake Ads Made With Artificial Intelligence Exploit Celebrities on Social Media*, WPSD LOCAL 6 (Mar. 11, 2024), https://www.wpsdlocal6.com/news/fake-ads-made-with-artificial-intelligence-exploit-celebrities-on-social-media/article_7a94d8a6-dfba-11ee-bb47-7f2861477d8e.html.

[30] Tiffany Hsu & Steven Lee Myers, *A.I.'s Use in Elections Sets Off a Scramble for Guardrails*, N.Y. TIMES (June 25, 2023), https://www.nytimes.com/2023/06/25/technology/ai-elections-disinformation-guardrails.html.

[31] Shannon Bond, *AI Fakes Raise Election Risks As Lawmakers and Tech Companies Scramble to Catch Up*, NPR (Feb. 8, 2024), https://www.npr.org/2024/02/08/1229641751.

[32] Nicholas Nehamas, *DeSantis Campaign Uses Apparently Fake Images to Attack Trump on Twitter*, N.Y. TIMES (June 8, 2023), https://www.nytimes.com/2023/06/08/us/politics/desantis-deepfakes-trump-fauci.html.

profile union vote by falsely showing a union leader urging members to oppose the contract that he had "negotiated and . . . strongly supported."[33]

Summarizing the challenges to the information ecosystem, one digital forensics scholar cautioned, "[i]f we enter a world where any story, any audio recording, any image, any video can be fake . . . then nothing has to be real."[34] As AI technology continues to improve, researchers predict that it will become increasingly difficult to distinguish between digital replicas and authentic content.[35]

B. Background of This Study

In early 2023, the Copyright Office announced an initiative to examine the copyright issues raised by AI. Over the following months, we hosted public listening sessions and engaged in extensive outreach to better understand the issues, including those related to generative AI's ability to produce digital replicas.[36]

The topic of digital replicas does not fall neatly under any one area of existing law. While some characterize it as a form of intellectual property, protection against the use of unauthorized digital replicas raises overlapping issues including privacy, unfair competition, consumer protection, and fraud. It relates to copyright in a number of ways: creators such as artists and performers are particularly affected; copyrighted works are often used to produce digital replicas; and the replicas are often disseminated as part of larger copyrighted works. Moreover, the noncommercial harms that may be caused are similar to violations of moral rights protected in part through the copyright system.[37]

In August 2023, the Office published a Notice of Inquiry on AI and Copyright that sought input on "the treatment of generative AI outputs that imitate the identity or style of human artists," among other topics.[38] The NOI asked what existing laws apply to AI-generated material that features the voice or likeness of a particular person; whether Congress should enact a new federal law that would protect against unauthorized digital replicas; and, if so,

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[33] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA).

[34] Weekend Edition Sunday, *As Tech Evolves, Deepfakes Will Become Even Harder to Spot*, NPR (July 3, 2022), https://www.npr.org/2022/07/03/1109607618 (Interview with Professor Hany Farid of U.C. Berkeley).

[35] *E.g.*, Weekend Edition Sunday, *As Tech Evolves, Deepfakes Will Become Even Harder to Spot*, NPR (July 3, 2022), https://www.npr.org/2022/07/03/1109607618 (Interview with Professor Hany Farid of U.C. Berkeley).

[36] *See, e.g.*, Music and Sound Recordings Listening Session Tr. at 11:11–12; 16:19–17:4; 73:11–77:20 (May 31, 2023) (statements by Nathaniel Bach, Music Artists Coalition ("MAC"); Kenneth Doroshow, Recording Industry Association of America ("RIAA"); Rohan Paul, Controlla; Garrett Levin, Digital Media Association ("DiMA")).

[37] *See infra* note 41.

[38] NOI at 59945.

what its contours should be. We also inquired whether there are or should be protections against AI systems generating outputs that imitate artistic style.[39] Finally, we sought views on how, for sound recordings, section 114(b) of the Copyright Act relates to state laws protecting against the imitation of an individual's voice.[40]

The Office received approximately one thousand comments responding to this group of questions, over 90% of them from individuals. The majority advocated for the enactment of new federal legislation. The scope, duration, and assignability of the right to be provided, as well as its relationship to existing state laws, were the subject of greater disagreement.

The copying of an individual's identity is not an entirely new topic for the Copyright Office. In 2019, we published a report on the moral rights of attribution and integrity[41] in the United States, in which we recommended that Congress consider adopting a federal right of publicity.[42] The current study has a narrower focus—assessing the need for federal protection specifically with respect to unauthorized digital replicas.

The Office concludes that the time has come to adopt such a law at the federal level. Based on our analysis of the comments received, independent research, and a review of work being done at other agencies, we believe there is an urgent need for a robust nationwide remedy beyond those that already exist. In the sections below, we review the protections available under current laws and the gaps in their capacity to respond to today's threats, explain the reasons for new federal protection, and provide recommendations regarding its contours.

We then address requests for protection against AI outputs that mimic or appropriate an artist's style. While the Office acknowledges the seriousness of this concern, we believe that existing laws may provide sufficient protection at this time.

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[39] *Id.* at 59945, 59948.

[40] *Id.* at 59948.

[41] Moral rights are non-economic rights in copyrighted works that are considered personal to the authors. The two most commonly recognized are the right of attribution (being credited as the author) and the right of integrity (preventing distortions of the work). U.S. COPYRIGHT OFFICE, AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES 6 (2019) ("MORAL RIGHTS REPORT"), https://copyright.gov/policy/moralrights/full-report.pdf. The United States provides these moral rights through a combination of federal and state laws, most of which are described below, including the Lanham Act, certain provisions of the Copyright Act, and state laws relating to privacy and publicity, contracts, fraud and misrepresentation, unfair competition, and defamation. *See id.* at 7.

[42] *Id.* at 110–19.

II. PROTECTION AGAINST UNAUTHORIZED DIGITAL REPLICAS

A. Existing Legal Frameworks

A variety of legal frameworks provide protection against the unauthorized use of aspects of an individual's persona. Some exist at the state level, including statutory and common law rights of privacy and publicity. Others are based on federal law, including the Copyright Act, the Federal Trade Commission Act, the Lanham Act, and the Communications Act.

1. State Common and Statutory Law

The most directly relevant state laws are the long-standing rights of publicity and privacy. In response to the accelerating pace of replicas created by generative AI systems, many states are also considering or have enacted new legislation specifically directed at unauthorized digital replicas.

a) Right of Privacy

The common law right of privacy emerged in the late 19th century and has been described as protecting against unreasonable intrusions into individuals' private lives, safeguarding their autonomy, dignity, and personal integrity.[43] Privacy rights are considered personal to the individual and typically apply only to the living.[44] Most states recognize some form of the right of privacy, either through statutory or common law.[45]

The common law right of privacy has been described as a complex of torts,[46] with the torts of false light and of appropriation of name and likeness most relevant here.[47] False light invasion of privacy protects the reputation of individuals, "with the same overtones of mental

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[43] Samuel Warren and Louis Brandeis first argued for a law to protect the right of privacy in their 1890 article, *The Right to Privacy*, describing "the next step which must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'" Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

[44] RESTATEMENT (SECOND) OF TORTS § 652I (AM. L. INST. 1977).

[45] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 6:1, 6:7 (2d ed. 2024).

[46] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960) ("It is not one tort, but a complex of four."). The four-tort complex includes: (1) intrusion upon seclusion or solitude, (2) disclosure of embarrassing private facts, (3) false light, and (4) appropriation of a person's name or likeness for the defendant's advantage. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 578 (2d ed. 2024).

[47] *See* Nicholas Schmidt, *Privacy Law and Resolving 'Deepfakes' Online*, IAPP (Jan. 30, 2019), https://iapp.org/news/a/privacy-law-and-resolving-deepfakes-online/; *see also* Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1794–95 (2019).

distress as in defamation."[48] Liability arises when someone "gives publicity to a matter concerning another that places [them] before the public in a false light," if the false light is "highly offensive to a reasonable person," and if "the actor had knowledge of or acted in reckless disregard as to the falsity."[49] For example, courts have found liability where a defendant spread false statements that "attribut[ed] a lewd fantasy" to a woman and claimed she agreed to appear nude in an adult magazine,[50] as well as where a defendant used individuals' names and likenesses in promotions for strip clubs without their consent.[51] The majority of jurisdictions have recognized this tort,[52] with a few incorporating it by statute.[53]

False light invasion of privacy may provide some legal protection against unauthorized digital replicas when they are used to depict an individual participating in offensive conduct.[54] It would appear particularly appropriate to address deepfake pornography. However, the objective "highly offensive" standard will limit its applicability to other uses of unauthorized digital replicas, such as depictions that are merely untruthful.[55]

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[48] William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 400 (1960). *See also* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:112 (2d ed. 2024) ("The difference between false light invasion of privacy and defamation is still unclear. While the false light tort primarily focuses upon indignity and defamation focuses upon reputation, the distinction is a subtle one."). Although some courts view defamation as duplicative of false light invasion of privacy, *see, e.g.*, *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 894 (Colo. 2002), defamatory statements are not necessary for an individual to be placed in a false light. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).

[49] RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977). "The courts uniformly adopt the Restatement of Torts list of elements." 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:114 n.1 (2d ed. 2024).

[50] *Wood v. Hustler Mag., Inc.*, 736 F.2d 1084, 1089, 1093 (5th Cir. 1984).

[51] *Longoria v. Kodiak Concepts LLC*, 527 F. Supp. 3d 1085, 1102 (D. Ariz. 2021); *Johnson v. J.P. Parking, Inc.*, No. 4:22-cv-00146, 2024 WL 676770, at *18 (S.D. Iowa Feb. 20, 2024).

[52] *Welling v. Weinfeld*, 866 N.E.2d 1051, 1055 (Ohio 2007) ("A majority of jurisdictions in the United States have recognized false-light invasion of privacy as a distinct, actionable tort."). However, some states, such as Colorado, Florida, Minnesota, New York, North Carolina, and Texas, have rejected or do not recognize the false light tort. 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:115 (2d ed. 2024).

[53] *E.g.*, 9 R.I. GEN. LAWS § 9-1-28.1(a)(4) (2024) (providing for a "right to be secure from publicity that reasonably places another in a false light before the public," and allowing recovery if "[t]here has been some publication of a false or fictitious fact which implies an association which does not exist" and "[t]he association which has been published or implied would be objectionable to the ordinary reasonable man under the circumstances"); NEB. REV. STAT. § 20-204 (2024) (following the *Restatement (Second) of Torts*' formulation).

[54] *See* Douglas Harris, *Deepfakes: False Pornography Is Here and the Law Cannot Protect You*, 17 DUKE L. & TECH. REV. 99, 115–16 (2019).

[55] *See, e.g.*, *De Havilland v. FX Networks, LLC*, 230 Cal.Rptr.3d 625, 630, 644 (Cal. Ct. App. 2018) (rejecting a false light claim for a docudrama's fictionalized interview because it would not "subject a person to hatred, contempt, ridicule, or obloquy").

The related tort of invasion of privacy by appropriation involves "appropriation of the plaintiff's identity or reputation, or some substantial aspect of it, for the defendant's own use or benefit."[56] On its face, this tort appears well suited to protect against unauthorized digital replicas,[57] although not every state recognizes it.[58] Courts, however, have not interpreted the tort consistently. Several states require that the appropriative act be for commercial purposes or purposes of trade,[59] excluding claimants harmed by noncommercial uses. Although in most jurisdictions the tort is available to any member of the public, some require a showing that the name or likeness has "intrinsic value," limiting protection to individuals who are well-known.[60]

b) Right of Publicity

The right of publicity addresses the use of individuals' personas[61] in commercial contexts, aiming to prevent others from profiting from unauthorized uses. The right evolved from the tort of invasion of privacy by appropriation to protect celebrities and well-known figures.[62] In 1953, the Second Circuit coined the term "right of publicity" in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, where it held that "in addition to and independent of that right

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[56] DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 579 (2d ed. 2024). Common law elements of invasion of privacy include (1) use, without permission, of "some aspect of the plaintiff's identity or persona in such a way that plaintiff is identifiable from defendant's use," and (2) that the use "causes some damage to plaintiff's peace of mind and dignity, with resulting injury measured by plaintiff's mental or physical distress and related damage." 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:62 (2d ed. 2024) (footnote omitted).

[57] Shannon Reid, *The Deepfake Dilemma: Reconciling Privacy and First Amendment Protections*, 23 U. PA. J. CONST. L. 209, 215 (2021).

[58] *See, e.g.*, *Hougum v. Valley Mem'l Homes*, 1998 ND 24, ¶ 12, 574 N.W.2d 812, 816 ("This Court has not decided whether a tort action exists in North Dakota for invasion of privacy."); *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 347 (8th Cir. 1996).

[59] *See, e.g.*, *Barbieri v. News-J. Co.*, 56 Del. 67, 70, 189 A.2d 773, 774 (1963); *Fergerstrom v. Hawaiian Ocean View Ests.*, 441 P.2d 141, 144 (1968).

[60] *See* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:62 (2d ed. 2024). Right of privacy laws generally do not address other issues, such as secondary liability or First Amendment exceptions, at the level of detail that right of publicity laws do, as discussed below. We also received fewer comments focused on these issues from a right of privacy perspective.

[61] The term "persona" in right of publicity law "is increasingly used as a label to signify the cluster of commercial values embodied in personal identity as well as to signify that human identity 'identifiable' from defendant's usage. There are many ways in which a 'persona' is identifiable: from name, nickname and voice, to picture or performing style and other indicia which identify the 'persona' of a person." *Id.* § 4:46.

[62] *Id.* § 1:25; Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203–04 (1954) ("[T]he [privacy] doctrine, first developed to protect the sensibilities of nineteenth century Brahmin Boston, is not adequate to meet the demands of the second half of the twentieth century, particularly with respect to the advertising, motion picture, television, and radio industries. Well known personalities connected with these industries do not seek the 'solitude and privacy' which Brandeis and Warren sought to protect.").

of privacy . . . , a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture. . . ."[63]

A majority of states now recognize the right of publicity by statute, common law, or both.[64] Because the harms that the right of publicity and the tort of invasion of privacy address are similar, some jurisdictions use the terms interchangeably,[65] while others treat them as distinct.[66]

Intended to protect aspects of an individual's identity, the right of publicity may be the most apt state law remedy for unauthorized digital replicas.[67] Numerous commenters noted, however, that the contours of the right differ considerably from state to state.[68] As to the subject matter, in some states the law sweeps more broadly than digital replicas, capturing aspects of

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[63] 202 F.2d 866, 868 (2d Cir. 1953).

[64] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:2 (2d ed. 2024). Some states, such as Alaska, Kansas, Maryland, and North Carolina, have neither statutory nor common law rights of publicity. *See* Jennifer Rothman, *Rothman's Roadmap to the Right of Publicity*, https://rightofpublicityroadmap.com/law/ (last visited July 21, 2024). There are also a few states, such as Colorado, Delaware, and Oregon, that have no statutory right of publicity but where the existence of a common-law right is unclear. *Id. See generally* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:2 (2d ed. 2024).

[65] *E.g.*, *Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp.*, 812 F.3d 824, 830 (11th Cir. 2016) ("The last category of invasion of privacy—misappropriation of a person's name or likeness—is commonly referred to as a violation of the 'right of publicity.'"); *In re Jackson*, 972 F.3d 25, 34 (2d Cir. 2020) (using the *Restatement (Second) of Torts*' description of liability for invasion of privacy by appropriation to describe right of publicity liability).

[66] *See, e.g.*, *Minnifield v. Ashcraft*, 903 So. 2d 818, 826 (Ala. Civ. App. 2004) ("[W]e cannot say that the commercial-appropriation invasion-of-privacy tort in Alabama bases its liability solely on commercial rather than psychological interests. To do so would, in effect, substitute the commercial-appropriation invasion-of-privacy tort with the tort of violating the right to publicity.").

[67] A number of commenters agreed that existing rights of publicity would apply to certain uses of digital replicas. *See, e.g.*, Jennifer Rothman, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 25, 2023) ("Jennifer Rothman Initial Comments") (noting that, in the context of an AI-generated Tom Hanks appearing in an advertisement and the AI-generated voices of Drake and The Weeknd appearing in a song, "[a]bsent jurisdictional hurdles, . . . each have straightforward lawsuits under state right of publicity laws for the uses described"); SAG-AFTRA Initial Comments at 6–7; *see also* Russell Spivak, *"Deepfakes": The Newest Way to Commit One of the Oldest Crimes*, 3 GEO. L. TECH. REV. 339, 383–85 (2019); Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 164, 166–67 (2023). Indeed, courts have applied standard right of publicity laws to other forms of digital likenesses. *See, e.g.*, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (digital avatars of football players); *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011) (digital avatars of the musical group No Doubt).

