



February 2, 2024

Representative Darrell Issa
Chair
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, DC 20515

Representative Hank Johnson
Ranking Member
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
2240 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Issa and Ranking Member Johnson:

The use of generative artificial intelligence to produce convincing, unauthorized replicas of individuals is a serious concern. Notable personalities have long enjoyed ways to protect their likeness from misuse; private citizens, faced with the threat of being digitally impersonated, now face this threat in a new and significant way. Both the recently-introduced [No AI FRAUD Act](#), as well as the discussion text of Senator Coons' [NO FAKES Act](#), attempt to protect both private citizens and those who trade on their likeness by creating a broad right of publicity. However, while we wholeheartedly support these policy goals, we have concerns with both the frameworks and the particulars of the legislation that has been put forward so far.

Both No AI FRAUD and the NO FAKES Act start with a right of publicity framework, which they then attempt to expand to private citizens. This is the wrong framework for a broad-purpose protection. The reason for this framing is, as we understand, attributable to the initial advocacy for the bills coming from the entertainment industry. For performers and intermediaries focused on enabling (and preventing) *commercial* exploitation, this makes sense. Publicity and

name-image-likeness (NIL) rights are designed explicitly as a licensing regime; they rest on a presumption that the protected individual not only exploits their likeness, but does so willingly, as part of their livelihood.

As a result, publicity rights come with a host of baggage--including long terms of post-mortem protection, and the ability to assign enforcement powers--that are not only unnecessary for private individuals, but actively problematic. For example, a purely IP framework would allow a novelty photo app to insert a provision into its terms of service which grants the app an unrestricted, irrevocable license to make use of the user's likeness, for the full duration of the personality right's term. A likeness assignment would similarly become just another line in a record label contract, with no meaningful chance for the artist to review (or veto) subsequent uses.¹ Without extensive guardrails--such as a hard limit on the duration of a license, automatic reversion, or a "use it or lose it" provision--intellectual property rights do not provide anything approaching a level playing field between creators, and the powerful intermediaries who seek to exploit those rights.²

Intellectual property regimes are themselves a form of speech regulation.³ By granting a monopoly on a specific kind of speech--in this case, speech that uses the audiovisual likeness of an individual--a publicity right bars all other individuals from engaging in that particular subset of speech. This means, for good or ill, that any IP regime must contain significant exceptions and limitations to accommodate the First Amendment. Copyright is only constitutionally sound because of a robust and flexible fair use doctrine;⁴ any federal publicity right would have to similarly allow for a broad range of speech. This remains the case even (or especially) in cases where a public figure may find the parodic use of their image distasteful or upsetting.⁵ Any new right must accommodate constitutionally protected commentary, *particularly* about public figures, within the bounds of existing parody and defamation law.

Moreover, any new intellectual property right would fall outside the purview of section 230 of the Communications Decency Act. Platforms cannot distinguish AI-generated from human-generated content, and they certainly cannot tell whether or not AI-generated content is "authorized" by the subject it depicts. Under both NO FAKES and No AI FRAUD, platforms which accept user uploaded content would be unable to defend themselves against significant liability for the conduct of their users.

¹ Congress has seen this phenomenon before; termination rights were expressly intended to allow for an artist to exit exploitative licensing arrangements and regain creative control of their works. However, the termination system as it was implemented is nigh unworkable, with remarkably few creators successfully exercising their rights. See, e.g., Dylan Gilbert et al, *Making Sense of the Termination Right: How the System Fails Artists and How To Fix It* (2019), <https://publicknowledge.org/wp-content/uploads/2021/11/Making-Sense-of-the-Termination-Right-1.pdf>

² See, e.g., Meredith Rose, *Streaming in the Dark: Where Listeners' Money Goes--and Doesn't* (2023) <https://publicknowledge.org/policy/streaming-in-the-dark-where-music-listeners-money-goes-and-doesnt>.

³ *Eldred v Ashcroft*, 537 U.S. 186, 190 (2003) (noting that copyright contains necessary "First Amendment accommodations" in the form of exceptions and limitations).

⁴ *Id.*

⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

Additionally, nothing in either bill provides a mechanism to have unauthorized deepfakes expeditiously taken down. To plug this gap and provide some certainty to platforms, Congress would need to design a new liability safe harbor, ideally contingent on a notice-and-takedown regime. As we have seen with the Digital Millennium Copyright Act, such systems are prone to abuse and bad-faith claims--a problem which will only be exacerbated when the field of takedowns expands to include any unflattering use of a person's likeness. Prominent public figures have already begun to insist that real, but unflattering, depictions of them, are malicious products of AI.⁶ This runs the risk of creating a second, equally disruptive layer of misinformation that can be used to evade accountability and silence dissent. To prevent this, Congress would need to include severe penalties for false or bad faith take-down demands.

In short, nothing about the current policy goal--protecting individuals from unauthorized use of their image--demands an intellectual property framework. Congress should seriously explore other structures, such as torts (including false light invasion of privacy) or privacy rights, to achieve this goal without importing the baggage attached to IP law.

Finally, banning or penalizing technology outright (as proposed in No AI FRAUD) is an unworkable solution to a difficult problem. Voice and image cloning technology already exists in interstate commerce, and is used for a variety of purposes, including accessibility.⁷ Congress must avoid overbroad technology mandates that undermine legitimate and socially valuable uses of generative AI technology.

We welcome the Subcommittee's interest in this issue. Moreover, we applaud efforts by members of both chambers to hold open and productive conversations with multiple stakeholders. We look forward to constructively engaging with members and staff to find meaningful, balanced solutions to this very real problem.

Sincerely,

Meredith Rose
Senior Policy Counsel
Public Knowledge

⁶ Pranshu Verma and Gerrit De Vynck, *AI is destabilizing 'the concept of truth itself' in 2024 election*, Washington Post (Jan. 22, 2024), <https://www.washingtonpost.com/technology/2024/01/22/ai-deepfake-elections-politicians/>.

⁷ Nelson Aguilar, *iOS 17 Lets You Clone Your Voice on Your iPhone*, CNet (Sep. 27, 2023), <https://www.cnet.com/tech/mobile/ios-17-lets-you-clone-your-voice-on-your-iphone/>. To the extent that Congress wishes to target "bad actor" services that are designed, marketed, or only commercially viable as tools to create unauthorized pornography or other harmful material, we urge you to look to the language of the Protecting Lawful Streaming Act as a guide. 18 U.S.C. § 2319C(b).