

PRESERVING WHAT'S REAL: THE NO FAKES ACT AS A FEDERAL RIGHT AGAINST UNAUTHORIZED DIGITAL REPLICAS

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INTRODUCTION

Imagine waking up and discovering a video of yourself saying things you never said or learning that your voice is being used to deceive your family. These unsettling scenarios are no longer fiction—artificial intelligence has made them a reality. Current state laws, which vary from state to state, are not equipped to tackle these new threats. The NO FAKES Act proposes a federal safeguard to protect everyone's voice and image. This Note examines how the Act would function, why it is necessary, and the challenges it might face.

Online, it has become increasingly difficult to determine what is real and what is not. One major reason for this is the proliferation in the use of artificial intelligence. Generative Artificial Intelligence (AI) has proven to be an undeniably powerful tool for chatbot systems and artistic expression.¹ There is a wide variety of platforms available, including language and writing assistance models such as ChatGPT and Scribe, image generators such as Dall-E2 and Midjourney, and coding models such as AlphaCode and GitHub Copilot.² Due to the simplicity and ease of use, AI is being unethically employed to cause harm to individuals and create deceptive content.³ To address this harm, lawmakers, academics, and business leaders are seeking options to regulate its use.⁴

Prior to analysis of these issues, Section I of this Note will provide the necessary background information about artificial intelligence, right of publicity, and the current state of the law. The remainder will focus on one proposed solution in particular, the NO FAKES Act and the implications it presents. Section II will discuss the potential extents of protection of a federal right of publicity and

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1. Felipe Romero Moreno, *Generative AI and Deepfakes: A Human Rights Approach to Tackling Harmful Content*, 38 INT'L REV. L., COMPUTS. & TECH. 297, 298 (2024).

2. *Top Generative AI Tools and Applications*, TURING (Apr. 3, 2025), <https://www.turing.com/resources/generative-ai-tools>; Sabrina Ortiz, *The Best AI Image Generators Are Getting Scary Good at Things They Used to Be Terrible at*, ZDNET (May 9, 2025, at 14:29 PT), <https://www.zdnet.com/article/best-ai-image-generator/>.

3. Moreno, *supra* note 1, at 297-98.

4. Kathy Baxter & Yoav Schlesinger, *Managing the Risks of Generative AI*, HARV. BUS. REV. (June 6, 2023), <https://hbr.org/2023/06/managing-the-risks-of-generative-ai>.

examine how current state or international laws address this. Section III will examine whether a federal bill should fully or partially preempt current state laws. Section IV will focus on the possible extents of liability associated with a federal right of publicity, the potential economic or innovative impacts, and a brief discussion of First Amendment considerations. Section V will briefly note some other considerations. Finally, this Note will conclude with a summary of the key points.

I. BACKGROUND

A. *Generative Artificial Intelligence and Deepfakes*

AI can be used as “an umbrella term for any theory, computer system, or software that is developed to allow machines to perform tasks that normally require human intelligence.”⁵ Generative AI is “capable of generating text, images, or other media in response to prompts.”⁶ This technology can be used in a wide variety of applications, such as generating text, images and videos, sounds and music, software codes, design and art, and simulations or synthetic data.⁷

The way generative AI works involves creating a foundation model and training a “deep learning algorithm on huge volumes of raw, unstructured, unlabeled data.”⁸ For the generally-trained system to perform specific functions, it must be tuned. This involves fine tuning through inputting correct answers into the system, or using reinforcement learning with human feedback, in which “human users respond to generated content with evaluations the model can use to update the model for greater accuracy or relevance.”⁹ Once the model can complete the desired function, developers and users can continue to tune the model for greater accuracy and relevance in the data they are seeking.¹⁰

In the media and entertainment industry, one form of generative AI has become increasingly prevalent and has raised issues in name, likeness, and image rights.¹¹ This technology is commonly known as a “deepfake.” A deepfake is defined as “an AI-based technique that synthesizes media,” which involves “superimposing human features on another person’s body—and/or manipulating sounds—to generate a realistic human experience.”¹² The term “deepfake” can be

5. *The Benefits and Limitations of Generative AI: Harvard Experts Answer Your Questions*, HARV. ONLINE (Apr. 19, 2023), <https://www.harvardonline.harvard.edu/blog/benefits-limitations-generative-ai>.

6. *Id.*

7. Cole Stryker & Mark Scapicchio, *What Is Generative AI?*, IBM (Mar. 22, 2024), <https://www.ibm.com/topics/generative-ai>.

8. *Id.*

9. *Id.*

10. *Id.*

11. See Vejay Lalla et al., *Artificial Intelligence: Deepfakes in the Entertainment Industry*, WIPO MAG. (June 19, 2022), https://www.wipo.int/wipo_magazine/en/2022/02/article_0003.html.

12. *Id.*

used interchangeably with “digital replica.”¹³ There are positive uses for this type of generative AI, such as using a deepfake Salvadore Dalí to welcome visitors at the Dalí Museum in Florida, or to create graphics for video game designs.¹⁴ However, the majority of deepfakes have a negative connotation with far-reaching implications and the “potential to ignite political or religious tensions between nations, deceive the public, disrupt financial markets, perpetrate acts of sabotage, fraud, scams, obstruct justice, and much more.”¹⁵

The “catalyst for proliferating deepfake content” was nonconsensual pornography.¹⁶ This content is still representative of the majority of AI content online.¹⁷ In fact, the term “deepfake” was coined back in 2017 on the social media site Reddit when a moderator created a “deepfakes” subreddit and “post[ed] videos that used face-swapping technology to insert celebrities’ likenesses into existing pornographic videos.”¹⁸ One research company, Sensity AI, tracked online deepfake videos starting in December 2018 and found that between 90% and 95% of them were nonconsensual pornography.¹⁹ Among other various deepfake incidents,²⁰ more recently in January 2024 there were sexually explicit deepfake images of Taylor Swift that circulated social media, leading to public uproar.²¹

These recent instances have raised public awareness that “the unauthorized creation, disclosure, and dissemination of these digital forgeries” poses significant risks.²² Unfortunately, there is not currently any enacted federal legislation in the United States banning or regulating deepfakes, and only a patchwork of legislation among the individual states, each offering varying levels of protection.²³ A current

13. *Copyright and Artificial Intelligence Part 1: Digital Replicas*, U.S. COPYRIGHT OFF. 2 n.10 (July 2024), <https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf>.

14. Dominic Lees, *Deepfakes Are Being Used for Good – Here’s How*, THE CONVERSATION (Nov. 4, 2022, at 12:58 ET), <https://theconversation.com/deepfakes-are-being-used-for-good-heres-how-193170>; James Vincent, *Nvidia Has Created the First Game Demo Using AI-Generated Graphics*, THE VERGE (Dec. 3, 2018, at 08:00 ET), <https://www.theverge.com/2018/12/3/18121198/ai-generated-video-game-graphics-nvidia-driving-demo-neurips>.

15. Ángel Fernández Gambín et al., *Deepfakes: Current and Future Trends*, 57 A.I. REV. 1, 3 (2024).

16. *Increasing Threat of Deep Fake Identities*, U.S. DEP’T OF HOMELAND SEC. (Oct. 31, 2023), https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf.

17. *Id.*

18. Laura Payne, *Deepfake*, BRITANNICA (Aug. 17, 2025), <https://www.britannica.com/technology/deepfake>.

19. Karen Hao, *Deepfake Porn Is Ruining Women’s Lives. Now the Law May Finally Ban It*, MIT TECH. REV. (Feb. 12, 2021), <https://www.technologyreview.com/2021/02/12/1018222/deepfake-revenge-porn-coming-ban/>.

20. See Michelle M. Graham, *Deepfakes: Federal and State Regulation Aims to Curb a Growing Threat*, THOMSON REUTERS (June 26, 2024), <https://www.thomsonreuters.com/en-us/posts/government/deepfakes-federal-state-regulation/> (discussing another example deepfake of Pope Francis wearing a white puffer coat in March 2023).

