Deepfakes in Domestic and International Perspective

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INTRODUCTION

Have you always (or ever) yearned to produce your own recording of Elvis Presley singing great baritone arias from Italian opera? Or to make a movie starring Nicole Kidman as Lady Macbeth? Or a videogame featuring the bully who tormented you in high school suffering repeated tortures worthy of the Christian martyrdoms recounted with gusto in *The Golden Legend*? You can fulfill all these wishes, and more, thanks to the AI technology enabling the creation of "deepfakes"—known in legal documents as "digital replicas"—capable of simulating the visual and vocal appearance of real people, living or dead. AI programs can also generate musical compositions in the style of well-known composers or performers, as well as video sequences. What may be good fun in private may become pernicious, offensive, and even dangerous, if widely disseminated over social media or through commercial channels. But, at least in the U.S., legal protections for performers and ordinary individuals against digital replicas, are at best, scanty.

Introduced into the U.S. Congress with bipartisan and extensive industry support,[1] the "Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2025," or the

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1. *See* Press Release, Adam Schiff, Representative, House of Representatives, *Schiff Joins Salazar & Bipartisan House Colleagues in Introducing the NO FAKES Act* (Sept. 12, 2024), https://web.archive.org/web/20240912230923/https://schiff.house.gov/news/press-releases/schiff-joins-salazar-and-bipartisan-house-colleagues-in-introducing-the-no-fakes-act. The bill has garnered support from many groups. *See* Gene Maddaus, *Entertainment Industry Backs Bill To Outlaw AI Deepfakes*, VARIETY (July 31, 2024), https://variety.com/2024/politics/news/ai-bill-outlaw-no-fakes-sag-aftra-1236091652/ [https://perma.cc/E7CU-KXYP] [https://web.archive.org/web/20250108161910/https://variety.com/2024/politics/news/ai-bill-outlaw-no-fakes-sag-aftra-1236091652/]; *SAG-AFTRA Applauds Introduction of NO FAKES Act in the House*, SAG-

"NO FAKES Act of 2025,"[2] aims to address these and other harms, and fill gaps in U.S. law by "protect[ing] intellectual property rights in the voice and visual likeness of individuals, and for other purposes."[3] One of its congressional sponsors expanded on the motivations for the 2024 House version of the bill as follows:

> From the biggest entertainers to everyday Americans, non-consensual voice and image clones can ruin careers, deceive families and friends, and traumatize victims. The American people need clear rules that empower individuals to control their own faces and voices while encouraging innovation and ensuring that the United States remains the world leader on artificial intelligence.[4]

AFTRA (Sept. 12, 2024), https://www.sagaftra.org/sag-aftra-applauds-introduction-no-fakes-act-house [https://perma.cc/FT5Z-MEGN] [https://web.archive.org/web/20241014203509/https://www.sagaftra.org/sag-aftra-applauds-introduction-no-fakes-act-house]; Nina Frazier, *NO FAKES Act Introduced in the Senate: Protecting Artists' Rights in the Age of AI*, RECORDING ACAD. (Aug. 9, 2024), https://www.recordingacademy.com/advocacy/news/no-fakes-act-introduced-in-the-senate [https://perma.cc/83NP-926Z] [https://web.archive.org/web/20250211192024/https://www.recordingacademy.com/advocacy/news/no-fakes-act-introduced-in-the-senate]; Association of American Publishers (@AmericanPublish), X (Sept. 12, 2024, 11:40 AM), https://x.com/AmericanPublish/status/1834255710445547896?mx=2 [https://perma.cc/M6PV-RMDB]; *NO FAKES Act*, HUMAN ARTISTRY CAMPAIGN, https://www.humanartistrycampaign.com/nofakesact [https://perma.cc/A3RZ-Y7LA] [https://web.archive.org/web/20250203113025/https://www.humanartistrycampaign.com/nofakesact] (last visited Feb. 19, 2025). The bill's purported solicitude for AI developers has provoked OpenAI and IBM to declare their support as well. *See* Press Release, Chris Coons, Senator, Senate, *Senators Coons, Blackburn, Klobuchar, Tillis Introduce Bill To Protect Individuals' Voices and Likenesses from AI-Generated Replicas* (July 31, 2024), https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-introduce-bill-to-protect-individuals-voices-and-likenesses-from-ai-generated-replicas [https://perma.cc/3EFG-CELY] [https://web.archive.org/web/20250215001542/https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-introduce-bill-to-protect-individuals-voices-and-likenesses-from-ai-generated-replicas].

2. H.R No. 2794, No Fakes Act, 119th Cong. (2025) (introduced April 9, 2025) .

3. *Id.* The NO FAKES Act is one of several legislative proposals aimed at curbing deepfakes. *See also* Tools To Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks (TAKE IT DOWN) Act, S. 4569, 118th Cong. (2024); Disrupt Explicit Forged Images and Non-Consensual Edits (DEFIANCE) Act of 2024, S. 3696, 118th Cong. (2024); Content Origin Protection and Integrity from Edited and Deepfaked (COPIED) Media Act of 2024, S. 4674, 118th Cong. (2024); Preventing Deep Fake Scams Act, H.R. 5808, 118th Cong. (2023); Protect Elections from Deceptive AI Act, S. 2770, 118th Cong. (2023); No Artificial Intelligence Fake Replicas and Unauthorized Duplications (NO AI FRAUD) Act, H.R. 6943, 118th Cong. (2023); Defending Each and Every Person from False Appearances by Keeping Exploitation Subject To (DEEPFAKES) Accountability Act, H.R. 5586, 117th Cong. (2021); *AI Deepfake Legislation Tracker*, BALLOTPEDIA, https://legislation.ballotpedia.org/ai-deepfakes/home [https://perma.cc/6ELM-Y35G] [https://web.archive.org/web/20250305010444/https://legislation.ballotpedia.org/ai-deepfakes/home] (last visited Mar. 4, 2025).

4. Press Release, María Elvira Salazar, Representative, House of Representatives, *Salazar Introduces the NO FAKES Act* (Sept. 12, 2024), https://salazar.house.gov/media/press-releases/salazar-introduces-no-fakes-act [https://perma.cc/SK4U-F93R] [https://web.archive.org/web/20250122093702/https://salazar.house.gov/media/press-releases/salazar-introduces-no-fakes-act].

This statement encompasses three potentially conflicting objectives: to prevent deception;[5] to provide rights to individuals to control the use of their faces and voices; but not to do either in a way that discourages innovations in AI. (As our analysis in Part II will show, however, the bill generally favors the last objective over the other two, neglecting or even undermining the interests of individuals and of the broader public.)

