Considerations For Federal Right Of Publicity As AI Advances

By **Ross Bagley** (July 31, 2024)

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Recent social changes are rapidly increasing the importance of the right of publicity, or the right to exploit an individual's name, image, voice and likeness — or NIL.

Artificial intelligence has achieved the stunning capacity to generate convincing content showing anyone, including celebrities and long-dead historical figures, saying or doing anything. In addition to the threats posed by deceptive deepfakes, AI's ability to instantly conjure detailed creative works and performances has already contributed to costly Hollywood strikes.[1]

At the same time, an entirely new profession — the social media influencer — has become a substantial economic force. Dependent on the value of their identities and the followers they attract, these creators (there are reported to be 50 million) are projected to earn $13.7 billion this year, with 59% coming from brand sponsorships.[2]

In the sports world, the NCAA recently began allowing student athletes to enter deals exploiting their NIL for the first time. In May, the NCAA tentatively settled antitrust claims in In re: College Athlete NIL Litigation in the U.S. District Court for the Northern District of California. The deal called for the distribution of $2.75 billion to athletes who had been prevented from exploiting their NIL rights by NCAA rules.[3]

In response to these profound changes, lawmakers are seeking to enact greater protections for NIL. The U.S. Patent and Trademark Office is scheduled to hold a roundtable discussion Aug. 5 concerning whether federal NIL legislation is appropriate.[4]

In October 2023, U.S. senators introduced the Nurture Originals, Foster Art and Keep Entertainment Safe, or No Fakes, Act [5] and this January, U.S. representatives introduced the No Artificial Intelligence Fake Replicas And Unauthorized Duplications, or No AI Fraud, Act.[6] Both of these proposals are designed to address digital replicas generated by AI. Legislators have also recently proposed the Take It Down Act to specifically address sexually explicit AI-generated images, and at least seven pieces of federal legislation to address NIL rights in college athletics.[7]

States have also been enacting reforms. Tennessee's Ensuring Likeness, Voice and Image Security, or ELVIS, Act, which is designed to broaden that state's right of publicity substantially, just came into effect July 1.

Since 2019, approximately 40 states have passed laws allowing student athletes to enter into NIL contracts.[8] Several states have also passed laws to punish so-called catfishing, or deception through a fake online profile.[9]

This article considers the challenges presented by existing right of publicity laws and outlines the issues that federal lawmakers should consider before enacting new legislation.

The Problematic Patchwork of State Law

Currently, the right of publicity is governed exclusively by state law. This results in an

unpredictable patchwork that makes it difficult to manage rights, while also chilling expression.

In fact, legal scholars, like University of Illinois Chicago Law School adjunct professor Jonathan Jennings, have commented that applying this "confusing patchwork"[10] provides less certainty than almost any other area of law, owing to diverse choice of law rules and substantive differences between state laws.[11]

With respect to choice of law, some states' courts apply the law of the state where the right was infringed. Some apply the law of the state where the injury was suffered. Some look to the state where the likeness gained commercial value, and some consider which state has the most significant relationship to the dispute.[12]

Some apply a governmental interest analysis, some apply the law of the state where the individual is domiciled at the time of the infringement, or where they were domiciled at the time of their death.[13] Some look to the law of one state to determine whether the right exists, then another to evaluate whether it was infringed.[14] The analysis is complicated further where the plaintiff is a licensee or assignee, rather than the identityholder.[15]

What is more, each state has differing substantive laws. In some states, the right is protected by statute. In others, it is protected at common law. Some states apply law from both sources, and some have no recognized rights at all. Some states protect only those identityholders who can show commercial value.[16] Some protect only a name or image, and others extend protection to include a voice, signature or other distinguishing features.

Some protect rights of dead citizens, and some only protect the rights of the living. Some allow rights to be assigned. Some states allow recovery for mental distress, and others limit recovery to the diminished commercial value of an identity. Some allow for the recovery of statutory damages, profits, attorney fees or punitive damages.[17] Some bar claims after one year, others as many as six.

Nationwide injunctions,[18] which are more critical to policing rights than ever, are also complicated by the potential for conflicts. For example, a state may seek to enjoin post-mortem usages in another state that does not recognize them. Or, a plaintiff might seek to recover damages for publications in states where the claim would be time-barred.

Recent U.S. Supreme Court decisions have also contributed to the uncertainty. For example in June 2023, in Jack Daniel's Properties Inc. v. VIP Products LLC,[19] the Supreme Court cast doubt on the application of the Rogers v. Grimaldi test, which for years has provided a defense against right of publicity claims where the usage had artistic relevance to the expressive work.

