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**Before the Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives**

February 2, 2024

Artificial Intelligence and Intellectual Property: Part II – Identity in the Age of AI

Chairman Issa, Ranking Member Johnson, and Members of the Subcommittee, I appreciate your inviting me to testify today about some of the issues raised by artificial intelligence (AI), particularly those that impact rights over our own likenesses and voices, and to consider what, if any role, Congress should play in addressing them.

I am the Nicholas F. Gallicchio Professor of Law at the University of Pennsylvania Carey Law School. My scholarship and teaching focus on intellectual property (IP) law and the freedom of speech. Of particular relevance for this hearing, I have been studying identity and publicity rights for nearly two decades and have robustly researched the history and development of these laws, as well as the current challenges these laws face. I am recognized as the leading expert on the subject, having written what has been called the “definitive biography of the right of publicity”¹ and numerous essays and articles on the topic, including most recently ones published in the *Harvard Law Review* and *Yale Law Journal*.² I also operate the website, *Rothman’s Roadmap to the Right of Publicity*, which documents right of publicity and related laws and provides commentary on current issues, legislation, and litigation in the field.³ Before becoming a law professor, I was an

¹ See Jennifer E. Rothman, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (Harvard Univ. Press 2018) (quoting Yale Law School Professor Jack Balkin’s review of the book on jacket cover).

² See, e.g., Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022); Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L. J. 86 (2020); Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEORGETOWN L.J. 185 (2012).

³ See ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY [“ROTHMAN’S ROADMAP”], <https://rightofpublicityroadmap.com>.

entertainment and IP lawyer in Los Angeles, CA. Prior to working in law I worked in both the creative and production side of the film and television industry. I therefore understand not only the laws on the books in this area, but also how these laws affect people and entities in the real world, whether they are actors, recording artists, other performers, filmmakers, writers, movie studios, record labels, athletes, or ordinary people trying to navigate our digital age, in which ever-improving AI technology can seamlessly replicate a person's image and voice.

Artificial intelligence poses both great opportunities and great dangers. Any legislation needs to consider both the potential risks and benefits of AI, so that we can best harness the advantages of AI for humanity, without it seeding and spreading misinformation, and replacing opportunities for people to work, create, and thrive. AI threatens to replace work for living writers, artists, and performers, and spread deepfakes masquerading as authentic recordings of politicians, recording artists, actors, and ordinary people in ways that threaten not only our livelihoods and our dignity, but also democracy itself.

You asked me to focus my comments specifically on voice and likeness rights, considering both the general possibility of adopting a federal right of publicity, and on two circulated drafts of bills intended to address unauthorized AI-generated performances.⁴ I will focus my comments today on three primary points. First, I want to highlight that although the capabilities of today's consumer-accessible AI are new, the problem of using a person's performance, voice, or likeness without permission is longstanding. We have many laws already on the books that address such unauthorized uses regardless of the technology employed to do so. Accordingly, any federal legislation in this area must improve the current state of affairs and not create or exacerbate problems produced either by AI or unauthorized uses of a person's identity. This leads to my second point, which is that any federal right to a person's voice or likeness must not be transferable away from that person. Allowing such transfers violates our most sacred and fundamental rights and thwarts the expressed goals of Congress to protect the livelihood of performers, the dignity of ordinary people, and the ability to distinguish accurate images and sounds from those which are

⁴ See No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024, H.R. 6943, 118th Cong. (2024) (introduced in House on Jan. 10, 2024) (also referred to as the "No AI FRAUD Act"); Discussion Draft Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023 (circulated Oct. 11, 2023, in Senate) (the "NO FAKES Act). Both the drafts and some more detailed comments on each are available on my website. ROTHMAN'S ROADMAP, *supra* note 3.

deceptive creations of highly sophisticated AI. Finally, despite these two hurdles, I will suggest some ways in which federal legislation in the area of the right of publicity could be helpful.