[68] *See, e.g.*, The Honorable Marsha Blackburn, U.S. Senator, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 30, 2023) ("Senator Marsha Blackburn Initial Comments"); Computer & Communications Industry Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 24 (Oct. 30, 2023); Daniel Gervais, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9 (Oct. 30, 2023).

identity that merely evoke or call to mind the protected individual. In one well-known example, the Ninth Circuit found that a robotic depiction of a blonde woman in a long gown turning large block letters on a game-show set sufficiently "evoked" Vanna White, even without using her name or image, to state a claim under California's common law right of publicity.[69] Further, some states protect additional aspects of identity, such as gestures and mannerisms in Indiana[70] or "any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener" in Illinois.[71]

In other cases, the laws are written too narrowly to cover all types of digital replica uses. Some states restrict the right to limited groups of individuals, from professional performers,[72] to soldiers[73] or the deceased.[74]

Protection for Postmortem Rights. The treatment of postmortem rights of publicity is one of the areas of greatest variation.[75] Twenty-seven states currently provide postmortem rights of publicity, 19 by statute and 8 by common law.[76] The durations vary from as short as 20 years in Virginia, to 100 years in Indiana, and indefinitely in Tennessee, as long as the right is continuously exploited.[77] The postmortem term can differ depending on the ongoing

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[69] *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992), *as amended* (Aug. 19, 1992) ("The identities of the most popular celebrities are not only the most attractive for advertisers, but also the easiest to evoke without resorting to obvious means such as name, likeness, or voice."). *See also* Stacy L. Dogan, *An Exclusive Right to Evoke*, 44 B.C. L. REV. 291, 292 (2003) (citing cases where "non-proprietary symbols" were held to call to mind, and thus violate the right of publicity of, various celebrities).

[70] IND. CODE § 32-36-1-6 (2024).

[71] 765 ILL. COMP. STAT. 1075/5 (West 2024).

[72] *See infra* Section II.A.1.c.

[73] ARIZ. REV. STAT. ANN. § 12-761 (2024).

[74] TEX. PROP. CODE ANN. § 26.002 (West 2023). As mentioned above, New York's digital-replicas-specific amendment applies only to deceased performers. N.Y. CIV. RIGHTS LAW § 50-f(1)(a)–(b), (2)(b) (McKinney 2024).

[75] *See, e.g.*, CAL. CIV. CODE §§ 3344, 3344.1 (West 2024) (protecting against the unconsented commercial use of a person's name, voice, signature, photograph, or likeness, affording a 70-year postmortem term, and requiring registration by the successor in interest); KY. REV. STAT. ANN. § 391.170 (West 2024) (recognizing a right in name and likeness, and protecting against the commercial use of the name or likeness of a "public figure" for 50 years after death); *see also* Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 CARDOZO ARTS & ENT. L.J. 1, 2 (2019).

[76] 2 J. THOMAS MCCARTHY AND ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 9:17 (2d ed.).

[77] *See* VA. CODE ANN. § 8.01-40 (2024); IND. CODE § 32-36-1-8(a) (2024); TENN. CODE ANN. § 47-25-1104 (2024).

commercial exploitation of the individual's identity, its commercial value at the time of death, and whether the estate complied with statutory registration requirements.[78]

Commercial Use Requirement. Many right of publicity laws only protect against unauthorized commercial uses. These uses may include advertising campaigns, product endorsements, merchandising, and sponsored content,[79] and may extend to newer forms of commercial exploitation facilitated by digital platforms, such as influencer marketing and brand partnerships on social media.[80]

Secondary and Intermediary Liability. Most state statutes do not specify rules for potential secondary liability.[81] However, courts have interpreted these laws as incorporating ordinary tort law principles of aiding and abetting liability, so that a party may be secondarily liable for infringing the right where it has knowledge of the illegal acts and provides substantial assistance.[82]

Several states explicitly limit liability for certain types of intermediaries, where they lack knowledge of the unauthorized acts. California, Pennsylvania, Ohio, and New York exempt advertising media from liability so long as they do not have knowledge that the use of the name, image, or likeness is unauthorized.[83] Arkansas, borrowing concepts from federal copyright law,[84] exempts the "service provider of a system or network" if the service provider does not have actual knowledge that the use is unlawful and is not aware of facts and

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[78] *See, e.g.*, CAL. CIV. CODE § 3344.1(h) (West 2024) (applying to deceased personalities "whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death").

[79] *See, e.g.*, *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 (1984), *judgment aff'd*, 488 N.Y.S.2d 943 (1985) (finding that the use of a look-alike in an advertisement infringed Jacqueline Onassis's right of publicity); *Beverley v. Choices Women's Med. Ctr., Inc.*, 532 N.Y.S.2d 400 (1991) (holding that the use of a female physician's photo on a calendar distributed by and advertising the defendant's business infringed the physician's right of publicity).

[80] Grace Greene, *Instagram Lookalikes and Celebrity Influencers: Rethinking the Right of Publicity in the Social Media Age*, 168 U. PA. L. REV. ONLINE 153, 189–92 (2020) (citing several (settled) right of publicity suits by online influencers seeking to protect their exact images as well as their influencer personas).

[81] *See* Alexandra Curren, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity*, 102 TEX. L. REV. 155, 164, 166–67 (2023).

[82] *See, e.g.*, *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1183–84 (C.D. Cal. 2002); *Keller v. Elecs. Arts, Inc.*, No. 09-cv-1967, 2010 WL 530108, at *3 (N.D. Cal. Feb. 8, 2010) (allowing civil conspiracy claims for violation of California right of publicity to proceed based on defendant's alleged direction of users to infringing websites).

[83] *See* CAL. CIV. CODE §§ 3344(f), 3344.1(a)(l) (West 2024); 42 PA. STAT. AND CONS. STAT. § 8316(d) (2024) (described as those "in the business of producing, manufacturing, publishing or disseminating material for commercial or advertising purposes by any communications medium"); OHIO REV. CODE ANN. § 2741.02(E) (West 2024); N.Y. CIV. RIGHTS LAW § 50-f(9) (McKinney 2024) (adding a "by prior notification" element to knowledge).

[84] *See infra* Section II.B.3.d.

circumstances that make a violation apparent.[85] A number of courts have found intermediaries not liable for state right of publicity violations where they served as "mere conduits" for the unlawful activity.[86]

First Amendment Protections. States have adopted varied approaches to accommodating First Amendment concerns, either by statute or judicial interpretation.[87] A number of statutes provide carveouts for categories of conduct likely to implicate protected speech, such as news reporting, sports broadcasts, political campaigns, commentary, and satire.[88] California's law, for example, permits unauthorized uses of an individual's voice or likeness "in connection with any news, public affairs, or sports broadcast or account, or any political campaign."[89] Some carveouts also cover broader categories of expressive works, such as in Ohio, which exempts a "literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the work appears or is transmitted."[90]

Others, however, are silent on this issue.[91] When interpreting the common law, or a statute without an express exemption, courts analyze the extent to which the claim at hand implicates First Amendment rights.[92]

Jurisdiction and Remedies. State right of publicity statutes apply varying jurisdictional requirements. Some restrict the law's protections to those domiciled in the state; others are

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[85] ARK. CODE ANN. § 4-75-1110(a)(1)(F) (2024).

[86] *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 27–28 (1st Cir. 2016) (upholding dismissal of statutory misappropriation claims against a classifieds website for images appearing in an advertisement, as it is a "mere[] conduit" and does not benefit from the appropriation); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006) (highlighting that Amazon did not make "editorial choices" when displaying a book cover that included an unauthorized image on the book's sales page, and that the display was incidental to its role as an internet bookseller).

[87] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 145, 147 (2018) ("At least five balancing approaches have been applied to evaluate First Amendment defenses in right of publicity cases. . . . This panoply of tests used to determine whether the First Amendment allows and protects uses of a person's identity has led to bizarre and conflicting outcomes in cases with similar facts.").

[88] *See, e.g.*, CAL. CIV. CODE § 3344 (West 2024); ARK. CODE ANN. § 4-75-1110 (2024); N.Y. CIV. RIGHTS LAW § 50-f(2)(d) (McKinney 2024); LA. STAT. ANN. § 51:470.5 (2024); NEV. REV. STAT. § 597.790 (2023).

[89] CAL. CIV. CODE § 3344(d) (West 2024).

[90] OHIO REV. CODE ANN. § 2741.09(A)(1)(a) (West 2024).

[91] *See, e.g.*, KY. REV. STAT. ANN. § 391.170 (West 2024); UTAH CODE ANN. § 45-3-3 (West 2024); VA. CODE ANN. § 8.01-40 (2024).

[92] *See, e.g.*, *Daly v. Viacom*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (the First Amendment protected the use of the plaintiff's likeness in advertisements for a television show in which the plaintiff appeared; the advertisement was found to be an expressive work); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186–87 (9th Cir. 2001) (right of publicity claims targeting noncommercial uses of an individual's name or likeness may receive heightened First Amendment scrutiny).

more generous.[93] Remedies available to a successful plaintiff also vary across states, although all provide for some form of both injunctive and monetary relief.[94]

c) New State Regulation of Digital Replicas

In response to the emergence of AI-created digital replicas, a number of states have taken steps to either amend existing right of publicity statutes or adopt new laws.[95] Tennessee, for example, recently extended its right of publicity statute to encompass voice simulations.[96] It also expanded the law's scope beyond solely commercial conduct (*i.e.*, "purposes of advertising") to include all acts of unauthorized publishing, performing, distributing, transmitting, or making available to the public.[97]

Two other states, Louisiana and New York, recently passed laws targeting the use of digital replicas.[98] The Louisiana statute applies only to living, professional performers, and prohibits the use of their digital replicas "in a public performance of a scripted audiovisual work, or in a live performance of a dramatic work, if the use is intended to create, and creates, the clear impression that the professional performer is actually performing in the role of a fictional character."[99] New York's amendment of its existing right of publicity prohibits unauthorized digital replicas of deceased professional performers "in a scripted audiovisual

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[93] *Compare* WASH. REV. CODE § 63.60.010 (2024) (applying to "all individuals and personalities, living and deceased, regardless of place of domicile or place of domicile at time of death"), *with* OHIO REV. CODE ANN. § 2741.03 (West 2024) (limiting to individuals whose domicile or residence is or was in the state).

[94] *See, e.g.*, ARK. CODE ANN. § 4-75-1109 (2024) (providing for injunctive relief and recovery of monetary damages and profits); OHIO REV. CODE ANN. § 2741.07 (West 2024) (providing for injunctive relief and recovery of actual damages including profits, statutory damages, punitive damages, attorney's fees, and treble damages).

[95] In 2023, state legislators introduced 191 AI-related bills, 37 of them addressing deepfakes. *2023 State AI Legislation Summary*, BSA|THE SOFTWARE ALLIANCE (2023), https://www.bsa.org/files/policy-filings/09222023statelegai.pdf. Six deepfake bills were passed targeting nonconsensual deepfake porn and use of deepfakes in politics. *Id. See, e.g.*, S.D. CODIFIED LAWS § 22-24A-2 (2024); 2024 Utah Laws Chs. 127 (H.B. 148), 146 (S.B. 66), 142 (H.B. 238); UTAH CODE ANN. § 20A-11-1104 (West 2024). New Mexico updated its elections laws in 2024 to require a disclaimer of any "materially deceptive media" generated by AI in the context of certain campaign advertisements, and claims may be brought by the Attorney General, a district attorney, falsely represented individual, candidate, or any organization that represents the interests of potentially deceived voters. 2024 N.M. Laws Ch. 57 (H.B. 182).

[96] Ensuring Likeness, Voice, and Image Security Act of 2024, Tenn. Pub. Acts ch. 588.

[97] *Id.*

[98] Other states seem likely to follow suit. In California, for example, a pending bill would amend the postmortem right of publicity statute to establish liability for the production, distribution, or making available of a deceased personality's digital replica. Assemb. B. 1836, Reg. Sess. (Cal. 2024).

[99] LA. STAT. ANN. § 51:470.4(C) (2024).

work as a fictional character or for the live performance of a musical work" if the use is likely to deceive the public.[100]

Both laws incorporate categorical exemptions to accommodate free speech concerns. New York specifies a list of uses excluded from protection:

> [I]f the work is of parody, satire, commentary, or criticism; works of political or newsworthy value, or similar works, such as documentaries, docudramas, or historical or biographical works, regardless of the degree of fictionalization; a representation of a deceased performer as himself or herself, regardless of the degree of fictionalization, except in a live performance of a musical work; de minimis or incidental; or an advertisement or commercial announcement for any of the foregoing works.[101]

Louisiana's law similarly exempts several categories of uses: those made in connection with "a news, public affairs, sports transmission or account, or political campaign," in works of "political, public interest, educational, or newsworthy value," and in "a play, book, magazine, newspaper, literary work, musical composition, single and original work of art or photograph, or visual work."[102] The law also exempts "a sound recording, audiovisual work, motion picture, or radio or television program," but not if they include unauthorized digital replicas that substitute for a professional performer who did not actually appear in the work.[103]

2. Federal Law

While no federal statute focuses solely on the use of an individual's image, likeness, or voice, several serve to limit the creation or use of digital replicas in particular circumstances. We outline below the most relevant laws and regulatory schemes: the Copyright Act, the Federal Trade Commission Act, the Lanham Act, and the Communications Act. In those areas where the Copyright Office does not have special expertise, we summarize the descriptions by the expert agency or commenters of the statutes and their application to digital replicas.[104]

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[100] N.Y. CIV. RIGHTS LAW § 50-f(1)(a)–(b), (2)(b) (McKinney 2024).

[101] N.Y. CIV. RIGHTS LAW § 50-f(2)(d)(ii) (McKinney 2024).

[102] LA. STAT. ANN. § 51:470.5(B) (2024).

[103] *Id.*; *id.* § 51:470.2(11) (defining "performance" as "the use of a digital replica to substitute for a performance by a professional performer in a work in which the professional performer did not actually appear"). The statute also provides that it "does not affect rights and privileges recognized under other state or federal laws, including those privileges afforded under the 'fair use' factors in the United States Copyright Act of 1976." *Id.* § 51:470.5(A).

[104] Other agencies are also working on aspects of digital replica issues. For example, the Federal Elections Commission ("FEC") has sought public comments on amending 11 C.F.R. section 110.16 to clarify that candidates

a) Copyright Act

Copyright protects original works of authorship, including the material—photographs or audio or video recordings—from which a digital replica might be constructed.[105] The Copyright Act provides copyright owners with a bundle of exclusive rights, including the rights to reproduce a work and to prepare derivative works.[106]

Digital replicas that are produced by ingesting copies of preexisting copyrighted works, or by altering them—such as superimposing someone's face onto an audiovisual work or simulating their voice singing the lyrics of a musical work—may implicate those exclusive rights.[107] If the depicted individual is an owner of the copyrighted work, he or she could have a copyright claim for infringement of the work as a whole. Copyright does not, however, protect an individual's identity in itself, even when incorporated into a work of authorship.[108] A replica of their image or voice alone would not constitute copyright infringement.

b) Federal Trade Commission Act

The Federal Trade Commission Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[109] FTC

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and their agents may not use deliberately deceptive AI in campaign ads. *Comments sought on amending regulation to include deliberately deceptive Artificial Intelligence in campaign ads*, FEC (Aug. 16, 2023), https://www.fec.gov/updates/comments-sought-on-amending-regulation-to-include-deliberately-deceptive-artificial-intelligence-in-campaign-ads/.

[105] *See* 17 U.S.C. § 102.

[106] *Id.* § 106. Under the Copyright Act, a "derivative work" is a work "based upon one or more preexisting works" in which the original is "recast, transformed, or adapted." *Id.* § 101. Examples of derivative works in the Act's definition include, but are not limited to, "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation." *Id.*

[107] The Office will address the legal issues involved in use of copyrighted works in AI systems in a subsequent Part of this Report.

[108] *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001) ("A person's name or likeness is not a work of authorship within the meaning of 17 U.S.C. § 102."); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) ("A voice is not copyrightable. The sounds are not 'fixed.' What is put forward as protectible here is more personal than any work of authorship."); *see also* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:41 (2d ed. 2024) ("While a recorded aspect of these features, such as a facial photograph or a video, is subject to protection under federal copyright law, the human identity that they identify is not protected by copyright.").

[109] 15 U.S.C. § 45(a)(1). Many states have unfair competition laws that target similar business practices and prohibit deceptive or misleading conduct in commercial activities. *See, e.g.*, CAL. BUS. & PROF. CODE § 17200 (West 2024) (providing that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising"); MASS. GEN. LAWS ch. 93A, § 11 (2024) (providing a

rules against deceptive advertising and unfair trade practices encompass the misleading use of individuals' identities.