21. *Id.*

22. *Id.*

23. *Id.*

possible recovery route could be through a tort or infringement claim that seeks damages from the poster of the deepfake content.²⁴ However, there are many factors that could make this difficult and would likely only offer temporary relief. Many people use anonymous accounts on the internet and social media, and these accounts can be created without any type of verification on some sites.²⁵ Even if the individual poster was identified and the deepfake content was taken down, there could already be other accounts that reposted it.²⁶

Some courts have begun to run into generative AI. An ongoing suit in the Northern District of California between plaintiff visual artists and defendant generative AI developers could prove to be a “landmark ruling.”²⁷ In this case, *Andersen v. Stability AI*,²⁸ the artists filed a class action to challenge the defendants’ “creation or use of Stable Diffusion, an artificial intelligence software product.”²⁹ Specifically, it was alleged that the defendants scraped over five billion images, for training their image-generating services, with billions of these images being copyrighted and used without permission.³⁰ The case has still not been finished, but the ruling will potentially “set[] a new precedent respecting how AI companies should operate in order to avoid violating copyright and trademark law.”³¹ This could be a turning point in artists’ ability to assert their rights in their content and establish guidelines for AI companies seeking material in training their generative technology.³²

Another case in the same court, *Cousart v. OpenAI*,³³ involved similar claims against OpenAI and Microsoft, alleging that the companies were using stolen personal data to train their systems.³⁴ However, the class-action case was dismissed because the plaintiffs failed to present a “plain and short statement” in their first amended complaint, which spanned almost 200 pages.³⁵ The complaint consisted of “swaths of unnecessary and distracting allegations” and “rhetoric and policy

24. *Mission Impossible?: The Legal Implications of Managing Deepfake Celebrity Videos*, J. OF SPORTS & ENT. L.: HARV. L. SCH. (Mar. 24, 2021), <https://journals.law.harvard.edu/jsel/2021/03/mission-impossible-the-legal-implications-of-managing-deepfake-celebrity-videos/>.

25. *Id.*

26. *Id.*

27. Zach Barreto, *Artists Secure Major Victory in Landmark Intellectual Property Case Against AI-Generated Content Companies*, EXPERT INST. (Sep. 11, 2024), <https://www.expertinstitute.com/resources/insights/artists-victory-intellectual-property-case-ai-generated-content-companies/>; see *Andersen v. Stability A.I. Ltd.*, 700 F. Supp. 3d 853 (N.D. Cal. 2023).

28. *Andersen*, 700 F. Supp. 3d 853.

29. *Id.* at 860.

30. *Id.*

31. Barreto, *supra* note 27.

32. *Id.*

33. *Cousart v. OpenAI LP*, 2024 WL 328252 (N.D. Cal. May 24, 2024).

34. Blake Brittain, *OpenAI, Microsoft Defeat US Consumer-Privacy Lawsuit for Now*, REUTERS (May 24, 2024, at 17:53 ET), <https://www.reuters.com/legal/transactional/openai-microsoft-defeat-us-consumer-privacy-lawsuit-now-2024-05-24/>; see *Cousart*, 2024 WL 328252, at *1; see also *Walters v. OpenAI*, 2024 WL 1366490 (11th Cir. Apr. 1, 2024) (displaying the AI company OpenAI was also involved in a defamation lawsuit in which it was accused of generating misleading statements about the plaintiff).

35. *Cousart*, 2024 WL 328252 at *3.

grievances” about the development of AI that the judge found unsuitable for a federal court to resolve.³⁶ Although clear that this case was dismissed for procedural reasons, it may be indicative that federal standards for addressing AI concerns are needed and underline the importance of creating clear guidelines for both individuals seeking to protect their personal content or data and companies that want to use material to train their systems.

B. *Calls for Federal Protection*

A possible solution for regulating deepfake content created from an individual’s visual likeness or voice is through right of publicity laws. However, there are only state versions of these laws. An article the American Bar Association published in 2020 called for a federal right of publicity, focusing on the need to harmonize the various existing state laws.³⁷ The right of publicity (ROP) concerns the exclusive right to license one’s own identity for commercial purposes, preventing other individuals unauthorized commercial use of their identity.³⁸ Alternatively, ROP is often recognized as “the right to prevent unauthorized commercial uses of one’s name, image, or likeness (NIL) or other aspects of one’s identity (such as one’s voice).”³⁹ Certainly, the image and likeness or voice rights of these laws would fit into the framework needed to regulate the unauthorized deepfake use.

The term “right of publicity” was first used in a Second Circuit case to “distinguish between privacy and publicity rights.”⁴⁰ The first, and only, Supreme Court opinion addressing the right of publicity was in *Zacchini v. Scripps-Howard Broadcasting Co.*,⁴¹ in which a performer brought action against a broadcasting company after the company filmed the performer’s “human cannonball” act and then aired the act on television without consent.⁴² The Court ultimately held that the First and Fourteenth Amendments of the Constitution were not preventive against a claim based on an Ohio right of publicity.⁴³ There have been multiple other cases that highlight a different result when a ROP claim is potentially adverse to First Amendment rights.⁴⁴

36. *Id.*

37. Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, AM. BAR ASS’N. (Sep. 16, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/.

38. *Publicity*, CORN. L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/wex/publicity> (last visited Mar. 10, 2026).

39. Christopher T. Zirpoli, *Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity*, CONG. RSCH. SERV. 1 (Jan. 29, 2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11052>.

40. Roesler & Hutchinson, *supra* note 37; *see Haelan Lab’ys, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

41. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563-64 (1977).

42. *Id.*

43. *See id.* at 578-79; Roesler & Hutchinson, *supra* note 37.

44. *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992) (holding that ROP was infringed upon); *see also Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 170 (3d Cir. 2013) (holding

In 2003, a Sixth Circuit Court of Appeals opinion, *ETW Corporation v. Jireh Publishing*,⁴⁵ noted that although ROP is widely recognized among the states and clearly accepted in societal jurisprudence, “the differences between the various state statutes has led to confusion such that there is a large body of opinion advocating that a uniform preemptive federal law be adopted.”⁴⁶ Here, the plaintiff, ETW, the licensing agent of Tiger Woods, sued Jireh, the publisher of artist Rick Rush.⁴⁷ Rush was known for creating paintings of famous athletes.⁴⁸ ETW sued Jireh for violating Wood’s ROP, and Jireh defended on the basis that the prints were protected by the First Amendment.⁴⁹ The Sixth Circuit agreed with the defendants and affirmed the district court that Rush’s work was entitled to full First Amendment protection.⁵⁰ Specifically, the court noted that the artwork had “substantial informational and creative content” that outweighed any negative effect on ETW’s market and did not violate Woods’s ROP.⁵¹ This opinion showed a different result between ROP laws and the First Amendment, with the court weighing in on how many other circuits had viewed this issue before reaching a decision.⁵² Indeed, different outcomes may result based on how a specific state structures its ROP protections. If there was a federal law in place, there would be a more predictable framework on how a court could balance these two bodies of law.

Certainly, there needs to be some type of federal law that addresses this longstanding issue of patchwork ROP laws, especially with new technological developments. AI use transcends state lines, and if different states are offering widely varying levels of protection, it will be difficult to seek remedies. As will be discussed below, there should be a federal law that will offer at least a minimal level of protection that creates a floor for individuals who want to protect themselves from AI.

C. *The NO FAKES Act*

1. *Introduction of the Act*

Lawmakers have observed the need for federal laws in AI regulation. In October 2023, Chair of the Senate Judiciary Subcommittee on Intellectual Property Chris Coons (D-Del.) and Senators Marsha Blackburn (R-Tenn.), Amy Klobuchar (D-Minn.), and Thom Tillis (R-N.C.) announced a discussion draft of their Nurture

that ROP was infringed upon); *Parks v. LaFace Recs.*, 329 F.3d 437, 463 (6th Cir. 2003) (holding that ROP may win out, but there was an issue of material fact).

45. *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915 (6th Cir. 2003).

46. *Id.* at 954

47. *Id.* at 918.

48. *See id.*

49. *Id.* at 919.

50. *Id.* at 937.

51. *Id.*

52. *See id.* (using a couple tests to help weigh factors from *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (2001) and *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir.1989)).

