

The elusive federal right of publicity: U.S. Copyright Office reports on AI and digital replicas

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Technological innovation routinely shapes the evolution of copyright law and policy as new forms of expression, new methods of copying and new means of distribution emerge. The ability of generative artificial intelligence to easily produce fake images and recordings — with uncanny verisimilitude — has caused concern for creators, legislators and the public.

Researchers predict that it will become increasingly difficult to distinguish between digital replicas and authentic content.

In early 2023, the U.S. Copyright Office announced a broad initiative to explore the intersection of copyright and artificial intelligence (AI). A Notice of Inquiry followed in August 2023 for public input on a full range of copyright issues. The Copyright Office received extensive commentary with a broad range of perspectives, forming the basis of its recommendations in its July 2024 report titled “Copyright and Artificial Intelligence Part 1: Digital Replicas” (<https://bit.ly/4gejlZO>, the Report).

Pertaining to Part 1, the Report’s primary inquiry is whether existing laws provide sufficient protection against unauthorized digital replicas. In response to that investigation, the Copyright Office concluded that a new federal law is required, not only to protect against harm in the entertainment and political arenas but also to provide safeguards for private individuals.

Summary of the report’s findings

Context and history

As AI technology continues to improve, researchers predict that it will become increasingly difficult to distinguish between digital replicas and authentic content. In the creative sector, artists and performers are particularly affected because copyrighted works often are used to produce digital replicas, which can then be disseminated as part of a larger copyrighted work.

The viral “Fake Drake” song titled “Heart on My Sleeve” is an example of a subgenre of sound recordings using generative AI systems to create vocals that pass for those of recognized artists. Even film projects have begun to use digital replica extras in lieu of background actors.

Notably, in addition to these industry-specific concerns, there are harms that can widely affect the public, such as fraudulent activities and scams that now occur with greater ease and sophistication. There is an increased risk of non-commercial harms as well, with generative AI systems being used to produce sexually explicit deepfake imagery.

Likewise, there is a danger that digital replicas will undermine the political system and news reporting by making misinformation impossible to discern.

Existing legal frameworks and current legislative proposals

The Report takes a comprehensive approach by analyzing the existing legal frameworks that provide protection against unauthorized uses of aspects of an individual’s persona. The Report concludes that state law protections are both inconsistent and insufficient for the new risks posed by AI. For example, some states do not provide rights of publicity at all, while others only protect certain categories of individuals.

Multiple states require a showing of commercial value for the individual’s identity, a threshold celebrities can meet but one that is onerous and unattainable for the average person. Moreover, state laws regarding right of publicity typically do not address harms inflicted by non-commercial uses.

Taken together, these aspects of the current landscape result in a patchwork of protections with the availability of a remedy dependent on where the affected individual resides or where the unauthorized use occurs.

Meanwhile, as explained in the Report, the available federal laws are too narrow to fully address the harms of digital replicas. For example, the Copyright Act protects original works of authorship but does not prevent the unauthorized duplication of an individual’s voice or image.

The Federal Trade Commission Act prohibits unfair or deceptive acts and can be applied to cases where digital replicas are used in commercially misleading ways, but that framework provides little protection in other circumstances.

Similarly, under the Lanham Act, claims such as false endorsement involving digital replicas are limited to unauthorized commercial uses. Notably, most federal courts require a showing of consumer awareness of the individual to establish likelihood of confusion, limiting the Lanham Act's protection to well-known figures and, again, commercial circumstances.

The Report considered two congressional proposals that address the unauthorized use of digital replicas more broadly. The No Artificial Intelligence Fake Replicas and Unauthorized Duplications (No AI FRAUD) Act would establish intellectual property rights in voice and likeness.

It would also protect against the unauthorized use of digital voice replicas and digital depictions that readily identify an individual. Rights would be transferrable and descendible and would endure at least 10 years after the death of the individual.

Any authorization to use a digital depiction or replica would have to be in writing and would be valid only if the individual is represented by counsel or if governed by the terms of a collective bargaining agreement. In balancing the public interest against the private digital replica right, the bill provides a list of factors to be considered.

Likewise, the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023 would provide the right to authorize the use of an image, voice or visual likeness of an individual in a digital replica.

The right would be descendible and licensable property that continues for 70 years after the individual's death. Licensing of the right would be valid only if (1) the individual is represented by counsel, (2) the agreement is in writing or (3) the license is governed by a collective bargaining agreement.

The discussion draft of the bill includes a list of categorical exclusions from liability including uses in news, public affairs or sport broadcasts; in documentary, historical or biographical works; for comment, criticism, scholarship, satire or parody; or where the use is de minimis or incidental.

A new federal right and its contours

After reviewing comments, existing law and current legislative proposals, the Copyright Office identified the following elements for the contours of a new digital replica right.

The definition of "digital replica": The Report defined a "digital replica" as a "video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual."

The Copyright Office advised that a new right should not sweep too broadly since the conduct that now requires federal attention is principally voice cloning in music and the creation of video or images that appear to depict a real person.

