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

**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**

Chairman Issa propounded four questions for the record following up on 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:** Have there been any constitutional challenges to state laws that treat name, image, and likeness as property rights, and what were the results of such challenges?

**Answer:**

Most of the constitutional challenges to right of publicity laws have focused on First Amendment and copyright preemption defenses. The outcome of these constitutional challenges and defenses have been case specific and reflect primarily as-applied challenges to these laws rather than facial challenges to their legitimacy. These constitutional defenses have been successful in many instances and provide limits on the scope of state right of publicity laws. For example, courts have held that the First Amendment protects depictions of real people in a variety of contexts, such as in works of art or motion pictures.[1] Similarly, many courts have held that federal

[1] *See, e.g.*, Sarver v. Chartier, 813 F.3d 891 (9th Cir. 2016) (rejecting right of publicity claim brought by a soldier who objected to a character based on him in the Academy Award winning film *The Hurt Locker*); ETW Corp. v. Jireh Publ'g, 332 F.3d 915 (6th Cir. 2003) (rejecting right of publicity claim for use of Tiger Woods's name and likeness in art print of his winning the Masters Tournament); De Havilland v. FX Networks, 21 Cal. App.5th 845 (2018) (rejecting right of publicity claim by Olivia de Havilland arising out of a docudrama in which a character based on her was played by Catherine Zeta-Jones). For further discussion of First Amendment defenses to right of publicity claims *see* Jennifer E. Rothman, THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD 138-59 (Harvard Univ. Press 2018); Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L. J. 86 (2020).

copyright law preempts (or blocks) state right of publicity claims when a lawful use of a copyrighted work is made.[2]

I am not aware of any cases that focus on challenging as a constitutional matter the classification of the right of publicity as "property." The status of the right of publicity as a form of property has been both recognized and contested since its emergence in the late 1800s. Today, some state statutes specifically designate the right as a form of "property" and some more specifically as a form of "transferable property."[3] Other state statutes are silent on the question and most states have a common law right of publicity that does not specify the right's categorization as either a property or personal right.[4]

Common law publicity rights have been categorized in at least three distinct ways since their inception in the late 1800s and continue to be today; they have been designated property, as personal only (and not property), and as a mix of both.[5] The Supreme Court, in a performance-based case that included a right of publicity/privacy-based appropriation claim, considered the right a "proprietary interest," at least in the context of the broadcast of the plaintiff's performance

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[2] *See, e.g.*, Maloney v. T3Media, 853 F.3d 1004 (9th Cir. 2017) (rejecting right of publicity claims by former student-athletes when copyrighted photographs at issue were lawfully licensed by NCAA); Dryer v. NFL, 814 F.3d 938 (8th Cir. 2016) (rejecting right of publicity claims of former professional football players when copyrighted footage of games and interviews were used in new films); Laws v. Sony Music Entm't, 448 F.3d 1134 (9th Cir. 2006) (rejecting singer's right of publicity claim when copyrighted recording was licensed for use as a sample in a new recording). For further discussion of copyright preemption defenses to right of publicity claims *see* Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 160-79; 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).

[3] *See, e.g.*, 765 Ill. Stat. 1075/15.

[4] Common law means judge-made rather than statutory law, and is a robust basis for laws, particularly at the state level. It is derived from longstanding doctrine and customs that date back hundreds of years.

[5] *See, e.g.*, Edison v Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 141 (Ct. Chan. NJ 1907) (citing Brown Chem. Co. v. Meyer, 139 U.S. 540 (1891)) ("If a man's name be his own *property*, as no less an authority than the United States Supreme Court says it is[,] it is difficult to understand why the peculiar cast of one's features is not also one's *property*, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it.") (emphasis added). *See also* Munden v. Harris, 134 S.W. 1076 (Mo. App. 1911) ("We therefore conclude that one has an exclusive right to his picture, on the score of its being a *property* right of material profit. We also consider it to be a *property* right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty, and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity or damages in an action at law.") (emphasis added).

without permission.[6] Some have considered this type of publicity right or performance right as a form of "quasi-property."[7]

The ambivalence around whether publicity rights are personal or property is best understood as a result of their being *both*. It is a personal type of property, or property in personhood itself, and therefore facile analogies to forms of property that are tangible (like cars or houses) or even to intangible property (like a book or an invention which are separable from their creators and inventors) are inapplicable. This longstanding hybrid understanding of the right of publicity is epitomized by the 1894 decision in *Corliss v. E.W. Walker Co.*, in which a federal district court pronounced that "a private individual has a right to be protected in the representation of his portrait in any form" and that such a right "is a *property as well as a personal right*[.]"[8] Similarly, in 1905, the Supreme Court of Georgia in *Pavesich v. New England Life Insurance* framed the right as one of both property *and* personhood, observing that "[t]he form and features of the plaintiff are his own," and protected both by property rights and the constitutional and natural right to liberty. [9]