The FTC submitted comments in response to the Office's NOI. It explained that it is empowered to protect the public against deceptive and unfair uses of AI technologies that harm competition, and "there is no AI exemption from the laws on the books."[110] According to the FTC, the use of a digital replica that mimics an individual's voice and likeness might qualify as an unfair method of competition or an unfair or deceptive practice, particularly if it "deceives consumers, exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers."[111]

The FTC is also exploring issues related to digital replicas in its ongoing rulemaking to amend its Rule on Impersonation of Government and Businesses.[112] Concurrent with the promulgation of the Impersonation Rule,[113] it issued a supplemental notice requesting comments on the Rule's expansion to prohibit the impersonation of individuals and to extend liability to parties who provide goods and services with knowledge or reason to know that they will be used in impersonations that are unlawful under the Impersonation Rule.[114] The proposed prohibition is meant to address misrepresentations that the person is, or is affiliated with, the impersonated individual, including those that use "identifying information, or insignia or likeness of an individual."[115] Digital replicas, including voice cloning, would be covered.[116]

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cause of action for those who engage in trade or commerce who suffer loss "as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice"). Because these laws largely parallel the protections provided by the FTC Act and the Lanham Act, we do not discuss them separately.

[110] FTC Initial Comments at 3–4, 6, 8 ("The FTC is empowered under Section 5 of the FTC Act to protect the public against unfair methods of competition, including when powerful firms unfairly use AI technologies in a manner that tends to harm competitive conditions.").

[111] *Id.* at 4–6.

[112] Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15072 (Mar. 1, 2024) ("Impersonation Rule"), https://www.govinfo.gov/content/pkg/FR-2024-03-01/pdf/2024-03793.pdf.

[113] Trade Regulation Rule on Impersonation of Government and Businesses, 89 Fed. Reg. 15017 (Mar. 1, 2024) (to be codified at 16 C.F.R. pt. 461), https://www.govinfo.gov/content/pkg/FR-2024-03-01/pdf/2024-04335.pdf.

[114] Impersonation Rule at 15072. The supplemental notice proposes defining "Individual" in 16 C.F.R. section 461.4 to mean "a person, entity, or party, whether real or fictitious, other than those that constitute a business or government under this Part." This definition may include deceased persons.

[115] *Id.* at 15077.

[116] *Id.* at 15082 n.98 ("[T]he use of voice cloning for purposes of impersonation is covered where its use satisfies the Rule's prohibitions. Audio deepfakes, including voice cloning, are generated, edited, or synthesized by artificial intelligence, or 'AI,' to create fake audio that seems real.").

In a statement accompanying the final rule on government and business impersonation and describing the supplemental notice, FTC Chair Lina Khan, joined by Commissioners Rebecca Kelly Slaughter and Alvaro Bedoya, highlighted the proliferation of AI-enabled fraud, such as voice cloning used to impersonate individuals regardless of whether they are celebrities.[117] This statement noted that the extension of "means and instrumentalities" liability could apply to persons or entities, including AI developers, "who knew or should have known that their AI software tool designed to generate deepfakes of IRS officials would be used by scammers to deceive people about whether they paid their taxes."[118]

c) Lanham Act

The Lanham Act is the federal trademark law and addresses certain acts of unfair competition. It prohibits deceptive and misleading uses of marks and unfair competition, and fraud and deception in commerce, among other things.[119] Several commenters noted that third-party uses of a digital replica without authorization could constitute false endorsement under the Lanham Act.[120] They cited cases where Lanham Act claims were successful based on unauthorized uses of aspects of plaintiffs' identities, such as soundalikes and lookalikes in advertising.[121] In some circumstances a celebrity or performer may be able to demonstrate that

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[117] 89 Fed. Reg. 15017, 15030–31 (to be codified at 16 C.F.R. pt. 461) (statement of Chair Lina M. Khan joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya).

[118] *Id.* at 15031 (to be codified at 16 C.F.R. pt. 461) (statement of Chair Lina M. Khan joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya).

[119] 15 U.S.C. § 1127. In March 2024, the U.S. Patent and Trademark Office held a public symposium on intellectual property and AI, which included a panel discussion titled "AI, NIL, and the Lanham Act," which addressed the legal and policy considerations related to name, image, and likeness, and the intersection with generative AI. *See Public Symposium on AI and IP*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/about-us/events/public-symposium-ai-and-ip (last visited July 21, 2024).

[120] Section 43(a) of the Lanham Act establishes liability for using in commerce "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which[] is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person," or which "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a)(1). For comments related to the Lanham Act, see, *e.g.*, International Trademark Association ("INTA"), Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023) ("INTA Initial Comments"); Jennifer Rothman Initial Comments at 3; American Intellectual Property Law Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 15 (Oct. 30, 2023); SAG-AFTRA Initial Comments at 5; Kernochan Center for Law, Media and the Arts, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 16 (Oct. 30, 2023).

[121] *E.g.*, UMG Initial Comments at 93 (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992)).

their voice or a particular pose has achieved trademark status as the basis for a successful claim.[122]

Both false endorsement and trademark infringement claims require proof of commercial use and a likelihood of consumer confusion, mistake, or deceit. The Lanham Act specifies that the defendant's use must be "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[123] It may be difficult for many individuals, including artists and performers, to prove that the challenged conduct is likely to confuse consumers regarding the plaintiff's association with, or approval of, the defendant's commercial activities. And as INTA noted, AI-generated "revenge porn" would likely fall beyond its reach.[124]

d) Communications Act

The Federal Communications Commission ("FCC") has taken action to regulate digital replicas and to authorize state Attorneys General to do the same. In 2023, it published a Notice of Inquiry on the use of AI-generated voice clones in robocall scams targeting consumers.[125] Following this inquiry, pursuant to the Telephone Consumer Protection Act, the FCC unanimously adopted a declaratory ruling "mak[ing] voice cloning technology used in common robocall scams targeting consumers illegal,"[126] and giving state Attorneys General authority to enforce the rule. FCC Chair Jessica Rosenworcel explained, "Bad actors are using AI-generated

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[122] *See, e.g.*, INTA Initial Comments at 7 (quoting *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 922 (6th Cir. 2003), for the "general rule" that "a person's image or likeness cannot function as a trademark," unless "a particular photograph was consistently used on specific goods"); Law Office of Seth Polansky LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 37 (Oct. 12, 2023) ("Seth Polansky Initial Comments"); *Presley's Est. v. Russen*, 513 F. Supp. 1339, 1364–65 (D.N.J. 1981) (noting that while the assertion that Elvis's likeness and image serve as a service mark is too broad, that "a picture or illustration of Elvis Presley dressed in one of his characteristic jumpsuits and holding a microphone in a singing pose is likely to be found to function as a service mark," and ultimately finding a likelihood of success on the merits of an infringement claim as to that mark).

[123] 15 U.S.C. § 1125(a).

[124] INTA Initial Comments at 8.

[125] FCC, Notice of Inquiry on Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, CG Docket No. 23-362 (Nov. 16, 2023), https://docs.fcc.gov/public/attachments/FCC-23-101A1.pdf.

[126] *FCC Makes AI-Generated Voices in Robocalls Illegal*, FCC (Feb. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-400393A1.pdf; *see* FCC, Declaratory Ruling on Implications of Artificial Intelligence Technologies on Protecting Consumers from Unwanted Robocalls and Robotexts, CG Docket No. 23-362 (Feb. 2, 2024), https://docs.fcc.gov/public/attachments/FCC-24-17A1.pdf.

voices in unsolicited robocalls to extort vulnerable family members, imitate celebrities, and misinform voters. We're putting the fraudsters behind these robocalls on notice."[127]

3. Private Agreements

Beyond these statutory and common law protections, private contracts can be negotiated to govern the use of individuals' names or likenesses. Performer service agreements, for example, often include terms proscribing whether and how the other contracting party can use the performer's identity. These usually cover use of the performer's name, image, voice, or likeness for the purpose of promoting the works in which the performer appeared.[128] They may be structured to allow only limited uses, for instance through time-limited grants and restrictions to a particular performance or context, or they may grant broad control, such as an assignment in perpetuity on an exclusive basis.[129] With the advent of AI, some agreements now include specific terms for the use of digital replicas. Talent agency WME, for example, described deals for the use of its clients' likenesses and personalities in connection with AI experiences and products.[130]

In the entertainment field, collective bargaining agreements that establish baseline employment terms have begun to include provisions on the treatment of AI-generated replicas. In December 2023, SAG-AFTRA ratified a multi-year agreement with the Alliance of Motion Picture and Television Producers ("AMPTP") that incorporates new provisions related to the

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[127] *FCC Makes AI-Generated Voices in Robocalls Illegal*, FCC (Feb. 8, 2024), https://docs.fcc.gov/public/attachments/DOC-400393A1.pdf.

[128] 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 10:48 (2d ed. 2024) ("When an actor or performer contracts with a producer to perform in a motion picture or record a phonorecord, the actor or performer commonly signs a contract which includes a 'grant of rights' clause. A 'grant of rights' clause typically assigns copyright in the work to the producer and exclusively licenses the producer to use the actor or performer's identity in advertising and promotion of the work.").

[129] *See* JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 120 (2018); *see also id.* at 122 ("Although many of these voluntary assignments are limited in various ways, to particular time periods, or to the context of telecasts, or to a particular photograph, they are often broader—and can be perpetual and cover all uses of a person's identity in any context."). Contract terms made public through litigation provide some examples of the range and breadth of such agreements. *See, e.g.*, *In re Jackson*, 972 F.3d at 31 (recording agreement granting a label term-limited exclusive rights, and non-exclusive rights thereafter, to use the artist's name and likeness for advertising and marketing covered sound recordings and videos); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 816 n.2 (Cal. 1979) (grant of rights clause for a film included, in part, the right to use and publicize "the artist's name and likeness, photographic or otherwise, and to recordations and reproductions of the artist's voice and all instrumental, musical and other sound effects produced by the artist hereunder, in connection with the advertising and exploitation of said photoplay" (emphasis omitted)).

[130] WME Initial Comments at 2 ("WME has already worked with its clients to negotiate AI-specific deals . . . [such as] a deal to lend Snoop Dogg's voice to the AI app Artifact, and deals between Meta and WME's clients to lend their likenesses and personalities to a series of AI-powered chatbots.").

creation and use of digital replicas produced by AI.[131] The ratification was the culmination of a months-long strike, in which this was among the issues "at the forefront."[132] The agreement's final terms establish guidelines related to consent, compensation, and exceptions for replicas created outside the scope of employment if the intended use is protected by the First Amendment.[133] First Amendment-protected uses are specified to include those "for purposes of comment, criticism, scholarship, satire or parody, or . . . use in a docudrama, or historical or biographical work."[134] Similar protections have been negotiated for voice actors and recording artists with respect to voice replicas.[135]

As AI technology continues to evolve, tailored private agreements are likely to become more common.[136] It may be unrealistic, however, to expect such agreements to extend to many other industries, particularly outside of the collective bargaining context.

B. The Need for Federal Legislation

The Copyright Office concludes that new federal legislation is urgently needed. As numerous commenters noted, generative AI technology enables the production and dissemination of digital replicas at a speed and scale that calls for a national response.[137]

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[131] Memorandum of Agreement Between the SAG-AFTRA and the AMPTP 60–76 (2023) ("SAG-AFTRA 2023 Agreement"), https://www.sagaftra.org/files/2023_Theatrical_Television_MOA.pdf.

[132] SAG-AFTRA Initial Comments at 1 ("[M]any of our members have identified AI as their number one issue, more important to them than increases in wages or improvements in other working conditions, because it poses an existential threat to their very livelihoods.").

[133] SAG-AFTRA 2023 Agreement at 60–76.

[134] *Id.* at 67.

[135] In January 2024, SAG-AFTRA entered into an agreement with Replica Studios covering the use of digital voice replicas by video game studios, and in April 2024, its members ratified an agreement with several major record labels regarding the use of voice replicas in sound recordings. Both agreements include provisions regarding consent and compensation. *SAG-AFTRA and Replica Studios Introduce Groundbreaking AI Voice Agreement at CES*, SAG-AFTRA (Jan. 9, 2024), https://www.sagaftra.org/sag-aftra-and-replica-studios-introduce-groundbreaking-ai-voice-agreement-ces; *SAG-AFTRA Members Ratify 2024 Sound Recordings Code Contract*, SAG-AFTRA (Apr. 30, 2024), https://www.sagaftra.org/sag-aftra-members-ratify-2024-sound-recordings-code-contract.

[136] More recently, in June 2024, the International Alliance of Theatrical Stage Employees ("IATSE") and AMPTP reached a tentative agreement covering requests and consent to "scan" employees. *Tentative 2024–2027 Basic Agreement Summary* at 5, IATSE (2024), https://iatse.net/wp-content/uploads/2024/06/2024-SUMMARY-OF-BASIC-AGREEMENT-NEGOTIATIONS_6.28.24-FINAL.pdf.

[137] *See*, *e.g.*, American Society of Composers, Authors and Publishers, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 13 (Oct. 30, 2023) ("[T]he ubiquity and scale of this new technology requires a robust federal law ensuring that creators' rights are adequately protected."); Songwriters of North America ("SONA") et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of

The impact is not limited to a select group of individuals, a particular industry, or a geographic location. And as described below, existing laws fail to provide fully adequate protection.

1. Shortcomings of Existing Laws

State laws are both inconsistent and insufficient in various respects. As described above, some states currently do not provide rights of publicity and privacy,[138] while others only protect certain categories of individuals.[139] Multiple states require a showing that the individual's identity has commercial value.[140] Not all states' laws protect an individual's voice; those that do may limit protection to distinct and well-known voices, to voices with commercial value,[141] or to use of actual voices without consent (rather than a digital replica).[142]

State right of publicity laws typically apply only where the infringement occurs in advertising, on merchandise, or for other commercial purposes.[143] They do not address the harms that can be inflicted by non-commercial uses, including deepfake pornography, which are particularly prevalent in the internet environment.[144] Different jurisdictional requirements create discrepancies as to who may seek relief.[145] Finally, some of these laws incorporate broad exceptions that may go beyond First Amendment requirements and place many unauthorized uses outside their scope.[146] As numerous commenters noted, the result is a patchwork of protections, with the availability of a remedy dependent on where the affected individual lives or where the unauthorized use occurred.

Inquiry at 10–11 (Oct. 30, 2023) ("SONA-MAC-BMAC Joint Initial Comments") ("We feel strongly that new federal legislation is needed for the protection of a person's identification – their image, voice, characterization, and other likenesses."); WME Initial Comments at 5–6; *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Jennifer Rothman, Professor of Law, University of Pennsylvania, in response to Questions for the Record ("QFRs") from Rep. Darrell Issa) ("Recent advancements in AI . . . highlight some preexisting challenges because the scale of the problem of unauthorized uses of a person's identity has grown.").

[138] 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY § 6:2 (2d ed. 2024).

[139] *See supra* notes 72–74 and accompanying text.

[140] *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (2024); OHIO REV. CODE ANN. §§ 2741.01, 2741.02 (West 2024).

[141] *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (2024); OHIO REV. CODE ANN. §§ 2741.01(A), 2741.02 (West 2024).

[142] *See, e.g., Midler*, 849 F.2d at 463 (concluding that the California right of publicity statute does not encompass voice imitations but holding that, under California common law, "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California.").

[143] *See, e.g.*, 765 ILL. COMP. STAT. ANN. 1075/30 (2024); VA. CODE ANN. § 8.01-40 (2024); FLA. STAT. § 540.08 (2024).

[144] *See supra* Section II.A.1.b.

[145] *See id.*

[146] *See, e.g.*, OHIO REV. CODE ANN. § 2741.09(A)(1)(a) (West 2024); *see also infra* Section II.B.3.f.

Existing federal laws are too narrowly drawn to fully address the harm from today's sophisticated digital replicas. As explained above, the Copyright Act protects original works of authorship but does not prevent the unauthorized duplication of an individual's image or voice alone,[147] and the targeted individual may not be an owner of copyright in the work as a whole.[148]

The Federal Trade Commission Act prohibits unfair or deceptive acts or practices in or affecting commerce.[149] While it can be applied to cases where digital replicas are used in commercially misleading ways, it does not provide comprehensive protection in other circumstances. Similarly, under the Lanham Act, claims such as false endorsement involving a digital replica are limited to unauthorized *commercial* uses, and most federal courts also require a showing of consumer awareness of the depicted individual in order to establish a likelihood of confusion, limiting the Lanham Act's protection to well-known figures and commercial circumstances. It may be difficult for many individuals, including less famous artists and performers, to prove that the challenged conduct is likely to confuse consumers regarding the plaintiff's association with, or approval of, the defendant's commercial activities. And issues like AI-generated "revenge porn" would likely fall beyond its reach.[150]

Nor can federal communications law address all of the issues raised by unauthorized digital replicas. It only provides the FCC with enforcement powers related to its authority over common carrier services, transmissions, and cable services.[151] The agency's efforts to combat robocall scams stem from its authority related to telephony issues and can help with that particular context. It does not offer a comprehensive solution that could extend more broadly to situations where the use and dissemination of digital replicas may be common, but are not under the FCC's enforcement purview, such as websites featuring user-generated content.