The persons protected: The Copyright Office noted that commenters advocated for a federal right that extends protection to all individuals, regardless of their level of fame or the commercial value of their identities, on the basis that everyone has a legitimate interest in controlling the use of their likeness.

Thus, it recommended that any new federal law should extend to protecting all individuals, consistent with the common law right of privacy, which typically does not require fame or commercial value.

The Copyright Office suggests that individuals be able to license their images and voices for use in digital replicas but not fully assign all rights.

The term of protection: The Report asserts that a federal right should prioritize the protection of the livelihoods of working artists, the dignity of living persons, and the security of the public from fraud and misinformation regarding current events. For these purposes, the Copyright Office opined that a postmortem term is not necessary.

Prohibited acts: The Copyright Office recommended proscribing activities that involve dissemination to the public, or in copyright terms, the acts of distribution, publication, public performance or display. In the Copyright Office's view, this is the type of conduct most likely to cause harm to the individual whose image or voice is being replicated. The Copyright Office also urged that a federal law should encompass both non-commercial and commercial uses.

Direct liability: In relation to direct liability, the Copyright Office recommended an actual knowledge standard, meaning that liability would attach only where a distributor, publisher or displayer acted with actual knowledge that the representation in question was a digital replica of a real person *and* that it was unauthorized.

Given the volume of potential outputs produced by current technologies and the number of individuals who could be targeted, the primary concern is that there are likely to be cases where a user passes along an image or audio recording without realizing that it is a replica of someone's voice or likeness.

Secondary liability: With respect to secondary liability, the Report drew on traditional principles of copyright law, including principles of contributory and vicarious liability, and liability for inducing infringement. The Copyright Office suggests that the new law be excluded from the immunity of section 230 of the Communications Decency Act to encourage prompt removal of unauthorized digital replicas by online service providers (OSPs).

As in copyright, a notice and takedown system combined with a safe harbor could be an effective approach with safe harbor available on the condition that the OSP expeditiously removes a digital replica when it has actual knowledge or has received a sufficiently reliable notification that the replica is infringing.

Licenses and assignments: Under any new federal law, the Copyright Office suggests that individuals be able to license their images and voices for use in digital replicas but not fully assign all rights. Licensing enables individuals to monetize and profit from their personas.

Although assignments are common in intellectual property, the Copyright Office opines that a digital replica right is more appropriately viewed as a hybrid of privacy interests and a form of property and, unlike publicity rights, privacy rights are not outright assignable.

Accommodation of First Amendment concerns: Related to accommodating First Amendment concerns, the Copyright Office deliberated between two approaches. Enumerated exceptions to the new statute would provide certainty but could be over- or under-inclusive depending on the facts.

By contrast, case-specific balancing of the right of publicity against the presented First Amendment interest would allow for greater flexibility to assess whether a specific unauthorized use is protected by the First Amendment.

The Copyright Office's Report favors the balancing framework and advocates a set of potential factors such as the purpose of the use, its expressive or political nature, the relevance of the digital replica to the purpose of the use, whether the use is intentionally deceptive, whether the replica was labeled, the extent of the harm caused and the good faith of the user.

Remedies: As for remedies, the Copyright Office recommends both monetary and injunctive relief. Damages might include compensation for loss of income, damage to reputation or emotional distress. Injunctive relief would help to prevent ongoing unauthorized use of an individual's likeness or to prevent future violations.

For cases where actual damages may be difficult to prove, the Copyright Office recommends the inclusion of special damages. In addition, the Copyright Office believes that there are specific

unauthorized uses that should incur criminal liability. However, it stated that it does not take a position on whether criminal penalties should be included in a federal digital replica right as opposed to stand-alone legislation.

Interaction with state laws: Finally, a broader question considered by the Copyright Office is whether a federal digital replica right should preempt state laws. On that front, the Copyright Office cautions against preempting state laws considering that extensive state law in this area has developed over many decades, creating settled expectations.

Full preemption would reduce existing protections for individuals in states that currently provide broader rights. Although a non-preemptive federal right would not fully harmonize the varied state approaches, it would fill in the gaps by ensuring the availability of effective national protection against unauthorized uses of digital replicas.

Implications

Although the Copyright Office has delineated the contours to a potential federal right of publicity, it is unlikely that Congress will pass legislation any time soon. Courts are already being forced to deal with AI-related copyright issues, such as the use of copyrighted works to train AI systems.¹

Congress has yet to act other than present bills that have not matured into legislation. However, the reports released by the Copyright Office and the analysis they include will continue to be important as they may provide guidance for how courts will deal with AI in the absence of congressional action.

The authors will continue to monitor the work of the Copyright Office as it continues to grapple with the new legal and policy issues raised by the emergence of AI.

Notes:

¹ See, e.g. *Alter v. OpenAI*, Nos. 1:23-cv-8292, 1:23-cv-10211, 1:24-cv-84 (S.D.N.Y.); *Andersen v. Stability AI*, No. 3:23-cv-201 (N.D. Cal.); *Getty Images v. Stability AI*, No. 1:23-cv-135 (D. Del.).

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