The statement also encompasses different perspectives on the bill's geographical scope. The creators and disseminators of deep fake videos and musical compositions need not be based within the United States (indeed, many are likely to be located abroad, especially in the case of deepfake pornography[6]). But some of the bill's promises seem to have Americans in mind. It is the "American people" who need the deception-discouraging "clear rules," and, by creating a "federal intellectual property right,"[7] the bill will address the need of "everyday Americans" to be protected against the harms associated with false and deceptive uses of image and voice clones. Even so, the protections to be afforded to the "biggest entertainers," of whom the bill is mostly solicitous, are not necessarily conditioned on U.S. citizenship or domicile. Taking account of the stated anti-deception objective of the proposed legislation,[8] a less parochial approach makes some sense. The harms to which "ordinary Americans" might be exposed are likely to be the same whether the unauthorized digital replicas be of Cate Blanchett, Catherine Deneuve, or Catherine Keener—"big" entertainers who are, respectively, Australian, French, and American. Foreigners who are sufficiently well-known in the United States would appear to have standing to enjoin and seek other relief for domestic U.S. creation and distribution of deepfakes. But the bill's drafting evinces little congressional solicitude for less well-known victims, whether American or foreign. And neither the bill nor general principles of private law clearly remedy the creation and dissemination abroad of Americans' unlicensed digital likenesses.

The first part of this Essay reviews existing protections against the creation and dissemination of deep fakes under U.S. copyright and trademarks laws as well as representative state right of publicity laws. Our brief survey supports the conclusion of the U.S. Copyright Office that "new federal legislation is urgently needed" because "existing laws fail to provide fully adequate protection."[9] These failures appear plainer

5. For an insightful discussion of the risks of deepfakes in the political context, see Shannon Sylvester, Note, *Don't Let Them Fake You Out: How Artificially Mastered Videos Are Becoming the Newest Threat in the Disinformation War and What Social Media Platforms Should Do About It*, 73 FED. COMMC'NS. L.J. 369, 370 (2021).

6. *See* Complaint ¶¶ 15–18, People v. Sol Ecom. Inc., No. CGC-24-617237 (Cal. Super. Ct. Aug. 16, 2024) [hereinafter, Complaint].

7. Schiff, *supra* note 1.

8. As we will see, the bill in fact scarcely addresses the public's transparency concerns.

9. U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE: PART 1: DIGITAL REPLICAS 22–23 (July 2024), https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf [https://perma.cc/WVA2-SZPH] [https://web.archive.org/web/20250211082624/https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-1-Digital-Replicas-Report.pdf].

still once consideration extends to the capacity of these doctrines to reach foreign violations. The second part of this Essay's analysis will show how the currently pending legislation may, and may not, provide performers and ordinary individuals with enforceable rights against the use of their voices and visual likenesses in digital replicas. Given the few material barriers to cross-border dissemination of deep fakes, any evaluation of the strength of the protections afforded by a new U.S. intellectual property right should consider its international scope, particularly in light of recent Supreme Court caselaw restricting the territorial reach of U.S. intellectual property protections.[10]

I. CURRENT POSITIVE LAW IN THE UNITED STATES

Suppose Taylor Swift discovers a TikTok or YouTube posting of a video performance of a song stylistically similar to her compositions, in which the voice and physical appearance of the singer bear a very strong resemblance to Taylor Swift. The resemblance is no accident; the person posting the video will have used AI programs that work from actual photographs or video clips and from recordings of Swift's voice in order to generate highly realistic emulations of Taylor Swift, performing works she never in fact performed. What recourse does current U.S. intellectual property law afford her?

A. COPYRIGHT LAW

Let us start with copyright. We'll soon see that we come up short. Copyright secures the author's exclusive rights to reproduce, adapt, distribute, publicly perform or publicly display her work. But copyright protects neither ideas nor artistic style. Writing a song in the style of Taylor Swift, that is not substantially similar to any songs she in fact wrote, is not infringement. Reproducing clips from a music video might infringe, but generating a new video that neither tracks actual videos, nor reproduces her musical compositions would not violate any rights of Swift (or of the video producer). For example, in a current lawsuit against an AI music-generator, the defendant, Suno, Inc., has responded to allegations of copying sound recordings of musical compositions:

> To be clear, the model underpinning Suno's service is not a library of pre-existing content, outputting a collage of "samples" stitched together from existing recordings. Instead, it is a vast store of information about what various musical styles consist of, used to generate altogether new auditory renditions of creations in those styles.

10. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 278 (2010); Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117, 127 (2013); RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016); WesternGeco LLC v. ION Geophysical Corp., 585 U.S. 407, 412–13 (2018); Hernandez v. Mesa, 589 U.S. 93, 109–110 (2020); Nestlé USA, Inc. v. Doe, 593 U.S. 628, 632–34 (2021); Yegiazaryan v. Smagin, 599 U.S. 533, 541–42 (2023).

> . . . [T]he outputs of tools like Suno, which do not reprise "the actual sounds fixed" in any "recording" owned by any record label, are not and cannot be even *prima facie* copyright infringements. The outputs generated by Suno are *new* sounds, informed precisely by the "styles, arrangements and tones" of previous ones.[11]

Note Suno's emphasis on "actual sounds"; that is because the scope of copyright protection in a sound recording is limited to the "actual [recorded] sounds."[12] No matter how close-sounding the imitation, no copyright claim arises if the sounds are in fact independently generated.

If the person posting to TikTok or YouTube used a voice clone, the analysis depends on whether the clone re-manipulated the actual sounds of a Swift recording, or if instead the AI voice generation program simply "learned" from extant Swift recordings, but created the sounds "from scratch." According to its defenders, voice cloning does not reproduce actual recordings but uses AI to mimic vocal patterns. AI models analyze hours of recordings to understand unique characteristics like tone, pitch, and speaking style. The AI then predicts how the voice would sound with new words or phrases and generates entirely original audio. If that is true, there would be no copyright infringement of the sound recording for the reasons we have already explored. If the voice clone program started out with actual recorded sounds, which it re-manipulated to create the vocal performance of the deepfake, the question would be whether the re-manipulated sounds were substantially similar to the recorded sounds—in other words, whether the original audio clip was recognizable in the replica.

Even were the original sound recording recognizable, an important impediment remains to Swift's claims: There may be an infringement of the sound recording copyright, but she may no longer have rights in the copied sound recording.[13] A similar problem of copyright ownership arises with respect to photographs that may have served as source material for the video: even if the photograph was copied and remained recognizable in the deepfake video, Swift may not own the copyright in the photo. The copyright starts out with the photographer; unless Swift obtained a transfer of exclusive rights from the photographer, she has no copyright claim. And even if Swift obtained the copyright in at least some photographs, she would need to establish that they had been used by the AI software—a task that, in the absence of robust watermarking and a strong transparency requirement,[14] could prove daunting. In any

11. Answer to Complaint at 3–4, 8, UMG Recordings, Inc. v. Suno, Inc., 24 Civ. 11611 (D. Mass. Aug. 1, 2024).

12. 17 U.S.C. § 114. *See* Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1289 n.18 (11th Cir. 2011) ("A copyright in the recording and in the song are separate and distinct and by statute are treated differently.").