2. Congressional Activity

The Office's recommendations here are presented against the backdrop of ongoing congressional activity.[152] Members of Congress have warned that AI-generated digital replicas have the potential to exacerbate problems of copyright infringement, as well as labor

[147] *See* 17 U.S.C. § 102; *see also supra* Section II.A.2.a.

[148] *See* 17 U.S.C. § 102(a); *id.* § 201(a).

[149] *See* 15 U.S.C. § 45(a)(1).

[150] INTA Initial Comments at 8.

[151] *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

[152] This discussion reflects relevant Congressional activity that has occurred before July 22, 2024.

displacement and election misinformation.[153] At a hearing last year on AI and copyright, Senator Chris Coons inquired "whether changes to our copyright laws or whole new protections like a federal right of publicity may be necessary to strike the right balance between creators' rights and AI's ability to enhance innovation and creativity."[154]

Legislation has been introduced to address unauthorized digital replicas in various contexts, including political advertisements and communications[155] and sexually explicit images.[156] These bills include the Preventing Deepfakes of Intimate Images Act,[157] which would make it a crime to intentionally disclose or threaten to disclose AI-generated intimate digital depictions; the REAL Political Advertisements Act,[158] which would require political advertisements to disclaim the use of AI-generated sounds or images; and the Protect Elections from Deceptive AI Act,[159] which would make it a crime to distribute deceptive AI-generated media relating to federal elections.

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[153] The Office is aware that name, image, and likeness issues related to college athletes have also received recent congressional attention. These issues differ from those examined in various aspects here and are beyond the scope of this Report. They arise out of the 2021 Supreme Court decision, *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021), which held in part that NCAA limits on college athlete compensation violated antitrust laws. While the *Alston* case was pending, many states enacted laws to recognize and regulate publicity rights for college athletes. *See generally* Maureen A. Weston, *Off the Guardrails: Opportunities and Caveats for Name Image Likeness and the [Student] Athlete Influencer*, 11 TEXAS A&M L. REV. 911 (2024), https://ssrn.com/abstract=4734794.

[154] *Artificial Intelligence and Intellectual Property—Part II: Copyright: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2023) (statement of Sen. Chris Coons, Chair, S. Subcomm. on Intell. Prop.). The House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet and the Senate Judiciary Subcommittee on Intellectual Property both held hearings focused on the misuse of AI technology with respect to the likeness, voice, and other identifying characteristics of individuals. *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary,* 118th Cong. (2024); *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024); *Oversight of AI: Election Deepfakes: Hearing Before the Subcomm. on Priv., Tech., & the Law of the S. Comm. on the Judiciary*, 118th Cong. (2024); *see also At Senate Judiciary Subcommittee Hearing, Klobuchar Urges Action to Address Deepfakes in Elections*, AMY KLOBUCHAR, SENATOR (Apr. 16, 2024), https://www.klobuchar.senate.gov/public/index.cfm/2024/4/at-senate-judiciary-subcommittee-hearing-klobuchar-urges-action-to-address-deepfakes-in-elections.

[155] REAL Political Advertisements Act, H.R. 3044, 118th Cong. (2023); Candidate Voice Fraud Prohibition Act, H.R. 4611, 118th Cong. (2023); REAL Political Advertisements Act, S. 1596, 118th Cong. (2023); Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. (2023).

[156] Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Cong. (2023); Protect Victims of Digital Exploitation and Manipulation Act of 2024, H.R. 7567, 118th Cong. (2024); DEFIANCE Act of 2024, S.3696, 118th Cong. (2024); TAKE IT DOWN Act of 2024, S.4569, 118th Cong. (2024).

[157] Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Cong. (2023).

[158] REAL Political Advertisements Act, S. 1596, 118th Cong. (2023); REAL Political Advertisements Act, H.R. 3044, 118th Cong. (2023)

[159] Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. (2023).

To date, two congressional proposals would address the unauthorized use of digital replicas more broadly: the No Artificial Intelligence Fake Replicas And Unauthorized Duplications ("No AI FRAUD") Act,[160] and the discussion draft of the Nurture Originals, Foster Art, and Keep Entertainment Safe ("NO FAKES") Act of 2023.[161] A number of commenters specifically referenced these two proposals and were generally supportive.[162]

a) No AI FRAUD Act

Introduced in early 2024, the No AI FRAUD Act would establish intellectual property rights in voice and likeness[163] and protect against the use of unauthorized digital voice replicas and digital depictions that readily identify an individual.[164] The bill would allow these rights to be transferred during the individual's lifetime and would make them descendible.[165] Rights would endure at least ten years after the death of the individual, even if they had not been used commercially during their lifetime, and would continue until either (a) proof that they had not been used commercially in a two-year period by an executor, transferee, heir, or devisee; or (b) the death of all executors, transferees, heirs, or devisees.[166]

The legislation would require any authorization to use a digital depiction or digital voice replica to be in writing and valid only if the individual is represented by counsel. If the individual is a minor, the agreement must be approved by a court in accordance with state

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[160] No AI FRAUD Act, H.R. 6943, 118th Cong. (2024).

[161] Sen. Chris Coons et al., NO FAKES Act Discussion Draft (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf. The COPIED Act, introduced in July 2024, establishes rules regarding the attachment of content provenance information for synthetic content, such as digital replicas, but does not provide new rights to individuals. *See* The COPIED Act, S. 4674, 118th Cong. (2024).

[162] *See, e.g.*, SAG-AFTRA Initial Comments at 7–8; Sandra Aistars, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20 (Oct. 30, 2023); Independent Music Publishers International Forum, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 2–3 (Oct. 30, 2023); Dina LaPolt, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9–10 (Oct. 30, 2023) ("Dina LaPolt Initial Comments").

[163] No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(b)(1)–(2) (2024).

[164] A "digital depiction" is a "replica, imitation, or approximation" of an individual's "likeness," which is defined as an actual or simulated image or likeness that is "readily identifiable as the individual." *Id.* § 3(a)(2), (6) (2024). The bill defines "voice" as an actual or simulated voice that is "readily identifiable" as the depicted individual, while a "digital voice replica" is an audio rendering that includes "replications, imitations, or approximations of an individual that the individual did not actually perform." *Id.* § 3(a)(4)–(5).

[165] *Id.* § 3(b)(2)–(3).

[166] *Id.* § 3(b)(2)–(3).

law.[167] Authorization would also be valid if governed by the terms of a collective bargaining agreement.[168]

The bill would impose direct liability for disseminating a digital voice replica or digital depiction with knowledge that it is not authorized,[169] and for trafficking in a "personalized cloning service" designed to produce digital voice replicas or digital depictions of particular individuals.[170] It would establish secondary liability for any person or entity who "materially contributes to, directs, or otherwise facilitates" directly infringing activity with knowledge that the rightsholder has not consented.[171]

To accommodate the First Amendment, the bill provides a list of factors for a court to consider in balancing the public interest against the private digital replica right.[172] This balancing framework is not required, however, if the digital depiction "includes child sexual abuse material, is sexually explicit, or includes intimate images."[173]

Potential remedies include statutory or actual damages, whichever is greater, lost profits, punitive damages, and attorney's fees.[174] The bill categorizes the law as intellectual property for the purposes of Section 230 of the Communications Decency Act.[175] It expressly does not preempt any state or federal laws.[176]

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[167] *Id.* § 3(b)(4)(A).

[168] *Id.* § 3(b)(4)(B).

[169] Specifically, any person or entity who "publishes, performs, distributes, transmits, or otherwise makes [it] available to the public." *Id.* § 3(c)(1)(B).

[170] *Id.* § 3(a)(3), (c)(1)(A). The bill does not incorporate a knowledge requirement for this violation.

[171] *Id.* § 3(c)(1)(C). The bill does not provide safe harbors, and a disclaimer is not a defense for any infringing activity. *Id.* § 3(c)(2)(D).

[172] *Id.* § 3(d). These factors include whether "(1) the use is commercial; (2) the individual whose voice or likeness is at issue is necessary for and relevant to the primary expressive purpose of the work in which the use appears; and (3) the use competes with or otherwise adversely affects the value of the work of the owner or licensee of the voice or likeness rights at issue." *Id.*

[173] *Id.* § 3(e)(3).

[174] *Id.* § 3(c)(2)(A)–(C).

[175] *Id.* § 3(j); *see infra* Section II.B.3.d.iii.

[176] No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(g) (2024).

b) NO FAKES Act Discussion Draft

The NO FAKES Act discussion draft provides for a right "to authorize the use of the image, voice, or visual likeness of the individual in a digital replica."[177] The right is a descendible and licensable property right that continues for 70 years after the individual's death, even if it is not exploited during their lifetime.[178] Licensing of the right is valid only if the individual is represented by counsel; the agreement is in writing; or the license is governed by a collective bargaining agreement.[179]

The draft bill imposes liability for producing and disseminating a digital replica without consent.[180] It conditions liability on "knowledge that the digital replica was not authorized by the applicable individual or rights holder."[181] The draft includes a list of categorical exclusions from liability, including the use of digital replicas in news, public affairs, or sports broadcasts; in documentary, historical, or biographical works; for comment, criticism, scholarship, satire, or parody; and where the use is *de minimis* or incidental.[182]

Potential remedies include statutory or actual damages, whichever is greater; punitive damages; and attorney's fees.[183] The bill categorizes the law as an intellectual property law for the purposes of Section 230 of the Communications Decency Act.[184] It expressly does not preempt other state or federal laws.[185]

3. The Contours of a New Right

In response to our NOI, the Office received extensive input on the contours of a new digital replica right. After reviewing the comments, existing law, and the current legislative proposals, we have identified the following critical elements: (1) the definition of "digital

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[177] Sen. Coons et al., NO FAKES Act Discussion Draft § 2(b)(1) (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf. The draft bill defines a "digital replica" as a representation that "is [nearly indistinguishable]" from an individual's actual image, voice, or visual likeness, and is fixed in a sound recording or audiovisual work. *Id.* § 2(a)(1).

[178] *Id.* § 2(b)(2)(A).

[179] *Id.* § 2(b)(2)(B).

[180] *Id.* § 2(c)(2).

[181] *Id.* § 2(c)(2)(B). The draft bill does not provide safe harbors for any activity. Displaying a disclaimer or not having participated in the "creation, development, distribution, or dissemination" of the digital replica is not a defense. *Id.* § 2(d)(3).

[182] *Id.* § 2(c)(3).

[183] *Id.* § 2(d)(4).

[184] *Id.* § 2(f); *see infra* Section II.B.3.d.iii.

[185] Sen. Chris Coons et al., NO FAKES Act Discussion Draft § 2(e) (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf.

replica;" (2) the persons protected; (3) the term of protection; (4) prohibited acts; (5) secondary liability; (6) licenses and assignments; (7) accommodation of First Amendment concerns; (8) remedies; and (9) interaction with state laws.[186]

a) Subject Matter

In this Report, we have defined "digital replica" as "a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual."[187] A new bill will have to include text that precisely prescribes the subject matter it seeks to protect. Although the Office did not receive comments proposing definitions, in our view the new right should not sweep too broadly. As discussed above, state rights of publicity have been interpreted to cover a broad range of imitations or evocations, including catch phrases or caricatures.[188] But the conduct that now demands federal attention—such as voice cloning in music and the creation of a video or image that appears to depict a real person—involves replicas that do not merely evoke an individual but are difficult to distinguish from reality. We recommend that federal law target replicas that convincingly appear to be the actual individual being replicated.

b) Persons Protected

As discussed above, state rights of publicity and related laws vary significantly in the persons that are protected. Some protect only those who can demonstrate that they are famous or that their identities have commercial value.[189]

Multiple commenters advocated for a federal right that extends protection to all individuals regardless of their level of fame or the commercial value of their identities.[190] They

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[186] There are other issues on which the NOI did not seek comment and which this Report does not discuss in detail. These include the statute of limitations, retroactivity, and whether federal courts should have exclusive jurisdiction.

[187] *See supra* Section I.A.

[188] *See supra* Section II.A.1.

[189] *See, e.g.*, IND. CODE ANN. § 32-36-1-6 (2024) (defining subject of right of publicity protections as a natural person who possesses an attribute (such as name, voice, image, or likeness) that has commercial value); OHIO REV. CODE §§ 2741.01(A), 2741.02 (2024) (protecting "an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value").

[190] *See, e.g.*, David Newhoff, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 7, 2023) ("David Newhoff Initial Comments") ("If ROP law is expanded, it should . . . apply to all persons, not just celebrities . . . ."); Walker Wambsganss et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 5 (Oct. 26, 2023) ("Walker Wambsganss et al. Initial Comments") ("[M]inimum standards should be set again including but not limited to, . . . obtain[ing] consent of an individual's likeness of AI-generated content regardless of their public or private status . . . ."); Internet Archive, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11–12 (Oct. 30, 2023) ("Internet

pointed out that everyone has a legitimate interest in controlling the use of their likenesses, and harms such as blackmail, bullying, defamation, and use in pornography are not suffered only by celebrities.[191] While a famous performer might be more susceptible to an AI-generated sound recording topping the music charts, any member of the public could be on the receiving end of a robocall imitating a close family member, or the subject of an explicit image used to humiliate them.[192] Protecting all individuals is consistent with the common law right of privacy, which typically requires neither fame nor commercial value.[193]

The Office believes that the goal of enacting a federal digital replica law is to ensure that everyone has adequate protection and recommends that the law cover all individuals.

c) Term of Protection

The appropriate term of protection is the subject of some debate. Should protection continue after death, allowing heirs or assigns to control exploitation of the deceased's voice and image? As discussed above, a number of states provide postmortem protection for rights of publicity, with protections varying in duration and conditions such as continuing commercial exploitation.

The Office received several comments on this issue. Talent agency WME argued in favor of postmortem rights, stating that "[u]nauthorized deepfakes threaten to usurp estates' valid interests in preserving and strengthening artists' legacies through the *legitimate* use of AI" and may detract from the authenticity, credibility, and commercial value of an artist's body of work.[194] Some courts and commentators have reasoned that postmortem rights promote

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Archive Initial Comments") ("The public deserves the right to exist in online spaces without being constantly surveilled, and the right to not have our likeness used in ways that humiliate, harass, or abuse us."); INTA Initial Comments at 10–11 (Basic standards for a federal right of publicity should include that "[a]n individual claimant need not make commercial use of his or her persona to have a right of publicity.").

[191] *See, e.g.*, Jennifer Rothman Initial Comments at 5 ("Many ordinary people have their names, likenesses, and voices used without their permission in ways that cause significant harm, including reputational and commercial injuries. There should be no requirement to have a commercially valuable identity to bring a claim."); Internet Archive Initial Comments at 12 ("It would be unfair to hand out rights to celebrities that would allow them to control how their image is collected, processed and used, but not have any protections for the general public.").

[192] *See supra* Section I.A.

[193] *See supra* Section II.A.1.a.

[194] WME Initial Comments at 4. A number of other groups and individuals also supported postmortem protection. *See, e.g.*, INTA Initial Comments at 11; Letter from RIAA, Summary of *Ex Parte* Meeting on April 23, 2024 Regarding the Office's AI Study, to U.S. Copyright Office (Apr. 29, 2024); *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of FKA twigs, Singer, Songwriter, Producer, Dancer, and Actor, in response to QFRs from Sen. Thom Tillis) ("[T]he NO FAKES Act[] should also provide for protection of the artist's rights and image after their death in perpetuity.").

investment in the deceased's legacy,[195] protect the value of assignments made before death,[196] prevent exploitation that heirs and assigns find objectionable or offensive,[197] and conform to the treatment of other types of property.[198]

Support for a postmortem right, however, was not unanimous. Others asserted that there is a less compelling government interest in such protection, making its application to expressive content more vulnerable to First Amendment challenge.[199] It has also been argued that postmortem rights offer little value as a motivating force for creative endeavors.[200] Moreover, to the extent that rights in one's image, voice, and likeness are personal in nature and rooted in privacy, the interests protected do not survive death and generally are not descendible

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[195] *See Martin Luther King Jr., Ctr. for Soc. Change v. Am. Heritage Prods.*, 694 F.2d 674, 682 (11th Cir. 1983) ("If the right of publicity dies with the celebrity, the economic value of the right of publicity during life would be diminished because the celebrity's untimely death would seriously impair, if not destroy, the value of the right of continued commercial use."); *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 99 n.11 (Tenn. Ct. App. 1987) (holding that the law should recognize a celebrity's expectation that he or she is creating a valuable capital asset for the benefit of heirs after death). *Cf.* Peter Felcher & Edward Rubin, *The Descendibility of the Right of Publicity: Is There Commercial Life After Death?*, 89 Yale L.J. 1125, 1128–29 (1980).