I. The Right of Publicity and Other Existing Laws Apply to Works Created by Artificial Intelligence

The recent evolutionary leaps in artificial intelligence and its expanded accessibility to a general consumer marketplace present new challenges for our society, creative industries, performers, and our democracy. But, the unauthorized use of a person’s name, likeness, or voice is an old problem with longstanding legal protections in place across the country under state right of publicity laws, as well as federal and state trademark and unfair competition laws, consumer protection laws, and federal copyright law.⁵ These laws serve as strong, existing limits on AI that uses another person’s image and voice to promote AI services or as outputs of these algorithms. The use of individuals’ voices and likenesses as training data for these systems may also violate these laws, though some use of training data may be considered fair use or protected by the First Amendment.⁶

Before I focus on how these myriad existing laws apply to uses of AI today, it will be useful to put this technological moment in perspective by briefly transporting ourselves back in time for just a moment to the mid-1800s. At that time, there was another set of disruptive technological innovations that launched the very right of privacy and right of publicity that is the subject of today’s hearing. In the mid-to-late 1800s, instantaneous cameras developed that could be wielded by even the most novice of photographers. These amateur photographers or “kodakers,” as they were sometimes called, could stand surreptitiously on the streets or at the beaches and take unauthorized photos of people in moments that were once thought private. These new “detective”

⁵ See Rothman, *Navigating the Identity Thicket*, supra note 2, at 1278-79.

⁶ Jennifer E. Rothman, *Artificial Intelligence, Copyright, and Right of Publicity Comments of Professor Jennifer E. Rothman*, at 4 (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/.

I note that similar questions arise in the context of copyright law with regard to whether using copyrighted works to train AI models violates copyright law or is instead a fair use when the output is itself fair and not substitutionary. These cases are just beginning to be litigated. See Complaint, *New York Times Co. v. Microsoft*, (S.D.N.Y., filed Dec. 27, 2023) (challenging the use of newspapers’ stories as training data for Open AI and Microsoft’s AI models). Cf. *Authors Guild v. Google, Inc.*, 804 F.3d 202 (holding that digitization of copyrighted works for use in search engine which only provided small portions of text to users was fair use and therefore not infringing).

cameras combined with improved printing technology that emerged at the same time made it possible for a person's photograph to be easily and unknowingly taken and then widely circulated across the world whether in newspapers or in advertisements.⁷

Outrage and calls for legal change followed in the wake of such nonconsensual taking and usage of photographs. In 1890, the actor Marion Manola objected when her photograph was taken during one of her performances on stage without her permission. She successfully sued over the taking of the photograph and her lawsuit and objection were covered in newspapers across the United States.⁸ In 1900, young Abigail Roberson, who had voluntarily sat for a photograph for her personal use, sued when she found her face slapped on 25,000 advertisements for flour without her permission.⁹ Although Roberson's lawsuit failed, it led the state of New York to adopt one of the first privacy laws in the United States,¹⁰ followed swiftly by many other states, most of which adopted such laws under their common law (what is known as judge-made law).¹¹ During this same era the great inventor Thomas Edison successfully sued when his name, likeness, and signature were used to sell an unauthorized pseudo-medicinal concoction.¹² There was widespread

⁷ Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 12-16.

⁸ *Will not be Photographed in Tights: Miss Manola Will Wear Them, but There She Draws the Line*, CHICAGO TRIBUNE, June 13, 1890; *see also* Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 20-21, and 191 n. 20. In Samuel Warren and Louis Brandeis's influential and famous article, *The Right to Privacy*, they noted Manola's objection and supported her claim to control both the taking and use of her photograph. *See* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-196 n.7 (1890).

⁹ *Roberson v. Rochester Folding-Box Co.*, 65 N.Y.S. 1109 (Sup. Ct. 1900). The decision was ultimately reversed in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), which itself was then abrogated by New York's swift passage of its right of privacy statute, Act of April 6, 1903, ch. 132, 1903 N.Y. Laws 308.

¹⁰ Act of April 6, 1903, ch. 132, 1903 N.Y. Laws 308. This law remains on the books as amended and renumbered as N.Y. Civ. Rights Law §§ 50-51. Section 50 provides in pertinent part that "a person . . . that uses for advertising, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained written consent of such person . . . is guilty of a misdemeanor." Section 51 creates a civil claim for such an act and includes use of a person's voice as a basis for liability.

¹¹ *See, e.g., Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (adopting a right of privacy, understood today as a right of publicity, in the context of holding liable an insurance company for using the plaintiff's photograph without permission in an advertisement).

¹² *Edison v. Edison Polyform & Mfg.*, 67 A. 392 (N.J. Ch. 1907).

agreement at the time—as there is today— that whether a person is a performer, a politician, or a private, ordinary person, they should each have a right to limit unauthorized uses of their identities.¹³

From the early 1900s to today, every state that has considered the issue has adopted some form of a right of publicity that restricts others from appropriating for their “own use or benefit the name or likeness of another.”¹⁴ This right of publicity has been held to include protections for voice, performances, and virtually any indicia of a person’s identity.¹⁵ While there are some significant variations in right of publicity laws across states, particularly with regard to the extension of postmortem rights and the scope of such postmortem rights, most states have longstanding, largely consistent publicity laws, some with more than 100 years of relied-upon precedents, that robustly protect against unauthorized uses of a person’s name, likeness, voice, and other indicia of identity, including their performances.

