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Considerations for Federal Right of Publicity and Digital Impersonation Legislation

At the recent hearing on July 12, 2023, titled "Artificial Intelligence and Intellectual Property—Part II: Copyright," several members of the Senate and witnesses suggested adding a right of publicity or digital impersonation right to federal law. I share their concerns about the use of artificial intelligence (AI) to facilitate and accelerate the ease with which both public and private figures can be replicated, replaced, and impersonated in audio-visual contexts without their permission in ways that may have significant impacts on their commercial, reputational, and dignitary interests, as well as on democracy itself as misinformation may spread under the cloak of deceptive authenticity. AI-generated content poses dangers to the famous and the ordinary alike. At the same time, the ability to develop and utilize this technology is essential to innovation and creativity. Balancing these competing interests is essential to any legislation in this space. As an expert on the right of publicity and identity rights, I offer the following thoughts about some of the key issues that such legislation should consider:

Existing State Right of Publicity Laws and Preemption. Almost every state already has "right of publicity" laws that protect against unauthorized uses of a person's name and likeness, and many expressly include voice and other indicia of a person's identity. While there are some significant variations across states, particularly with regard to the extension of postmortem rights and their scope, many states have longstanding publicity laws, some with more than 100 years of relied-upon precedents. Any federal legislation in this area should be careful not to destabilize state right of publicity and privacy laws in this area. At the same time, a preemptive federal law in this area could help clarify and coordinate conflicting state publicity laws, particularly with regard to who can bring such claims, postmortem rights, and exceptions to liability.

Ordinary People. Any federal legislation in this area should make sure that everyone benefits from its protections, not solely famous and commercially successful people. Many ordinary people have their names, likenesses, and voices used without their permission in ways that cause significant harms, including reputational and commercial injuries. There should be no requirement to have a commercially valuable identity to bring a claim. 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.

Inalienable/Nontransferable Right. Any right created by legislation should <u>not</u> be transferable away from identity-holders, the people whose identity is sought to be protected by such legislation. Creating a transferable right would strip individuals of the very protections the proposed legislation is supposed to provide. Allowing 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. Making publicity rights or other identity-based rights transferable poses a particular risk to student-athletes, aspiring actors, recordings artists, and models, who would be (and sometimes already are) asked to sign away such rights in perpetuity to others or whose parents may do so when children are minors. Such transferability also threatens ordinary people

who may unwittingly sign over those rights as part of online terms-of-service that they click approval of without even reading.

Limiting such transferability will not prevent authorized parties, such as a movie studio or record label, from having standing to enforce rights under any proposed legislation.

First Amendment. Any federal publicity law or digital replica right must navigate its potential conflict with free speech and the First Amendment. The current state of the First Amendment's application to right of publicity claims is uncertain and differs substantially from jurisdiction to jurisdiction with at least five different approaches currently employed. Congress should be cautious wading into this still developing area of First Amendment law, and if it does so, should try to do so in a way that adds clarity, perhaps with specific exceptions to liability. 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" is used, or the uses are in commercial products or advertising not related to an authorized underlying work.

Potential Conflicts with Copyright Law. Many of today's generative-AI works were created using copyrighted works without permission either to directly create new works or to train AI models. In other instances, however, AI technology can be used to create works either with the permission of the copyright holders or by the copyright holders themselves. Copyright law permits the production of such derivative works. Any federal legislation restricting uses of such copyrighted works will need to address this potential conflict. Any federal publicity or digital replica/impersonation right should balance the protection of performers with allowing copyright holders to exercise their federal right under the Copyright Act to reuse copyrighted material. State right of publicity laws are sometimes preempted by federal copyright law when the two laws clash, but the case law does not provide a stable or predictable roadmap for Congress to employ at the federal level. The best way to read these cases and conflicts, however, and one which may provide some guidance is that when a person appears in a copyrighted work with permission, it is appropriate to provide some latitude for a copyright holder to make anticipated and related uses of the copyrighted work in derivative works, unless limited by contract or collective bargaining agreements. At the same time, a copyright holder should not be able to create an entirely new performance that substitutes for the work of a living performer and that would mislead the public as to their participation in the new work. Nor should unrelated derivative works be allowed, such as the reuse of a photograph or performance in an unrelated advertisement or merchandise.

Gap Filling and Existing Laws. Congress should legislate in this area with the recognition that state right of publicity laws already may protect against many of the unauthorized uses of a person's identity in generative AI, both in terms of outputs and potentially the use of training data as well. State and Federal trademark, unfair competition, and false endorsement laws, including the Lanham Act, will also likely provide protection in many instances of AI-generated content.

Section 230 and Intermediary Liability. There is currently a circuit split on whether state right of publicity laws are exempt from the immunity from third-party liability provided to interactive computer services by the Communications Decency Act § 230. Any federal legislation should clarify third-party liability and perhaps whether § 230's exception for intellectual property laws applies to *state* publicity laws. Given the concerns over generative AI, particularly in the context of the Internet, immunity from third-party liability will greatly limit the effectiveness of any federal legislation unless some alternative mechanism is employed that requires websites and others to take down infringing material.