To the extent that the law recognizes a property right in one's own self, including one's likeness, name, and voice, it is because of the conception of self-possession and self-ownership, and the right to exclude others from interfering with your body or using your identity or labor without permission.[10] This understanding of having property rights in oneself was true even before the emergence of formal publicity and privacy rights. Consider John Locke's 1698 pronouncement of the basis of his labor-theory of property ownership: "[E]very Man has a *Property* in his own *Person*. This no Body has any Right to but himself."[11]

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[6] *Zacchini v. Scripps-Howard Broad. Co*., 433 U.S. 562, 573 (1977).

[7] *Cf.* Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889 (2012) (noting the unique features of such "quasi-property" as distinguished from traditional property regimes).

[8] Corliss v. E. W. Walker Co., 64 F. 280, 282 (D. Mass. 1894) (emphasis added).

[9] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 76-77 (Ga. 1905); *see also* Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895) (Gray, J. dissenting) (concluding, in subsequently widely embraced view, that a person's likeness was "a form of *property*, as much as is the right of complete immunity of one's person") (emphasis added).

[10] Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 208-28 (2012).

[11] See John Locke, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698).

Perhaps of most importance for the Committee's consideration of the constitutionality of a *transferable* property right in a person's voice or likeness, classifying something as property does *not* determine whether it is transferable. There are numerous forms of property that have limited or no transferability (sometimes termed "alienability").[12] Property in oneself has long been understood as different from other forms of property and, as I discuss in my written testimony, transferring the ownership of a person's voice and likeness to another entity or person is a chilling prospect, and one that works at cross-purposes with the expressed objectives of the proposed legislation being considered to combat the digital impersonation of performers and ordinary people alike.[13]

Few courts have ruled directly on the constitutionality of such transfers. There have been very few direct challenges to the right of publicity's transferability, and most of these cases have settled.[14] With that said, I have observed an increase in litigation raising these issues.[15] Some of these cases focus on whether a particular use was authorized by a third-party claiming rights to use a person's identity, or a party seeking to enforce the identity-holders rights with their support, some also largely revolve around trademark law. These cases do not specifically raise the broader constitutional challenge.

The most on-point decision on the issue of the constitutionality of the transferability of publicity rights held that such a transfer would violate the constitutional right to liberty and the constitutional prohibition on slavery and involuntary servitude.[16] This decision by a California trial court held that a defendant's right of publicity, including his right to control uses of his voice, name, and

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[12] *See* Rothman, *The Inalienable Right of Publicity*, *supra* note 10, at 208-33.

[13] 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.

[14] As I have noted elsewhere, those claiming to own another's right of publicity to date have rarely pressed their rights against the identity-holders in court because of a concern that such claims would be unconstitutional and they have more leverage by threatening to enforce such agreements than by litigating them. Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 117-19.

[15] Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271, 1273-74, 1281-88 & n. 66 (2022).

[16] *See* Goldman v. Simpson, No. SC03-6340, slip op. (Cal. Super Ct., Oct. 31, 2006).

likeness, could not be transferred to the plaintiff judgment-creditors. The court compared such a transfer to placing the defendant into "involuntary servitude."[17]

2. **Question:** Are there currently legal gaps in the protection of name, image, likeness, and voice that have been exposed by recent technical developments in artificial intelligence?

**Answer**: I do not think the recent advances in artificial intelligence (AI) technology reveal *new* gaps in the law. Recent advancements in AI do, however, highlight some preexisting challenges because the scale of the problem of unauthorized uses of a person's identity has grown. Because current and ever-improving AI is available to a general consumer market it can be used by almost anyone to rapidly produce realistic-seeming images and audiovisual works using a person's voice or likeness without permission. This means that while the problem is not new in kind, it is new in scale. This makes the "whack-a-mole" problem even greater than it already was with regard to online infringement, and even more important that technological solutions be adopted, and that platforms and AI companies be part of the solutions to these problems.