Originals, Foster Art, and Keep Entertainment Safe Act⁵³ (NO FAKES Act). The NO FAKES Act seeks “[t]o protect intellectual property rights in the voice and visual likeness of individuals, and for other purposes.”⁵⁴ On July 31, 2024, the bipartisan group of Senators formally introduced a “substantially revised and improved” version of the bill to the Senate.⁵⁵ The revised version included more comprehensive definitions of terms such as “digital replica” and “individual” and more information on enforcement mechanisms and guidelines for liability. Most recently, on September 12, 2024, Representatives María Elvira Salazar (R-Fla.), Madeleine Dean (D-Pa.), Nathaniel Moran (R-Tex.), Adam Schiff (D-Cal.), Rob Wittman (R-Va.), and Joe Morelle (D-N.Y.) introduced the bill to the House of Representatives as companion legislation to the Senate version.⁵⁶

The introduction of the NO FAKES Act followed the Senate’s unanimous passage of the bipartisan Disrupt Explicit Forged Images and Non-Consensual Edits Act of 2024⁵⁷ (DEFIANCE Act), which offers a civil remedy and seeks “[t]o improve rights to relief for individuals affected by non-consensual activities involving intimate digital forgeries [deepfakes], and for other purposes.”⁵⁸ The DEFIANCE Act “allows victims of sexual deepfakes to sue for damages” and would solve issues such as the Taylor Swift deepfake incident.⁵⁹ However, this Act does not propose as broad a range of protection, and it is limited to sexually explicit deepfakes.⁶⁰ There are still gaps in the rights to safeguard individuals from having their voice or image used in broader settings.

The NO FAKES Act was also introduced within days of the U.S. Copyright Office’s Report on Copyright and Artificial Intelligence, which focused on digital replicas.⁶¹ This report concluded as follows:

53. *Senators Coons, Blackburn, Klobuchar, Tillis Announce Draft of Bill to Protect Voice and Likeness of Actors, Singers, Performers, and Individuals from AI-Generated Replicas*, CHRIS COONS (Oct. 12, 2023), <https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-announce-draft-of-bill-to-protect-voice-and-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas>.

54. *Nurture Original, Foster Art, and Keep Entertainment Safe Act of 2024*, S.4875, 118th Cong. 2d Sess. (2024).

55. Jennifer E. Rothman, *NO FAKES Act Introduced in Senate*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Sep. 9, 2024), https://rightofpublicityroadmap.com/news_commentary/no-fakes-act-introduced-in-senate/.

56. *Salazar Introduces the NO FAKES Act*, CONGRESSWOMAN MARIA EVIRA SALAZAR (Sep. 12, 2024), <https://salazar.house.gov/media/press-releases/salazar-introduces-no-fakes-act>; see NO FAKES Act of 2024, H.R. 9551, 118th Cong.

57. Kat Tenbarge, *The Defiance Act Passes in the Senate Potentially Allowing Deepfake Victims to Sue Over Nonconsensual Images*, NBC NEWS (July 24, 2024, at 15:28 ET), <https://www.nbcnews.com/tech/tech-news/defiance-act-passes-senate-allow-deepfake-victims-sue-rcna163464>.

58. *Disrupt Explicit Forged Images and Non-Consensual Edits Act*, S.3696, 118th Cong. (2024).

59. Benj Edwards, *Senators Propose “Digital Replication Right” for Likeness, Extending 70 Years After Death*, ARS TECHNICA (Aug. 1, 2024), <https://arstechnica.com/information-technology/2024/08/senates-no-fakes-act-hopes-to-make-unauthorized-digital-replicas-illegal/>.

60. See Tenbarge, *supra* note 57.

61. See Eileen McDermott, *Senators Introduce NO FAKES Act to Create a Universal Right to Control Digital Replicas*, IPWATCHDOG (July 31, 2024), <https://ipwatchdog.com/2024/07/31/senators-introduce-no-fakes-act-create-universal-right-control-digital-replicas/id=179705/>.

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.⁶²

The Copyright Office, similarly to many other groups, recognized that broader federal rights for all individuals are needed.

The NO FAKES Act itself is quite lengthy and provides a variety of exceptions and exclusions, so below, a brief summary is provided before taking a deeper look at the Act throughout the rest of this Note.

2. *Summary of the NO FAKES Act*

While many interpret the NO FAKES Act more generally as a federal right of publicity, the bill actually targets digital replicas, with a narrower focus on federal voice and visual likeness rights.⁶³ This “digital replication right” is defined as a property right that is not assignable during life, is licensable wholly or in-part and exclusively or non-exclusively, and does not expire upon death.⁶⁴ The right is exclusive to the individual or right holder, with exceptions such as licensing and time limits.⁶⁵

The Act also provides for civil liability against anyone that either produces a digital replica without the right holder’s consent or publishes, reproduces, displays, distributes, or transmits a digital replica to the public without the right holder’s consent.⁶⁶ Actual knowledge is required to incur liability, and there are certain exclusions if the digital replica is used in “bona fide news, public affairs, or sports broadcast or account” or if used to represent the individual “in a documentary or in a historical or biographical manner.”⁶⁷ However these exceptions do not apply if the digital replica (1) falsely implies the work is authentic; (2) is used in a sound recording; (3) is used consistently in bona fide commentary criticism, scholarship, satire, or parody; (4) is used fleetingly or negligibly; or (5) is used in an advertisement or commercial for purpose described in (1)-(4).⁶⁸

Next, the Act discusses safe harbors. It specifies that secondary liability does not arise unless a product or service is primarily designed, used exclusively, or marketed for creating digital replicas.⁶⁹ Online services are also not held liable for

62. *Copyright and Artificial Intelligence Part 1: Digital Replicas*, *supra* note 13.

63. Rothman, *supra* note 55; Nurture Original, Foster Art, and Keep Entertainment Safe Act of 2024, S.4875, 118th Cong. 2d Sess., § 2(b)(2) (2024).

64. Nurture Original, Foster Art, and Keep Entertainment Safe Act of 2024, § 2(b)(2)(i)-(ii).

65. *See id.* § 2(c)(1)-(2).

66. *Id.* § 2(c).

67. *Id.* § 2(c)(4)(A)(i)-(ii).

68. *Id.* § 2(c)(4)(A)(i)-(v).

69. *Id.* § 2(d)(1)(A).

linking to an unauthorized digital replica or storing third-party material, as long as they remove or disable access to all instances of the material “as soon as technically and practically feasible for that online service” and “take[] reasonable steps to promptly notify the third-party that provided the material.”⁷⁰ The Act goes on to define what reasonable notice is and penalties for false or deceptive notice.⁷¹

The Act also describes the availability of civil action, such as who can sue, the period of limitations, and unavailable defenses and remedies, before moving on to preemption.⁷² As described later in this Note, the Act proposes to preempt state laws but with significant exceptions.⁷³ Overall, the NO FAKES Act seeks to protect all individuals against unauthorized digital replicas while also attempting to balance these concerns with First Amendment rights, protections against media platforms from users’ content, and existing state laws. It is clear from the lengthiness of the bill that it is trying to address concerns but also balance out other important rights such as free speech and enforceability challenges.

3. *Support and Concerns from Organizations*

The bill was met with support from multiple entertainment and media organizations such as SAG-AFTRA, the Recording Academy, the Motion Picture Association, Warner Music Group, and Universal Music Group.⁷⁴ Even companies such as Open AI and IBM, that use and rely on AI, endorsed the bill.⁷⁵ The Human Artistry Campaign also released survey results that indicated that 84% of U.S. voters believe AI voice cloning and deepfakes are major problems, and 87% of voters support regulation to protect against unauthorized use.⁷⁶ Dr. Moiya McTier, the Human Artistry Campaign’s Senior Advisor, said that the proposed legislation “is essential to protecting people and our culture while acknowledging long-held exceptions for free speech” and that “[a]s some unethical AI developers move recklessly forward, Congress must pass this bipartisan legislation.”⁷⁷

However, another coalition, with groups such as the Association of Research Libraries (ARL), Center for Democracy and Technology, Electric Frontier Foundation, and R Street Institute, sent a letter with their concerns about the NO FAKES Act.⁷⁸ Some of the more serious concerns were that this Act was a “blunt solution” to a problem that is not yet fully understood; the Act creates an exception

70. *Id.* § 2(d)(1)(B)-(C).

71. *Id.* § 2(d)(3)-(4).

72. *Id.* § 2(e).

73. *See id.* § 2(g)(2).

74. Douglas Mirell, *How the NO FAKES Act Is a Bipartisan Challenge to AI*, NO FILM SCH. (Aug. 22, 2024), <https://nofilmschool.com/no-fakes-act>.