13. Raisa Bruner, *Here's Why Taylor Swift Is Re-Releasing Her Old Albums*, TIME (Mar. 25, 2021), https://time.com/5949979/why-taylor-swift-is-rerecording-old-albums/ [https://perma.cc/T2YN-SCCU] [https://web.archive.org/web/20250228182344/https://time.com/5949979/why-taylor-swift-is-rerecording-old-albums/].

14. *Cf.* Recitals (132)–(136), Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L. 1689) [hereinafter, E.U. AI Act] (on transparency obligations regarding certain AI-produced

event, the other internet-available images whose copyrights she does *not* own will likely provide sufficient grist to the deepfake mill.

Whether, even assuming proof of copying, the photographer has a claim will turn on the circumstances in which the photographer made her work available to the public. If, for example, she released the photo under a Creative Commons license, she might have (unwittingly) consented to its reuse in digital replicas. The current version of the 4.0 attribution license provides:

> You are free to:
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> Share—copy and redistribute the material in any medium or format for any purpose, even commercially.
>
> Adapt—remix, transform, and build upon the material for any purpose, even commercially.
>
> The licensor cannot revoke these freedoms as long as you follow the license terms.
>
> Under the following terms:
>
> Attribution—You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use.
>
> No additional restrictions—You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits. [15]

The permission to "adapt" may well be broad enough to extend to the reuse of a photograph in a deepfake. The "attribution" requirements condition that permission; the obligation not to suggest the photographer's endorsement provides some protection to the photographer, and to the public who will encounter the deepfake, but the limitations do not apply to the subject of the photograph.

Similarly, suppose the photographic or video deepfake was based on content a non-celebrity produced and posted to YouTube or TikTok. The Terms of Service may be broad enough to cover the reuse of that content in the creation of deepfakes. For

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outputs); *see especially id.*, recital (134) ("[D]eployers who use an AI system to generate or manipulate image, audio or video content that appreciably resembles existing persons, objects, places, entities or events and would falsely appear to a person to be authentic or truthful (deep fakes), should also clearly and distinguishably disclose that the content has been artificially created or manipulated by labelling the AI output accordingly and disclosing its artificial origin."); *id.* art. 50.4 ("Deployers of an AI system that generates or manipulates image, audio or video content constituting a deep fake, shall disclose that the content has been artificially generated or manipulated. . . . Where the content forms part of an evidently artistic, creative, satirical, fictional or analogous work or programme, the transparency obligations set out in this paragraph are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work.").

15. *Attribution 4.0 International Deed*, CREATIVE COMMONS, https://creativecommons.org/licenses/by/4.0/ [https://perma.cc/B3FN-49W3] [https://web.archive.org/web/20250228010112/https://creativecommons.org/licenses/by/4.0/] (last visited Mar. 6, 2025).

example, TikTok's terms of service ("TOS") permit the service to engage in an extremely wide range of uses, and to authorize third parties to make those uses as well.[16] As a result, even if the digital replica incorporated copyright-protected material, its author may have surrendered any rights.

Protections afforded to foreign individuals are likely to confront the same difficulties. Let's suppose that the deepfake victim retains ownership of sufficient copyright material on which to base a claim. U.S. implementation of national treatment obligations under the Berne Convention and other international accords,[17] places foreign copyright claimants on an equal footing with U.S. individuals.[18] With a few exceptions, almost all foreign-origin copyright-protected material, including the material that could, in theory, form the basis of an infringement action targeting deepfakes, is now protected under U.S. law. The difficulty, as we have seen, is that rights afforded by domestic copyright law are unlikely to prove useful. Foreigners are thus in the same position as Americans when it comes to copyright's inadequacies.

Many deepfakes may not originate in the U.S.; they may be created and disseminated abroad. But if they become accessible in the U.S., the victim (assuming she is a copyright owner) may find redress in U.S. courts under U.S. law, at least as to harm caused in the U.S.[19] By contrast, without that U.S. point of attachment, enforcement of U.S. rights against foreign-created deepfakes may encounter intractable difficulties. Suppose Taylor Swift learned of instances of deepfakes created and disseminated abroad and sought redress from U.S. courts. First, she would need to demonstrate the court's subject matter jurisdiction over the claim, that is, that the claim arises under U.S. copyright law, or, in the absence of federal question jurisdiction, that the parties are of diverse citizenship. A claim alleging purely foreign acts does not arise under the U.S. copyright law because copyrights, like other intellectual property laws, are territorially contained. That is, protections afforded under U.S. copyright law normally reach no further than the nation's borders.[20] Recent Supreme Court caselaw reaffirms the

16. "[B]y submitting User Content via the Services, you hereby grant us an unconditional irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute and to authorise other users of the Services and other third-parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit your User Content in any format and on any platform, either now known or hereinafter invented." *Terms of Service*, TIKTOK (Nov. 2023), https://www.tiktok.com/legal/page/us/terms-of-service/en [https://perma.cc/KV32-KHN4] [https://web.archive.org/web/20250228184106/https://www.tiktok.com/legal/page/us/terms-of-service/en].

17. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as revised* July 24, 1971, *and amended* Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

18. Under § 104(a) of the Copyright Act of 1976, all unpublished words are protected under U.S. copyright law without regard to the nationality or domicile of the author. Non-U.S. published works are protected under § 104(b) on the basis of compliance with a range of connecting factors, including the author's domicile. 17 U.S.C. § 104.

19. *See, e.g.*, Sound N Light Animatronics Co. v. Cloud B, Inc., No. 16 Civ. 5271 (BRO) (JPR), 2017 WL 3081685, at *6 (C.D. Cal. Apr. 7, 2017); Crunchyroll, Inc. v. Pledge, No. 11 Civ. 2334 (SBA), 2014 WL 1347492, at *17 (N.D. Cal. Mar. 31, 2014); Shropshire v. Canning, 809 F. Supp. 2d 1139, 1141 (N.D. Cal. 2011).

20. Section 101 of the U.S. Copyright Act defines the "United States" as comprising "the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the

geographic confines of U.S. intellectual property laws, at least in the absence of specific congressional authorization of extraterritorial application.[21] Alternatively, a U.S. court sitting in diversity could apply foreign law to the infringement claims, but Swift would still need to establish that the U.S. court has personal jurisdiction over the foreign defendant. In the case of a non-resident whose alleged infringements neither originated in nor impacted U.S. users, there may be no basis for long-arm jurisdiction.[22]