The right of publicity—this right to stop others from making unauthorized uses of a person’s identity—is often expressly part of state privacy laws, and even in states where it is a distinct tort, it essentially has the same elements.¹⁶ The right of publicity then both at its inception and today is a right that protects each of us from having our names, likenesses, and voices used without permission, whether in today’s AI algorithms and outputs, advertisements on Facebook, or on

¹³ Rothman, *THE RIGHT OF PUBLICITY*, *supra* note 1, at 11-35.

¹⁴ American Law Institute, *RESTATEMENT (SECOND) OF TORTS* § 652C (1977); *see also* Rothman, *THE RIGHT OF PUBLICITY*, *supra* note 1, at 87; *ROTHMAN’S ROADMAP*, *supra* note 3 (providing a state-by-state guide to publicity laws).

¹⁵ *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (rejecting a First Amendment defense to a news broadcast of a human cannonball artist’s “entire” performance under Ohio’s appropriation-branch of its privacy law, denominated as a “right of publicity” claim by the Supreme Court); *see also* Rothman, *THE RIGHT OF PUBLICITY*, *supra* note 1, 88-96 (describing history and sweep of right of publicity laws); Post & Rothman, *supra* note 2, at 96-106 (describing how current law protects against unauthorized performances, including the creation of computer-generated performances of actors and singers).

¹⁶ Post & Rothman, *supra* note 2, at 93-95. While some have erroneously suggested that the right of publicity is a newer and distinct tort (dating only to the 1950s) and that it only protects celebrities or the market value of those who commercialize their identities, this is not the case. *See* Rothman, *THE RIGHT OF PUBLICITY*, *supra* note 1, at 11-86 (debunking erroneous history of the right of publicity’s development); Post & Rothman, *supra* note 2, at 93–95 (discussing the state of the law today and the essential identity of right of publicity and privacy-based appropriation claims even in states that claim they are distinct).

bobblehead dolls. The concerning uses of AI that have been raised in this and other Congressional hearings each already violate state right of publicity laws. One of these examples is the viral AI-generated song “Heart on My Sleeve,” which imitated the voices of Drake and The Weeknd. The song became a hit—until it was removed from various platforms. The public initially thought it was a real song by the performers. A second example provided is the recent AI-generated version of Tom Hanks used without authorization in an advertisement for a dental plan. Examples like these abound and will likely only grow. Consider the recently reported use of an AI-generated replica of Taylor Swift purportedly promoting Le Creuset cookware.¹⁷

Each of these uses are already actionable under existing law. Absent jurisdictional hurdles, Tom Hanks, Drake, The Weeknd, and Taylor Swift each have straightforward lawsuits under state right of publicity laws for the AI-generated unauthorized advertisements and songs masquerading as authentic, and could also bring successful federal false endorsement and trademark claims.¹⁸ When sound recordings that imitate identifiable recording artists are publicly distributed for profit as if they were genuine new works by the recording artists, as was the case with the “Heart on My Sleeve” generative-AI song, state publicity laws provide a clear remedy. Similarly, an AI-generated performance by an actor without his permission in a circulated advertisement, as occurred using Tom Hanks, would be a clear winner under state right of publicity laws. Notably, right of publicity claims do not turn on confusion, so one could not avoid liability by adding a disclaimer saying that even though a recording sounds like The Weeknd, it is not him.

¹⁷ Tiffany Hsu and Yiwen Lu, *No, That’s Not Taylor Swift Peddling Le Creuset Cookware*, N.Y. TIMES, Jan. 9, 2024, at B1.

¹⁸ Some state publicity laws are limited to those who are domiciled in the state, but others extend to all uses that take place in a state or the location where an injury occurs. My understanding is that Hanks and The Weeknd live in California and would benefit from the multiple privacy and publicity laws in the state that protect against such uses. Whether Swift is deemed to reside in New York, California, Tennessee, or Rhode Island, each of these states would extend to her right of publicity claims. Drake appears to be a resident of Canada. I note that Canada has personality protections as well. I do not address choice of law issues here, but given the similarity of Canadian law to U.S. law, Drake will have an easier time winning in U.S. Courts than Princess Diana’s heirs, who faced a circumstance in which the United Kingdom did not extend postmortem rights. *Cf. Cairns v. Franklin Mint Co.*, 292 F.3d 1139 (9th Cir. 2002). In addition, because Drake (and the others) will be able to bring unfair competition, false endorsement, and trademark claims under U.S. law, any challenges in bringing a right of publicity claim will likely be mitigated by these options.