75. *Id.*

76. *Human Artistry Campaign AI Perception Survey*, HUM. ARTISTRY CAMPAIGN 4, <https://www.humanartistrycampaign.com/ai-perception-survey> (last visited Mar. 10, 2026).

77. Eileen McDermott, *NO FAKES Act Moves Forward with Bipartisan Support in House*, IPWATCHDOG (Sep. 12, 2024), <https://ipwatchdog.com/2024/09/12/no-fakes-act-moves-forward-bipartisan-support-house/id=181194/>.

78. Letter from Technology Groups to Chris Coons, Senator, and Thom Tillis, Senator 1 (Sep. 6, 2024), <https://www.rstreet.org/wp-content/uploads/2024/09/NO-FAKES-Concerns-Letter.pdf>.

that could lead to over-censorship; it creates a licensable and transferable right without any substantial limits; it has a 70-year post-mortem term of protection; it burdens First Amendment speech; and it exceeds Congressional authority.⁷⁹ Other criticisms of the Act include that there is not flexibility for fair use analysis because of the “prescriptive approach” offered.⁸⁰

Based solely on the support of both partisan groups and a variety of support and concerns from other groups, it appears that this Act could be valuable but may need to undergo a few changes to effectively function.

II. EXTENT OF PROTECTION OF THE NO FAKES ACT

A. *Current Protection of Right of Publicity and Generative Artificial Intelligence Laws*

1. *State Level Protection*

The current levels of protection offered among the U.S. states vary, with some right of publicity laws applying to only advertising, and others taking a broader approach to protect against any commercial uses.⁸¹ As of 2020, approximately thirty-five states recognized a right of publicity in some form, either through statute or common law.⁸² In some states, the ROP goes beyond protecting the typical NIL, voice, and signature, and also protects “distinctive appearance, gestures, or mannerisms.”⁸³ State laws vary in that some of them only protect those with “commercially valuable” NIL, rather than all persons.⁸⁴

Regarding artificial intelligence laws, state legislation has been trying to catch up. Without a comprehensive framework for federal regulation of unauthorized AI, the state and local patchwork continues to grow.⁸⁵ One study found that, as of June 7, 2024, thirteen states and the District of Columbia have proposed legislation, five states have enacted legislation, sixteen states have both proposed and enacted legislation, and sixteen states have yet to propose any legislation for AI.⁸⁶ Recently, a few states have actually targeted generative AI itself in relation to ROP, similarly to the NO FAKES Act.

The first state to take this step and “enact voice, image and likeness protections for its residents against misuses of artificial intelligence” was

79. *Id.*

80. Katherine Klosek, *No Frauds, No Fakes...No Fair Use?*, ASS'N. OF RSCH. LIBRS.: ARL VIEWS (Mar. 1, 2024), <https://www.arl.org/blog/nofraudsnofakes/>.

81. Zirpoli, *supra* note 39, at 1.

82. Roesler & Hutchinson, *supra* note 37.

83. Zirpoli, *supra* note 39, at 2.

84. *Id.*

85. Goli Mahdavi et al., *US State-by-State AI Legislation Snapshot*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=d0c88d95-695f-4ef1-913f-a4c1ca6a9d12> (last visited Mar. 10, 2026).

86. *Id.*

Tennessee.⁸⁷ The ELVIS Act, short for the Ensuring Likeness Voice and Image Security Act, updated and expanded Tennessee's prior ROP laws in March 2024.⁸⁸ It also sought to also address "personalized generative AI cloning models and services that enable human impersonation and allow users to make unauthorized fake works in the image and voice of others."⁸⁹ Tennessee is known for its country music industry, supporting more than 61,617 jobs in the state, and Governor Bill Lee noted that "[a]s the technology landscape evolves with artificial intelligence, we're proud to lead the nation in proposing legal protection for our best-in-class artists and songwriters."⁹⁰

Illinois was the next state to "create a cause of action against parties creating unauthorized digital replicas of individuals with the use of generative artificial intelligence (AI) systems."⁹¹ The bill was unanimously approved in May 2024, and similarly updated the state's current ROP laws.⁹² The most recent state to enact ROP laws regulating generative AI was California in September 2024.⁹³ The state passed Assembly Bills 1836 and 2602, increasing civil penalties against parties making unauthorized digital replicas and clarifying that contracts may fail if they fail to include specific descriptions about digital replication use.⁹⁴ These two bills were similarly passed to "help actors and performers protect their digital likenesses in audio and visual productions, including those who are deceased."⁹⁵ In light of there still being no federal protections, more states will likely continue to follow the lead and come up with solutions until a uniform law is in place.

87. Audrey Gibbs, *TN Gov. Lee Signs ELVIS Act Into Law in Honky-Tonk, Protects Musicians from AI Abuses*, THE TENNESSEAN (Mar. 21, 2024, at 16:01 CT), <https://www.tennessean.com/story/entertainment/music/2024/03/21/elvis-act-tennessee-gov-lee-signs-act-musicians-ai/73019388007/>.

88. Kanishka Singh, *Tennessee Becomes First US State with Law Protecting Musicians From AI*, REUTERS (Mar. 22, 2024, at 11:59 ET), <https://www.reuters.com/legal/tennessee-becomes-first-us-state-with-law-protecting-musicians-ai-2024-03-21/>; see Ensuring Likeness, Voice, and Image Security Act, ch. 588, 2024 Tenn. Pub. Acts 1 (2024).

89. Singh, *supra* note 88; see Ensuring Likeness, Voice, and Image Security Act, *supra* note 88.

90. *Tennessee First in the Nation to Address AI Impact on Music Industry*, TENN. OFF. OF THE GOVERNOR (Jan. 10, 2024, at 14:40 ET), <https://www.tn.gov/governor/news/2024/1/10/tennessee-first-in-the-nation-to-address-ai-impact-on-music-industry.html>.

91. Steve Brachmann, *Illinois Becomes Second State to Ban Unauthorized Digital Replicas Created by Generative AI*, IPWATCHDOG (Aug. 15, 2024, at 12:15 ET), <https://ipwatchdog.com/2024/08/15/illinois-becomes-second-state-ban-unauthorized-digital-replicas-created-generative-ai/id=180164/>; see H.B. 4875, 103d Gen. Assemb., Reg. Sess. (Ill. 2024) (enacted).

92. Morgan Enos, *Illinois Passes AI Digital Replica Protections Law: What to Know About HB 4875*, RECORDING ACADEMY (May 29, 2024, at 16:41 ET), <https://www.recordingacademy.com/advocacy/news/illinois-passes-ai-digital-replica-protections-law>.

93. Steve Brachmann, *Other Barks & Bites for Friday, September 20: Biden Administration Announces \$3 Billion Advanced Battery Investment; Fifth Circuit Affirms Fair Use Ruling on Dog Art Kits; and California Passes State Bills on Digital Replica Rights*, IPWATCHDOG (Sep. 20, 2024, at 12:59 ET), <https://ipwatchdog.com/2024/09/20/barks-bite-fifth-circuit-affirms-fair-use-ruling-dog-art-kits-california-passes-state/id=181417/>.

94. *Id.*; see Assemb. B. 1836, 2023-2024 Reg. Sess. (Cal. 2024) (enacted); Assemb. B. 2602, 2023-2024 Reg. Sess. (Cal. 2024) (enacted).

95. *Governor Newsom Signs Bills to Protect Digital Likeness of Performers*, GOVERNOR GAVIN NEWSOM (Sep. 17, 2024), <https://www.gov.ca.gov/2024/09/17/governor-newsom-signs-bills-to-protect-digital-likeness-of-performers/>.

