Responses of Professor Jennifer E. Rothman to
Questions for the Record of Representative Dean

Artificial Intelligence and Intellectual Property: Part II – Identity in the Age of AI
Before the Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives

February 27, 2024

Representative Dean propounded three questions for the record following the hearing of February 2, 2024, on Artificial Intelligence (AI) and Intellectual Property: Part II —Identity in the Age of AI. Questions and responses are provided below.

1. **Question:** You have said that Taylor Swift would have a straightforward lawsuit to address deepfakes under state right of publicity laws. But don't many states appear to limit claims to uses for commercial purposes? Would Taylor Swift fake nudes posted online qualify as having a commercial purpose?

Answer: There is disagreement and confusion over who can bring right of publicity claims and what types of unauthorized uses violate the right.[1] Some right of publicity statutes are drafted to focus on uses in the context of advertising and merchandise, or are limited to uses for "commercial purposes."[2] However, many state laws sweep more broadly and many states have both statutory and common law rights. In California, for example, even though the statutory (inter vivos) right (Cal. Civ. Code § 3344) is limited to uses "on products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases," the common law is much broader and extends to

[1] *See* Jennifer E. Rothman, *Commercial Speech*, *Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1951-55 (2015); *see also* ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY ["ROTHMAN'S ROADMAP"], www.rightofpublicityroadmap.com (surveying state laws).

[2] *See, e.g.*, 765 Ill. Comp. Stat. Ann. 1075/10; *see also* 42 Pa. Cons. Stat. Ann. § 8316 (limiting liability to uses for "commercial or advertising purpose"). However, Pennsylvania also has a common law right of publicity and privacy-based appropriation tort which do not have such a requirement. Even though Illinois's statute preempts its common law, the state has an intimate image law that would cover these nude images. *See* 720 Ill. Comp. Stat. Ann. 5/11-23.5.

any use for a "defendant's advantage."[3] Taylor Swift has the advantage of being a person with commercial value so even in states that (potentially) limit the scope of who can bring claims and in what contexts, any uses of her identity may be considered to provide a commercial benefit.

Nevertheless, some states and courts interpreting state laws have problematically limited claims on the basis of whether a plaintiff has "commercial value."[4] Remedying these potential inequities and inadequacies presents an opportunity for federal legislation in this space and will be particularly important—along with statutory damages and fee-shifting provisions—to protect ordinary people or even most performers, who do not have access to Taylor Swift's resources to combat such unauthorized uses both in the public arena and the courthouse. Federal legislation could clarify and establish a preferred rule, making clear that uses can violate the law regardless of whether the use is for a commercial purpose and without regard to whether the plaintiff has a commercially valuable identity. This would have to be done in a way that would still protect creative works and free speech, and address the potential danger of conflicting laws, disruption of existing licensing and contractual agreements, and injury to other reliance parties. Preemption of conflicting state laws would be the best way to harmonize conflicting state laws, but needs to be done in such a way as to not destabilize more than 100 years of precedents.

Specifically with regard to Taylor Swift, I cited in my written testimony the example of the recent fake Le Creuset advertisement using Taylor Swift's identity as being "straightforward."[5] Such uses in advertisements are uncontroversial under all state publicity laws. I cannot comment on a specific use of Swift's identity in a variety of deepfakes or "fake nudes" which I have not personally reviewed. But in broad strokes, considering her possible claims under several state laws in states that she has an ongoing connection to, she may well have right of publicity claims arising out of these uses. Such uses could violate the common law of many states, such as California,

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[3] Eastwood v. Superior Court, 149 Cal. App.3d 409, 417 (1983) (setting forth the elements of the common law right of publicity or appropriation claim under California law and noting that the use need not be "commercially" advantageous.)

[4] *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 8316(a), (e); *see also* Rothman, *Commercial Speech*, *Commercial Use, and the Intellectual Property Quagmire*, *supra* note 1, at 1951-52 (discussing the variety of requirements for acquisition of rights under state laws).

