

AI Deepfakes: Unauthorized Depictions and Protection of Property Rights to Name, Image and Likeness

By Sasha Rosenthal-Larrea, Liza C. Clark and Lucille Dai-He

June 3, 2024

As the capabilities of artificial intelligence (AI) continue to expand rapidly, legal and regulatory frameworks struggle to keep pace. The recently introduced No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act (No AI FRAUD Act) proposes to protect each individual's right to control the use of their own likeness and voice against unsanctioned use of AI-generated content. This proposed legislation seeks to fill a gap left by a patchwork of state and federal protections in intellectual property and privacy laws and regulations.

Proliferation of Deepfakes

AI-generated "deepfakes", which are digitally generated or altered depictions of a person's likeness, may be satirical or artistic, but can often be harmful. For example, a fabricated image of Pope Francis in a white puffer coat went viral online. More nefariously, an AI-created deepfake robocall mimicking the voice of President Joe Biden went out to voters during the New Hampshire 2024 primary election. Recently, fake digitally gener-



Courtesy photo

Sasha Rosenthal-Larrea of Cravath, Swaine & Moore.

ated intimate images of Taylor Swift allegedly created by AI were splashed across the social-media platform X, causing injury beyond the singer's reputation and brand.

Deepfakes can significantly harm private individuals as well. According to a variety of recent reporting, teenagers have been allegedly using AI to create and distribute false and non-consensual intimate images of minor

classmates to the great distress of the individuals depicted.

The No AI-FRAUD Act

On Jan. 10, 2024, Representative Maria Salazar and six bipartisan co-sponsors introduced one response to this proliferation of AI-generated deepfakes. H.R. 6943, known as the No AI FRAUD Act, aims “to provide for individual property rights in likeness and voice.”

The proposed bill would allow for use of an individual’s likeness or voice in digitally created content only if the individual is over the age of 18 and assents to the use in a written agreement negotiated with the assistance of legal counsel or as part of a valid collective bargaining agreement.

Sufficient “harm” to qualify for relief from an unauthorized use can be (1) financial or physical harm, or elevated risk thereof, (2) severe emotional distress of the subject of the content or (3) a likelihood of deceit or fostering of confusion of the public or a court. Individuals alleging violation of this right may sue the distributors of “personalized cloning service[s]” (including algorithms and software with the primary purpose or function of producing digital voice replicas or digital depictions of identified individuals) utilized to create the violative media for \$50,000 per violation or the actual damages suffered, plus any profits from the unauthorized use.

They may also sue individuals who publish or otherwise distribute disallowed digital voice replicas or digital depictions directly for \$5,000 per violation or the actual damages suffered, plus any profits from the unauthorized use.

In either case, punitive damages and legal fees may also be sought and awarded.

The bill has garnered meaningful support. Notably, the Human Artistry Campaign published a letter in support of the No AI Fraud Act signed by hundreds of notable artists and performers ranging from Cardi B to Bradley Cooper.

Conversely, opponents of the bill, including the American Civil Liberties Union and the Electronic Frontier Foundation, have raised concerns as to the breadth and administrability of the legislation as drafted. In a coalition letter to the Subcommittee on Courts, Intellectual Property, and the Internet, opponents acknowledged the importance of protecting consumers and creators, but challenged the proposed act’s scope, arguing that this bill would “endanger wide swaths of non-commercial, First Amendment protected activities” through its strict liability regime. The letter acknowledges overlap with existing state right of publicity laws, and concludes this new legislation “would make the situation worse rather than better”.

Existing Legal Frameworks

While the proposed No AI FRAUD Act aims to address the proliferation of AI-generated deepfakes head-on, an existing patchwork of federal and state statutes and common law may already be used to protect against deepfake technology. To appreciate the additional protections that the No AI Fraud Act may offer, we must carefully examine the patchwork of protections currently available. A summary of existing avenues for relief from unauthorized creation and distribution of AI-generated content featuring an individual’s likeness follows.

Right of Publicity

While a “right of publicity” over an individual’s name, image and likeness (“NIL”) exists in a

majority of states through statutes or the common law, there is no federal right of publicity, and state laws differ in the protections they afford. For example, in New York, “voice” is included within the scope of NIL covered by the private right of action from the codified Right of Privacy, but Rhode Island’s comparable statute only includes “name, portrait, or picture”.

