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<u>Artificial Intelligence, Copyright, and Right of Publicity Comments of Professor Jennifer E. Rothman</u>

In response to your notice of inquiry and request for comments, I am submitting the following comments primarily focused on the right of publicity and related issues raised in your questions numbered 30 to 34.[1]

I am the Nicholas F. Gallicchio Professor of Law at the University of Pennsylvania and am nationally recognized for my scholarship in the field of intellectual property. I am known as the leading expert on the right of publicity and identity rights, having written what has been called the "definitive" book on the subject.[2] I have also published numerous relevant articles, including most recently ones in the *Harvard Law Review* and *Yale Law Journal*.[3] I also operate the well-regarded website, *Rothman's Roadmap to the Right of Publicity* which documents current (varying) state laws and provides posts on current issues, legislation, and decisions on the topic.[4]

Artificial intelligence poses both great opportunities and great dangers, so any legislation needs to consider both sides of this problem and how we can best harness the advantages of AI for humanity, without it seeding and spreading misinformation, and replacing opportunities for people to work, create, and thrive. AI threatens to replace work for living writers, artists, and performers, and to spread deepfakes masquerading as authentic recordings of politicians, recording artists, actors, and ordinary people in ways that threaten not only our livelihoods but democracy itself. It is therefore appropriate and necessary for the Copyright Office and Congress to consider how best to address these challenges in light of how existing copyright, right of publicity, trademark, unfair competition, and other laws address these issues. These comments will focus primarily on the issues that arise from the ability to generate images, likenesses, voices, and performances based on those of real people.

There are four primary ways in which people's identities can be used in generative AI: (1) images, videos, and sound recordings of real people can be used as training data; (2) people's names and other identifying data can be used as prompts; (3) outputs of generative AI can include, replicate, or evoke the names, likenesses, voices, and performances of identifiable individuals; (4) people's identities or performances can be used to promote or market AI platforms. My comments, and the concerns highlighted in Congressional hearings on the issue, focus primarily on the third of these uses, in which

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[1] Artificial Intelligence and Copyright, Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59942 (Aug. 24, 2023), Docket No. 2023-6.

[2] Jennifer E. Rothman, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD (Harvard Univ. Press 2018).

[3] *See, e.g.*, Jennifer E. Rothman, *Navigating the Identity Thicket*, 135 HARV. L. REV. 1271 (2022); Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L. J. 86 (2020).

[4] *See* Rothman's Roadmap to the Right of Publicity, at www.rightofpublicityroadmap.com.

generative AI produces outputs that are convincing images, sound recordings, or performances that appear to have been done by known and recognizable individuals.

The ability to produce AI-generated performances threatens the right of each of us to control how our identities are used by others, our dignity, and in some instances our livelihood. The ability to produce hard-to-discern deepfakes that can animate politicians giving speeches or doing things they did not say or do presents a fundamental threat to democracy. Many of these concerns go far beyond the scope of copyright, right of publicity laws, and other intellectual property laws. I will confine my comments to the scope of the Notice of Inquiry, focusing on the issues raised involving the unauthorized use of a person's identity, particularly their image and voice. But this broader context is essential to understand because any legislative fixes in this area should protect against disinformation, inauthentic performances being passed off as real ones, and the replacement of living performers with digital ones.

These comments will focus on how current law addresses AI-generated uses of a person's identity, the potential benefits of federal legislation in the area, and the pitfalls any such legislation would need to avoid.

I note that as I prepared this submission, several senators circulated a discussion draft of "Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023" or the NO FAKES Act of 2023 which would create a "digital replication right" in both "living" and "dead" "individuals" to "authorize the use of the image, voice or visual likeness of the individual in a digital replica."[5] I analyze this proposed legislation in depth elsewhere, and focus my comments here more generally on the questions posed by the Copyright Office rather than on this specific proposal.[6]

Current Laws that Address AI-generated Uses of Others' Identities

In the recently circulated one-pager accompanying a draft of proposed Congressional legislation to address some of these concerns, the two primary examples given were of AI-generated performances passed off to the public as being authentic. The first is the viral AI-generated song "Heart on My Sleeve," which imitated the voices of Drake and The Weeknd. The song became a hit—until it was removed from various platforms. The public initially thought it was a real song by the performers. The second example provided in the one-pager is the recent AI-generated version of Tom Hanks used without authorization in an advertisement for a dental plan.