[5] Statement of Jennifer E. Rothman, before the Before the Subcommittee on Courts, Intellectual Property, and the Internet Committee on the Judiciary, U.S. House of Representatives, Hearing on Artificial Intelligence and Intellectual Property: Part II— Identity in the Age of AI, Feb. 2, 2024, at 6.

which is not limited to "commercial" uses, and it is possible that some of these uses would also violate California Civil Code § 3344 or other state statutes, even if limited to uses for commercial purposes or advantage if the uses, for example, drive web traffic or interest to a particular defendant or their site that potentially generates income for them. New York limits its right of publicity (and privacy rights) to those provided by statute and limits claims to uses that are "for the purposes of trade."[6] The term "for purposes of trade" has been expansively interpreted, however, so could extend liability to some deepfakes but possibly not others. Notably, Rhode Island has a statute that expressly applies to noncommercial appropriation claims in which a person's name or likeness is used without permission.[7]

It is important to highlight that right of publicity laws are not the only available tools to address the circulation of such intimate images. There is an increasing trend of states adopting intimate image laws, under both their criminal and civil laws. These generally cover uses that depict an "intimate body part."[8] There is also a federal law that addresses such uses,[9] and to the extent that there is uncertainty about whether this federal law covers AI-generated depictions it could be amended to so indicate.[10] Other state privacy torts will also be available to plaintiffs like Swift in such circumstances, including portrayal in a false light and potentially publication of private facts. Plaintiffs could also bring intentional and negligent infliction of emotional distress and defamation claims under such circumstances. Swift could also bring false endorsement claims under state and federal law.[11]

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[6] N.Y. Civ. Rights Law §§ 50, 51.

[7] R. I. Ann. Stat. § 9-1-28.1 (2).

[8] *See, e.g.*, Cal. Civ. Code § 1708.85; Cal. Penal Code § 647(j). *See also*, *e.g.*, N.Y. Civ. Rights Law § 52-b.

[9] 15 U.S.C. § 6851; *see also* 10 U.S.C. § 917(a).

[10] There are a number of pending bills to address this issue, including another bill that you have introduced and sponsored. *See* SHIELD Act of 2023, H.R. 3686, 118th Cong. (2023); *see also* DEFIANCE Act of 2024, S. 3696, 118th Cong. (2024); Preventing Deepfakes of Intimate Images Act, H.R. 3106, 118th Cong. (2023).

[11] The Federal Trade Commission also enforces regulations against false endorsements and is considering expanding its regulations to more broadly prohibit impersonation of another. *See* Federal Trade Commission, *FTC Proposes New Protections to Combat AI Impersonation of Individuals*, Feb. 15, 2024, https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-proposes-new-protections-combat-ai-impersonation-individuals.

The greatest challenge for these claims is not the lack of underlying law, but Section 230 of the Communications Decency Act which potentially insulates internet platforms from liability. This leaves victims with few avenues to track down and hold the wrongdoers accountable, and limited options to get the platforms to take down such content. Notably, platforms are much more likely to respond to Taylor Swift's requests to take down images than those of an ordinary person, regardless of what the law requires.

2. **Question:** Relatedly, you have claimed that Taylor Swift would have a right of publicity claim in Tennessee or Rhode Island. It is my understanding that, currently, neither Tennessee nor Rhode Island right of publicity laws extend to an individual's voice. What does that mean for her ability to address deepfakes that include voice replicas – such as recently posted videos on X which used voice-cloning technology to make Swift appear to say certain political phrases – in those states?

Answer: Some states limit claims to those who are domiciled in that state, while others limit claims to those who have been injured in that state, which could mean that a person could bring a claim anywhere where distribution took place (which would pick up uses on the Internet). For example, both Washington State and Hawaii allow claims for uses that are distributed within their states regardless of the domicile of the plaintiff and both expressly includes "voice" in their statutes.[12] Common law claims may extend beyond the place of domicile as well. As I do not know where Ms. Swift is domiciled, I cannot accurately comment on where she might be able to successfully bring suit.

With that said, it is true that in the minority of states that only provide right of publicity and privacy rights by statute, some do not expressly include voice in the covered uses. As I have suggested in both my written testimony and prior submissions to Congress and the Copyright Office,[13] one of the opportunities for a federal right of publicity is to clarify, simplify, and

[12] *See, e.g.*, Wash. Rev. Code Ann. §§ 63.60.010 *et seq.*; Haw. Rev. Stat. § 482P-1 *et seq*.