2. *International Laws*

Outside of the United States, rights similar to ROP “are sometimes recognized as ‘personality rights,’ ‘rights of persona,’ or other similar terminology, and the sources and scope of those rights vary.”⁹⁶ For example, in the European Union, each country has differences in how they approach ROP, with some countries, like the United Kingdom, traditionally being more protective of free speech and protecting ROP through tort law, and other countries, such as Spain, seeing the rights “as an autonomous personal right” that is independent from privacy rights.⁹⁷ Asian countries are also split on their ROP laws, with some countries, like China, Taiwan, and Japan, recognizing image rights as an “economic right,” and other countries, like Thailand and Singapore, not having any specific legislation that recognizes publicity rights.⁹⁸

In relation to AI, other nations are similarly seeking ways to regulate artificial intelligence and unauthorized digital replicas. One source notes that internationally, there have been more than 69 countries that “have proposed over 1000 AI-related policy initiatives and legal frameworks to address public concerns for AI safety and governance.”⁹⁹ In December 2023, the European Union (EU) adopted a risk-based approach to AI, agreeing on the first-ever legal framework for AI regulation, the EU AI Act.¹⁰⁰ This approach means that the regulations on AI systems depend on the level of risk they present for humanity and minimal risk applications would not be subject to mandatory rules.¹⁰¹ The EU AI Act promotes transparency while “acknowledg[ing] the need for flexibility to accommodate various content formats, cutting-edge technologies, and AI functionalities.”¹⁰² However, it is noted that a “critical gap” still exists in the EU AI Act because it “lacks regulations specifically addressing the emerging and nuanced threat of deepfake extortion.”¹⁰³

China appears to be another leader in AI regulation and, in July 2023, “issued the world’s earliest and most detailed regulations on generative artificial intelligence...by highlighting healthy content and ‘core socialist values.’”¹⁰⁴ In addition to this, China already had regulations in place to limit the spread of

96. *Right of Publicity*, INT’L. TRADEMARK ASS’N., <https://www.inta.org/topics/right-of-publicity/> (last visited Mar. 10, 2026).

97. Kateryna Moskalenko, *The Right of Publicity in the USA, the EU, and Ukraine*, 1 INT’L. COMPAR. JURIS. 113, 116 (2015).

98. Wun Rizwi, *A Brief Analysis of Image Rights in Asia: Does the Right of Celebrity Transcend Life and Death?*, RHTLAW ASIA 1-2 (Dec. 2024), <https://www.rhtlawasia.com/wp-content/uploads/2024/11/Image-Rights-in-Asia.pdf>.

99. Nick Sherman, *AI Regulations Around the World*, MIND FOUNDRY (Jan. 25, 2024, at 12:02 ET), <https://www.mindfoundry.ai/blog/ai-regulations-around-the-world>.

100. *Id.*

101. *Id.*

102. Moreno, *supra* note 1, at 301.

103. *Id.* at 303.

104. Che Pan, *China Sets out New Rules for Generative AI, with Beijing Emphasizing Healthy Content and Adherence to ‘Socialist Values’*, S. CHINA MORNING POST (July 13, 2023, at 18:20 ET), <https://www.scmp.com/tech/big-tech/article/3227576/china-sets-out-new-rules-generative-ai-beijing-g-emphasising-healthy-content-and-adherence-socialist>.

deepfakes.¹⁰⁵ However, China's laws have also tended to be "deeply fragmented and piecemeal" and have been released "whenever a new AI product becomes prominent."¹⁰⁶ Other countries, including Australia, India, and Japan, are still looking into ways to address AI.¹⁰⁷ As one source notes, finding an ideal scenario means that "it is imperative to forge a legal landscape that acknowledges the evolving nature of artificial intelligence while safeguarding individual rights."¹⁰⁸ Taking both the United States' current laws and international approaches into mind is important in finding a successful approach.

B. *Formulating a New System of Federal Protection*

Based on the current status of state laws, it seems that a federal ROP would be useful in harmonizing the level of protection and possibly increasing protection from unauthorized digital replicas in states that still have not addressed this issue. Other than the fact that the NO FAKES Act would create the first federal visual and likeness property right, it is unique in that it proposes to protect the rights of all individuals, rather than those with only "commercially available" NIL like some state laws do.¹⁰⁹ As Senator Coons noted, "[e]veryone deserves the right to own and protect their voice and likeness."¹¹⁰ Although the presence of social media platforms has made the idea of developing a "commercially available" NIL a reality for many more people today, there is still an entire category of people without any type of social media presence that could still be at risk of exploitation simply by someone having access to a recording of their voice or an image.

Specifically, the NO FAKES Act proposes protections for an "individual" or a "right holder."¹¹¹ The Act defines "individual" as "a human being, living or dead."¹¹² The term "right holder" is defined as "the individual whose voice or visual likeness is at issue with respect to a digital replica and any other person that has acquired, through a license, inheritance, or otherwise, the right to authorize the use of such voice or visual likeness in a digital replica."¹¹³ This means that an

105. Theara Coleman, *How Countries Around the World Are Trying to Regulate Artificial Intelligence*, THE WEEK (July 4, 2023), <https://theweek.com/artificial-intelligence/1024605/ai-regulations-around-the-world>; see *China's Rules for "Deepfakes" to Take Effect From Jan. 10*, REUTERS (Dec. 12, 2022, at 16:48 ET), <https://www.reuters.com/technology/chinas-rules-deepfakes-take-effect-jan-10-2022-12-12/>.

106. Tate Ryan-Mosley et al., *What's Next for AI Regulation in 2024?*, MIT TECH. REV. (Jan. 5, 2024), <https://www.technologyreview.com/2024/01/05/1086203/whats-next-ai-regulation-2024/>.

107. Sherman, *supra* note 99.

108. Sandhya Surendran, *Navigating Generative AI and Personality Rights: Legal Implications and Creative Innovation*, BTG ADVAYA (Oct. 5, 2023), <https://www.btgadvaya.com/post/navigating-generative-ai-and-personality-rights-legal-implications-and-creative-innovation?>.

109. Zirpoli, *supra* note 39, at 2; see Nurture Original, Foster Art, and Keep Entertainment Safe Act of 2024, S. 4875, 118th Cong. 2d Sess. § 2(b)(1)(2024).

110. Anna Washenko, *Senators Introduce Bill to Protect Individuals Against AI-Generated Deepfakes*, ENGADGET, at 3 (July 31, 2024, at 16:28 ET), <https://www.engadget.com/senators-introduce-bill-to-protect-individuals-against-ai-generated-deepfakes-202809816.html>.

111. S. 4875 § 2(b)(1).

112. *Id.* § 2(a)(2).

113. *Id.* § 2(a)(5).

individual can enforce their protection rights as well as those that hold these rights as intellectual property. It also means the right will not expire upon an individual's death and can still be transferable and licensed.¹¹⁴ The Act notes that the right holder will continue to hold the right for a minimum of ten years after the individual's death. With "active and authorized public use," the right can extend for extra five-year periods for up to seventy years.¹¹⁵

This seventy-year duration of post-mortem ROP rights is not necessarily more extensive than current state's post-mortem ROP laws. This duration "varies widely among the states from ten years to one hundred years, with some states having protection for an uncertain duration based on common law."¹¹⁶ The NO FAKES Act seems to take a more generous approach but does require the continued use of the rights. Overall, it appears this "digital replication right" can apply to both living persons and the deceased. It can also be used by right holders such as the private individual themselves and those that hold the right as intellectual property.

To best protect these voice and likeness rights, it would be wise for the U.S. to continue to monitor these changes and continue researching the best ways to protect individuals' rights, while also keeping innovation and free speech rights in mind, as well as state law and international approaches. Next, it should be considered if the proposed NO FAKES Act preemption formula would be the best approach to integrate federal law into the current state ROP protections.

III. PREEMPTION

A. Proposed Preemption by the NO FAKES Act

The preemption formula presented in the NO FAKES Act is as follows: "[t]he rights established under this Act shall preempt any cause of action under State law for the protection of an individual's voice and visual likeness rights in connection with a digital replica, as defined in this Act, in an expressive work."¹¹⁷ As the lawmakers noted in their one-pager, this means that the Act would "[l]argely preempt State laws addressing digital replicas to create a workable national standard."¹¹⁸ This formulation notably goes against the Copyright Office's recommendation for a non-preemptive digital replicas law.¹¹⁹ The Copyright Office noted that "[m]ost importantly...extensive state law in this area has developed over many decades, creating settled expectations."¹²⁰ A state that already provided

114. *Id.* at § 2(b)(2)(A)(ii)-(iii).

115. *Id.* at § 2(b)(2)(A)(iv)-(v).

116. Sharon L. Klein & Jenna M Cohn, *The Post-Mortem Right of Publicity: Defining It, Valuing It, Defending It and Planning for It*, 48 ACTEC L. J. 63, 64 (2022).