B. TRADEMARK LAW

Even with respect to deepfakes made or disseminated in the U.S., Taylor Swift will not fare much better under U.S. trademark law, and the position for ordinary non-celebrities will be worse. The federal trademark act, titled the Lanham Act, includes a provision, § 43(a), which courts have interpreted to afford rights against false endorsements, [23] a perspective that aligns with the Lanham Act's concern with

jurisdiction of the United States Government." 17 U.S.C. § 101. Some circuit courts of appeals have developed an exception to the territoriality principle, known as the "predicate act doctrine." *See, e.g.*, Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd., 108 F.4th 458, 473 (7th Cir. 2024), *reh'g and reh'g en banc dismissed*, 2024 WL 4416886 (7th Cir. 2024) (allowing recovery for infringements that occurred abroad that were enabled by the creation of an infringing copy within the United States); Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940) (finding that profits from overseas infringement can be recovered on the theory that the infringer holds them in a constructive trust for the copyright owner and reversing the grant of summary judgment). *See also* Tire Eng'g & Distrib., LLC v. Shandong Linglong Rubber Co., 682 F.3d 292, 306–08 (4th Cir. 2012); L.A. News Serv. v. Reuters Television Int'l (USA) Ltd., 340 F.3d 926, 928 (9th Cir. 2003), *as amended on denial of reh'g* (Oct. 7, 2003); Liberty Toy Co. v. Fred Silber Co., 149 F.3d 1183, 1998 WL 385469, at *3 (6th Cir. 1998) (unpublished table decision). For analysis of the application of the predicate act theory in the context of digital networks, see Jane C. Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 SANTA CLARA COMPUT. & HIGH TECH. L.J. 347 (1999); Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1 (1999). But this doctrine is premised on an initial infringing act in the U.S., and therefore it will not enable a rightsholder to reach infringing conduct in foreign territories if she cannot trace the origin of the foreign infringements to a predicate infringement committed in the U.S.

21. Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412 (2023) (trademark law). *See also* Subafilms, Ltd. v. MGM–Pathe Commc'ns Co., 24 F.3d 1088, 1091 (9th Cir.1994) (en banc) (recognizing that infringing actions that take place entirely outside the United States are not actionable); Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., No. 96 Civ. 1103 (MBM), 1996 WL 724734, at *6 (S.D.N.Y. Dec. 17, 1996) (same). In *Motorola*, 108 F.4th at 472–73, the Seventh Circuit acknowledged, in light of the Supreme Court's decision in RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) that "[l]ike all federal statutes, the Copyright Act is subject to the presumption against extraterritoriality." However, the court sidestepped deciding whether the predicate act doctrine survived the Court's revigorated commitment to the presumption against extraterritoriality, holding instead that the doctrine did not apply on the facts.

22. This assumes compliance with other conditions in the relevant long-arm statute. *See, e.g.*, N.Y. C.P.L.R. 302(a)(3)(ii) (McKinney 2008) (stating that the defendant needs to reasonably expect "the act to have consequences in the state and [the defendant] derives substantial revenue from interstate or international commerce").

23. Lanham Act § 43(a) (15 U.S.C. § 1125) provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

unauthorized commercial uses.[24] For example, Woody Allen successfully sued a video rental store whose advertisement featured a Woody Allen look-alike holding a subscriber card and appearing to express satisfaction with the store's services.[25] The court ruled that consumers might be confused into thinking either that Allen appeared in the advertisement, and therefore endorsed the store's services, or that, even if the public realized the happy customer in the advertisement was not in fact Woody Allen, consumers might believe Allen authorized the appearance of a look-alike in the advertisement. Taylor Swift might make a similar argument respecting the use of a digital replica: If the replica and video are of very high quality, the public might think the deepfake video portrays a real Taylor Swift performance. Even if the video does not dupe the public into believing it is watching an actual Swift performance, the public might, given the burgeoning practice of licensing deepfakes, believe that Swift authorized the appearance of a digital replica.

To any trademark claim, it should make little difference if the quality of the digital replica sang with even better pitch and danced with even greater precision than Swift herself. Modern trademark doctrine's solicitude for *consistent* quality,[26] not merely protections against the denigration of goodwill, should be adaptable to protections for celebrity personality. Accordingly, it should be no answer that the deepfake's performance is superior (or at least not defamatory). And, to reference an increasingly prevalent use of AI technology, whether to undergo a digital "de-ageing" process,[27] or perhaps a less drastic facial touch up, should be for the celebrity to decide.[28]

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
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> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

24. U.S. COPYRIGHT OFF., *supra* note 9 at 24 (describing the Lanham Act's focus on commercial uses as an impediment to protections against deepfakes).

25. Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985). *See also* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992), *as amended* (Aug. 19, 1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

26. *See* Société Des Produits Nestlé, S.A. v. Casa Helvetia, Inc., 982 F.2d 633, 636 (1st Cir. 1992).

27. *See* Melena Ryzik, *Tom Hanks and Robin Wright Open a New Box*, N.Y. TIMES (Nov. 1, 2024), https://www.nytimes.com/2024/11/01/movies/tom-hanks-robin-wright-here-forrest-gump.html [https://web.archive.org/web/20250305023336/https://www.nytimes.com/2024/11/01/movies/tom-hanks-robin-wright-here-forrest-gump.html] (discussing the use of digital technologies to de-age Hollywood celebrities).

28. Under the current draft of the NO FAKES Bill, the requirement that a "digital replica" be "newly created" indicates that a technological de-aging "fix" to the appearance of a human actor is not in scope. At the same time, the bill's application to deceased celebrities indicates that a newly created (and therefore within the bill's scope) digital replica representing an actor's younger self is not disqualifying on the basis that the depiction is not "highly realistic." *See* H.R No. 2794, *supra* note 2.. On the use of AI to enhance (real) actors'

But, supposing Swift succeeds in proving a claim under the Lanham Act, it is not certain that a court would enter an injunction against all disseminations of the video. Rather, given that the video is an expressive work that does not infringe any copyrights (we posit), a court may be reluctant to compel its withdrawal from public view. Rather, the court may determine that a clear and prominent disclaimer adequately protects the public's interest, and Swift's.[29] If the video's creator were to preface the video with statements such as the following, then, arguably, the creator would have headed off attempts to compel the video's removal:

> This video contains a digital replica of Taylor Swift generated using artificial intelligence and other technologies. The likeness and voice used in this video were not authorized by Taylor Swift, her team, or her record label. This content is a simulated representation and is not intended to mislead viewers into believing it is an authentic performance by Taylor Swift. For clarity, the creation of this digital replica was entirely for illustrative and creative purposes, and the video does not represent any participation or endorsement by Taylor Swift.[30]

What of cases in which either the defendant is not American or the deepfake is created or distributed outside of the United States? In essence, § 43(a) federalizes common law passing-off, with the consequence that the cause of action relies on a reputation within the jurisdiction, and attendant consumer confusion, or likely confusion, arising from the defendant's actions.[31] Woody Allen's Lanham Act claim was grounded on his familiarity to "millions of people,"[32] and the possibility that average lay

performances in recent movies, see Amy Hume, *When Does an Actor Stop, and AI Begin? What The Brutalist and Emilia Pérez Tell Us About AI in Hollywood*, CONVERSATION (Jan. 22, 2025), https://theconversation.com/when-does-an-actor-stop-and-ai-begin-what-the-brutalist-and-emilia-perez-tell-us-about-ai-in-hollywood-247796 [https://perma.cc/U8TG-T7N3] [https://web.archive.org/web/20250228192821/https://theconversation.com/when-does-an-actor-stop-and-ai-begin-what-the-brutalist-and-emilia-perez-tell-us-about-ai-in-hollywood-247796].