Enforcement of existing laws at the state and federal level, particularly by governmental agencies, would also be helpful. Any legal change, including adoption of a federal right of publicity or digital performance right, particularly if it extended intermediary and platform liability, might facilitate technological developments and private enforcement, but might also face the same hurdles that we encounter enforcing existing law, including difficulty tracking down defendants and stopping reposting, as well as the delay and cost of litigation. Extending platform liability for third-party unauthorized uses online would help with this, but may create other challenges, for example, potentially shutting down legitimate speech if there are not adequate speech protections or limitations in scope of liability.[18]

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[17] *See id*. at 12. The court distinguished the transfer of a person's right of publicity from the transfer of a copyright in works created by that person, which the court in the case had previously transferred to the plaintiffs in the case. For a more detailed exploration of the treatment and understanding of transferability of state right of publicity laws and this decision *see* Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 115-37; Rothman, *The Inalienable Right of Publicity*, *supra* note 10.

[18] *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; 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).

3. **Question:** Is new federal legislation necessary to address these gaps, or do you believe that current federal and state laws are adequate for now?

**Answer:** Per my answer to question #2, I do not think there are new gaps, but the scale of the problem highlights some of the opportunities for federal legislation to improve matters. A well-drafted, new federal right of publicity statute has the potential to harmonize and improve upon current, varying state laws, but the potential for doing more harm than good with such federal legislation is significant. Therefore, any such legislation must proceed only with great care, caution, and precision. Well-crafted new federal legislation could, for example, beneficially:

- Ensure that both the ordinary and the famous can bring claims and can do so in both commercial and noncommercial contexts.
- Protect against the loss of control of one's own identity by overreaching state laws or contracts.
- Clarify that Section 230 immunity does not apply to right of publicity or similar claims for unauthorized uses of a person's voice or likeness.
- Harmonize differing state laws. Notably, this would *only* work if the new federal law had preemptive effect. Such preemption would need to be done so as not to unsettle clear and well-established precedents in the area that have provided longstanding and consistent guidance, particularly about what are allowable uses of another's identity. As part of this harmonization, Congress could set forth safe harbors for legitimate uses of another's identity, such as in the context of news reporting or storytelling.[19]

With that said, it is not *necessary* to enact new federal legislation, as I outlined in my written testimony, because many existing laws cover the nonconsensual uses of a person's identity, including uses of likenesses, voices, and performances. These laws include intimate-image laws, federal and state unfair competition and trademark laws, and state right of publicity and privacy laws, as well as various other state torts and federal regulations. Accordingly, any new federal legislation must avoid worsening the situation, such as:

[19] *See* Statement of Jennifer E. Rothman, *supra* note 13, at 12-16.

• By creating a transferable or broadly licensable federal right that could lead to a person losing control over their own voice and likeness. Such "authorized" loss of control would also worsen the growing confusion as to the authenticity of digital images and performances.

• By adding an extra layer of confusion and conflict to an already complex array of rights over a person's identity. A new federal law could unsettle existing agreements and exacerbate the challenges of navigating the "identity thicket."[20]

4. **Question:** Would the ability of individuals to later revoke an assignment of their name, image, likeness, and voice rights address some of the potential concerns with licensing, and how could such an ability be balanced to be effective but still respect freedom to contract?

**Answer:** I do not think allowing broad transfers (or licenses) of a person's rights to their own names, likenesses, and voices should be allowed even if revocation is permissible. Allowing such transfers works at odds with many, if not all, of the articulated goals of legislation to address unauthorized digital performances and images. As outlined in my written testimony, if identity-holders—the person whose voice and likeness are at issue—are not specifically performing or authorizing digitally-created performances this will *exacerbate* rather than combat deception, and accelerate the replacement of opportunities for new performances and careers for living artists. Allowing such transfers also wrests control from the identity-holder themselves in ways that should not be permissible and that likely are unconstitutional.

Revocation may be better than allowing transfers or broad licensing without such an option, but will cause many of the same problems as transfers and should not justify allowing a transferable performance right. The same bargaining problems that were raised in my written testimony and during the February 2nd hearing will remain, and depending on how such a revocation provision is structured may be contracted around or bargained away through collective bargaining agreements. Even if a revocation provision were not waivable and could be exercised at any time, this allowance would create a contractual and business mess by authorizing a third-party to control (and own) another person's voice and likeness for an uncertain duration, adding an additional layer of confusing and conflicting rights over a person's identity to the already fraught mix.[21] It is far

[20] Rothman, *Navigating the Identity Thicket*, *supra* note 15.

[21] *See generally id*.

better, and still highly profitable, to allow licensing agreements, which can be exclusive, but must be limited to specific contexts and for limited durations. AI-generated performances should also be disclosed, even if done with permission, otherwise such uses may deceive the public in contravention of one of the key objectives of this legislation.

Thank you for the opportunity to answer your questions.