Unauthorized uses of a famous person’s name, likeness, and voice (or something replicating it) are nothing new, even if the technology makes the uses quicker to generate and more difficult to detect. Such unauthorized uses have been commonplace for hundreds of years and have wrought many a successful lawsuit, or, more often these days, a quick settlement. Thomas Edison, Fred Astaire, Vanna White, Bette Midler, Tom Waits, Kareem Abdul-Jabbar, and Michael Jordan have all prevailed in lawsuits (or related settlements) arising from unauthorized uses of their names, likenesses, jersey numbers, voices, and, in White’s case, a robot with a blonde wig that simply evoked her identity.¹⁹

Similarly, the recreation or reanimation of actors’ performances did not spring on to the technological scene in 2023. Just ask Crispin Glover who sued when he was replaced in the 1989 sequel to *Back to the Future*—he wasn’t replaced by AI or even fancy CGI, but instead by a new actor with makeup and a prosthetic mask combined with the use of existing footage to which the studio held the copyright. Hologram technology has reanimated dead people for decades, creating a deceased Tupac Shakur who performed at Coachella in 2012, and a Michael Jackson hologram that moonwalked at the 2014 Billboard Music Awards. Deceased actors like Peter Cushing, Paul Walker, and Philip Seymour Hoffman have all been reanimated using visual effects that were impressive even before the current leap in AI technology. And the living have had performances recreated as well, most often with permission, like with Carrie Fisher (then alive) in *Rogue One: A Star Wars Story*, and sometimes without permission, as with Gwen Stefani and No Doubt in the video game *Band Hero*, and Philip Ahn and other performers who were recorded for the *Mortal Kombat* arcade game in the 1990s and whose performances were reanimated in subsequent home versions of the game.²⁰

¹⁹ See, e.g., *Edison v. Edison Polyform & Mfg.*, 67 A. 392 (N.J. Ch. 1907); *Astaire v. Esquire Magazine*, N.Y. LAW JOURNAL, at 760, Feb. 11, 1936; *White v. Samsung Elecs. Am.*, 971 F.2d 1395 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992); *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

²⁰ Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 175-77 (discussing instances of reanimated performances by actors, sometimes dubbed “synthespians” or “delebs” in these circumstances, depending on whether they are dead or alive); *No Doubt v. Activision Publ’g*, 192 Cal. App.4th 1018 (2011) (allowing right of publicity claim when use of digital performance violated scope of consent); *Ahn v. Midway Mfg.*, 965 F. Supp. 1134 (N.D. Ill. 1997) (holding performers’ right of publicity claims preempted by federal copyright law).

These are not new problems, even if the quality of the replications and scale has shifted. State laws already extend protections against such unauthorized uses of a person’s identity whether in an advertisement or a performance. Federal trademark, unfair competition, and false advertising laws under the Lanham Act, as well as federal regulations (through the Federal Trade Commission) also provide claims for false endorsement and trademark infringement and dilution that extend liability in many of these instances, including the examples of The Weeknd/Drake knock-off and the use of Tom Hanks in an unauthorized advertisement.²¹ State trademark and unfair competition laws provide additional protection against such unauthorized uses. Uses of copyrighted photographs, sound recordings, and videos to produce these songs and performances may also violate copyright law and so a performer who holds those copyrights—or a record label or film studio that does—could also bring copyright claims.

This does not mean that every threat by AI is addressed by existing law or that every use will lead to liability, but it does mean that there are already robust protections on the books that address many of the concerns raised today and in prior hearings. This means that the bar to enacting something new should be high. And most importantly, it should not destabilize what is working about current laws with hundreds of years of precedents nor make things worse for performers, athletes, or ordinary people whose identities are the ones who are being fed into and spit out by AI models.

This leads me to my second point—because there are robust existing protections for unauthorized uses of another’s voice or likeness, any federal intervention in this space must protect self-ownership and ongoing control of one’s own identity, combat misinformation, and protect opportunities for the living to work and thrive. These are the primary articulated concerns raised by today’s AI technology and any federal law should further those goals without overly burdening technological advancement, creativity, and the freedom of speech.