29. Allen v. Men's World Outlet, Inc., 679 F. Supp. 360, 362, 369–70 (S.D.N.Y. 1988) (discussing sufficiency of disclaimers); Jackson v. MPI Home Video, 694 F. Supp. 483, 492 (N.D. Ill. 1988); Consumers Union of U. S., Inc. v. Gen. Signal Corp., 724 F.2d 1044 (2d Cir. 1983). *See also* Ethan LeBleu, *Trademark Modernization Act and the Codification of the Presumption of Irreparable Harm*, 30 J. INTELL. PROP. L. 206 (2022) (explaining how the *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006) decision discouraged the granting of injunctions in trademark infringement cases by eliminating the presumption of irreparable harm, leading to inconsistent rulings, and how the Trademark Modernization Act of 2020 restored clarity by codifying the presumption).

30. *See also* Hang Lu and Shupei Yuan, *"I Know It's a Deepfake": The Role of AI Disclaimers and Comprehension in the Processing of Deepfake Parodies*, 74 J. COMMC'N 359, 364 (2024) (finding that an AI disclaimer for deepfake parody ("This is a lip-synched video, meaning that it was created using an artificial intelligence algorithm to change the original lip movements of the speaker and make him say whatever the video creator wanted him to say.") significantly improved the audience's comprehension and ability to recognize the parody").

31. Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 627 (S.D.N.Y. 1985) ("The court . . . finds it helpful, in applying the likelihood of confusion standard to the facts of this case, to refer to traditional trademark analysis.").

32. *Id.* at 617.

observers might be confused.[33] A Cate Blanchett or Catherine Deneuve might satisfy these requirements,[34] but other foreign victims, including victims of deepfake pornography,[35] otherwise anonymous to the American public, are unlikely to do so.

As for (sufficiently well-known) plaintiffs seeking relief for conduct abroad, the recent Supreme Court decision in *Abitron Austria GmbH v. Hetronic International, Inc.*,[36] calls into question the continued viability of Lanham Act claims directed at activity in foreign territories. The decision marked the first time the Court had engaged with the capacity of the Lanham Act to afford relief for trademark infringement abroad since its 1952 decision in the *Steele v. Bulova Watch Co.*[37] In the earlier case, the Court held that, at least in cases involving U.S. defendants, infringing conduct occurring in foreign territories, but that that targeted U.S. residents or which had ripple effects in the United States could be enjoined under the Lanham Act.[38] Without expressly overturning *Steele*,[39] the Court applied a "presumption against extraterritoriality" to trademark cases alleging infringing activity abroad.[40] Overcoming the presumption requires plaintiff to pass a "two-step" test: Congress must have unmistakably instructed that a provision should apply to foreign conduct; if not, the court must be satisfied that the claim requires a "(permissible) domestic"—not an "(impermissible) foreign"—application of the provision.[41] At least with tangible goods, foreign sales to foreign customers of goods to which the plaintiff's trademark had been affixed did not pass muster, as the Tenth Circuit Court of Appeals confirmed on remand,[42] nor did "downstream" foreign sales

33. *Id.* at 630 (Congress prohibited only likelihood of confusion as to "average lay observer") (citing Warner Bros., Inc. v. Am. Broad. Cos., Inc., 720 F.2d 231, 246 (2d Cir. 1983)")).

34. David W. Dunlap, *For Lesbian Magazine, a Question of Image*, N.Y. TIMES (Jan. 8, 1996), https://www.nytimes.com/1996/01/08/business/for-lesbian-magazine-a-question-of-image.html [https://web.archive.org/web/20250228194657/https://www.nytimes.com/1996/01/08/business/for-lesbian-magazine-a-question-of-image.html] (explaining that *Deneuve* magazine voluntarily changed its name to *Curve* to avoid litigation costs when Catherine Deneuve sued for trademark infringement). *See also* Complaint, Pele IP Ownership LLC v. Samsung Elecs. Co., 16 Civ. 3354 (N.D. Ill. Mar. 16, 2016) (Pelé sued Samsung for false endorsement after they used a look-alike in a soccer-themed advertisement, claiming it deceptively implied his endorsement and damaged his brand value; the case settled several years later.).

35. *See* Press Release, David Chiu, City Attorney, San Francisco, C*ity Attorney Sues Most-Visited Websites that Create Nonconsensual Deepfake Pornography* (Aug. 15, 2024), https://www.sfcityattorney.org/2024/08/15/city-attorney-sues-most-visited-websites-that-create-nonconsensual-deepfake-pornography/ [https://perma.cc/F4PY-9X6B].

36. 600 U.S. 412 (2023).

37. 344 U.S. 280 (1952).

38. *Steele v. Bulova Watch Co.* spawned a complex body of jurisprudence testing the scope of its doctrine, described by one commentator as a "[m]otley [c]rew of [c]ircuit [c]ourt [t]ests." TIM W. DORNIS, TRADEMARK AND UNFAIR COMPETITION CONFLICTS: HISTORICAL-COMPARATIVE, DOCTRINAL, AND ECONOMIC PERSPECTIVES 161 (2017).

39. *Cf.* Hetronic Int'l, Inc. v. Hetronic Ger. GmbH, 99 F.4th 1150, 1170 (10th Cir. 2024) ("[P]ost-*Abitron*, *Steele* no longer carries weight in the extraterritoriality analysis.").

40. Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 415 (2023).

41. *Id.* at 418.

42. Hetronic Int'l, Inc. v. Hetronic Ger. GmbH, 99 F.4th at 1167.

of products that ended up in the United States.[43] These uses did not constitute "use in commerce" regulated by the Lanham Act.

With online exploitation of digital replicas, the position is less clear. The *Abitron* Court acknowledged that use in domestic commerce could include advertising in the U.S. As the Tenth Circuit confirmed, "advertising . . . infringing products online to U.S. customers would qualify as domestic infringing uses in commerce under *Abitron*," including, it seems, advertising initiated abroad.[44] And at least one district court has held, post-*Abitron*, that foreign use of the plaintiff's mark, including in internet advertising, might provide circumstantial evidence of an intention to reach U.S. customers with its promotional material.[45] It is not obvious, however, that these possibilities for localizing foreign activities in the context of false endorsement claims would assist in claims targeting foreign exploitations of deepfake replicas. If courts see an analogy between foreign-sourced deepfake celebrity endorsements and advertising that affects U.S. commerce, Lanham Act claims might survive, but, post-*Abitron,* this is likely to prove an uphill battle. Much will depend on the facts, and whether disclaimers nullify the possibility of consumer confusion. In any event, many deepfakes would not be endorsements at all: An Elvis Presley clone crooning "Largo al factotum" from *The Barber of Seville* to sell haircare products might be within the Lanham Act's scope if viewed in the U.S., but it may just as likely to be created (and even shared) for personal amusement as for commercial ends, and thus escape the Lanham Act's reach on other grounds.