[196] *See Martin Luther King Jr., Ctr. for Soc. Change*, 694 F.2d at 705.

[197] Marc A. Lieberstein, *Why a Reasonable Right of Publicity Should Survive Death: A Rebuttal* at 9, 10, NYSBA BRIGHT IDEAS (2008) ("Without a post-mortem right of publicity, [Marilyn] Monroe's name or likeness could show up on portable toilets. Such offensive, unauthorized uses of Monroe's persona are a real possibility absent reasonable legislation that would permit the heirs and/or other authorized entities to regulate use of the publicity right after death.").

[198] *See, e.g.*, *State ex rel. Elvis Presley Int'l Mem'l Found.*, 733 S.W.2d at 97–98 ("If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death.").

[199] *E.g.*, Letter from MPA, Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 5 (May 20, 2024).

[200] As the Sixth Circuit put it in *Memphis Development Foundation v. Factors Etc., Inc.*, before Tennessee adopted postmortem rights legislation, "[t]he desire to exploit fame for the commercial advantage of one's heirs is . . . a weak principle of motivation." 616. F.2d 956, 959 (6th Cir. 1980).

to one's heirs.[201] One commenter warned that postmortem rights could reduce investment in living artists by shifting it to "digitally-resurrected" celebrities.[202]

In addition to these policy arguments, postmortem rights can pose practical challenges. For example, identifying the individual or entity that controls these rights may be difficult, depending on how the rights were bequeathed. INTA suggested addressing the uncertainty around the holder of postmortem rights though a non-mandatory registration system that would provide "public notice that such rights are being claimed, and provide contact information for the use of such rights."[203]

Taking into account all of these points, the Office makes the following recommendation: A federal digital replica right should prioritize the protection of the livelihoods of working artists, the dignity of living persons, and the security of the public from fraud and misinformation regarding current events. For these purposes, a postmortem term is not necessary.

At the same time, we recognize that there is a reasonable argument for allowing heirs to control the use of and benefit from a deceased individual's persona that had commercial value at the time of death. If postmortem rights are provided in a new federal law, we would recommend an initial term shorter than twenty years, perhaps with the option of extending it if

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[201] This point is consistent with the approach taken in the Visual Artists Rights Act, which protects the moral rights of artists to control their work and reputation via copyright law only during the life of the author. 17 U.S.C. § 106A(d)(1). *See Lugosi v. Universal Pictures*, 603 P.2d 425, 431 (Cal. 1979) ("We hold that the right to exploit name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime."); *see also The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Benjamin Sheffner, Senior Vice President & Associate General Counsel, MPA) ("Any interest in a performer's reputation or dignity is already governed by defamation and privacy law, which is personal to the individual at issue. But recognizing dignitary interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in centuries of American law, under which 'there can be no defamation of the dead.'" (quoting RESTATEMENT (SECOND) OF TORTS § 560 (AM. L. INST. 1977))).

[202] Jennifer Rothman Initial Comments at 6 ("A federal postmortem right may shore up the replacement of up-and-coming performers with long-dead celebrities."). *Cf.* Mark Bartholomew, *A Right to Be Left Dead*, CALIF. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4610679 ("Because dead celebrities no longer have the capacity to make unpredictable choices in their personal lives that can jeopardize their corporate sponsor's relationship with the public, they represent a more stable investment than their living counterparts. . . . Dead stars also come cheaper as company spokespersons than live ones—an obvious point in their favor when constructing a marketing campaign on a limited budget.").

[203] INTA Initial Comments at 10–11 ("Where practicable, a non-mandatory post-mortem registration system would assist . . . in proving public notice that such rights are being claimed, and provide contact information for the use of such rights. . . . There could be incentives to register the claim of rights, such as reserving the ability to obtain monetary relief to only those valid rights holders who registered their claim prior to the commencement of the unauthorized use.").

the persona continues to be commercially exploited.[204] This approach would not pose the same burden to free expression interests or raise as many practical challenges as a long-term or perpetual right.[205] We note that to the extent the federal law is not fully preemptive, as discussed below, states could still offer a longer term.

d) Infringing Acts

The Office received relatively few comments addressing the scope of the conduct to be prohibited and the allocation of liability.

Regarding the baseline acts that a law should cover, we recommend proscribing activities that involve dissemination to the public—in copyright terms, the acts of distribution, publication, public performance, display, or making available. In our view, this is the type of conduct likely to cause harm to the individual whose image or voice is being replicated.

In contrast, the creation of a digital replica in itself could be part of an artist's experimental process or for a consumer's personal entertainment. Such purely personal use would ordinarily be innocuous and can foster further creativity.[206] If Congress were to impose liability for the mere act of creation, it would be advisable to include a defense for legitimate and reasonable private uses. This does not mean, however, that the act of creation could not be the basis for liability where it is a knowing part of a broader distribution scheme[207] or violates other laws.[208]

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[204] *Cf.* 15 U.S.C. §§ 1058–59 (providing for successive renewals of trademark registrations so long as there is continued use in commerce). The longer term of copyright protection, in contrast, is intended to incentivize the creation of original works in order to promote progress.

[205] Even a short postmortem term could benefit from something like the voluntary registry INTA proposes in order to clarify the status of postmortem rights and facilitate licensing. Among states with right of publicity laws, California, Oklahoma, and Texas all have registration regimes through which descendants of rightsholders may publicly register their rights with the government. CAL. CIV. CODE § 3344.1 (West 2024) (registration is required in order to recover damages); OKLA. STAT. ANN. tit. 12, § 1448(F)(2) (2024) (same); TEX. PROP. CODE ANN. § 26.006 (West 2023) (registration is prima facie evidence of a valid claim to a property right).

[206] In the copyright context, see, *e.g.*, *Chapman v. Maraj*, No. 2:18-cv-9088, 2020 WL 6260021, at *10 (C.D. Cal. Sep. 16, 2020) (holding that Nicki Minaj's unauthorized creation of a derivative work based on a Tracy Chapman song for experimentation was a fair use).

[207] In these circumstances, principles of secondary liability could apply. *See infra* Section II.B.3.d.iii.

[208] For example, digital replicas used to create child sexual abuse material ("CSAM") or nonconsensual pornography would still be subject to criminal law penalties. *See, e.g.*, 18 U.S.C. § 2251(a) (criminalizing, among other acts, using a minor to produce CSAM with materials transported interstate, such as a computer); *United States v. Tatum*, No. 3:22-cr-157, 2023 WL 3185795, at *2 (W.D.N.C. May 1, 2023) (involving an indictment alleging, in part, production of sexually explicit content under 18 U.S.C. § 2251(a) for using a website to produce deepfake nude images); TEX. PENAL CODE ANN. § 21.165(b) (West 2023) ("A person commits an offense if, without the effective consent of the person appearing to be depicted, the person knowingly produces or distributes by electronic means a deep fake video that appears to depict the person with the person's intimate parts exposed or engaged in sexual conduct.").

(i) Commercial Nature of Use

As discussed above, state rights of publicity typically cover only commercial uses.[209] While some commenters suggested that any federal right be similarly limited,[210] others urged that it should cover both commercial and non-commercial uses,[211] noting the range of harms that can arise from unauthorized replicas.[212] As the Brooklyn Law Incubator & Policy Clinic ("BLIP") and National Public Radio ("NPR") pointed out, the creators of deepfakes do not always act for financial gain,[213] and deception can be harmful regardless of commercialization.[214] Moreover, distinguishing between commercial and non-commercial contexts can be challenging, especially in today's online environment. For example, social media posts that appear to be an individual's personal expression may be part of a paid influencer campaign in support of a commercial interest.[215]

The Office agrees that harmful uses of digital replicas are not limited to those that are commercial in nature. In fact, the commercial use requirement in many state laws is frequently cited as a major reason why these laws are unable to provide adequate protection.[216] We recommend that a federal digital replica law should encompass both non-commercial and

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[209] *See supra* Section II.A.1.

[210] *See, e.g.*, INTA Initial Comments at 10 ("To be actionable, the use at issue should be for commercial purposes, and a direct connection between the use and the commercial purpose must exist."); Law Office of Seth Polansky Initial Comment at 37.

[211] *See, e.g.*, BLIP, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 32 (Oct. 30, 2023) ("BLIP Initial Comments") ("[C]onsidering the breadth of content on which AI systems can be trained, when it comes to infringement of the right of publicity through the use of AI systems, commercial use should not be a required element."); David Newhoff Initial Comments at 5.

[212] *E.g.*, Artist Rights Alliance & Future of Music Coalition Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 3 (Dec. 6, 2023) ("[T]he harms go deeper still. Just last week, reports surfaced of a generative AI engine used to create non-consensual pornographic images, including those depicting 'several multiplatinum Grammy Award-winning singer-songwriters and Academy Award-winning actresses' among others. And reports of other forms of deepfake harms such as cyber bullying, impersonation scams, and revenge porn are well-known.").

[213] *E.g.*, BLIP Initial Comments at 32 ("[S]ometimes the end-users do not produce [deepfakes] for commercial purposes, but for creativity or maliciousness.").

[214] *E.g.*, NPR, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 9 (Oct. 30, 2023) ("NPR Initial Comments").

[215] *See* Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 416–17 (2018) ("[C]ommercial use on the internet—especially on social media—can be a complicated question. . . . In fact, everything on social media is advertising at some level—a level that has become increasingly difficult to determine." (footnotes omitted)).

[216] *See, e.g.*, WME Initial Comments at 5 ("Here too, there is often limited recourse. Right-of-publicity laws are generally limited to commercial uses, leaving it unclear whether they apply to fan-generated deepfakes that were not created for profit or for commercial distribution.").

commercial uses. In this respect, the law would incorporate aspects of the right of privacy, which typically guards against non-economic damage.[217]

(ii) Knowledge Standard

Although the Office did not receive many comments on this issue, we recommend adoption of an actual knowledge standard for direct liability.

Under the actual knowledge standard, liability would attach only where the distributor, publisher, or displayer acted with actual knowledge both that the representation in question was a digital replica of a real person, and that it was unauthorized. An objective or "should have known" standard might ensnare unsuspecting or technologically unsophisticated defendants. Given the volume of potential outputs produced by current technologies, and the number of individuals who could be targeted, there are likely to be cases where a user passes along an image or audio recording without realizing that it is a replica of someone's voice or likeness.[218] And even where the user recognizes the subject of a digital replica, they may not be aware that the replica is inauthentic or unauthorized.

Some commenters proposed the stricter standard of intent to deceive. NPR, for instance, argued that "Congress should adopt a narrow law that creates liability in instances where someone's name, image, likeness, or voice is used with intent to deceive the audience to believe that false, faked, or AI-generated content is true or represents actual facts or event[s]. . . . Liability would turn on intentional deceptiveness—that something is fake but is trying to persuade someone otherwise."[219] The Office notes, however, that there may be no intent to deceive in some situations where liability should attach, such as where an unauthorized digital replica is used to harass or ridicule an individual, or to profit from the replica of a popular

[217] *See supra* Section II.A.1.a.

[218] *E.g.*, Public Knowledge, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20 (Oct. 30, 2023) ("[A]ny universally-available right needs to adequately address the 'digital doppelganger' problem—namely, ways of dealing with situations in which an AI-generated work, by pure mathematical chance, looks or sounds like an otherwise unknown individual. Such instances should not give rise to liability, or trigger a rabbit hole of provenance questions about the training data of the GAI system that generated the accidental lookalike.").

[219] NPR Initial Comments at 9–10.

performer's voice or image.[220] Proof of subjective intent is also a high barrier to meet when seeking to prevent damaging distributions of unauthorized replicas.[221]

(iii) Secondary Liability

Since digital replicas are generally distributed and displayed online through the services of various intermediaries, the treatment of secondary liability will be an important element of a new federal law.

Traditional secondary liability principles from copyright law may be drawn on here. Pursuant to these principles, a defendant may be contributorily liable if it "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[222] Vicarious liability may be found if the defendant "profits directly from the infringement and has a right and ability to supervise the direct infringer."[223] And a defendant may be liable for inducing infringement where it "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement."[224]

While these principles could apply in a variety of cases,[225] most of the comments on this topic related to online service providers ("OSPs") that transmit, cache, host, or link to user content. In several areas, Congress has provided OSPs with special safe harbors against liability for unlawful conduct by their subscribers. The most far-reaching example is Section 230 of the Communications Decency Act of 1996, which immunizes online platforms from civil liability for

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[220] In some recent instances where popular artists' voices (both living and deceased) have been cloned without authorization, the rights owners' objections do not appear to depend on whether the unauthorized use was intended to deceive. *See, e.g.*, Vicky Wong & Bonnie McLaren, *Drake: AI Tupac track gone from rapper's Instagram after legal row*, BBC News (Apr. 26, 2024), https://www.bbc.com/news/newsbeat-68904385.

[221] *See* David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1071–72 (2010) ("[I]ntent, of course, cannot be seen directly by witnesses. It eludes all five senses. It is known only to the actor, and even here, only sometimes, because some definitions of intent allow the actor to readily believe that there is no intent, even when there is. . . . [T]he law evaluates intent by what the actor does, which means that the law evaluates intent by circumstantial evidence. At the same time, intent is easily denied or rebutted, even when it exists, and sometimes the denial is accompanied by convincing belief on the part of the actor."); *cf.* Thomas O. Depperschmidt, *Bankruptcy for Gamblers: The Questions of Fraudulent Intent, Dischargeability, and Remedial Policy in Credit Card Cash Advance Cases*, 13 BANKR. DEV. J. 389, 403–04 (1997) (concerning the difficulty of establishing intent in fraud cases).

[222] *Co-Star Grp. Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

[223] *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005).

[224] *Id.* at 919, 936–37.

[225] For example, the trafficking in devices tailored to create digital replicas might be addressed through secondary liability. *Cf.* No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(c)(1)(A), (C) (2024) (establishing liability for distributing, and for facilitating the distribution of, services for creating digital replicas).

many types of illegal third-party content.[226] It provides that an OSP shall not be treated as the "publisher or speaker" of content provided by others, and that neither OSPs nor their users shall be liable for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[227]

Section 230 includes a significant carve-out; it does not "limit or expand any law pertaining to intellectual property."[228] Commenters had differing views on whether a federal digital replica law would constitute a "law pertaining to intellectual property" carved out from section 230.[229] Some favored including the law within the scope of immunity in order to support online platforms' ability to make moderation decisions and avoid chilling protected speech.[230] Electronic Frontier Foundation ("EFF"), for example, argued that "Congress should clarify that the right of publicity sounds in privacy and is not 'intellectual property' for purposes of Section 230" because "when platforms must fend off expensive lawsuits to protect user speech, they are likely to cave to censorious demands."[231]

Others asserted that including digital replica protection in the intellectual property carve-out is necessary to incentivize platforms to remove infringing material.[232] Several pointed to experiences under current law with OSPs refusing requests to remove AI-generated content violating state rights of publicity, citing section 230.[233]

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[226] 47 U.S.C. § 230; *see Hepp v. Facebook*, 14 F.4th 204, 209 (3d Cir. 2021) (Section 230 "encourages [internet] companies to host and moderate third-party content by immunizing them from certain moderation decisions.").

[227] 47 U.S.C. § 230.

[228] 47 U.S.C. § 230(e)(2).

[229] *See, e.g.*, DiMA, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 6 (Oct. 30, 2023) ("DiMA Initial Comments"); A2IM-Recording Academy-RIAA Joint Reply Comments at 18; Jennifer Rothman Initial Comments at 4–5.

[230] *See, e.g.*, EFF, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 7 (Oct. 30, 2023) ("EFF Initial Comments"); *see also* DiMA Initial Comments at 6.

[231] *See, e.g.*, EFF Initial Comments at 7; *see also* DiMA Initial Comments at 6 (DiMA "strongly believes that any such right should not be deemed a form of 'intellectual property . . . .").

[232] *See, e.g.*, UMG Initial Comments at 94; SAG-AFTRA Initial Comments at 7; A2IM-Recording Academy-RIAA Joint Reply Comments at 18.

[233] *See, e.g.*, UMG Initial Comments at 94; *see also* SAG-AFTRA Initial Comments at 7; *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group, in response to QFRs from Sen. Thom Tillis) ("Some platforms have responded to our requests for removal and some have resisted. . . . Some have argued that under Section 230 . . . they are not required to remove them.").

The Copyright Office believes that exclusion from section 230 is advisable to encourage prompt removal of unauthorized digital replicas from online platforms. In many circumstances, OSPs are best positioned to prevent the continuing harm from the availability of such replicas.[234] For example, the disseminators may be anonymous or unreachable,[235] making it impossible to take direct action against them, either informally or through court action. OSPs should be incentivized to assist in removing the replicas once they know they are unauthorized and protected from liability when they do so.