And in May 2023, in Andy Warhol Foundation for the Visual Arts Inc. v. Goldsmith,[20] the Supreme Court diminished the "transformative" concept within the copyright fair use analysis, which has been applied as a defense to right of publicity claims. [21]

Key Considerations for a Carefully Crafted Federal Solution

The idea that a federal right of publicity should clean up this existing state law morass is not new. In fact, there have been calls for its enactment for decades, including from the American Bar Association[22] and the International Trademark Association.[23] Now, Congress appears poised to act, spurred by the ease with which identities can be co-opted by generative AI.

But before any new law is passed, lawmakers should be certain to consider the following issues that have evolved within our state laboratories of democracy and the courts.

Scope

Congress should consider how narrowly to define the right, which is most broadly articulated as protecting against the unauthorized appropriation of one's identity for another's advantage. Congress should consider what identifying features should be protected in addition to name, image, voice and likeness.

Subsidiary questions include whether to limit claims to commercial uses, and whether to create separate claims for deceptive usages, sexually explicit usages or usages that compete with a performer's real-life work.

Transferability

Whether a federal right of publicity should be transferable is a hotly contested issue. Some have proposed durational limitations on transfers during one's lifetime.[24]

University of Pennsylvania Carey Law School professor Jennifer Rothman has proposed a prohibition on transfers and a seven-year limitation on licenses.[25] Others have proposed much longer periods. Alternative options include a writing requirement, a right to limit sublicensing usages that an identityholder finds unacceptable, and the right for minors to renegotiate contracts upon reaching the age of majority.

Post-Mortem Rights and Descendability

Most states recognize posthumous right of publicity claims, but some do not. For states that do recognize these rights, the period of protection ranges widely from 10 to 100 years, or even indefinitely so long as the rights remain in use.[26] Some states' laws also reach back to create rights in individuals who died before they were passed.[27]

Another question is whether ownership of posthumous rights may, as in Florida, be limited to heirs or licensees who were granted the right during the decedent's lifetime. Notably, the U.S. Senate's No Fakes Act proposes a period extending 70 years after the death of the identityholder.[28]

Special Protections for Performances

Whether special rights should be granted to performers or athletes is another question. The U.S. House of Representatives' proposed No AI Fraud Act requires that any contract authorizing the use of NIL for a performance created by generative AI be in writing, that the licensor be over 18 and represented by counsel, or that the deal be governed by the terms of a collective bargaining agreement, which are common in professional sports.[29]

Class Action Availability

Federal legislation would be more compatible with class action litigation than the current state law patchwork, which has been cited as a basis to reject class certification.[30] This may become more relevant as AI continues unlicensed training on photos and recordings of celebrities and ordinary people. It would also more easily enable college and professional athletes to vindicate their rights.

Preemption of State Laws

Preemption would provide greater certainty concerning the legality of proposed usages, which would make claims more efficient to pursue, combat a rising tide of infringements and eliminate forum shopping.

On the other hand, adding a new layer of federal law on top of existing state right of publicity laws would contribute to, rather than resolve, uncertainty surrounding NIL rights.

Another consideration is the extent to which a preemptive right should unsettle contracts involving preexisting state publicity rights.

Statute of Limitations

Current proposed legislation provides for three- and four-year statutes of limitations, and expressly incorporates the so-called discovery rule,[31] which some states have adopted and which was at the center of several recent Supreme Court cases in connection with claims for copyright infringement.[32]

However, other states have rejected the discovery rule, finding that it conflicts with the single-publication rule, which holds that a claim accrues at the time of first publication and not upon subsequent publications.[33]

Internet Service Provider Liability

There is a federal circuit split as to whether internet service providers are protected from right of publicity claims,[34] based on questions of whether the right is an intellectual property one and therefore exempted from immunity under the Communications Decency Act.[35]

Any federal legislation should seek to resolve this uncertainty, and address whether claims against online service providers require a showing of knowledge that a usage is unauthorized, or whether a notice and take down scheme similar to Section 512 of the Copyright Act is appropriate.

Harm Recognized

Under existing state law, damages can generally be recovered for harm to the value of a plaintiff's commercial identity. Whether a plaintiff may recover for harm to reputation or for pain and suffering — which the proposed No AI Fraud Act covers — varies from state to state.[36]

Available Relief

In addition to damages for actual harm, Congress could deter infringing usages by providing for statutory damages or recovery of profits. Punitive damages for willful misappropriation, and attorney fee awards are also potential features, each of which are included in versions of current proposed legislation.