C. RIGHT OF PUBLICITY

Unlike trademark rights which, at least in theory, do not afford "rights in gross" against non-consensual exploitations of individuals' identities, state law publicity rights may be enforced even in the absence of consumer confusion. The nature of a right of publicity claim lies in misappropriation, not deceit.[46] A majority of states have some form of right of publicity, either judge-made or by statute, and often derived from protections of personal privacy. For example, the New York States Civil Rights law, Section 51, provides:

> Action for injunction and for damages. Any person whose name, portrait, picture, likeness or voice is used within this state for advertising purposes or for the purposes

43. *Id.* at 1169. *See also id.* ("Products bound for the United States but sold abroad cannot premise a Lanham Act claim without some domestic conduct tying the sales to an infringing use of the mark in U.S. commerce."); Timothy R. Holbrook & Anshu Garg, *Confusion over Trademark Extraterritoriality . . . and Beyond*, 73 AM. U. L. REV. 989, 1035 (2024) ("[A]n effect (of some level) on U.S. commerce is no longer germane to the extraterritoriality analysis of the Lanham Act.").

44. Hetronic Int'l, Inc. v. Hetronic Ger. GmbH, 99 F.4th at 1171.

45. Hazelden Betty Ford Found. v. My Way Betty Ford Klinik GmbH, No. 20 Civ. 409 (JRT) (TNL), 2023 WL 6318164, at *9 (D. Minn. Sept. 28, 2023). *See also* Rockwell Automation, Inc. v. Parcop S.R.L., No. 21 Civ. 1238 (GBW) (JLH), 2023 WL 4585952, at *3 (D. Del. July 18, 2023).

46. For differences between infringement of the right of publicity and false endorsement, see, e.g., J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:14 (5th ed. 2024).

> of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using such person's name, portrait, picture, likeness or voice, to prevent and restrain the use thereof[.]. . .[47]

The original version of the text did not include "voice" within the protected subject matter, reflecting how legislators, when initially drafting the statute, did not foresee voice as a key element of personal identity.[48] New York courts had interpreted the statute liberally in regards to physical appearance, but consistently barred actions involving sound-alikes.[49] While New York and other states now recognize voice as part of an individual's personality,[50] and some have created claims against deepfakes of deceased (but not living) persons,[51] this shift highlights how laws can lag behind emerging technologies and social realities—just as deepfakes may be slipping through the cracks today.

For present purposes, it suffices to establish that the scope of protection may vary from state to state, spawning uncertainty for individuals and users alike.[52] Hence the perception of the need for some form of federal protection against digital replicas.[53] In

47. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2024). "Voice" was added to the list of protectable attributes in 1995. Act of Aug. 9, 1995, ch. 674, 1995 N.Y. Laws 3642 (codified at N.Y. CIV. RIGHTS LAW § 51).

48. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 259 (Sup. Ct. 1984), *aff'd*, 488 N.Y.S.2d 943 (1985).

49. *Id. See also* Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 620 (S.D.N.Y. 1985); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978).

50. CAL. CIV. CODE § 3344(a) (West 1989); IND. CODE § 32-36-1-6; NEV. REV. STAT. § 597.770; 765 ILL. COMP. STAT. 1075; OHIO REV. CODE ANN. § 2741.01 (West); TENN. CODE ANN. § 47-25-1101 (West); WASH. REV. CODE § 63.60.010; TEX. PROP. CODE ANN. § 26.002 (West). In contrast, the following statutes still do not explicitly mention "voice." *See* FLA. STAT. § 540.08; KY. REV. STAT. ANN. § 391.170 (West); MASS. GEN. LAWS ch . 214, § 3A; VA. CODE ANN. § 8.01–40.

51. *See* N.Y. CIV. RIGHTS LAW § 50-f.

52. For an analysis of some of the differences in the scope of state right of publicity laws, see Responses of Professor Jennifer E. Rothman to Questions for the Record of Representative Dean, *Artificial Intelligence and Intellectual Property: Part II—Identity in the Age of AI, Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 118th Cong. (Feb. 27, 2024) (written responses of Jennifer E. Rothman), https://rightofpublicityroadmap.com/wp-content/uploads/2024/03/Rothman_Answers-to-Rep-Dean-Questions-for-the-Record_Feb-27_2024.pdf [https://perma.cc/A4AZ-2PQR] [https://web.archive.org/web/20240420020337/https://rightofpublicityroadmap.com/wp-content/uploads/2024/03/Rothman_Answers-to-Rep-Dean-Questions-for-the-Record_Feb-27_2024.pdf].

53. U.S. COPYRIGHT OFF., *supra* note 10, at 22–23; Coons, *supra* note 1 (Vice President of Global Affairs at OpenAI explained that "[c]reators and artists should be protected from improper impersonation, and thoughtful legislation at the federal level can make a difference."); Schiff, *supra* note 1 (Representative Madeleine Dean expressed that "as AI's prevalence grows, federal law must catch up".). To avoid a proliferation of potentially inconsistent rights, a new federal publicity right concerning deepfakes should create a uniform national standard, preempting state legislation. *See* Jennifer E. Rothman, *Senate Holds Hearing on Ways to Improve Draft Digital Replica Bill*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (May 1, 2024), https://rightofpublicityroadmap.com/news_commentary/senate-holds-hearing-on-ways-to-improve-draft-digital-replica-bill/ [https://perma.cc/GD2L-QAWF] [https://web.archive.org/web/20250407141510/https://rightofpublicityroadmap.com/news_commentary/senate-holds-hearing-on-ways-to-improve-draft-digital-replica-bill/] ("All witnesses who addressed the question suggested the need for the federal law to preempt a confusing and conflicting set of state laws. The alignment of the recording industry, tech platforms, movie industry, and academic witness around this issue

addition, considerable uncertainty has surrounded the protection of the publicity rights of foreigners and of individuals domiciled outside of the state in which the acts were committed in violation of the right.[54] Because publicity rights have been treated as akin to privacy rights, the law of the place of domicile at the time of the alleged violation occurred is frequently applied (or, in the case of deceased celebrities, the law of the place of domicile at the time of death[55]). This has sometimes deprived foreign or out-of-state plaintiffs of any relief.[56]

II. PROPOSED LEGISLATION: NO FAKES ACT

The following discussion analyzes some of the bill's highlights. The bill is too long and complex to consider all its provisions. Notably, we do not review the extensive provisions regarding the exploitation of digital replicas of dead celebrities, and we offer no reflections on the adequacy of and avenues for securing remedies, except to invite some further consideration of the decision to adopt a single remedial regime for claims by celebrities and ordinary individuals: remedies tailored to protecting the commercial interests of the former might not be well adapted to vindicating the dignitary interests of the latter. And we leave for another occasion the bill's treatment of the secondary liability of internet services that disseminate third party-created digital replicas.[57]

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is a shift from prior discussions."). The 2025 version of the Bill does not fully reflect these views. The rights established under the Bill will preempt "cause[s] of action under State law for the protection of an individual's voice and likeness in connection with a digital replica . . . in an expressive work" but the Bill will nevertheless preserve *inter alia* "causes of action under State statutes or common law in existence, as of January 2, 2025, regarding a digital replica." No Fakes Act, 119th Cong. § 2(g)(1), (2)(A) (2025) (unintroduced bill) (on file with authors).