Open AI advocated for "a form of safe harbor . . . for technology providers that do not induce users to create non-consensual digital replicas and take proactive steps to monitor and mitigate harmful uses."[236] Some commenters proposed a notice-and-takedown framework similar in concept to section 512 of the Digital Millennium Copyright Act.[237] This provision encourages copyright owners and OSPs to cooperate "to detect and deal with copyright infringement"[238] by providing qualifying OSPs with immunity from monetary liability for copyright infringement committed by their users.[239] The safe harbors for hosting or linking to infringing content are conditioned upon (among other things) a requirement that the OSP act expeditiously to remove allegedly infringing content upon receiving a valid notification or otherwise becoming aware of the infringing activity.[240]

A number of commenters suggested a safe harbor that differs from section 512 in various respects. DiMA, for instance, argued that if a digital replica law allows for secondary liability, then a safe harbor ought to provide "complete immunity when a service removes

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[234] Recently, YouTube announced a program allowing individuals to demand a takedown of image and voice deepfakes. Dylan Smith, *YouTube Unveils New AI Likeness Protections—Covering Soundalike Audio and More—for 'Uniquely Identifiable' First Parties*, DIGI. MUSIC NEWS (July 2, 2024), https://www.digitalmusicnews.com/2024/07/02/youtube-ai-protections/.

[235] The hurdles rightsholders face to identify infringers was the subject of a number of comments in the Office's Section 512 Study. *See* U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 164 (2020) ("SECTION 512 REPORT"), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

[236] *See* Letter from OpenAI, Summary of *Ex Parte* Meeting on May 28, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 4 (June 4, 2024).

[237] *See, e.g.*, *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law, in response to QFRs from Sen. Tillis).

[238] H.R. REP. NO. 105-551, pt. 2, at 49 (1998).

[239] U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17 13–21 (2020) ("SECTION 512 REPORT"), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

[240] *See* 17 U.S.C. § 512(c)–(d).

specifically identified content upon notice."[241] Warner Music Group, by contrast, requested a framework that conditions safe harbor on platforms' not only taking content down, but ensuring that it stays down.[242]

The Office agrees that a notice and takedown system, combined with an appropriate safe harbor, could be an effective approach. Such a system need not duplicate every element of section 512. In our 2020 report on section 512, we observed that some of its provisions were not working as Congress had intended;[243] the experience gained in that context could inform the design of a safe harbor here. The Office recommends conditioning its availability on the OSP expeditiously removing the digital replicas when it has actual knowledge or has received a sufficiently reliable notification that the replica is infringing. We would not, however, import the DMCA's "red flag" knowledge standard, given its interpretive problems in the copyright context.[244]

e) Licensing and Assignment

A digital replica law should address whether rights can be transferred either by assignment or licensing.[245] While the Office did not receive many comments on these issues, they were discussed in congressional hearings, and we have considered that testimony as part of our analysis.[246]

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[241] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Graham Davies, President & Chief Executive Officer, DiMA, in response to QFRs from Sen. Thom Tillis).

[242] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group, in response to QFRs from Sen. Thom Tillis); *see also id.* (statement of Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA, in response to QFRs from Sen. Thom Tillis).

[243] *See* SECTION 512 REPORT at 2–6.

[244] *See id.* at 113–20.

[245] The Office uses the terms assignment and licensing here in the same sense as in the copyright context. An assignment is an outright sale or transfer of all rights to another party, who then controls the use and distribution of those rights going forward. A license is a contractual permission, either exclusive or nonexclusive, for the use of a digital replica, which may include limitations such as the duration of the license and the uses licensed.

[246] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop.*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group); *id.* (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law); *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Dana Rao, Executive Vice President, General Counsel, & Chief Trust Officer, Adobe, Inc.); *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Jeff Harleston, General Counsel & Executive Vice President, UMG).

Commenters in favor of assignability asserted that a digital replica right should be treated no differently than other intellectual property rights, such as copyrights, trademarks, and patents. UMG, for instance, stated that "it is important that . . . as with all forms of intellectual property, [a digital replica] right should be eligible for assignment or licensing either in whole or in part, so that enforcement may be delegated."[247] INTA likewise argued that digital replica "rights should be freely transferable, licensable and descendible property rights."[248]

Others raised concerns about the abuses that could occur if individuals were permitted to fully assign their rights, thereby permanently losing control over how their image is used. Professor Jennifer Rothman stated that "[a]llowing another person or entity to own a living human being's name, likeness, voice, or other indicia of a person's identity in perpetuity poses a significant threat to a person's fundamental rights and liberty, and should be prohibited."[249]

Most commenters favored the ability to license digital replica rights, but with different views on whether there should be any limitations and what the limitations should be. The MPA supported broad freedom to contract, including through licensing.[250] Professor Lisa Ramsey warned, however, that "[i]f digital replica right licenses are not limited in significant ways, this will undermine the objectives of [a digital replica law], which include preventing public deception and protecting the ability of people to control uses of their identity."[251] Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA, argued that licensing guardrails are needed and described those negotiated by the guilds in 2023 as "model provisions for protection against abuse."[252]

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[247] UMG Initial Comments at 95.

[248] INTA Initial Comments at 11.

[249] Jennifer Rothman Initial Comments at 5; *see also The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law); *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary,* 118th Cong. (2024) (statement of FKA twigs, Singer, Songwriter, Producer, Dancer, and Actor, in response to QFRs from Sen. Thom Tillis) ("[T] he importance of limiting licensing agreements in time subject to reasonable renewable contractual terms and conditions must be made clear and provided for. There should be no suggestion of or opportunity for licensed rights being given in perpetuity.").

[250] *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Benjamin Sheffner, Senior Vice President & Associate General Counsel, MPA, in response to QFRs from Sen. Thom Tillis).

[251] *Id.* (statement of Lisa P. Ramsey, Professor of Law, University of San Diego School of Law, in response to QFRs from Sen. Thom Tillis); *id.* (statement of FKA twigs, Singer, Songwriter, Producer, Dancer, and Actor, in response to QFRs from Sen. Thom Tillis).

[252] *See id.* (statement of Duncan Crabtree-Ireland, National Executive Director, SAG-AFTRA, in response to QFRs from Sen. Thom Tillis).

Having considered these views, the Office recommends that individuals be able to license their images and voices for use in digital replicas but not to fully assign all rights. Licensing can facilitate the creation, distribution, and use of creative works, products, and services. It enables individuals who choose to do so to monetize and profit from their own personas.

At the same time, the Office acknowledges the potential for abuse. Given unequal contracting power or knowledge, particularly in the context of employment or talent contracts, individuals may lose control over their own personas for long periods of time or under broad terms, based on a decision made early in their career. Although assignments are common in other areas of intellectual property, digital replica rights are most appropriately viewed as a hybrid of privacy interests and a form of property. Unlike publicity rights, privacy rights, almost without exception, are waivable or licensable, but cannot be assigned outright.[253] Accordingly, we recommend a ban on outright assignments, and the inclusion of appropriate guardrails for licensing, such as limitations in duration and protection for minors.

(i) Duration

To avoid the effective result of an outright assignment, the Office suggests limiting licenses (other than those collectively bargained) to a relatively short term, such as five or ten years.[254] Parties that wish to continue the licensing arrangement could subsequently renegotiate it—allowing for consideration of changed circumstances, including bargaining power.

In adopting a time limitation, care should be taken not to block the ongoing use of content produced lawfully during the period of the license. In creative industries, an owner of digital replica rights is often not the owner of the copyrighted works that incorporate that replica. Similarly, the licensed digital replica may be incorporated into a product that the licensee has invested in with a reasonable expectation of continued distribution, such as packaging or labeling of consumer goods.[255]

Accordingly, we believe that the lapse of a digital replica license should bar only new uses after the expiration of the license period. In other words, if a singer consents to a record label using a digital replica of her voice for a period of years, when that period ends, the label would be prohibited from making new recordings using a digital replica (absent a subsequent

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[253] *See* 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 10:1, 10:2 (2d ed. 2024).

[254] Jennifer Rothman Initial Comments at 6; *see, e.g.*, CAL. LAB. CODE § 2855(a) (West 2024) ("a contract to render personal service, other than a contract of apprenticeship . . . may not be enforced against the employee beyond seven years from the commencement of service under it").

[255] For example, a company's trademark or product packaging may include the image of an individual, such as Gerber's use of an image of a baby on its baby food packaging, or General Mills' use of images of athletes on its Wheaties cereal boxes.

agreement). It could, however, continue distribution of recordings that were prepared during the contractual period.[256]

(ii) Informed Consent

Reflecting the personal aspects of a digital replica right and the risks of public confusion, the Office believes that a federal statute should ensure that individuals licensing their rights are doing so with adequate knowledge and full disclosure of the intended uses. SAG-AFTRA's collective bargaining agreement provides an example: it requires contract terms regarding digital replica rights to be "clear and conspicuous" and agreed to in a separate contract or rider, or in some other form that stands out prominently.[257] We also note that other federal and state laws offer examples of similar terms required in contracts where personal rights are at issue.[258]

(iii) Contracts with Minors

A number of commenters emphasized the unequal bargaining power of minors.[259] They proposed restrictions on such contracts, including requiring that licenses involving minors would automatically expire when they reach the age of 18, and be subject to procedural safeguards such as court review and holding income in a trust.[260] The Office agrees that such safeguards are advisable.

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[256] This approach is similar to how copyright law treats derivative works after termination of a grant, allowing those already prepared to continue to be utilized. *See* 17 U.S.C. §§ 203, 304(c), 304(d) (2022). As the Office has explained, a "derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." *See id.* § 203; *Notices of Termination*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/recordation/termination.html (last visited July 21, 2024).

[257] In its FAQs on digital replica rights, SAG-AFTRA explains that "this could mean [a digital replica provision] is in a separate rider or it could be in your contract as long as it clearly stands out, such as in a larger font, ALL CAPS or **bold**. . . . A bolded paragraph granting consent, alone, is not sufficient." *FAQs on AI*, SAG-AFTRA, https://www.sagaftra.org/files/sa_documents/AIFAQs.pdf (last visited July 21, 2024).

[258] For instance, the Age Discrimination in Employment Act requires a range of contractual safeguards for employees entering into certain severance and settlement agreements. *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (codified as amended in scattered sections of 29 U.S.C.A.). Under this statute, agreements must explicitly advise the contracting party to consult an attorney before signing and must be written in plain, clear language that the contracting party can understand and not exaggerate any benefits.

[259] *See, e.g.*, Jennifer Rothman Initial Comments at 6 (stating that "[t]he most egregious licenses are likely to involve those with the least bargaining power," and highlighting children as a particularly vulnerable group currently lacking control over these rights).

[260] *E.g.*, *id.* For example, California requires that a court confirm entertainment or sports personal services contracts involving minors. CAL. FAM. CODE §§ 6750, 6751 (West 2024) ("A contract, otherwise valid, of a type described in

f) First Amendment Concerns

Digital replicas may be used in the context of constitutionally protected speech, including news reporting, artistic works, parody, and political opinion, in ways that may be unauthorized and objectionable. Federal legislation in this area will need to take into account the speech interests protected by the First Amendment.[261]

The First Amendment, however, does not protect all speech equally. While the Supreme Court has acknowledged that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee,"[262] it has permitted restrictions in cases of defamation,[263] fraud,[264] and commercially misleading speech[265]—each of which could be implicated by certain uses of unauthorized digital replicas.

In applying state rights of publicity, courts have acknowledged the tension between an individual's right to control their persona and a third party's free speech rights.[266] However, the outcomes in these cases are not consistent, leading to a lack of predictability. The application of First Amendment principles in right of publicity cases has been described by scholars as "a confusing morass of inconsistent, incomplete, or mutually exclusive approaches, tests, and

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Section 6750, entered into during minority, cannot be disaffirmed on that ground either during the minority of the person entering into the contract, or at any time thereafter, *if the contract has been approved by the superior court* in any county in which the minor resides or is employed or in which any party to the contract has its principal office in this state for the transaction of business." (emphasis added)).

[261] *See, e.g.*, *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Benjamin Sheffner, Senior Vice President & Associate General Counsel, MPA) ("[C]reation of a new right that would apply in expressive works raises serious First Amendment concerns and risks interfering with core creative freedoms.").

[262] *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

[263] *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). Defamation claims involving public officials and public figures must meet a higher standard, however. *See N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (defamatory statements about public officials are protected by the First Amendment unless they are made with actual malice); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (applying *Sullivan* to public figures).

[264] *Stevens*, 559 U.S. at 468 (citations omitted).

[265] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (false or misleading commercial speech falls outside of the First Amendment).

[266] *See, e.g., Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977) (acknowledging the tension between a news broadcaster's First Amendment rights and a performer's right of publicity, holding that First and Fourteenth Amendments "do not immunize the media when they broadcast a performer's entire act without his consent . . . "); *see also Comedy II Productions, Inc. v. Gary Saderup*, 25 Cal.4th 387, 397 (Cal. 2001) ("The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.") (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring)).

standards"[267] or, more succinctly, a "dumpster fire."[268] At least five different balancing tests are in use by courts in different states across the country,[269] producing "conflicting outcomes in cases with similar facts."[270]

Our NOI questions on this issue elicited strong reactions from commenters. Many recognized that a federal law prohibiting unauthorized digital replicas must leave room for First Amendment-protected activity.[271] Commenters, however, disagreed on exactly how a statute should accommodate free speech rights. Some supported specific exceptions similar to those in some state right of publicity statutes, primarily for news reporting, various types of expressive works, and sports broadcasting, as well as parody, comment, and criticism.[272]

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[267] Gloria Franke, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 946 (2006).

[268] William McGeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 362 (2018).

[269] Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1346 (2009); *see also* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L. J. 86, 127 n.167 (2020).

[270] JENNIFER E. ROTHMAN, THE RIGHT OF PUBLICITY 145, 147 (2018).

[271] *See, e.g.*, Senator Marsha Blackburn Initial Comments at 3 ("This liability must be balanced, of course, by significant protections for any applicable First Amendment rights."); International Center for Law & Economics, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 26 (Oct. 30, 2023) ("If Congress chose to enact a federal 'right of privacy' statute, several key issues would need to be addressed regarding . . . First Amendment limitations."); Digital Media Licensing Association, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 20–21 (Oct. 30, 2023) ("The right to create content for newsworthy and expressive purposes that are guaranteed under the First Amendment must be considered and balanced with the concerns of the public including actors and other public figures."); Internet Archive Initial Comments at 11–12 ("[G]ranting a new right of publicity along the lines of existing state laws . . . come with serious First Amendment concerns."); Pamela Samuelson et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 37 (Oct. 30, 2023) ("Pamela Samuelson Initial Comments") (advocating for "thoughtful self-regulation in [addressing the issue of deepfakes]," but expressing skepticism about the feasibility of imposing rules due to potential conflicts with the First Amendment).

[272] *See, e.g.*, Getty Images, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 28 (Oct. 30, 2023) ("Getty Images Initial Comments") ("[A]ny new federal right of publicity should be carefully considered so that constitutionally protected expression is not unduly limited. Accordingly, legislation should include explicit exemptions for First Amendment-protected expression."); MPA, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 33 (Dec. 6, 2023) ("MPA Reply Comments") ("At minimum, a bill establishing a federal digital-replica right must include exemptions where the use is in a work of political, public interest, educational, or newsworthy value, including comment, criticism, or parody, or similar works, such as documentaries, docudramas, or historical or biographical works, or a representation of an individual as himself or herself, regardless of the degree of fictionalization, and for uses that are de minimis or incidental."); INTA Initial Comments at 11 (proposing exceptions for "a. News, public affairs and sports reporting or commentary; b. Dramatic, literary, artistic, or musical works, so long as the use has artistic relevance to the work and does not explicitly mislead as to endorsement or approval by the individual; c. Works that parody, criticize, satirize or comment upon the individual; d. Advertising and promotion for (a)-(c); and (e). Any other noncommercial use, including, but not limited to, education and research").

Protection for expressive works was a principal area of focus.[273] The MPA offered several examples of expressive uses as deserving of protection, including documentaries using digital replicas "to re-create scenes from history where no actual footage exists" and late-night comedians "using digital replicas to poke fun at celebrities, politicians, athletes."[274] It asserted that categorical exceptions "are crucial to giving filmmakers clarity so they know what uses are allowed, or not allowed" before they undertake expensive projects, and proposed a list of exceptions, some subject to the caveat that the use was not intended to and did not create a false impression of authenticity.[275] Donaldson Callif Perez LLP stated that "the implementation of a right that does not explicitly exempt expressive works would have immediate negative consequences."[276]

Other commenters argued that categorical exceptions are unnecessary and could undermine effective protection. RIAA asserted that "categorical exclusions for certain speech-oriented uses are not constitutionally required and, in fact, risk overprotection of speech interests at the expense of important publicity interests."[277] Instead, "the First Amendment calls for a case-specific balancing of the right of publicity against whatever First Amendment

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[273] *See* MPA, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 71 (Oct. 30, 2023) ("MPA Initial Comments") ("The right of publicity does not—and, to be consistent with the First Amendment, may not—regulate uses of or references to individuals' [name, image and likeness] in 'expressive works,' such as books, plays, news articles and broadcasts, songs, and movies and television programs. Such expressive works are non-commercial speech fully protected by the First Amendment, regardless of whether those works are sold for a profit."); David Newhoff Initial Comments at 5 ("If ROP law is expanded, it should . . . not restrict expressive uses of AI-generated likeness for purposes (e.g., biographical films) that fall within the scope of protected speech.").