In some states, only the NILs of celebrities or “commercially valuable” identities are protected; while in others, any individual, no matter how little known, has a right of publicity. Further, transferability of such rights varies widely from state to state. This patchwork approach creates a legal regime whereby a non-celebrity in New York might be able to seek redress following the misappropriation of a recording of their speaking voice, while a different non-celebrity less than 200 miles away in Rhode Island would be left without redress if harmed in the same manner.

In short, the availability and applicability of state law protections are neither comprehensive nor consistently available to all individuals.

Trademark Law

Existing trademark law can offer protections against commercial misappropriations of a recognizable NIL using AI-generated deepfakes. If a person’s name—for example, Martha Stewart—is used for commercial purposes to identify a brand or products, it might be eligible for trademark protections, and unauthorized use could constitute infringement. Signatures, catchphrases and other business-related NILs can also be protected under trademark if they identify the source of a product or service.

However, a person who is not using her NIL commercially could not rely on trademark law for redress for unauthorized misappropriation

of her NIL in deepfake content. Moreover, even commercially valuable, famous NILs may be without redress if the accused deepfake is used in a non-commercial context.

Defamation Law and Other Relevant Causes of Action

State law defamation causes of action generally allow aggrieved individuals to seek damages following a showing of harm to the reputation of the subject of a statement, regardless of the individual’s celebrity or any commercial context. However, it may be difficult to prove that some unwelcome deepfake materials, including perhaps the aforementioned image of Pope Francis, have been harmful to the subject’s reputation.

If the unwelcome AI-generated content is defamatory or injurious due to the intimate nature of the depiction, victims might also attempt to seek relief through the private right of civil action authorized by the federal Violence Against Women Act Reauthorization Act of 2022. While such claims were initially envisaged as a method of recovering from the unauthorized and nonconsensual distribution of human-generated intimate content, this narrowly tailored private right of action might reasonably be interpreted to apply to comparable AI-generated content as well.

The language of the Reauthorization Act protects the nonconsensual use of an identifiable individual of any gender “identifiable by virtue of the person’s face, likeness or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, or from information displayed in connection with the visual depiction” in pornographic content.

A suit brought by a New Jersey high schooler who has been the victim of alleged proliferation of AI-generated nonconsensual sexual content

featuring her image adopts this legal theory; the suit is currently pending.

Copyright Law

Some protection from unauthorized use of content for the creation of deepfakes can be drawn from existing copyright law, but only insofar as the deepfake copies existing original content, and the harmed party is the original content's creator.

Copyright law protects the rights of the artists and authors to control their works, not the subjects within the works. As such, if an unauthorized AI-generated image infringed on a copyrighted photograph, the individual depicted in the image could only seek redress under copyright law if they happened to also have taken the photograph.

First Amendment Considerations

First Amendment protections may reasonably permit certain AI-generated deepfake content. Existing copyright law balances rights of copyright owners against the First Amendment rights of subsequent creators through the fair use doctrine.

The proposed No AI FRAUD Act similarly carves out an exception to address the tension of its protections with the First Amendment. The No AI FRAUD Act explicitly states that "First Amendment protections shall constitute a defense" to violations, and requires that, in the assessment of such a defense, the balancing of "the public interest in access to the use . . . against the intellectual property interest in the voice or likeness", via consideration of three factors

reminiscent of copyright fair use analysis: (1) the commercial nature of the use, (2) the necessity of using this individual's likeness to achieve the "primary expressive purpose of the work" and (3) any adverse impact of the use on the value of the work of the individual claiming injury.

Unlike the Copyright Act, which enumerates certain purposes at which the fair use exception is aimed, such as criticism, comment, news reporting, teaching, scholarship and research, the proposed No AI FRAUD Act does not specify examples of activity that the required balancing is intended to exempt. Opponents warn that the broad scope of the No AI FRAUD Act would establish causes of action against a wide range of protected speech, and the exemptions as currently drafted would not sufficiently prevent speech-chilling threats of litigation.

Conclusion

The No AI FRAUD Act proposal indicates a potential shift from the existing focus on protection of an individual's right to profit economically from their commercially valuable NIL to the recognition of an individual's broader right to control the uses of their NIL, even where their likeness carries no significant commercial or economic value. As the capabilities and applications of AI continue to expand, protection of all individuals, not just to stars and notables, will continue to require the thoughtful expansion of regulatory and legal frameworks.

Sasha Rosenthal-Larrea is a partner in the New York office of Cravath, Swaine & Moore. **Liza C. Clark** and **Lucille Dai-He** are associates at the firm.