Both of the emblematic uses highlighted in the one-pager distributed with the NO FAKES Act and the examples given in the Copyright and AI hearings in July of this year appear to already be actionable under existing law. Absent jurisdictional hurdles, Tom Hanks, Drake, and the Weeknd each have

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[5] NO FAKES Act of 2023, Discussion Draft Dated October 11, 2023, accessible at https://rightofpublicityroadmap.com/news_commentary/senate-circulates-draft-of-digital-replica-bill/.

[6] Jennifer E. Rothman, *Draft Digital Replica Bill Risks Living Performers' Rights over AI-Generated Replacements*, at https://rightofpublicityroadmap.com/news_commentary/draft-digital-replica-bill-risks-living-performers-rights-over-ai-generated-replacements/ (Oct. 12, 2023); Jennifer E. Rothman, Summary and Analysis of Proposed NO FAKES ACT of 2023, Discussion Draft Dated October 11, 2023, accessible at https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Professor-Rothman-Analysis-of-NO-FAKES-ACT-of-2023-Discussion-Draft-of-October-11-2023.pdf. (Prepared Oct. 19, 2023).

straightforward lawsuits under state right of publicity laws for the uses described.[7] When sound recordings that imitate identifiable recording artists are publicly distributed for profit as if they were genuine new works by the recording artists, as was the case with the "Heart on My Sleeve" generative-AI song, state publicity laws provide a clear remedy. Similarly, an AI-generated performance by an actor without his permission in a circulated advertisement, as occurred using Tom Hanks, would be a clear winner under state right of publicity laws. Notably, right of publicity claims do not turn on confusion, so one could not avoid liability by adding a disclaimer saying that even though a recording sounds like the Weeknd it is not him.

Federal trademark, unfair competition, and false advertising laws under the Lanham Act and similar state laws would also provide claims to Drake, Hanks, and the Weeknd for false endorsement and trademark infringement.

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. No state has rejected such a right, and the likelihood is that when confronted with the issue the remaining states that do not have express common law or statutes on the question would also recognize such a right against unauthorized uses of a person's identity for another's advantage. While there are some significant variations in right of publicity laws across states, particularly with regard to the extension of postmortem rights and the scope of such postmortem rights, most states have longstanding, largely consistent publicity laws, some with more than 100 years of relied-upon precedents, that robustly protect against unauthorized uses of a person's name, likeness, voice, and other indicia of identity, including their performances.[8]

In addition, trademark and unfair competition laws, both under the federal Lanham Act and state laws, protect against unauthorized uses of a person's identity if the use suggests confusion as to the person's endorsement or participation in the newly generated work. These claims may be limited to those with recognized commercial value. Trademark dilution claims will also be available to those whose identities (particularly their names or likenesses) rise to the level of being famous marks.[9]

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[7] Some state publicity laws are limited to those who are domiciled in the state, but others extend to all uses that take place in a state or where an injury occurs. My understanding is that Hanks and The Weeknd live in California and would benefit from the multiple privacy and publicity laws in the state that protect against such uses. Drake appears to be a resident of Canada. I note that Canada has personality protections as well, but I do not address them here. Nor do I address choice of law issues. So, it is possible that Drake would have a slightly harder time bringing a state publicity claim, but in contrast to Princess Diana's heirs who faced a circumstance in which the United Kingdom did not extend postmortem rights, Canada would protect the living Drake, making the extension of U.S. law more likely. *Cf.* Cairns v. Franklin Mint Co., 292 F.3d 1139 (9th Cir. 2002). In addition, because Drake will be able to bring unfair competition and trademark claims, any challenges in bringing a right of publicity claim will likely be mitigated by these options. I note that the fair use determination in *Cairn* may be called into question by the recent Supreme Court decision in *Jack Daniel's Properties, Inc. v. VIP Products, Inc.*, 143 S. Ct. 1578 (2023).