Injunctions seeking to stop distribution of infringing material, which are often sought in connection with right of publicity claims, should be explicitly addressed as well.[37]

First Amendment Protections

Many state laws specifically exempt certain categories of uses from liability so as not to infringe upon First Amendment rights.[38] The proposed No Fakes Act takes this approach, exempting specific uses for the purposes of comment, criticism, scholarship, satire or parody; that are de minimis or incidental; or that are made in connection with news, public affairs, or sports reporting; or in a documentary, docudrama, or historical or biographical work.[39]

By contrast, the draft No AI Fraud Act merely states that "First Amendment Protections shall constitute a defense," and lays out considerations including the commerciality of the usage, whether the likeness is necessary for, and relevant to, the expressive purpose of the work, and whether the use competes with the value of the identityholder's work as a creator or performer.

While it has been evident for years that a federal right of publicity would provide more predictability and certainty, there was little appetite for enacting new protections until recent advances in generative AI. To pave the way for a more consistent and coherent system of rights, legislation codifying a federal right of publicity should take care to consider these issues and strike the right balance between identityholders' rights, freedom of expression, fostering technological innovation and encouraging economic growth.

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[1] Jake Coyle, In Hollywood writers' battle against AI, humans win (for now), AP News, September 27, 2023, available at https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence-39ab72582c3a15f77510c9c30a45ffc8; Winston Cho, Hollywood Spurs Long-Awaited Bill Looking to Protect Performers From Deep Fakes and Voice Clones, The Hollywood Reporter, January 10, 2024, available at https://www.hollywoodreporter.com/business/business-news/new-legislation-looks-protect-performers-deep-fakes-voice-clones-1235784650/.

[2] Sarah E. Needleman and Ann-Marie Alcántara, Social-Media Influencers Aren't Getting Rich — They're Barely Getting By, Wall Street Journal, June 17, 2024, available at https://www.wsj.com/tech/social-media-influencers-arent-getting-richtheyre-barely-getting-by-71e0aad3?st=9kit5isctol0cwf&reflink=article_email_share.

[3] Becky Sullivan, What we know and what we don't about a historic settlement to pay college athletes, NPR, May 24, 2024, available at https://www.npr.org/2024/05/24/nx-s1-4978680/house-ncaa-settlement-pay-college-athletes.

[4] 89 FR 54442, Public Roundtable on Protections for Name, Image, Likeness, Other Indicia of Identity, and Reputation, available at https://www.federalregister.gov/documents/2024/07/01/2024-14455/public-roundtable-on-protections-for-name-image-likeness-other-indicia-of-identity-and-reputation#:~:text=DATES%3A,and%20a%20separate%20virtual%20session.

[5] Transcript: US Senate Judiciary Subcommittee Hearing on "The NO FAKES ACT", Tech Policy Press, May 1, 2024, available at https://www.techpolicy.press/transcript-us-senate-judiciary-subcommittee-hearing-on-the-no-fakes-act/.

[6] Salazar Introduces The No AI Fraud Act, January 10, 2023, available at https://salazar.house.gov/media/press-releases/salazar-introduces-no-ai-fraud-act.

[7] See The College Athlete Economic Freedom Act; The College Athletes Compensation and Protection Act; The Fairness, Accountability, and Integrity in Representation of College Sports Act; The College Sports NIL Clearinghouse Act of 2023; The Protecting Athletes, Schools, and Sports Act; and The Student-Athlete Level Playing Field.

[8] Timothy J. Eustace, Federal NIL Bill Necessary to Protect the Future of College Athletics, Insider New Jersey, March 15, 2024, https://www.insidernj.com/press-release/federal-nil-bill-necessary-to-protect-the-future-of-college-athletics/.

[9] Cameron Cantrell, Catfish Bait: Too Few State Laws Protect the "Faces" of Catfishers, Washington Journal of Law, Technology & Arts, February 5, 2021, https://wjlta.com/2021/02/05/catfish-bait-too-few-state-laws-protect-the-faces-of-catfishers/; California's Online Impersonation Law Comes Into Effect, Inside Privacy, January 4, 011, https://www.insideprivacy.com/united-states/californias-online-impersonation-law-comes-into-effect/.

[10] Thomas McCarthy, The Rights of Publicity and Privacy §6:6.; The Right of Publicity and Cyberspace, Jonathan S. Jennings, available at https://www.pattishall.com/pdf/Publicity-Cyberspace.pdf.

[11] David G. Post, Territoriality, Jurisdiction, And The Right(s) of Publicity, 42 Colum. J.L. & Arts 365 (2019); White v. Samsung Elecs. Am. Inc., 989 F.2d 1512, 1516 (9th Cir. 1993).