[274] MPA Reply Comments at 32.

[275] Letter from MPA, Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 4 (May 20, 2024) ("Use of a digital replica would not constitute a violation where: 1. the digital replica is used to depict the individual in a documentary, docudrama, or historical or biographical work, or any other representation of the individual as such individual, regardless of the degree of fictionalization, unless use of the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated; 2. the digital replica is used for purposes of a news, public affairs, or sports broadcast or report, or for a purpose that has political, public interest, educational, or newsworthy value, unless use of the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated; 3. the use of the digital replica is for purposes of comment, criticism, scholarship, satire, or parody; 4. the use of the digital replica is de minimis, incidental, or fleeting; 5. the use of the digital replica is addressed by a collective bargaining agreement; or 6. the digital replica is used in an advertisement or commercial announcement for a work that includes the use of the digital replica as described in [1 through 5].").

[276] Donaldson Callif Perez, LLP, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10 (Oct. 30, 2023).

[277] *E.g.*, Letter from RIAA, Summary of *Ex Parte* Meeting on April 23, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (Apr. 29, 2024).

interests may be presented in the given case."[278] Professor Jennifer Rothman suggested that a new law be specific regarding uses that would not be Constitutionally privileged: "Current common areas of agreement are that unauthorized uses of a person's identity are not protected by the First Amendment if a person's 'entire act' or performance is used, or the uses are in commercial products or advertising not related to an authorized underlying work."[279]

Each of these approaches has advantages and disadvantages. Enumerated exceptions provide greater certainty: users can more easily determine from the face of the statute whether the use they are considering is lawful. In addition, the existing bodies of state precedent are available to be drawn upon for purposes of interpretation. But such exceptions may be both over- and under-inclusive depending on the facts.[280] For example, an exception for expressive works, if not appropriately cabined, could render the law toothless against common uses of digital replicas—such as voice clones in music or deepfake pornography. Indeed, many of the problematic uses reported have been in expressive or political contexts, such as the "Fake Drake" song and the President Biden robocalls described above.[281]

The Office stresses the importance of explicitly addressing First Amendment concerns. While acknowledging the benefits of predictability, we believe that in light of the unique and evolving nature of the threat to an individual's identity and reputation, a balancing framework is preferable. Although the potential overbreadth of categorical exceptions can be cabined by conditions like those proposed by MPA, this introduces a high level of complexity. In addition, we note that in today's online environment, traditional categories such as "news" or "public affairs" are often difficult to define.[282] The result may be to exempt conduct that legislators intended to prohibit.

In our view, a balancing framework permits greater flexibility to assess whether a particular unauthorized use is protected by the First Amendment. Rather than checking a box marked "news" or "musical work," courts can assess the full range of factors relevant to the First Amendment analysis. These could include the purpose of the use, including whether it is

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[278] A2IM-Recording Academy-RIAA Joint Reply Comments at 16–17; *see also id.* at 17 ("[W]e disagree with those commenters who argue that any federal right of an individual to control uses of their voice or likeness must contain express, categorical exclusions for all uses of a certain type, such as unauthorized uses of an individual's voice or likeness in any 'expressive works,' regardless of the particular facts and circumstances of the use.").

[279] Jennifer Rothman Initial Comments at 6.

[280] *See* Joshua Matz, RIGHT OF PUBLICITY AND THE FIRST AMENDMENT (2024), humanartistrycampaign.com/rop-first-amendment; Letter from RIAA, Summary of *Ex Parte* Meeting on April 23, 2024 Regarding the Office's AI Study, to U.S. Copyright Office (Apr. 29, 2024) (endorsing Matz's view).

[281] *See supra* Section I.

[282] Indeed, the meanings of categories like "news" or "public affairs" are themselves contested. *See* Richard L. Hansen, *From Bloggers in Pajamas to The Gateway Pundit: How Government Entities Do and Should Identify Professional Journalists for Access and Protection* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4776774; Sonja R. West, *Favoring the Press*, 106 CAL. L. REV. 91 (2018).

commercial; its expressive or political nature; the relevance of the digital replica to the purpose of the use; whether the use is intentionally deceptive; whether the replica was labeled; the extent of the harm caused; and the good faith of the user.[283] We believe that this approach would leave room for the types of expressive works that many commenters identified as a priority.[284]

g) Remedies

A federal right must offer effective remedies through which individuals can seek redress. Several commenters proposed a range of appropriate remedies, including monetary and injunctive relief.[285]

The Office agrees that a digital replica law should provide both monetary and injunctive relief. Damages should include compensation for loss of income, damage to reputation, or emotional distress. As INTA commented, "[t]he commercial value of a persona may have an impact on any damage amount claimed in a dispute."[286] Injunctive relief is essential to prevent ongoing unauthorized use of an individual's likeness or to prevent future violations.

We note that some individuals may have difficulty proving actual damages, particularly market-based injuries, in court. To ensure that protection is both accessible and effective for all, the Office recommends inclusion of special damages enabling recovery by those who may not be able to show economic harm or afford the cost of an attorney.[287] As in the copyright system,

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[283] *See* 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 8:23, 8:71–3 (2d ed. 2024); A2IM-Recording Academy-RIAA Joint Reply Comments at 16–17 ("[T]he First Amendment calls for a case-specific balancing of the right of publicity against whatever First Amendment interests may be presented in the given case.").

[284] Importantly, application of these factors should permit a movie to use unauthorized digital replicas of deceased individuals where those individuals are portrayed in objectively unrealistic, fictionalized contexts. As an example, a remake of the movie *Bill & Ted's Excellent Adventure*, in which the protagonists use a time machine to interact with and transport historical figures (portrayed by digital replicas) into modern times, should not require authorization. *See Synopsis, Bill & Ted's Excellent Adventure*, IMDB, https://www.imdb.com/title/tt0096928/plotsummary/#synopsis (last visited July 21, 2024).

[285] *See, e.g.*, Law Office of Seth Polansky Initial Comments at 37 ("Enforcement mechanisms would also need to be specified, through both civil remedies and criminal penalties. Given the rapid speed at which AI-generated material can be created and distributed, it is crucial for enforcement measures to be timely and effective."); SAG-AFTRA Initial Comments at 7–8 ("Monetary relief . . . might include lost wages and reputational damage. Injunctive relief must also be available, particularly in the context of AI-generated content that might impact one's reputation (such as AI-generated voice or likeness used to sell shoddy merchandise or questionable services).").

[286] INTA Initial Comments at 11.

[287] Jennifer Rothman Initial Comments at 5 ("Any legislation should include statutory damages to protect people who may not otherwise be able to establish market-based injuries. A number of states have included statutory damages in publicity legislation with the express purpose of protecting ordinary people.").

without the potential for statutory damages or attorney's fee awards to the prevailing party, litigation costs may be a barrier to the filing of meritorious claims.

Several commenters urged the inclusion of criminal penalties,[288] particularly in connection with nonconsensual intimate material.[289] Criminal liability would recognize the seriousness of the harm caused by such actions and the need for accountability; appropriate penalties could deter bad actors and provide justice for victims. The Office agrees that there are specific unauthorized uses that should incur criminal liability, including sexual deepfakes and other particularly harmful or abusive imagery. We do not take a position, however, on whether criminal penalties should be included in a federal digital replica right as opposed to stand-alone criminal legislation, such as the bills pending in this Congress.[290]

h) Preemption

An overarching question is whether, and to what extent, a federal digital replica law should preempt state laws.[291] Commenters were divided on this issue, with some urging preemption and others seeking to preserve state flexibility.

The benefit of preempting state laws as they pertain to digital replicas would be to establish a uniform nationwide standard, entirely replacing the patchwork of existing coverage. Commenters who supported this approach asserted that it would provide clarity for creators, businesses, and consumers alike.[292] DiMA, for example, stated that "Congress should ensure that content related matters have consistent standards by preempting state and common laws where doing so would ensure consistency in application and reduce operational challenges and improve the customer experience."[293] MPA also urged preemption to "provide national uniformity."[294]

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[288] *See, e.g.*, NPR Initial Comments at 10 ("Criminal penalties may be necessary."); Walker Wambsganss et al. Initial Comments at 5.

[289] *E.g.*, Anonymous AI Technical Writer, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 17 (Dec. 6, 2023) ("At minimum the right to not have one's face used in generative AI, with criminal penalties for nonconsensual pornography and child pornography generated with AI.").

[290] For example, the TAKE IT DOWN Act, introduced in the Senate in June of 2024, would criminalize publishing or threatening to publish non-consensual intimate imagery. TAKE IT DOWN Act of 2024, S.4569, 118th Cong. (2024).

[291] *See generally* CONG. RSCH. SERV., ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11052.

[292] *See, e.g.*, DiMA Initial Comments at 5; INTA Initial Comments at 9; MPA Reply Comments at 34; BLIP Initial Comments at 32.

[293] DiMA Initial Comments at 5.

[294] MPA Reply Comments at 34.

Commenters opposing preemption stressed the desirability of preserving the extensive body of state law precedent developed over many decades.[295] SONA, Black Music Artists Coalition, and MAC stated that "there is nothing that should warrant preemption of laws that have been thoroughly considered and vetted in our state."[296]

Many proposed that federal law should set a "floor," permitting states to offer broader protection than federal law and displacing only those state laws that fell beneath the federal standard.[297] In testimony before Congress, Warner Music Group advocated for this approach.[298] ImageRights International also urged that the federal right "should set a baseline (floor) for protections, allowing states to provide additional protections if they choose."[299] Dina LaPolt, an entertainment lawyer, stated, "It is important that any potential federal right protecting voice and likeness set a 'floor' of fundamental rights such that states can be individualized in their approach to cater to the potentially more stringent wishes of their residents."[300]

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[295] *See, e.g.*, SAG-AFTRA Initial Comments at 8 (A "federal right should not preempt state right of publicity laws unless it provides individuals greater protections over their name, image, voice, or likeness than existing state law. Further, it is critical that any federal law relating to AI-generated image and/or voice not supersede, whether intentional or inadvertent, existing state law relating to sexually explicit digital replicas."); A2IM-Recording Academy-RIAA Joint Reply Comments at 18 ("[A] federal right should not preempt state law to deprive individuals of rights that have been carefully developed over decades of legislation and litigation."); SONA-MAC-BMAC Joint Initial Comments at 10–11.

[296] SONA-MAC-BMAC Joint Initial Comments at 10–11.

[297] *See, e.g.*, SAG-AFTRA Initial Comments at 8 ("[A]ny federal law should set a floor for state law protections, allowing states to provide greater protection to individuals residing in their state."); Dina LaPolt Initial Comments at 10. Commenters did not use a uniform term for this form of preemption. Some cases and scholars use the term "partial preemption" to describe statutes that create a regulatory floor that state laws can exceed.

[298] *See The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Robert Kyncl, Chief Executive Officer, Warner Music Group, in response to QFRs from Sen. Thom Tillis) ("[L]imited preemption would be appropriate to the extent of the scope of a new federal right. But state laws that provide enhanced protections and that are supported by decades of helpful jurisprudence regrading protection of voice and likeness should be allowed to stand to the extent they do not conflict with federal law.").

[299] ImageRights International, Inc., Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Dec. 6, 2023).

[300] Dina LaPolt Initial Comments at 10. To the extent that states have developed diverse approaches, this may reflect differences in state industries and interests. For example, California, the domicile of many celebrities, has a retroactive postmortem right that arose in large part due to a ruling denying the descendability of Marilyn Monroe's right of publicity. *See* Laurie Henderson, *Protecting A Celebrity's Legacy: Living in California or New York Becomes the Deciding Factor*, 3 J. BUS. ENTREPRENEURSHIP & L. 165, 171, 177–83 (2009). Similarly, some have observed that Tennessee's potentially perpetual right of publicity may be traceable to the influence of native Tennessean Elvis Presley. Annie T. Christoff, *Long Live the King: The Influence of Elvis Presley on the Right of Publicity in Tennessee*, 41 U. MEM. L. REV. 667, 699 (2011). This is not to say that state variations in right of publicity laws always neatly track local or regional interests. JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR NEW YORK?, 592–93 (2018) (noting variation in postmortem rights in the tri-state area).

Alternatively, a non-preemptive law would leave existing state protections in place, regardless of whether those state protections exceeded or fell short of the federal protection. This approach would be similar to the Lanham Act, which leaves state trademark and unfair competition laws coexisting with federal protections.[301]

Although there are reasonable arguments for each approach, the Office recommends against preempting state laws for several reasons. Most importantly, as commenters pointed out, extensive state law in this area has developed over many decades, creating settled expectations.[302] Full preemption would reduce existing protections for individuals in states that currently provide broader rights, causing discrepancies between protection for digital replicas and other imitations of their personas. For example, in a state that provides for postmortem rights of publicity, a preemptive federal law without postmortem rights would result in a deceased individual's beneficiaries having longer-lasting rights in the non-digital context. And there may be advantages in preserving policy flexibility at the state level to respond to rapidly changing conditions, without the need to achieve consensus at the federal level.

Moreover, a non-preemptive federal right can achieve some of the benefits of uniformity, but without imposing a one-size-fits-all solution on all states. Although it would not fully harmonize the varied state approaches, it would fill in the gaps by ensuring the availability of effective national protection against unauthorized uses of digital replicas. Everyone, whatever the status of their own state's law, would have recourse to the same federal claim.

Finally, a non-preemptive law has the advantage of greater clarity. Either full or partial preemption raises the specter of extensive litigation over its scope and the question of which state-level protections remain available. This uncertainty could be minimized by specifying that the federal digital replica law supplements rather than preempts a state's protections.

4. Relationship to Section 114(b) of the Copyright Act

The Office's NOI inquired about the relationship between section 114(b) of the Copyright Act and state law protections against unauthorized digital replicas of voices in sound recordings.[303] Section 114(b) states that the copyright owner's reproduction and derivative work rights in a sound recording are limited to uses that appropriate "the actual sounds fixed in the recording," and "do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or

[301] *See* J. THOMAS MCCARTHY, 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 1:18, 22:1 (5th ed. 2024).

[302] *See supra* notes 295–96.

[303] NOI at 59948.

simulate those in the copyrighted sound recording."[304] The provision was intended to clarify that "mere imitation" of a copyrighted sound recording does not constitute infringement.[305]

Because section 114(b) permits imitation or simulation of sounds (including an individual's voice) in the context of a sound recording copyright, some have questioned whether it might preempt state laws that prohibit an unauthorized replica of someone's voice used in a sound recording. Several commenters noted this issue, with one stating that "legislative attention might be necessary to address potential conflicts and gaps in the law" to clarify these relationships.[306]

Only a few courts have analyzed whether section 114(b) preempts a state right of publicity claim based on the imitation of an individual's voice, with varying results. While the Ninth Circuit has twice rejected preemption in cases involving claims for voice misappropriation under California law,[307] a federal court in Michigan concluded a state right of publicity claim was preempted.[308] The uncertainty regarding section 114(b)'s impact appears to be having real-world consequences as state legislatures debate and enact laws with provisions on digital replicas. Presumably to avoid possible inconsistencies with the Copyright Act, both New York and Louisiana included in their recent laws language which mirrors section 114(b) and limits the scope of conduct prohibited by these state laws. These are right of publicity laws that encompass digital replicas in certain instances and not specifically "digital replica laws." Louisiana's statute, for example, exempts from liability "the making or duplication of another recording that consists entirely of an independent fixation of other sounds, even though the

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[304] 17 U.S.C. § 114(b).

[305] H.R. REP. NO. 94-1476, at 106 (1976).

[306] *See, e.g.*, Rightsify Group LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 13 (Oct. 30, 2023); *see also* UMG Initial Comments at 98 ("[W]hile UMG maintains that rights of publicity as applied to AI-generated soundalikes are not preempted, the potential for disagreement further counsels in favor of a federal right of publicity that will eliminate debate on this issue."); A2IM and RIAA, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 43–44 (Oct. 30, 2023) ("A2IM-RIAA Joint Initial Comments") ("Case law concerning copyright preemption of rights of publicity is still developing, and we are not aware of any cases addressing that issue in the specific context of AI. Whether courts properly recognize the distinction between Section 114(b) and rights of publicity . . . with respect to generative AI is an issue that warrants attention. Legislative clarification is not clearly necessary but may prove to be helpful.").