117. S. 4875 § 2(f)(1).

118. *NO FAKES Act OnePager*, CHRIS COONS, https://www.coons.senate.gov/imo/media/doc/no_fakes_act_one-pager.pdf (last visited Mar. 10, 2026).

119. Madison Alder, *Copyright Office Cites 'Urgent' Need for Digital Replicas Law as Legislation Introduced*, FEDSCOOP (July 31, 2024), <https://fedscoop.com/copyright-office-cites-urgent-need-for-digital-replicas-law-as-legislation-introduced/>.

120. *Copyright and Artificial Intelligence Part 1: Digital Replicas*, *supra* note 13, at 50.

broad protection could experience a reduction in existing rights and potential policy flexibility advantages would be lost.¹²¹

Exceptions to the Act's preemption formula provide that it would not apply to state laws regarding digital replicas passed prior to January 2, 2025, regulation of sexually explicit or election-related deepfakes, and regulation of products or services capable of producing digital replicas.¹²² So, while it initially seems like the Act would be fully preemptive, it is actually quite limited.¹²³ Jennifer Rothman, known for her "Roadmap to the Right of Publicity," notes that "[f]ailing to preempt the burgeoning set of state digital replica laws will greatly worsen the 'thicket' of conflicting laws that address unauthorized uses of a person's identity, including voices and likenesses."¹²⁴ Without at least partial preemption of state laws to create a floor with a federal law, individual states enacting varying protections will make it more difficult for those seeking enforcement. AI digital replicas, as they are currently being used across the internet, are not confined within state lines; this technology requires some type of uniform regulation.

B. *Partial Preemption Should Be Used Over Full Preemption*

Partially preempting state laws rather than fully preempting them would allow states to still fill in their own gaps and decide the specifics of their AI regulatory laws. A federal law could be used as the floor and states could decide whether or not they want to expand on protections for their citizens. This idea is supported by the U.S. Constitution and case law.

1. *Preemption Generally*

Federal power to preempt state law comes directly from the Constitution in the Supremacy Clause, Commerce Clause, and Necessary and Proper Clause, which was first determined in *Gibbons v. Ogden*.¹²⁵ Federal law can supersede state law in two different ways, either through express or implied preemption.¹²⁶ Implied preemption can be divided into subcategories of field and conflict preemption, and conflict preemption can be further divided into impossibility and obstacle preemption.¹²⁷

Existing federal intellectual property laws take different approaches on preemption; the Patent Act and Copyright Act largely preempt state laws, but the

121. *Id.*

122. S. 4875 §2(f)(2)(A)-(C).

123. See Rothman, *supra* note 55.

124. Jennifer E. Rothman, *Copyright Office Calls for Congressional Action on Digital Replicas*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Sep. 12, 2024), https://rightofpublicityroadmap.com/news_commentary/copyright-office-calls-for-congressional-action-on-digital-replicas/.

125. Kellen Norwood, *Federal Preemption of State and Local Law*, AM. BAR ASS'N. 2 (June 20, 2019), https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/210871015/C_hapter%201.pdf; see *Gibbons v. Ogden*, 22 U.S. 1, 196-97, 210-11 (1824).

126. See BRYAN L. ADKINS ET AL., CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 3 (2023), <https://sgp.fas.org/crs/misc/R45825.pdf>.

127. *Id.*

Lanham Act and Defend Trade Secrets Act do not.¹²⁸ The Copyright Act specifically has raised issues with states' right of publicity laws.¹²⁹ In *Melendez v. Sirius XM Radio, Inc.*,¹³⁰ a radio personality brought a suit against a radio company, claiming that the company had exploited his right of publicity in using his voice recordings. The Second Circuit applied a two-part test and dismissed the lawsuit on the basis that the Copyright Act preempted the plaintiff's right of publicity claim.¹³¹ The two-part test evaluated requirements of (1) subject matter and (2) general scope, to determine if the ROP claim was equivalent to protections of the Copyright Act.¹³² In determining the first requirement, the court found that the voice recording at issue fell within the list of protected materials in copyright and the case was dismissed. This same situation arose in prior cases.¹³³ However, the courts are inconsistent with their approaches and sometimes decline to apply preemption doctrine at all.¹³⁴ With AI getting thrown in the mix, these splits can be harder to resolve.

2. *Dangers of Piecemeal Law*

While full preemption of current state laws may not be the best path, patchwork state laws create issues. The lack of uniformity may be even more dangerous. One article describes the state-by-state approach to ROP as a "race to the bottom" in which "a handful of states provide ever-expanding rights of publicity that invite forum shopping and give short shrift to First Amendment rights and public domain interests."¹³⁵ For example, some states, such as Hawaii,

128. Zirpoli, *supra* note 39, at 5.

129. Alec Winshel, *Copyright Has a Preemption Problem That's Destined for the Supreme Court*, HARV. L. SCH.: J. SPORTS & ENT. L., (Dec. 9, 2022), <https://journals.law.harvard.edu/jsel/2022/12/copyright-has-a-preemption-problem-thats-destined-for-the-supreme-court/>.

130. *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294, 297 (2d Cir. 2022).

131. Winshel, *supra* note 129.

132. *Id.*

133. *See Jackson v. Roberts*, 972 F.3d 25, 33 (2d Cir. 2020) (holding that Copyright Act preempts state ROP claims); *see also Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1009 (9th Cir. 2017) (displaying the Ninth Circuit's two-part test determining whether Copyright Act preempts claim).

134. *See Winshel, supra* note 129; *see also Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003–05 (9th Cir. 2001) (holding that the Copyright Act did not preempt plaintiffs' state-law ROP claims because the claims targeted the commercial use of plaintiffs' identities, not the reproduction of the photographs themselves); *Brown v. Ames*, 201 F.3d 654, 657–58 (5th Cir. 2000) (holding that the Copyright Act did not preempt state-law ROP claims because such claims protect an individual's name and likeness, which are not works of authorship, and involve rights inequivalent to copyright); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1029–32 (3d Cir. 2008) (holding that the Copyright Act did not preempt a state-law ROP claim because a person's voice is not a work of authorship under and the claim required the additional element of unauthorized commercial use). *But see Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 674 (7th Cir. 1986) (holding that players' state-law ROP in their game performances *are* preempted under § 301(a) of the Copyright Act once those performances are fixed in tangible form) (emphasis added).

135. Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM'NS LAW. 14, 16 (2011), https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/why_federal_right_publicity_statute_is_necessary_comm_law_28_2_authcheckdam.pdf.

Indiana, Nevada, and Washington, offer broad protection and only require that exploitation occur within the state, “regardless of whether the decedent was a domiciliary or resident.”¹³⁶

Another danger is “nationwide injunctions based on one state’s right of publicity laws.”¹³⁷ In one Sixth Circuit case, *Carson v. Here’s Johnny Portable Toilets*,¹³⁸ the defendant was barred from engaging in infringement of right of publicity in any state, not just in Michigan, where the right was allegedly violated. Here, the plaintiff, Johnny Carson, sued a company that was using the phrase “Here’s Johnny” in their advertising.¹³⁹ This phrase was associated with Carson’s show, and the court ruled in his favor that Michigan’s ROP law did protect Carson’s use of this phrase.¹⁴⁰ On remand, the defendant company was enjoined from using the phrase anywhere in the entire country, even though the ruling was based off only one state’s law.¹⁴¹ The Sixth Circuit noted that there were “indications that other states would hold as [they] predicted Michigan would” and that they did not see an issue with letting the injunction stand for the time being.¹⁴² Without a uniform floor-level federal law, a patchwork system will continue to exist across the nation.

Overall, it is clear that because of the varying levels of ROP in each state and issues with preemption and interpretation by the courts there needs to be at least a minimum, uniform level of federal ROP law. Using partial preemption, states could keep or raise the ceiling to their own laws, and states with less protections could be brought to a base level. Because of the nature of digital media, once something is posted somewhere, it is virtually accessible anywhere in the world. To have existing uniform protection at least at the federal level would be a significant achievement in protecting individuals’ interests in their voices and visual likenesses.

IV. LIABILITY IMPLICATIONS AND CONFLICTS WITH EXISTING LAW

A. *Intersection with the Communications Decency Act*

Another major implication of the NO FAKES Act is that Section 230 of the Communications Decency Act (CDA) would not shield platforms from liability for user-posted content.¹⁴³ Section 230 was passed to promote user speech and states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information

136. Klein & Cohn, *supra* note 116, at 65.

137. Vick & Jassy, *supra* note 135, at 116.

138. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 836-37 (6th Cir. 1983).