II. Federal Legislation Must Protect Self-Ownership, Combat Misinformation, and Protect Opportunities for the Living to Work and Thrive

Already, well-intentioned members of the Senate and the House have begun to circulate and even introduce draft bills addressing concerns over AI. The two proposed bills I was asked to look

²¹ See Rothman, *Navigating the Identity Thicket*, *supra* note 2, at 1278–1289.

at raise a number of concerns and I have provided more specific comments on these drafts on my website and elsewhere.²² Here, however, I want to focus on one significant, paramount concern raised by these proposals. Each of them makes it more likely that things will be far worse for recording artists, actors, and other performers, and for each of us, as our own voices and likenesses will be put up for sale and able to be owned by others. *Because of the chilling prospect of erecting a federal law that would transfer ownership over a person's identity to someone else*, and our limited time, I want to focus on this concern, but am happy to consider these other issues as well.

No One Should Own Another Person. Unfortunately, each of the two draft bills to address the problems of AI and performance rights essentially do exactly this—they allow another person, or most likely a company, to own or control another person's name, voice, and likeness forever and in any context. It is essential that any right created by federal legislation that protects a person's name, likeness, voice, or other indicia of identity *not* be transferable away from that person—what I call the identity-holder—the person whose identity is sought to be protected by such legislation.

Creating a transferable right in a person's identity would strip individuals of the very protections that the proposed legislation is supposed to provide. Allowing another person or entity to own a living human being's name, likeness, voice, or other indicia of a person's identity in perpetuity violates our fundamental and constitutional right to liberty and should be prohibited.²³ Making publicity rights or other identity-based rights transferable poses a particular risk to student-athletes, aspiring actors, recording artists, and models, who would be (and sometimes already are) asked to sign away such rights in perpetuity to others or whose parents may do so when children

²² See Jennifer E. Rothman, *House's Draft AI Bill Risks Loss of Control over Our Own Voices and Likenesses*, ROTHMAN'S ROADMAP (Jan. 23, 2024), https://rightofpublicityroadmap.com/news_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/; Jennifer E. Rothman, *Digital Replica Bill May Leave Performers Worse Off*, REGULATORY REVIEW, Jan. 2, 2024, <https://www.theregreview.org/2024/01/02/rothman-digital-replica-bill-may-leave-performers-worse-off/> (considering Senate discussion draft); see also Jennifer E. Rothman, *Draft Digital Replica Bill Risks Living Performers' Rights over AI-Generated Replacements*, ROTHMAN'S ROADMAP (Oct. 20, 2023), https://rightofpublicityroadmap.com/news_commentary/draft-digital-replica-bill-risks-living-performers-rights-over-ai-generated-replacements/; see also Jennifer E. Rothman, *Summary and Analysis of Proposed NO FAKES Act of 2023*, October 19, 2023, available at <https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Professor-Rothman-Analysis-of-NO-FAKES-ACT-of-2023-Discussion-Draft-of-October-11-2023.pdf>.

²³ See Rothman, *The Inalienable Right of Publicity*, *supra* note 2, at 210-17 & *passim*; see also *Goldman v. Simpson*, No. SC03-6340, slip op. at 12-13 (Cal. Super. Ct., Oct. 31, 2006) (concluding that a transfer of a person's right of publicity was akin to forcing someone into "involuntary servitude" and therefore was not permissible under California law).

are minors. Such transferability also threatens ordinary people who may unwittingly sign over those rights as part of online terms-of-service that they click approval of without even reading.

Even though the recently introduced No AI FRAUD Act would limit such transfers to those who are represented by counsel or who are over 18, these limits provide little protection. Lawyers are expensive and bargaining power often limited. Even if we imagine that our 18-year-old student-athletes or drama students are able to hire and pay for the best attorneys money can buy and somehow have wisdom beyond their years to understand what it means for another person to own your face and your voice forever and to be able to make you say and do things you never said or did, we should not allow it. We do not allow people to sell themselves into slavery or servitude. We do not allow people to sell their votes, or their organs, or their babies. And we should not allow people to sell their names, likenesses, or voices even if they can make a lot of money doing so.