[13] *See* Statement of Jennifer E. Rothman, *supra* note 5; Jennifer E. Rothman, Considerations for Federal Right of Publicity and Digital Impersonation Legislation, Aug. 24, 2023, available at https://rightofpublicityroadmap.com/news_commentary/submission-to-congress-in-wake-of-ai-concerns/; Jennifer E. Rothman, *Artificial Intelligence, Copyright, and Right of Publicity Comments of Professor Jennifer E. Rothman* (submitted to U.S. Copyright Office, Oct. 25, 2023), available at https://rightofpublicityroadmap.com/news_commentary/comments-submitted-to-copyright-office-on-the-right-of-publicity-and-ai/.

harmonize right of publicity laws and one way to do so could be to establish that unauthorized uses of a person's voice are actionable across the country regardless of what state one lives in or where those unauthorized uses are distributed.

I note, however, that even the two states you mention do not clearly exclude voice from coverage as there have been no definitive rulings on the question. Notably, Tennessee, in addition to the state's right of publicity statute, which does not specifically provide protection for voice, recognizes a common law right of publicity and privacy-based appropriation claims. These claims likely encompass unauthorized uses of a person's identity, including their voice.[14] New York and California, which could also be Swift's domiciles, both expressly extend protection to the unauthorized use of a person's voice by statute,[15] and California's common law right of publicity also covers voice-based claims.[16] Depending on the nature of the use of her voice, Swift would also be able to bring claims under state and federal false endorsement, unfair competition, and trademark laws, as well as a host of other tort-based theories, some of which I enumerated in my answer to Question 1 above. It is possible that the Rhode Island privacy statute would exclude a voice-based claim, as use of a person's voice is not enumerated under the statute, but Rhode Island has not yet ruled on the question and it may be that its courts (or federal courts applying its law) would either interpret the law to cover voice or understand the uses in context to count as a use of her name or likeness.

3. **Question:** You testified that you have been impersonated online and had difficulty having that material removed until you made a copyright claim. As you know, copyright claims often are not available in circumstances where someone's voice and likeness are used without their permission. Along these lines, you said that it is very difficult to have unwanted impersonations

[14] *See, e.g.*, Laws v. Sony Music Entm't, 48 F.3d 1134 (9th Cir. 2006) (recognizing availability of voice-based claims under California's common law); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (recognizing common law claim for voice appropriation under California common law). Common law publicity claims are, in contrast to statutorily provided ones, largely identical across states so Tennessee is very likely to follow California and other states' lead in including voice in its common law right, even if it were to interpret its statute to exclude such claims.

[15] N.Y. Civ. Rights Law § 51; Cal. Civ. Code § 3344.

[16] *See supra* note 14.

removed because the platforms are shielded by Section 230 of the Communications Decency Act and that they could do more. What more could they do?

Answer: Some platforms do remove content on the basis of impersonation; it does, however, take longer and can require sharing additional personal information, such as the image of a driver's license or passport. It can also be frustrating, and some platforms are quicker to do so than others. There are also some bad actors who will not take any actions to remove such content.[17] In contrast, because of the Digital Millennium Copyright Act's notice and takedown process,[18] claims for copyright infringement are handled more immediately and more swiftly without requiring submission of personal information. If a photograph or other copyrighted material is being used to impersonate someone online and the origin of that material is known, it may be possible to get the copyright holder to submit the infringement notice or to authorize the person impersonated to do so.

Clarifying that right of publicity claims are not within the scope of Section 230 immunity could encourage platforms to do more to address unauthorized uses of a person's identity online. There is a federal circuit split on this issue.[19] Congress could clarify this through an amendment to Section 230 or could actively support such an interpretation of the existing law. A new federal publicity law could also clarify either that Section 230 immunity does not apply or develop an alternative notice and takedown system like that of the DMCA.[20]

Thank you for the opportunity to answer your questions.

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[17] *Cf.* Danielle Keats Citron, THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE (W.W. Norton & Co. 2022).

[18] 17 U.S.C. § 512.

[19] *See* Jennifer E. Rothman, *Third Circuit Holds that Newscaster's Right of Publicity Claim can Proceed Against Facebook*, ROTHMAN'S ROADMAP, Sept. 28, 2021, https://rightofpublicityroadmap.com/news_commentary/third-circuit-holds-that-newscasters-right-of-publicity-claim-can-proceed-against-facebook/.

[20] I note that the DMCA notice and takedown process while an improvement over blanket immunity has raised some concerns that there has been overzealous removal of legitimate content and speech. *See* Report of the Register of Copyrights, Section 512 of Title 17, U.S. Copyright Office, May 2020, available at https://www.copyright.gov/policy/section512/section-512-full-report.pdf. (assessing some of challenges and successes of system); Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC'Y 371 (2017).