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A Federal Right of Publicity May Address AI-generated Deepfakes While Protecting Free Expression

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During this month's Senate hearing on artificial intelligence and copyright, witnesses and Senators discussed how deepfakes—images or videos created using machine learning algorithms that appear to be real—can be used to divert revenue from artists, spread disinformation, and damage reputations. Several members of Congress suggested that a federal right of publicity law might be a way of addressing concerns that arise when an individual's likeness is copied by artificial intelligence models and used to produce deepfakes.

This explainer lays out how a federal right of publicity might address gaps caused by the variability of state publicity rights—and why it cannot be an intellectual property right.

A Federal Right of Publicity Law Would Harmonize Protections in All 50 States

Publicity rights currently are state laws that are meant to protect individuals against harms that stem from unauthorized uses of their identities, typically in a commercial context. The statutes vary in the aspects of a person's identity that may be the basis of a claim (e.g., name, image, likeness, or "NIL"); who is eligible for right of publicity protection (in some states, only public figures receive this protection); and whether the right extends beyond the death of an individual. State right of publicity laws also provide a range of remedies, such as injunctive relief, attorney fees, and damages.

The variability of state laws means that legitimate users might adhere to the most restrictive laws that provide the least amount of protection to free speech rights. At the same time, bad actors could escape liability by making harmful uses of a person's NIL in states without publicity rights.

A federal right of publicity could be useful if it harmonizes protections in all 50 states, thereby ensuring uniform nationwide protection of individuals' inherently personal characteristics. It could have clearly drawn exceptions that prevent abuse of publicity rights to stifle commentary or criticism. A federal publicity law could also preempt the existing state laws, thereby eliminating inconsistent levels of protection.

Potential Pitfalls of a Federal Right of Publicity

Publicity rights often exist in a degree of tension with principles of free expression. Celebrities have employed publicity rights to limit parodic or critical uses of their NIL. Further, publicity rights have been used to challenge uses that allegedly imitates a singer's "style" or voice. Unless the federal right has properly crafted exceptions, it could have a chilling effect on NIL uses that should be permitted.

Additionally, as discussed below in more detail, a federal right of publicity could have the effect of limiting the section 230 safe harbor.

Copyright Law Cannot Protect an Individual's Likeness

The Intellectual Property Clause of the US Constitution (Article I, Section 8, cl. 8) authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors … the exclusive Right to their Respective Writings…" The Supreme Court has interpreted this clause to mean that originality is a constitutional requirement for copyright protection. US Copyright law only offers protection for original creative works that are authored by a human and fixed in a tangible medium of expression. Therefore, concerns about the exploitation of an individual's likeness by generative artificial intelligence models are distinct from other questions of copyright law and policy that arise from the use of generative AI, and would be more appropriately addressed through publicity laws rather than copyright law.

A Federal Publicity Right May Be Constitutional Under the Commerce Clause

Congress likely does not have the power to create a publicity right under the US Constitution's IP clause. As noted above, the IP clause has an originality requirement, but there is no originality in an individual's NIL. Nonetheless, because a person's NIL can be used through the Internet and other channels of interstate commerce, Congress may find authority to regulate the use of NIL—that is, to enact a federal right of publicity—in the Commerce Clause of the US Constitution. In other words, conceptually, a federal publicity right would not be a federal intellectual right. This is consistent with the history of state publicity rights, which derived from privacy law.

Congress Should Make Clear That Section 230 of the Communications Decency Act Immunizes Libraries and Other Interactive Computer Services from Right of Publicity Claims

During the hearing, some stakeholders endorsed enacting a federal publicity right as a federal intellectual property right. This classification could have the effect of circumventing the safe harbors of section 230 of the Communications Decency Act.

Pursuant to section 230(e)(2) of the CDA, the safe harbor does not protect interactive computer services from claims of infringement of federal intellectual property. By labeling a federal publicity right as an federal IP right, liability could be imposed on interactive computer services for publicity rights violations by their users.

To ensure that Section 230 continues to promote free speech online, Congress should make clear that any publicity right it adopts is not a federal IP right and does not fall within Section 230(e)(2). If interactive computer services become liable for their users' actions, they may be forced to pre-screen third party content, or simply refuse to host user-generated content at all. Libraries provide interactive computer services; exempting publicity rights from Section 230 would pressure libraries to monitor and restrict patrons' use of web services, contrary to libraries' commitments to privacy, free expression, and access to knowledge.