[12] Mary LaFrance, Choice of Law and the Right of Publicity: Rethinking the Domicile Rule, 37 Cardozo Arts & Ent. L.J. 1 (2019).

[13] Milton H. Greene Archives Inc. v. CMG Worldwide Inc., 568 F. Supp. 2d 1152 (C.D. Cal. 2008), aff'd, 692 F.3d 983 (9th Cir. 2012).

[14] Fifty-Six Hope Rd. Music Ltd. v. Mayah Collections Inc., No.2:05-CV-01059(KJD)(GWF), 2006 WL 1687451 (D. Nev. June 16, 2006).

[15] Phillips v. Scalf, 778 N.E.2d 480 (Ind. Ct. App. 2002).

[16] See e.g., Landham v. Lewis Galoob Toys Inc., 227 F.3d 619 (6th Cir. 2000); Ind. Code § 32-36-1-6; Ohio R.C. § 2741.01(A)).

[17] See e.g., N.Y. Civ. Rights Law § 50-f(2)(c); Ind. Code § 32-36-1-10; Cal. Civ. Code §§ 3344(a) and 3344.1(a)(1).

[18] See e.g., Carson v. Here's Johnny Portable Toilets Inc., 810 F.2d 104 (6th Cir. 1987).

[19] 599 U.S. 140 (2023).

[20] 598 U.S. 508 (2023).

[21] See e.g., Comedy III Prods. Inc. v. Gary Saderup Inc., 25 Cal. 4th 387 (2001); No Doubt v. Activision Publ'g Inc., 192 Cal. App. 4th 1018, 1033 (2011); Hart v. Electronic Arts Inc., 717 F.3d 141 (3d Cir.2013); Davis v. Elec. Arts Inc., 775 F.3d 1172 (9th Cir. 2015). Notably, because Right of Publicity claims are often alleged alongside copyright or trademark claims, or are between citizens of different states, much of the law in this area has already been developed by the federal courts, often guessing what a given state court might do that may have never addressed the existence or application of these rights, and which may ultimately reject the federal court's expectation.

[22] See March 3, 1998, request for INTA Board Resolution approving a federal right of publicity.

[23] Right of Publicity, ABA Sec. Intell. Prop. L. Ann. Rep. 202, 250 (1995–1996).

[24] Transcript: US Senate Judiciary Subcommittee Hearing on "The NO FAKES ACT", Tech Policy Press, May 1, 2024, available at https://www.techpolicy.press/transcript-us-senate-judiciary-subcommittee-hearing-on-the-no-fakes-act/.

[25] October 25, 2023, Artificial Intelligence, Copyright, and Right of Publicity Comments of Professor Jennifer E. Rothman available at https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Prof-Rothman-Comments-to-Copyright-Office-on-Right-of-Publicity-and-AI_October-2023.pdf.

[26] Tenn. Code Ann. § 47-25-1104; Ind. Code § 32-36-1-8; Cal. Civ. Code § 3344.1(g).

[27] Jonathan S. Jennings, The Right of Publicity and Cyberspace, available at https://www.pattishall.com/pdf/Publicity-Cyberspace.pdf.

[28] NO FAKES Act §2(b)(2)(A)(iii)(II).

[29] No AI FRAUD Act §3(b)(4).

[30] Dryer v. National Football League, Civil No. 09-2182 (PAM/AJB), 2013 WL 5888231 (D. Minn. Nov. 1, 2013).

[31] NO FAKES Act § (2)(d)(2).

[32] Warner Chappell Music Inc. v. Nealy, 144 S. Ct. 1135 (2024); Petition for Writ of Certiorari, Hearst Newspapers LLC et al. v. Antonio Martinelli, No. 23-474 (Nov. 2, 2023).

[33] See Blair v. Nev. Landing P'ship, 369 Ill. App. 3d 318 (2006).

[34] See Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Hepp v. Facebook, 14 F. 4th 204 (3d Cir. 2021).

[35] Courtney Kim, Analyzing The Circuit Split Over CDA Section 230(E)(2): Whether State Protections for The Right of Publicity Should be Barred, 96 S. Cal. L. Rev. 449, available at https://southerncalifornialawreview.com/2023/05/27/analyzing-the-circuit-split-over-cda-section-230e2-whether-state-protections-for-the-right-of-publicity-should-be-barred/

[36] No AI FRAUD Act §3(e)(2).

[37] See e.g., N.Y. Civ. Rights Law § 51 ; Michaels v. Internet Entm't Grp. Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).

[38] See e.g., Cal. Civ. Code §§ 3344(d) and 3344.1(j); Cal. Civ. Code § 3344.1(a)(2).

[39] NO FAKES Act §2(c)(3).