Neither the record labels, nor movie studios, nor the NCAA, nor anyone else should be able to own other people's voices and likenesses. Imagine a world in which Taylor Swift's first record label, Big Machine, obtained rights in perpetuity to Swift's voice and likeness. The label could then replicate Swift's voice over and over in new songs that she never wrote and have AI-renditions of her perform and endorse the songs in videos and even in holograms on tour. In fact, Big Machine would be able to sue Swift for violating her own right of publicity if she used her voice and likeness to write and record new songs and publicly perform them. Yet, this is the topsyturvy world that the two draft bills that have been floated in the House and the Senate would create. This does not serve the interests of recording artists, actors, or ordinary people.²⁴

Allowing transfers of rights to a person's voice and likeness away from them harms not only the person who loses control of their own identity, but it harms all of us. We are each the poorer in a society where people do not own their own identities. And each of the reasons given for considering a federal right of publicity and legislation to address the threat AI poses are thwarted by allowing such transfers of rights. A federal right of publicity or performance right should protect the person whose identity is used without permission, not set up a way to lose the right to control such uses forever.

²⁴ For some earlier thoughts on this subject see Jennifer E. Rothman, *Only Robin Wright Should Own Robin Wright*, REASON (May 9, 2018), <https://reason.com/volokh/2018/05/09/only-robin-wright-should-own-robin-wright/>.

Licensing Must Have Limits. Unrestricted licenses to a person’s voice and likeness can produce the same negative consequences as transfers of those rights. Any possible licensing of another person’s likeness and voice needs to be significantly limited so as not to be a subterfuge for long-term, perpetual, or global licenses that are akin to transferring all future rights to a person’s performance, voice, or likeness to others. The ability for licensees to generate performances by a person forever and in unknown contexts as if the person is saying or singing words they never said nor agreed to is a chilling prospect. This possibility poses a broad threat to society by undermining trust in authentic communication and seeding misinformation. A license to use another person’s identity should only authorize a specific use, performance, or set of performances over which a person has ongoing control over the words and actions of their computer-generated self. This will have the important bonus of protecting against deceptive performances—an express goal of such legislation and one of the concerns raised in this very hearing.

Combating Deception. Federal laws should protect the public from being deceived by AI-generated performances that were not in fact performed by or approved by the people depicted or whose voices are used or simulated. Yet, by allowing transfers (or overly broad licensing) of these rights, this goal is undermined because the identity-holder who transfers these rights will have no say on how their voices, likenesses, and performances are presented to the public going forward. The public will not know if the person they see depicted is actually performing or if that person approved of an AI-generated performance. Any federal law should expressly bar people from being made to say or do things that they did not *specifically* and *knowingly* authorize.

Competition for Jobs. Finally, AI-generated performances threaten opportunities for living performers. Creating a postmortem right and allowing ongoing perpetual ownership of voices and likenesses may incentivize the replacement of work for existing and aspiring recording artists, actors, and others. If we want to protect work for the living, then it makes little sense to incentivize a lucrative market in famous dead people. There may be other reasons to extend such a postmortem right, but Congress needs to consider this trade-off and recognize that it works at cross-purposes with the stated objective of protecting employment opportunities for the living in the face of AI.

My final point in this statement is to suggest some ways in which federal legislation in the context of publicity rights could be helpful.

III. Opportunities for a Federal Right of Publicity

Even though existing state and federal laws likely protect against many (if not most) unauthorized uses of generative AI that are not otherwise protected from liability by the First Amendment, there are a number of potential benefits to having a federal right of publicity. These benefits, however, have less to do with addressing concerns with AI specifically, than they do with the possibility that a federal law could more generally lend greater harmony and clarity around the scope of personality rights than the current 50-state set of laws does. With that said, there are many pitfalls of adopting a federal right of publicity and any legislation would need to be carefully crafted and consider the interplay of these laws with copyright and trademark laws, as well as with the First Amendment.

I highlight here some of the possible benefits of such federal legislation, as well as some of the challenges:

Harmonization without Destabilization. A broad and preemptive federal right of publicity law could harmonize and clarify state right of publicity laws and exceptions to them but would be a massive undertaking. It would have to be done carefully so as not to destabilize state right of publicity and privacy laws in this area which have been operating for more than 100 years. And to succeed with the goal of harmonization, a federal law would need to preempt or replace state right of publicity laws, as Congress has done in the context of copyright and patent laws.

If done without preempting state law—in other words, if current state law is left in place—federal law risks making the current conflicting set of state and federal laws that protect a person’s identity even more problematic by creating yet another conflicting set of laws.²⁵ And, whether preemptive or not, any federal law in this area could unsettle existing licenses and contracts. This problem could potentially be addressed by making a preemptive law that is *prospective* in application only, and that explicitly does not unsettle existing contractual agreements.