[8] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (rejecting a First Amendment defense to a news broadcast of a human cannonball artist's "entire" performance under Ohio's appropriation-branch of its privacy law, denominated as a "right of publicity" claim by the Supreme Court); *see also* ROTHMAN, supra note 2, *passim* (describing history and sweep of right of publicity laws); Post & Rothman, *supra* note 3, at 93–106 (considering similarities in elements of right of publicity and appropriation-based claims across states, and how current law protects against unauthorized performances, including the creation of computer-generated performances of actors and singers).

[9] *See* Rothman, *Navigating the Identity Thicket*, *supra* note 3, at 1278–1289.

I note with regard to Question #34, that consideration of the role of federal and state trademark, unfair competition, and false advertising laws, as well as of FTC regulations in this area is relevant to the issues raised by generative AI, including the unauthorized use of individuals' identities and the passing off of works as authored by particular individuals when they were not in fact produced by those individuals.

AI-generated *outputs* that use others' identities without permission likely infringe state publicity rights and in some instances trademark and unfair competition laws absent applicable exclusions or First Amendment defenses. However, it is a closer question—as is the case with the copyright analysis— whether *training data* that uses others' names, likenesses, and voices as inputs infringe state publicity and privacy-based appropriation rights. The answer to this question may depend in part on the particular parameters of state law, but in broad strokes it seems that such inputs could be understood as uses of another's identity without permission for the defendant's advantage. This still would leave open the possibility that the use of such information for training purposes is protected by the First Amendment, even if outputs would not be.

Considering a Federal Right of Publicity Law

Even though existing state and federal laws likely protect against many of the unauthorized uses by generative AI, there are a number of potential benefits to having a federal right of publicity. These benefits, however, have less to do with addressing concerns with AI specifically, than they do with the possibility that a federal law could more generally lend greater harmony and clarity around the scope of personality rights than the current 50-state set of laws does. With that said, there are many pitfalls of adopting a federal right of publicity and any legislation would need to be very carefully crafted.

I highlight here some of the possible benefits of such federal legislation, as well as some of the challenges for doing so and necessary considerations if Congress chooses to proceed on such a path.

Harmonization without Destabilization. A broader and preemptive federal right of publicity law could harmonize and clarify state right of publicity laws and exceptions to them but would be a massive undertaking. It would have to be done carefully so as not to destabilize state right of publicity and privacy laws in this area which have been operating for more than 100 years.

If done without preempting state law, any federal law risks making the current conflicting set of state laws even more problematic by layering on top of them yet another conflict and setting up clashes with existing licenses and contracts. This last problem would likely also occur even with a preemptive law if it were not limited to being prospective in application and if it did not leave in place existing contractual agreements.

Nevertheless, without preemption a broad federal law would lose many of its benefits. The primary reason to proceed with such a law is to help clarify and coordinate conflicting state publicity laws, particularly with regard to who can bring such claims, postmortem rights, and exceptions to liability. But without preemptive effect all of these benefits would be lost.

CDA § 230. Another benefit of a federal law is that it could designate the right as "intellectual property" for purposes of the Communications Decency Act Section 230,[10] which would facilitate the

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[10] 47 U.S.C. § 230.

removal of infringing content and the ability to obtain damages from online platforms. There is currently a circuit split about whether state right of publicity claims fall within the immunity provisions of the Communications Decency Act § 230 or instead fall under its exception for intellectual property laws.[11] This matters because if the exception does not apply, it is difficult to get platforms to take down infringing content, and it can be hard to track down individuals who initially created or circulated works. However, the Section 230 problem could be addressed more directly by amending Section 230 to clarify that state right of publicity and privacy-based appropriation claims are not immunized by Section 230.

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 harm, 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.