[307] *Midler*, 849 F.2d at 462 ("Midler does not seek damages for Ford's use of [a licensed song], and thus her claim is not preempted by federal copyright law. Copyright protects 'original works of authorship fixed in any tangible medium of expression.' A voice is not copyrightable. The sounds are not 'fixed.'"); *Waits*, 978 F.2d at 1100, *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) (finding that the elements of Tom Waits's voice misappropriation claim "are 'different in kind' from those in a copyright infringement case challenging the unauthorized use of a song or recording," and that the claim is not preempted by copyright).

[308] *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 764 (E.D. Mich. 2008) (finding that the Copyright Act preempted a right of publicity claim based on use of a band's "distinctive sound" in a videogame, where the "distinctive sound" at issue was that of a copyrighted song rather than the band more generally).

sounds imitate or simulate the voice of the professional performer," and New York's law uses similar language.[309]

In the Office's view, these concerns are misplaced, and section 114(b) does not preempt state laws prohibiting unauthorized voice replicas. The Copyright Act does not preempt state laws with respect to "subject matter that does not come within the subject matter of copyright" or "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright."[310] The legislative history of the Act's preemption provision explains that "[t]he evolving common law rights of 'privacy,' 'publicity,' and trade secrets . . . remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement."[311]

The Office believes that digital replica rights in an individual's voice satisfy this test. An individual's voice, unlike a particular sound recording that may capture it, "does not come within the subject matter of copyright."[312] It is the product of biology, nature, environment, and, in the case of performers, training, skill, and talent. It is not an "original work[] of authorship,"[313] or "fixed in any tangible medium of expression . . . from which [it] can be perceived, reproduced, or otherwise communicated."[314]

Copyright and digital replica rights serve different policy goals; they should not be conflated. Section 114(b) shields vocal imitations and other soundalike recordings against claims of copyright infringement. But nothing indicates that Congress intended for this limitation on copyright to deprive individuals of rights in their unique voices, whether under state right of publicity laws or a new federal statute.[315] To avoid unnecessary confusion or carve outs like the limitations in the New York and Louisiana laws discussed above, the Office recommends that Congress clarify in express terms that section 114(b) does not preempt state laws or affect a new federal right protecting an individual's voice.

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[309] *See* LA. STAT. ANN. § 51:470.2(4) (2024); N.Y. CIV. RIGHTS LAW § 50-f(1)(c) (McKinney 2024) ("A digital replica does not include . . . the making or duplication of another recording that consists entirely of the independent fixation of other sounds, even if such sounds imitate or simulate the voice of the individual.").

[310] 17 U.S.C. § 301(b)(1), (3).

[311] H.R. REP. NO. 94-1476, at 132 (1976).

[312] *See* 17 U.S.C. § 301(b)(1).

[313] *See id.* § 102(a). *Cf.* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 906.7 (3d Ed. 2021) ("Because human authorship is required for copyright protection, the U.S. Copyright Office will not register naturally occurring objects or materials that are discovered in nature.").

[314] 17 U.S.C. § 102(a).

[315] *See* H.R. REP. NO. 94-1476, at 132 (1976).

III. PROTECTION OF ARTISTIC STYLE

The Office received many comments seeking protection against AI "outputs that imitate the artistic style of a human creator."[316] Commenters voiced concern over the ability of an AI system, in response to a text prompt asking for an output "in the style of artist X," to quickly produce a virtually unlimited supply of material evoking the work of a particular author, visual artist, or musician.[317] They asserted that these outputs can harm, and in some cases have already harmed, the market for that creator's works.[318]

For example, the Center for AI and Digital Policy warned that "if AI can replicate [artists'] signature style en masse, it might undermine the market value of their creations, unjustly depriving them of economic benefits."[319] The Authors Guild described "authors, who, after years of developing their unique voice and style, are finding AI appropriating a part of their personality and mimicries of their work being sold in the market."[320] In addition, commenters argued that, while in the past the impact of human imitators was limited by the demands of time and labor, AI systems present a challenge exponentially greater given their speed and scale.[321] An anonymous artist offered the following example:

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[316] *See, e.g.*, The Authors Guild, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 10–12 (Oct. 30, 2023) ("The Authors Guild Initial Comments") ("[W]e will need to find a way to prevent authors' body of work or recognizable style from being exploited by others without permission.").

[317] Some commenters described similar results where an image prompt uses copies of the artist's work. *E.g.*, Katherine Lee et al., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 44–46 n.229 (Oct. 29, 2023) (providing as a hypothetical text-to-image prompt, "a big dog facing left wearing a spacesuit in a bleak lunar landscape with the earth rising in the background as an oil painting in the style of Paul Cezanne high-resolution aesthetic trending on artstation"); *see also id.* at 20 n.66, 46 (describing image-to-image prompts).

[318] *See, e.g.*, *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (2024) (statement of Karla Ortiz, Concept Artist, Illustrator, and Fine Artist) ("Artists and creators who have spent a lifetime honing and refining a skill can now have facsimiles of their hard work reproduced in an instant by a Generative AI model that has been trained on their work . . . .").

[319] Center for AI and Digital Policy, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 15–16 (Oct. 30, 2023).

[320] The Authors Guild, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 11 (Oct. 30, 2023) ("The Authors Guild Initial Comments") ("Suddenly, we see people using generative AI to generate texts in the style of authors. . . . [W]e have already seen someone write the last two novels in George R.R. Martin's *A Song of Ice and Fire (Game of Thrones)* series.").

[321] *See, e.g.*, Letter from The Authors Guild, Summary of *Ex Parte* Meeting on May 6, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (May 10, 2024) (noting "that the need for [style] protection has increased in light of the ease with which materials lacking proper attribution can be created and disseminated by AI, as well as the recent explosion of false attribution for AI generated works").

> [A]s of November 29th, 2023, the top result when googling American artist Kelly McKernan is an AI-generated imitation of her style. Not only does this demonstrate the ability of AI forgeries to quickly propagate and pollute search engines and the wider internet but this digital impersonation has a chilling effect on artists' agency and ability to control their online identity. Artists are essentially competing with a distorted version of themselves.[322]

The Office acknowledges the seriousness of these concerns and believes that appropriate remedies should be available for this type of harm.

Copyright law's application in this area is limited, as it does not protect artistic style as a separate element of a work.[323] As noted by several commenters, copyright protection for style would be inconsistent with section 102(b)'s idea/expression dichotomy.[324] Moreover, in most cases the elements of an artist's style cannot easily be delineated and defined separately from a particular underlying work.[325] Google and EFF both stressed that, as a policy matter, stylistic

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[322] Anonymous Artist, Reply Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 1 (Dec. 5, 2023).

[323] 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery."); *see also Douglas v. Osteen*, 317 F. App'x. 97, 99 (3d Cir. 2009) ("[T]he use of a particular writing style or literary method is not protected by the Copyright Act."); *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 11 (D.D.C. 2004) ("While similar writing styles may contribute to similarity between works' total concept and feel, a particular writing style or method of expression standing alone is not protected by the Copyright Act."); *Tangle Inc. v. Aritzia, Inc.*, No. 23-cv-1196, 2023 U.S. Dist. LEXIS 187348, at *7 (N.D. Cal.) ("Style, no matter how creative, is an idea, and is not protectible by copyright."). *But see* Benjamin L.W. Sobel, *Elements of Style: Copyright, Similarity, and Generative AI*, 38.1 HARV. J.L. & TECH. (forthcoming 2024), https://www.bensobel.org/files/articles/Sobel_Elements-of-Style_Public-Draft-May-18-2024.pdf ("[A]n honest application of copyright law requires us to acknowledge that some of what we call style is copyrightable some of the time, and that in some legal contexts courts regularly protect emergent copyright interests that span multiple works.").

[324] *See, e.g.*, Pamela Samuelson Initial Comments at 36–37 ("[A]ny concept of style that can only be identified by considering several works collectively is far too abstract to merit copyright protection consistent with the idea/expression distinction and Section 102(b). Even if proposed copyright protection for 'style' were focused on stylistic features of individual works, it is difficult to see how copyright protection for style or artistic technique could be reconciled with the idea/expression distinction and Section 102(b)."); MPA Initial Comments at 74 ("However, the law does not grant individuals exclusive rights over artistic style. . . . This conclusion flows ineluctably from one of copyright's most fundamental precepts: that it protects expression, not ideas."). *Cf.* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[325] *See* 2 PATRY ON COPYRIGHT § 4:14 (2024) ("If an . . . artist claimed broad protection for a style not associated with a particular work . . . it would be difficult, if not impossible, to determine the scope of protection.").

aspects of expressive content should remain freely available for later creators to develop and build on.[326]

The Copyright Act may, however, provide a remedy where the output of an "in the style of" request ends up replicating not just the artist's style but protectible elements of a particular work. Additionally, as future Parts of this Report will discuss, there may be situations where the use of an artist's own works to train AI systems to produce material imitating their style can support an infringement claim.

Numerous commenters pointed out that meaningful protections against imitations of style may be found in other legal frameworks,[327] including the Lanham Act's prohibitions on passing off and unfair competition.[328] In its comments, the FTC stated:

> [M]imicking the creator's writing style . . . may also constitute an unfair method of competition or an unfair or deceptive practice, especially when the copyright violation deceives consumers, exploits a creator's reputation or diminishes the value of her existing or future works, reveals private information, or otherwise causes substantial injury to consumers.[329]

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[326] *See* EFF Initial Comments at 7 ("A greater degree of restriction on the public's permissible range of speech, particularly one as elusive as a 'style,' would undermine the cultural advancement at the core of copyright's goals."); Google LLC, Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 16 (Oct. 30, 2023) ("[A] law protective of artistic style would inevitably inhibit creativity and impoverish the public domain, which is the cultural commons from which all artists can freely take inspiration.").

[327] *See, e.g.*, A2IM-RIAA Joint Initial Comments at 41 ("To the extent that AI systems are based on, or derive their value from, a particular artist's identity, that artist should be protected by laws governing the use of an individual's brand or identity (such as the individual's voice or likeness), including the Lanham Act and laws regarding rights of publicity and unfair competition."); SAG-AFTRA Initial Comments at 8 ("To the extent an AI system is based on, or derives value from, the artist's brand or identity, that artist should have legal recourse. Laws such as the right of publicity or Lanham Act that protect an individual's persona may be implicated, including when an AI program generates output by using the name of a specific artist as a prompt."); Pamela Samuelson Initial Comments at 37 ("The tendency of users of text-to-image generators to invoke the names of living artists in prompts has caused considerable consternation . . . it can occasionally result in the names of particular artists being publicly associated with works they did not author, to an extent that dwarfs their own substantial artistic contributions . . . . This seems like harm that trademark law and right of publicity could address more easily than copyright law.").

[328] *See* Andrew J. Noreuil, *Nice Tie: Trade Dress Protection for Visual Artistic Style When Competitors Offer Artist-Inspired Products*, 67 FORDHAM L. REV. 3403, 3427 (1999) (discussing *Walt Disney Co. v. Goodtimes Home Video Corp.*, 830 F. Supp. 762 (S.D.N.Y. 1993)).

[329] FTC Initial Comments at 5–6. Adobe has proposed that Congress enact legislation, titled the Federal Anti-Impersonation Right (FAIR) Act, which would provide a right of action to artists whose unique personal style or likeness is intentionally imitated using AI tools for commercial gain. Adobe Inc., Comments Submitted in Response to U.S. Copyright Office's Aug. 30, 2023, Notice of Inquiry at 8 (Oct. 30, 2023).

Although state right of publicity statutes do not explicitly refer to style, where a particular style is closely identified with an individual performer, it may be protected.[330] Protection may also be available under the common law.[331] Although the law in this area is not fully developed, that may be because the means of easy and near-perfect stylistic impersonation have not been widely available until recently,[332] and the advent of generative AI may result in an increase in such claims. Meanwhile, some AI developers have reportedly placed guardrails in their systems blocking requests to generate images in the style of living artists.[333]

In sum, there are several sources of protection under existing laws that may be effective against unfair or deceptive copying of artistic style. Given these resources, as well as the policy reasons not to extend property-like rights to style in itself, the Office does not recommend including style as protected subject matter under a federal digital replica law at this time.[334] If existing protections prove inadequate, this conclusion may be revisited.

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[330] *See* 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, THE RIGHTS OF PUBLICITY AND PRIVACY §§ 8:110, 4:75 (2d. ed. 2024); *see also Muzikowski v. Paramount Pictures Corp.*, No. 01-cv-6721, 2003 U.S. Dist. LEXIS 21766, at *17–18 (N.D. Ill. Dec. 2, 2003) (holding that the "Illinois Right of Publicity Act defines a person's 'identity' broadly . . . . While the term 'persona' is not contained in the [statute's] list of examples [of attributes that serve to identify an individual], the breadth of the . . . statute supports the conclusion that Illinois courts would use an expansive approach in determining what kinds of attributes are protected under the statute."). *But see Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 452 (S.D.N.Y. 2008) (holding that the New York right of publicity statute should be "strictly construed and is not to be applied so as to prohibit the portrayal of an individual's personality or style of performance").

[331] The Ninth Circuit has recognized athletic play style as an element of "likeness" under California common law, *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268, 1272 (9th Cir. 2013), and the Northern District of Texas has recognized "performing style" as a protectible aspect of an individual's persona under Texas common law, *Henley v. Dillard Dep't Stores*, 46 F.Supp. 2d 587, 591 (N.D. Tex. 1999) (citing *Elvis Presley Enters. V. Capece*, 950 F.Supp. 783, 801 (S.D. Tex. 1996)).

[332] *See, e.g.*, Authors Guild Initial Comments at 10.

[333] *See Index: Creative Control*, OPENAI, https://openai.com/index/dall-e-3/ ("DALL·E 3 is designed to decline requests that ask for an image in the style of a living artist.") (last visited July 21, 2024); *Frequently Asked Questions*, COPILOT, https://www.bing.com/images/create/help ("We allow living artists, celebrities, and organizations to make requests to limit the creation of images associated with their names and brands.") (last visited July 21, 2024).

[334] In addition to artistic style, some commenters identified other subject matter—specifically name or attribution—they would like to have covered by a digital replica law. They seek to bar the unauthorized use of an individual's name on or in connection with AI-generated material or creative works in general—a different type of harm from the use of realistic image or voice replicas produced by AI, addressed in this Report. The Authors Guild would prohibit unauthorized use of an author's name in connection with AI-generated material. Letter from Authors Guild, Summary of *Ex Parte* Meeting on May 6, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 2 (May 10, 2024). This would prevent unauthorized users from labeling such material with the name of the author the AI system was prompted to imitate. The Directors Guild of America would add moral rights of attribution and integrity, *see supra* note 41, in order to prevent the "harm to a Director's reputation when his/her creative work is altered without their involvement and when their name is falsely attributed to, or deleted from, a creative work." Letter from

IV. CONCLUSION

The Copyright Office agrees with the numerous commenters that have asserted an urgent need for new protection at the federal level. The widespread availability of generative AI tools that make it easy to create digital replicas of individuals' images and voices has highlighted gaps in existing laws and raised concerns about the harms that can be inflicted by unauthorized uses.

We recommend that Congress establish a federal right that protects all individuals during their lifetimes from the knowing distribution of unauthorized digital replicas. The right should be licensable, subject to guardrails, but not assignable, with effective remedies including monetary damages and injunctive relief. Traditional rules of secondary liability should apply, but with an appropriately conditioned safe harbor for OSPs. The law should contain explicit First Amendment accommodations. Finally, in recognition of well-developed state rights of publicity, we recommend against full preemption of state laws.

The Office remains available as a resource to Congress, the courts, and the executive branch in considering the recommendations in this Report and future developments.

Directors Guild, Summary of *Ex Parte* Meetings on May 22 and May 29, 2024 Regarding the Office's AI Study, to U.S. Copyright Office 1–2 (June 4, 2024). In this area, too, it is important to note that several bodies of existing law protect against the unauthorized and confusing use of an individual's name. *See, e.g.*, CAL. CIV. CODE § 3344 (West 2024) (protecting "name, voice, signature, photograph, or likeness"); FLA. STAT. § 540.08 (2024) (protecting "name, portrait, photograph, or other likeness"); VA. CODE ANN. § 8.01-40 (2024) (protecting "name, portrait, or picture"); 15 U.S.C. § 1125 (providing a cause of action for using, among other things, a name in connection with goods and services that is likely to cause confusion).

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Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office
July 31, 2024

To Follow

Further Parts of the U.S. Copyright Office's Copyright and Artificial Intelligence Report will be published in 2024. Visit www.copyright.gov/AI for more information and to sign up for updates.