Clarify CDA § 230 Treatment. Another possible benefit of a federal law is that it could designate the right of publicity as “intellectual property” for purposes of the Communications Decency Act Section 230, which would facilitate the removal of infringing content and the ability to obtain damages from online platforms.²⁶ There is currently a circuit split about whether state

²⁵ For a discussion of some of these likely conflicts see Rothman, *Navigating the Identity Thicket*, *supra* note 2, *passim*.

²⁶ 47 U.S.C. § 230.

right of publicity claims fall within the immunity provisions of the Communications Decency Act § 230 or instead fall under its exception for intellectual property laws.²⁷ This matters because if the IP exception does not apply, it is difficult to get platforms to take down unauthorized content, and it can be hard to track down the individuals who initially created or circulated works that use a person’s voice or likeness without permission. The Section 230 problem could be addressed directly by amending Section 230 to clarify that state right of publicity and privacy-based appropriation claims are not immunized by Section 230. I note that the record labels did not have trouble taking down the “Heart on My Sleeve” AI-generated song because of the different treatment of works that potentially infringe copyrights and also because of the record labels’ ongoing relationships and agreements with the relevant platforms.²⁸

Protect Ordinary People. Any federal right of publicity legislation should make sure that everyone benefits from its protections, not solely famous and commercially successful people. Many ordinary people have their names, likenesses, and voices used without their permission in ways that cause significant harm, including reputational and commercial injuries. There should be no requirement to have a commercially valuable identity to bring a claim. Any legislation should include statutory damages to protect people who may not otherwise be able to establish market-based injuries. A number of states have included statutory damages in publicity legislation with the express purpose of protecting ordinary people. Some of these harms were highlighted in the findings in the proposed No AI FRAUD Act, which pointed to the recent circulation of unauthorized AI-generated images of high school students from New Jersey that took real images of the students and then showed them in pornographic contexts. While the circulation of these nonconsensual images should violate existing state publicity and privacy laws, federal law could clarify that the right of publicity is for everyone and provide sufficient statutory damages and fees to make it worthwhile for attorneys to take these cases.

²⁷ Compare *Hepp v. Facebook*, 14 F.4th 204 (3d Cir. 2021) (holding that Section 230 does not bar a state right of publicity claim from proceeding against Facebook) with *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (holding that a right of publicity claim could not proceed because of Section 230 immunity since the claim was under state rather than federal law); see also Jennifer E. Rothman, *Third Circuit Holds that Newscaster’s Right of Publicity Claim can Proceed Against Facebook*, ROTHMAN’S ROADMAP (Sep. 28, 2021), https://rightofpublicityroadmap.com/news_commentary/third-circuit-holds-that-newscasters-right-of-publicity-claim-can-proceed-against-facebook/.

²⁸ See 17 U.S.C. § 512.

Place Limits on Licensing and Prohibit Transfers. As discussed already, it is essential that any right created by federal legislation not be transferable away from identity-holders. A preemptive federal law could help clarify any uncertainty in some state laws about whether state rights to a person’s identity can be transferred or owned by anyone other than the identity-holder. It could also meaningfully limit overreaching licenses that restrict a person’s control over their own name, likeness, and voice.

Clarify Intersection with Copyright Law. Many of today’s generative-AI works were created using copyrighted works without permission either to directly create new works or to train AI models. In other instances, however, AI technology can be used to create works either with the permission of the copyright holders or by the copyright holders themselves. Copyright law permits the production of such derivative works. Any federal right of publicity legislation restricting uses of such copyrighted works will need to address this potential conflict. Any federal publicity or digital replica/impersonation right should balance the protection of performers with allowing copyright holders to exercise their federal right under the Copyright Act to reuse copyrighted material.

State right of publicity laws are sometimes preempted by federal copyright law when the two laws clash, but the case law does not provide a stable or predictable roadmap for Congress to employ at the federal level.²⁹ The best way to read these cases and conflicts, however, and one which may provide some guidance is that when a person appears in a copyrighted work with permission, it is appropriate to provide some latitude for a copyright holder to make anticipated and related uses of the copyrighted work in derivative works, unless limited by contract or collective bargaining agreements. At the same time, a copyright holder should not be able to create an entirely new performance that substitutes for the work of a living performer and that would mislead the public as to their participation in the new work. Nor should unrelated derivative works be allowed, such as the reuse of a photograph or performance in an unrelated advertisement or merchandise.³⁰

²⁹ For additional discussion of copyright preemption and the right of publicity see Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 160-79. See also Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUMBIA J. L & ARTS 441 (2016); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002).