Inalienability and Limits on Licensing. Any right created by federal legislation should not 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 that 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.[12]

Any possible licensing would also need to be significantly limited so as not to be a subterfuge for long-term, perpetual, or global licenses that are akin to transferring all future rights to a person's performance to others. It would also need to be limited so as not to seed misinformation. One concern with the recently circulated draft NO FAKES Act is that its licensing provision does exactly this.[13]

A license to use another person's identity should only authorize a specific use, performance, or set of performances over which a person has ongoing control over the words and actions of their computer-

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[11] *Compare* Hepp v. Facebook, 14 F.4th 204 (3d Cir. 2021) (holding that Section 230 did not bar a state right of publicity claim from proceeding against Facebook) *with* Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (holding that a right of publicity claim could not proceed because of Section 230 immunity since the claim was under state rather than federal law); *see also* Jennifer E. Rothman, *Third Circuit Holds that Newscaster's Right of Publicity Claim can Proceed Against Facebook*, at https://rightofpublicityroadmap.com/news_commentary/third-circuit-holds-that-newscasters-right-of-publicity-claim-can-proceed-against-facebook/ (Sept. 28, 2021).

[12] For additional discussion of these concerns see ROTHMAN, *supra* note 2, at 115–37; Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEORGETOWN L.J. 185 (2012).

[13] *See* Rothman, *Draft Digital Replica Bill Risks Living Performers' Rights over AI-Generated Replacements*, *supra* note 6.

generated self. This will have the important bonus of protecting against deceptive performances in which a performer played no role.

In the absence of such individualized approval, there should be clear and prominent disclosures that the uses or performances were not by the individuals nor specifically reviewed or approved by the person. As is true with other AI-generated works, it is appropriate to mandate disclosure of the use of this technology, but it is particularly crucial in the context of computer-generated performances of human-beings that could deceive the public into thinking these "performances" are real. The ability for licensees to generate performances by a person forever and in unknown contexts as if they are saying or singing words they never said nor agreed to is a chilling prospect. This possibility poses a broad threat to society by undermining trust in authentic communication.

At a minimum, licenses should be limited to a specific context and broad licenses (if allowed) should not exceed seven years, an outer limit we see in the regulation of personal services contracts. Even the seven-year duration and related noncompete agreements are falling out of favor because of the increasing awareness of the unacceptable constraints they place on individuals.[14] Broad licenses over a person's own name, likeness, voice, and performances pose great risks to individual freedom and productivity. The most egregious licenses are likely to involve those with the least bargaining power, and children are currently without any control over these rights—something a federal law could address.[15] Any licenses involving children should expire when they turn 18, should be reviewed by a court, and any income earned should be held in a trust for them.

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" or performance is used, or the uses are in commercial products or advertising not related to an authorized underlying work.[16]

Postmortem Rights. If postmortem rights are considered, there are many additional issues that need to be addressed, and the context of tackling the first-generation of challenges of generative AI may not be the best time to do so. Extending or limiting postmortem protection at the federal level could help to harmonize disparate state laws and clarify speech-protective exceptions, but it has little to do with addressing the problems with AI and may actually undermine job opportunities for the living. A federal postmortem right may shore up the replacement of up-and-coming performers with long-dead celebrities.

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[14] Noam Scheiber, *U.S. Moves to Bar Noncompete Agreements in Labor Contracts*, N.Y. TIMES, Jan. 5, 2023, accessible at https://www.nytimes.com/2023/01/05/business/economy/ftc-noncompete.html; Mark A. Lemley & Orly Lobel, *Banning Noncompete Agreements to Create Competitive Job Markets*, Day One Project, accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3773893.

[15] Jennifer E. Rothman, *What Happened to Brooke Shields was Awful. It Could Have Been Even Worse*, SLATE, April 18, 2023, at https://slate.com/human-interest/2023/04/brooke-shields-hulu-documentary-child-stars.html.

[16] For further discussion of these issues, see Post & Rothman, *supra* note 3.