139. *Id.* at 832-33.

140. *Id.* at 836.

141. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 810 F.2d 104, 105 (6th Cir. 1987).

142. *Id.*

143. Katie Wright Morrone, *AI Deepfake Bill: Senators Contemplate the First Federal Right of Publicity*, VENABLE LLP (Oct. 20, 2023), <https://www.allaboutadvertisinglaw.com/2023/10/ai-deep-fake-bill-senators-contemplate-the-first-federal-right-of-publicity.html>.

content provider.”¹⁴⁴ The statute typically “immunizes web operators from liability when they publish third-party content.”¹⁴⁵ However, an exemption to this protection is found in intellectual property rights, which would include the NO FAKES Act.¹⁴⁶

Section 230, similarly to the Copyright Act, has preempted ROP claims in the past.¹⁴⁷ In a Pennsylvania case that went to the Third Circuit, *Hepp v. Facebook*,¹⁴⁸ a plaintiff sued under the state’s ROP law after her image was used on defendant’s social media sites. The companies argued that they were entitled to Section 230 protection, and the district court ruled in their favor applying the Ninth Circuit’s view that Section 230 limitations only apply to federal intellectual property.¹⁴⁹ The Third Circuit took a different approach. They read Section 230 as not being limited to only federal laws and held that the defendant, Facebook, was not immune under Section 230(c).¹⁵⁰

The current circuit splits indicate that there is a need for a federal ROP right; the circuits that take the Ninth Circuit view can leave individuals without any remedy against platform sites or leave them guessing as to how a court will rule. However, these rights need to be balanced with ideas of free speech and censorship.

The coalition of groups that noted issues with the NO FAKES Act identified the exception to Section 230’s protections as one of their major concerns.¹⁵¹ While some cases have argued for a narrowing of Section 230,¹⁵² these groups are concerned that if there are exceptions to the Section, there will no longer be “flourishing of online expression and creativity by empowering platforms to moderate the content they host without facing undue liability for users’ speech.”¹⁵³ Mainly, the groups are concerned with platforms over-censoring to protect themselves from liability, since the Act could potentially require media platforms to have methods in place to detect unauthorized digital replicas or face risk of liability for hosting the content.¹⁵⁴

144. 47 U.S.C. § 230(c)(1) (2024).

145. Emma Aistrop, *Real or Fake? The NO FAKES Act Cracks Down on Unauthorized AI-Generated Content*, LOY. L. SCH.: ENT. L. REV. (Dec. 1, 2023), <https://entertainmentlawreview.lls.edu/real-or-fake-the-no-fakes-act-cracks-down-on-unauthorized-ai-generated-content/>.

146. Jonathan Bailey, *Understanding the NO FAKES Act*, PLAGIARISM TODAY (Aug. 1, 2024), <https://www.plagiarismtoday.com/2024/08/01/understanding-the-no-fakes-act/>.

147. Courtney Kim, Note, *Analyzing the Circuit Split Over CDA Section 230(E)(2): Whether State Protections for the Right of Publicity Should Be Barred*, 96 S. CAL. L. REV. 449, 462 (Dec. 2022).

148. *Hepp v. Facebook*, 14 F.4th 204, 207 (3d Cir. 2021).

149. *Compare id.*, with *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (holding that Section 230 only includes *federal* intellectual property).

150. *Hepp*, 14 F.4th at 214.

151. Letter from Technology Groups to Chris Coons, Senator, and Thom Tillis, Senator, *supra* note 78.

152. *See Gonzalez v. Google LLC*, 598 U.S. 617, 619-20 (2023) (discussing family members of an ISIS victim sued Google, alleging that their resources helped ISIS coordinate a terrorist attack).

153. Letter from Technology Groups to Chris Coons, Senator, and Thom Tillis, Senator, *supra* note 78.

154. *See Aistrop*, *supra* note 145.

B. *Preventing Over-Censoring and Protecting Free Speech*

Over-censoring largely implies violation of First Amendment rights and issues with fair use. Fair use permits the public to utilize creative works without the copyright holder's consent as a First Amendment accommodation.¹⁵⁵ Some groups are concerned that, although the NO FAKES Act carves out exceptions for digital replicas used in certain settings, “[t]his prescriptive approach offers certainty about the uses listed, but without the flexibility that a fair use analysis requires.”¹⁵⁶ When looking at fair use, courts weigh four factors that come directly from the Copyright Act.¹⁵⁷ These factors include (1) purpose and character of use, (2) nature of the copyrighted work, (3) amount of copyrighted material used, and (4) the effect of the use on potential market.¹⁵⁸

Courts take each of these factors into account using this flexible framework that can “adapt to new technologies.”¹⁵⁹ Applying this analysis alongside a new federal approach to ROP may be difficult if the federal law does not allow for flexibility or exceptions. If there is not room for “the full and robust protections of fair use and the First Amendment,” this new federal right could lead to over-censoring.¹⁶⁰ It is noted that Congress should hear from a “broad range of stakeholders” to help inform their decision on how to “develop a targeted legislation” in addressing digital replicas.¹⁶¹

If ROP is left completely to the states, First Amendment protections could potentially be even more limited because of “inconsistent tests to resolve clashes between the ROP and First Amendment protections.”¹⁶² As mentioned earlier in this Note, courts have varied in their holdings when balancing these bodies of law,¹⁶³ and it is suggested that Congress “might have more latitude to enact ROP laws aimed at commercial speech.”¹⁶⁴ Commercial speech typically receives “less First Amendment protection than other forms of protected speech” and is subjected

155. Klosek, *supra* note 80.

156. *Id.*

157. Richard Stim, *Fair Use: The Four Factors Courts Consider in a Copyright Infringement Case*, NOLO (Jun. 20, 2023), <https://www.nolo.com/legal-encyclopedia/fair-use-the-four-factors.html>.

158. 17 U.S.C. § 107 (2024).

159. Klosek, *supra* note 80.

160. *Id.*

161. *Id.*

162. Zirpoli, *supra* note 39, at 6.

163. See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 954 (6th Cir. 2003); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280-84 (9th Cir. 2013) (affirming that the Copyright Act did not preempt athletes' state-law publicity claims); *Brown v. Elec. Arts*, 724 F.3d 1235, 1239-45 (9th Cir. 2013) (affirming dismissal of Lanham Act false endorsement claim because the use of Jim Brown's likeness in EA's video game was artistically relevant and not explicitly misleading, but noting that state-law ROP claims may not be barred by the First Amendment); *Sarver v. Chartier*, 813 F.3d 891, 901-07 (9th Cir. 2016) (affirming dismissal of ROP claims because the portrayal of plaintiff in a film was protected expressive speech under the First Amendment).

164. Zirpoli, *supra* note 39, at 6.

to intermediate scrutiny, rather than the higher standard of strict scrutiny.¹⁶⁵ Congress may want to “consider limiting federal ROP protections to commercial speech,” as this may “limit the reach of ROP claims.”¹⁶⁶ However, limiting just to commercial speech or use would not protect those individuals that are having their name or voice in many other scenarios, such as if their voice was being used to scam another person over the phone.

As noted earlier, the Act does allow for digital replicas being “produced or used in a bona fide news, public affairs, or sports broadcast or account, provided that the digital replica is the subject of, or is materially relevant to, the subject of that broadcast or account.”¹⁶⁷ It also allows for the digital replica being “produced or used consistent with the public interest in bona fide commentary, criticism, scholarship, satire, or parody,” or if the replica use is “fleeting or negligible.”¹⁶⁸ Lawmakers are clearly trying to make exceptions to account for the First Amendment and fair use, but a more flexible framework that can be used to weigh factors could possibly work better.

C. Requirement of Actual Knowledge

While the NO FAKES Act appears to extend further liability, one important limitation is that it requires the “defendant have ‘actual knowledge’ that the use is of an unauthorized digital replica,” meaning that platforms hosting the content would need to know that this unauthorized use is present.¹⁶⁹ The Supreme Court has held that “actual knowledge” means “a plaintiff actually is aware of the relevant facts, not when he should be.”¹⁷⁰ This knowledge can be obtained through either notification or willful avoidance of having such knowledge.¹⁷¹

Because of the “willful avoidance” piece to this, these platforms would need to constantly monitor user posts, and as previously mentioned, implement a detection method for unauthorized digital replications.¹⁷² Practically, this requirement “could lead to an increase in takedown requests, potentially overwhelming platforms and leading to the removal of legitimate content.”¹⁷³ This could loop back to over-censoring as a way for companies to protect themselves from incurring liability.