³⁰ For additional discussion of copyright preemption in the context of derivative works and reanimated performances see Rothman, THE RIGHT OF PUBLICITY, *supra* note 1, at 170-79.

Any federal legislation addressing voice rights in the context of sound recordings will need to consider the express allowance (under copyright law) of sound-alike recordings.³¹ This federal law has long insulated new performances of old songs, sometimes called “covers,” from state right of publicity liability. Such uses do not produce liability when there is no confusion as to whose voice is being used, or at least when the voice is not intentionally mimicking a particular singer.

Protect the Freedom of Speech and Comply with the First Amendment. Any federal publicity law or digital replica right must navigate its potential conflict with free speech and the First Amendment. The current state of the First Amendment’s application to right of publicity claims is uncertain and differs substantially from jurisdiction to jurisdiction with at least five different approaches currently employed. Congress should be cautious wading into this still developing area of First Amendment law, and if it does so, should try to do so in a way that adds clarity, perhaps with specific preemptive exceptions to liability. Current common areas of agreement are that unauthorized uses of a person’s identity are not protected by the First Amendment if a person’s “entire act” or performance is used, or the uses are in commercial products or advertising not related to an authorized underlying work.³²

The First Amendment provides latitude for works in the style of or same genre as that of others. So, there should not be liability for works merely because they are in the “style” of a Taylor Swift or Drake song when there is no confusion as to the use of the performers’ voice or participation, and there is no advertising using their names or likenesses. This is largely the state of the law today, where liability based on sound-recordings under right of publicity laws stems from using confusingly similar voices, not the mere use of a similar vocal or musical style.³³

³¹ 17 U.S.C. § 114(b).

³² For further discussion of these issues, see Post & Rothman, *supra* note 2 *passim*.

³³ See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (allowing Lanham Act false endorsement claims and state publicity claims when an advertisement used a singer who copied the vocal sound of Tom Waits in ways that confused listeners as to his participation or sponsorship); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (allowing liability under right of publicity law for a sound-alike performance when listeners thought Bette Midler was singing and “the distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product.”). Although these cases are sometimes understood as protecting mere style, both had evidence of confusion as to whether the performers were actually singing, and both involved intentional evocation of the singers’ identities for use in commercial advertising for products. When this is not the case, it is appropriate to give latitude for

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

It may be appropriate to consider such federal legislation, but such a significant extension of federal rights deserves its own attention and hearings, especially when it works at cross-purposes with the protection of opportunities for the living sought to be addressed by this hearing. Postmortem rights also raise a host of unique questions, such as with whom such a right should vest, and how long it should last. Extending such rights after death could also force the commercialization of deceased celebrities even if they and their loved ones do not want to do so because of how such a right would be treated under current estate tax laws.³⁴ Limits on depicting the dead in creative works are also more likely to run afoul of the First Amendment than limits on depicting the living and any laws would need to protect against liability for works that have already been created.

IV. Concluding Thoughts

In conclusion, this is a large and complex area of the law and an evolving area of technology. Any legislation considered must keep in mind that AI technology will continue to develop and

similar styles and recordings of licensed musical compositions, otherwise the first person to record a song will get a monopoly in the work in contravention of copyright law and free speech.

³⁴ Federal right of publicity legislation could address the open question of whether rights of publicity are part of the estate of a deceased person. If Congress decides that such rights should be valued at the time of death, then an exemption should be allowed if heirs, the deceased, or the trustees wish to limit commercialization of the dead. Without such a clarification, some families will be forced to commercialize the identity of a dead person in violation of the decedent's own wishes and those of the family. This was a great concern of the comedian Robin Williams, who in conjunction with his estate lawyer tried to protect himself and his family from this gruesome prospect. *See* Rothman, *THE RIGHT OF PUBLICITY*, *supra* note 1, at 123-24; *see also* Jennifer E. Rothman, *Mixed Victory for Jackson Estate in Tax Court*, *ROTHMAN'S ROADMAP* (May 18, 2021), https://rightofpublicityroadmap.com/news_commentary/mixed-victory-jackson-estate-tax-court/ (discussing taxation of state postmortem publicity rights).

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

I appreciate your committee's attention to the threats posed by artificial intelligence to the creative communities and more broadly to the public at large. I hope that this hearing will be only the start of many discussions about how federal law can best address these challenges. I look forward to your questions.