54. Mary LaFrance, *Choice of Law and the Right of Publicity: Rethinking the Domicile Rule*, 37 CARDOZO ARTS & ENT. L.J. 1 (2019).

55. LOUIS ALTMAN & MALLA POLLACK, 4 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 22:34 (4th ed. 2024)*; see also* A.L.I., PRINCIPLES OF INTELLECTUAL PROPERTY § 301 (2008) (section on territoriality); N.Y. CIV. RIGHTS LAW § 50-f(b) (creating a cause of action against unauthorized digital replicas of deceased personalities but limiting relief to a "deceased natural person domiciled in this state at the time of death").

56. Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149 (9th Cir. 2002) (holding that because Princess Diana was domiciled in the United Kingdom at the time of her death and U.K. law does not provide post-mortem publicity rights, no claim could be brought in California); Rogers v. Grimaldi, 875 F.2d 994, 1002 (2d Cir. 1989); Bi-Rite Enters., Inc. v. Button Master, 555 F. Supp. 1188, 1197 (S.D.N.Y. 1983); Se. Bank, N.A. v. Lawrence, 489 N.E.2d 744, 745 (N.Y. 1985).

57. The bill creates a notice-and-take-down regime similar to the Copyright Act's § 512, but with an important clarification: While courts have divided on the permissibility of a take-down-stay-down remedy under § 512 (*Compare* Capitol Recs., LLC v. Vimeo, LLC, 826 F.3d 78, 83 n.4 (2d Cir. 2016) ("Plaintiffs and their *amici* protest that copyright owners are shortchanged by the compromise. . . . [A]ssuming copyright owners" complaint has merit, the need for remediation is a question for Congress."), *with* EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79, 91 (2d Cir. 2016) ("[R]equiring MP3tunes to extend that policy to users who sideloaded infringing content may not be an unreasonably burdensome request. . . . MP3tunes would simply have had to make use of information already within its possession and connect that information to known users.")), the bill's provision on safe harbors excludes liability if the service "removes, or disables access to *all other publicly available instances* of the work embodying the claimed unauthorized digital replica" (emphasis added). This must be done "as soon as is technically and practically feasible for that online service." The condition is subject to the further requirement that there be a match

A. WHAT ARE "DIGITAL REPLICAS?"

The bill regulates "digital replicas," which it defines as:

> (A) … a newly created, computer-generated, highly realistic electronic representation 12 that is readily identifiable as the voice or visual likeness of an individual that—
>
> > (i) is embodied in a sound recording, image, audiovisual work, including an audiovisual work that does not have any accompanying sounds, or transmission—
> >
> > > (I) in which the actual individual did not actually perform or appear; or
> >
> > > (II) that is a version of a sound recording, image, or audiovisual work in which the actual individual did perform or appear, in which the fundamental character of the performance or appearance has been materially altered;[58]

The definition makes clear that the bill in no way regulates sound recordings, images, audiovisual works, or live performances that are not computer-generated. Thus, the bill would not jeopardize the careers of Elvis imitators, whether appearing live in Las Vegas or on recordings, etc. Unlicensed hologram shows[59]—such as the remarkably successful "ABBA Voyage"[60]—are, however, likely to be covered. A "digital replica" must be "embodied in a sound recording . . . or audiovisual work."[61] However lifelike and freestanding holograms may appear to an audience, they will be the projections of digital sound recordings and audiovisual works incorporating AI-generated vocal and audio elements.

The definition imposes no citizenship or domicile limitations on the individuals whose identities might be susceptible to digital replication.[62] Replicas of our French and Australian Catherines and Cates would seem to qualify. Celebrities of their magnitude would easily surmount the 'readily identifiable' threshold. But what of the everyday individuals who do not enjoy such fame and whose likenesses are replicated? The term "readily identifiable" suggests a higher threshold than "recognizable." And

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with a digital fingerprint of an unauthorized digital replica that was specifically identified in the notice sent by the right holder and that the other publicly available instances of the work were uploaded after the applicable notice was submitted to, and processed by, the provider. H.R. 2794 § 2(d)(1)(B)(ii)(II). This may require the service provider to render inaccessible not only the digital replica specifically noticed by the individual or right holder, but also any other qualifying appearances of that replica on the host's servers. *See id.*

58. H.R. 2794 § 2(a)(2).

59. Rachel Hall, *AI Elvis Not the First Hologram Star To Shake His Moves on Stage*, GUARDIAN (Jan. 4, 2024), https://www.theguardian.com/music/2024/jan/04/ai-elvis-not-the-first-hologram-star-to-shake-his-moves-on-stage [https://perma.cc/Z8ZD-N5K7] [https://web.archive.org/web/20250201170115/https://www.theguardian.com/music/2024/jan/04/ai-elvis-not-the-first-hologram-star-to-shake-his-moves-on-stage].

60. ABBA VOYAGE, https://abbavoyage.com/ [https://perma.cc/GN5A-WGCU] [https://web.archive.org/web/20250307005408/https://abbavoyage.com/] (last visited Mar. 7, 2025).

61. H.R. 2794 § 2(a)(2)(i).

62. The first U.S. federal copyright law, the Copyright Act of 1790, expressly applied only to citizens or residents of the U.S. Copyright Act of 1790, § 1, 1 Stat. 124 (1790).

"readily identifiable" to whom? To the ordinary observer? To the individual's local community? We might expect, for example, digital replicas of professors to be "highly recognizable" in their university contexts, but few of us enjoy recognition beyond these milieux. Even then, close familiarity may result in the deepfake not being "highly realistic," because close friends and family (and colleagues and students) may be able to tell the difference. Even for domestic plaintiffs, the bill will require considerable judicial construction if it passes in this form.

The problems will be compounded for foreign individuals who do not enjoy the benefits and burdens of American celebrity. Whether the harms are lessened if the individuals are unrecognized by the public to which the deepfake is made available will surely depend on the context.[63] The dignitary violations and outrage induced by a foreign individual's discovery that her likeness has been deployed in deepfake pornography or "deepnudes,"[64] for example, should provide a *sufficient* basis for a claim under the proposed regime, even if the affronts might be more deeply felt when the individual is "readily identifiable" to a local viewership. For many foreign and U.S. claimants, the rights to be afforded by the NO FAKES Act would be illusory if only famous individuals' likenesses counted as "digital replicas"—and would be contrary to the expressed intent of the bill's sponsors.[65] The intention that the bill should prevent the production and dissemination of non-consensual pornographic imagery,[66] for example, will be realized only if the "readily identifiable" criterion does not impose an unrealistic barrier to relief.