165. Victoria L. Killion, *The First Amendment: Categories of Speech*, CONGRESS.GOV (Mar. 28, 2024), <https://crsreports.congress.gov/product/pdf/IF/IF11072>.

166. Zirpoli, *supra* note 39, at 6.

167. S. 4875, 118th Cong. 2d Sess. § 2(c)(4)(A)(i) (2024).

168. *Id.* § 2(c)(4)(A)(iii)-(iv).

169. Rothman, *supra* note 55.

170. *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 589 U.S. 178, 187 (2020); *see also Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir. 1992) (holding that “actual knowledge” under ERISA requires awareness of all material facts necessary to understand that a claim exists).

171. S. 4875 § 2(c)(3).

172. *See Aistrop*, *supra* note 145.

173. Rob Rosenberg, *The No Fakes Act: Protecting Voices and Likenesses in the Digital Age*, ATT’Y AT L. MAG. (Sep. 16, 2024), <https://attorneyatlawnmagazine.com/legal/legal-news/the-no-fake-s-act-protecting-voices-and-likenesses-in-the-digital-age>.

While the NO FAKES Act appears to primarily target those creating or distributing unauthorized digital replicas, the Act does not inform on how end-users may be treated if they share or interact with the content. Based on the actual knowledge requirement, it is likely that end-users would get away with reposting the content. While true that many users would not realize the content is unauthorized, it would be almost impossible to determine if they had actual knowledge or not, leading to potential situations in which unauthorized content still ends up being spread across the internet.

V. FURTHER CHALLENGES AND CONSIDERATIONS OF A FEDERAL RIGHT

A. *International Challenges and Enforcement Issues*

Of course, the NO FAKES Act would only be a U.S. law; therefore, it would not be able to take effect on those that are making unauthorized deepfakes in other countries.¹⁷⁴ The NO FAKES Act borrows many of its policies from copyright law; however, the Act does not have the international treaty support that copyright laws do.¹⁷⁵ Effective international enforcement against deepfakes will need to be addressed in future international conferences. The United Nations (UN) has noted that gaps are appearing in AI regulation and that “just seven countries (Canada, France, Germany, Italy, Japan, UK and US) are parties to seven prominent non-UN AI initiatives, whereas 118 countries, primarily in the Global South, are parties to none.”¹⁷⁶ Until other countries begin enacting laws, it may be awhile until a working international framework specifically for AI is in place.

The NO FAKES Act, through addressing unauthorized digital replicas, is targeting unfair competition. Unfair competition is mainly governed by state laws, but there are federal laws that help address scenarios involving intellectual property.¹⁷⁷ Internationally, unfair competition is mainly governed by the Paris Convention, in which the “contracting parties are obligated to provide protection against unfair competition, and to ensure appropriate legal remedies.”¹⁷⁸ The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement reinforces this.¹⁷⁹ While these international agreements do not involve every country or specifically address AI use, they could be a starting point to address unauthorized digital replicas that are protected under intellectual property rights.

174. Bailey, *supra* note 146.

175. *Id.*

176. ‘Irrefutable’ Need for Global Regulation of AI: UN Experts, UNITED NATIONS: UN NEWS (Sep. 19, 2023), <https://news.un.org/en/story/2024/09/1154541>.

177. *Unfair Competition: Everything You Need to Know*, UPCOUNSEL (May 20, 2025), <https://www.upcounsel.com/unfair-competition>.

178. *Unfair Competition Law—Additional Minimum Standards*, INT’L. TRADEMARK ASS’N. 1 (Sep. 14, 2021), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/20210914-UCC-Board-Resolution-Unfair-Competition-Law-Additional-Minimum-Standards.pdf>.

179. *Id.*

B. Promoting Innovation

The NO FAKES Act does carve out many exceptions, but there are concerns in the technological industry that innovation could be hindered “by creating legal uncertainties and potential liabilities for developers and companies working with generative AI.”¹⁸⁰ However, others believe the Act will instead promote creative innovations. Artists will no longer “have to worry about their voices being used to promote products they’ve never endorsed or their likenesses appearing in works they never agreed to.”¹⁸¹ All individuals would be able to feel more secure knowing that they have an available legal remedy to seek.

Having a proper set of guidelines for digital AI replication could help, not only individuals wishing to protect their rights, but also those that want to utilize AI technology such as in entertainment, healthcare, and education. There could be reduced production costs and time to create visual effects in television and film.¹⁸² In the healthcare field, companies would have clearer guidelines on how they could use synthetic patient data to train their models.¹⁸³ In education, historical figures could be used for interactive classroom learning.¹⁸⁴ Without flexible exceptions and clear guidelines in place for a federal right of publicity and the use of digital replicas, there could be a chilling effect on those wishing to innovate. It will certainly be a balancing effort to protect both sides of technological and creative developments.

C. Addressing Digital Replicas in Other Ways and Other Concerns

Other opportunities and solutions should also continue to be researched to learn more about artificial intelligence. One idea is that legislation could still be used, but more narrowly, by specifically “prohibiting the use of digital replicas to humiliate an individual with non-consensual intimate imagery or to mislead the public concerning who is performing a particular song.”¹⁸⁵ Another possible solution is to push more for self-regulation in the artificial intelligence community, which has been in progress.¹⁸⁶ It is certainly true that a “one size fits all” approach to AI will not work; and as the field continues to evolve and grow, the industry and lawmakers will need to continuously adapt and focus their efforts on finding balanced solutions.

180. Rosenberg, *supra* note 173.

181. Kaviya Raja, *The NO FAKES Act Is Being Introduced into the House of Representatives*, MASS. DAILY COLLEGIAN (Sep. 22, 2024), <https://dailycollegian.com/2024/09/the-no-fakes-act-is-being-introduced-into-the-house-of-representatives/>.

182. Rosenberg, *supra* note 173.

183. *See id.*

184. *Id.*

185. *Constitutional Concerns with NO FAKES and Similar Acts*, RE:CREATE 5 (Aug. 20, 2024), <https://www.recreatecoalition.org/wp-content/uploads/2024/08/Constitutional-Concerns-with-NO-FAKES-and-Similar-Acts.pdf>.

186. *See* Esmat Zaidan & Imad Antoine Ibrahim, *AI Governance in a Complex and Rapidly Changing Regulatory Landscape: A Global Perspective*, 11 HUMANS. & SOC. SCIS. COMM'NS, Sep. 10, 2024, at 1, 4.

CONCLUSION

Although every state has some type of right of publicity through statute or common law, generative artificial intelligence presents new and harmful issues. Many state laws do not currently protect non-celebrity individuals from unauthorized digital replica use or know how to handle new AI technology, which suggests a need for a uniform federal law that will. With some changes, the bipartisan-proposed bill, the NO FAKES Act, could offer a viable solution. The NO FAKES Act is a first step in the right direction for protecting all individuals against unauthorized deepfakes and digital replicas. This Act, as do many other AI-related drafts and bills, has bipartisan support, furthering the importance of these protections. Legislators should keep in mind the ever-changing landscape of artificial intelligence and formulate a system of federal protection that balances individuals' NIL rights as well as free speech and technological innovation.

A federal law should leave in place state ROP laws offering broader protection than the federal law but should otherwise be preemptive to create a more uniform system. There should be a floor to these rights established through federal law, and state laws should be able to supplement, following a partially preemptive system. The law should take liability concerns into account. A balanced system that protects individual rights while also leaving room for creative works is necessary. Media platforms should not have to feel that there is incentivization of over-censoring. Starting at a lower protection level to experiment with how effective it is at regulating harmful digital replicas may be best before enacting a broad law that potentially places limits on innovations.

Everyone deserves to feel that they have control over their rights in protecting their individual voice and image. Because of AI, almost all individuals could experience their voice or likeness being used to create false or deceptive material. Although the NO FAKES Act may not offer a perfect solution, it is surely better to have federal protections in place for a more predictable framework for legal recourse.