An entirely separate call for comment on such a significant extension of federal rights would be appropriate if Congress wishes to consider adding postmortem publicity rights to federal law. Some of the many issues raised by extending rights emanating from dead people include questions of with whom such a right should vest, as well as its duration. Extending such rights after death could also force the commercialization of deceased celebrities even if they and their loved ones do not want to do so because of how such a right would be treated under current estate tax laws.[17] Limits on depicting the dead in creative works are also more likely to run afoul of the First Amendment than limits on depicting the living.

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.[18] 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.[19]

Style-Based Claims and 17 U.S.C. § 114(b)

The First Amendment provides latitude for works in the style of or same genre as that of others. So, there should not be liability for works merely because they are in the "style" of a Taylor Swift or Drake song when there is no confusion as to the use of the performers' voice or participation, and there is no advertising using their names or likenesses. This is largely the state of the law today, where

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[17] *Cf.* Jennifer E. Rothman, *Mixed Victory for Jackson Estate in Tax Court*, at https://rightofpublicityroadmap.com/news_commentary/mixed-victory-jackson-estate-tax-court/ (discussing taxation of state postmortem publicity rights) (May 18, 2021).

[18] For additional discussion of copyright preemption and the right of publicity see ROTHMAN, *supra* note 2, at 160-79. *See also* Jennifer E. Rothman, *The Other Side of* Garcia: *The Right of Publicity and Copyright Preemption*, 39 COLUMBIA J. L & ARTS 441 (2016); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002).

[19] For additional discussion of copyright preemption in the context of derivative works and reanimated performances see ROTHMAN, *supra* note 2, at 170-79.

liability based on sound-recordings under right of publicity laws stems from using confusingly similar voices, not the mere use of a similar vocal or musical style.[20] The ability to make sound-alike recordings under the Copyright Act has long prevented the right of publicity from extending liability merely because a cover of a song made famous by one performer is subsequently played or recording by another performer when there is no confusion as to whose voice is being used, or at least when the voice is not intentionally mimicking a particular singer. Disclaimers should not be relevant to such inquiries.

Some General Considerations

Any legislation considered must keep in mind that AI technology will continue to develop and should not lock in approaches that may swiftly become outdated. Any consideration of legislation should be done with the awareness that lawsuits bringing copyright, right of publicity, trademark, unfair competition, defamation and other claims against works, performances, and products produced by or arising out of this new generation of AI are just beginning. There are some advantages to allowing courts to navigate some real-world disputes using existing legal frameworks before rushing in with legislation that will short-circuit the common law process of adjudication and natural development and problem-solving around the copyright and identity-based challenges produced by artificial intelligence. Given that many laws already unquestionably protect against unauthorized uses of a person's identity, and the reality that the copyright questions are still at the earlier stages of being evaluated by courts, any proposed legislation must operate from the position of not making things worse than the status quo, with regard to protecting both the famous and the ordinary from having their identities harnessed by AI systems without their permission.

I hope these comments have been useful to you as the Copyright Office and Congress consider how best to address the myriad issues created by generative AI, particularly in the context of using people's names, likenesses, voices, and performances without permission.

Please reach out with any questions or comments to me directly at rothmj@law.upenn.edu or at 215-898-9356.

Sincerely,

/s/ Jennifer E. Rothman

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[20] *See, e.g.*, Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (allowing Lanham Act false endorsement claims and state publicity claims when an advertisement used a singer who copied the vocal sound of Tom Waits in ways that confused listeners as to his participation or sponsorship); Midler v. Ford Motor Co., 849 F.3d 460 (9th Cir. 1988) (allowing liability under right of publicity law for a sound-alike performance when listeners thought Bette Midler was singing and "the distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product."). Although these cases are sometimes understood as protecting mere style, both had evidence of confusion as to the performers actually singing and involved intentional evocation of the singers' identities for use in commercial advertising for products. When this is not the case, it is appropriate to give latitude for similar styles and recordings of licensed musical compositions, otherwise the first person to record a song will get a monopoly in the work in contravention of copyright law and free speech.