If the difficulties attending the "readily identifiable" standard cannot be resolved through sensible statutory construction, some rethinking of the legislative text might be warranted. One approach might be to adopt the language used in § 2256 of Title 18, the definition of "sexually explicit conduct" to which the NO FAKES bill cross-refers.[67] In the context of child pornography, § 2256, which also refers to "computer-generated image[s],"[68] requires only that the person depicted be an "identifiable minor" who is "recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature."[69] The individuals to be protected under the NO FAKES bill include minors;[70] accordingly, consistent definitions would better align the NO FAKES regime with other legal

63. *See* H.R. 2794 § 2(c)(1), (2) (describing the bases for liability). These are discussed *infra* Part II.D.

64. *See* Complaint, *supra* note 7, ¶ 4.

65. Schiff, *supra* note 1 (Rob Wittman said that "we must protect all Americans—from artists to innocent young children—from deepfakes," while Chris Coons added: "Everyone deserves the right to own and protect their voice and likeness, no matter if you're Taylor Swift or anyone else.").

66. H.R. 2794 § 2(c)(5)(B); Schiff, *supra* note 1 (Representative Wittman affirmed that the "NO FAKES Act is an important step in safeguarding Americans from bad actors who may try to . . . generate sexually explicit deepfakes.").

67. Section 2(c)(5)(B) provides that the delineated exclusions "shall not apply where the applicable digital replica is used to depict sexually explicit conduct, as defined in section 2256(2)(A) of title 18, United States Code." S. 4875 § 2(c)(4)(B). *See* 18 U.S.C. § 2256.

68. 18 U.S.C. § 2256(8).

69. *Id.* § 2256(9).

70. The NO FAKES Act includes detailed provisions relating to licenses of digital replica image rights involving individuals who are younger than eighteen years of age. *See* H.R No. 2794 § 2(b)(2)(B)(ii).

protections for children against exploitation and abuse. More generally, the "Take it Down Act," sec. 2(b)(1)(C) defines an "identifiable individual" as

> an individual—
>
> (i) who appears in whole or in part in an intimate visual depiction; and
>
> (ii) whose face, likeness, or other distinguishing characteristic (including a unique birthmark or other recognizable feature) is displayed in connection with such intimate visual depiction.[71]

Requiring that the depiction incorporate "recognizable features" or be recognizable "as an actual person" would better realize the aspiration that "[e]veryone deserves the right to own and protect their voice and likeness."[72]

B. WHO OWNS THE RIGHTS?

Under the bill, "each individual or right holder shall have the right to authorize the use of the voice or visual likeness of the individual . . . in a digital replica."[73] The bill defines a "right holder" as "the individual, the voice or visual likeness of whom is at issue with respect to a digital replica or a product or service described in subsection (c)(2)(B)[74] or that person's successor in title."[75] Living individuals may not assign their digital replica rights, but they may license them "in whole or in part, exclusively or non-exclusively"[76] for a maximum duration of ten years.[77]

If the drafters sought to protect individuals by prohibiting a total *inter vivos* assignment of the right, the breadth of the licensing provision seems to undermine that objective. Apart from the limited duration of a license—which in fact is limited only as to new uses of deepfakes; previously-licensed uses may continue to be exploited even after the license's expiration[78]—it is not obvious that there is any meaningful difference between an assignment of all rights and an exclusive license of digital replica rights "in whole." It seems the drafters intended a narrower scope for licenses relative to assignments, because, in addition to the ten-year limit, the bill also conditions a license's validity on being "in writing and signed by the individual or an authorized representative of the individual; and [] includ[ing] a reasonably specific description of

71. S. 146, 119th Cong. (introduced 01/16/2025).

72. Schiff, *supra* note 1.

73. H.R. 2794 § 2(a)(6)(B).

74. *Id.* § 2(c)(2)(B)(i) ("is primarily designed to produce one or more digital replicas of a specifically identified individual or individuals").

75. *Id.* § 2(a)(6).

76. *Id.* § 2(b)(2)(A)(i)(III).

77. *Id.* § 2(b)(2)(B)(i)(I).

78. *Id.* § 2(b)(2)(E) (providing that any uses already made before the license's expiration may continue to be exploited even after expiration). *See* Jennifer E. Rothman, *NO FAKES Act Introduced in Senate*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Sept. 9, 2024), https://rightofpublicityroadmap.com/news_commentary/no-fakes-act-introduced-in-senate/ [https://perma.cc/KV6H-D8YY] [https://web.archive.org/web/20250208031242/https://rightofpublicityroadmap.com/news_commentary/no-fakes-act-introduced-in-senate/].

the intended uses of the applicable digital replica."[79] But the possibility of licensing the right "in whole" would seem to circumvent the requirement of specificity. Moreover, it is not clear whether "in writing and signed" would include click on assent to Terms of Service, such as the TikTok TOS discussed above.[80]

C. WHAT ARE THE RIGHTS?

Subject to a variety of exceptions, the following acts violate the individual's or right holder's digital replica rights:

> The public display, distribution, transmission, or communication of, or the act of otherwise making available to the public, a digital replica without authorization by the applicable right holder.[81]

The acts listed echo the exclusive rights under copyright and seem relatively noncontroversial. The bill also, in language echoing the circumvention device-trafficking prohibitions in the Digital Millennium Copyright Act,[82] bars:

> Distributing, importing, transmitting, or otherwise making available to the public a product or service that—
>
> (i) is primarily designed to produce 1 or more digital replicas of a specifically identified individual or individuals without the authorization of such individual or individuals or the law;
>
> (ii) has only limited commercially significant purpose or use other than to produce a digital replica of a specifically identified individual or individuals without the authorization of such individual or individuals or the law; or
>
> (iii) is marketed, advertised, or otherwise promoted by the individual or entity described in paragraph (1), or another individual or entity acting in concert with the individual or entity described in paragraph (1) with the knowledge of the individual described in paragraph (1), as a product or service designed to produce an unauthorized digital replica of a specifically identified individual or individuals without the authorization of such individual or individuals or the law.[83]

The version of the Bill introduced in 2024 did not include device-trafficking prohibitions.[84] Under that Bill, liability extended to the mere "production" of digital replicas without consent; that version did not condition liability on dissemination of the deepfake. By contrast, the Copyright Office, in a 2024 report to Congress advised

79. No Fakes Act, § 2(b)(2)(B)(i)(II).
80. *See* Rothman, *supra* note 78.
81. No Fakes Act, § 2(c)(2)(A).
82. 17 U.S.C. § 1201(a)(2), (b)(1).
83. No Fakes Act, § 2(c)(2)(B).
84. *See* S. 4875, 118th Cong. § 2(c)(2) (2024).

"proscribing [only] activities that involve dissemination to the public."[85] The Office cautioned: "[T]he creation of a digital replica in itself could be part of an artist's experimental process or for a consumer's personal entertainment. Such purely personal use would ordinarily be innocuous and can foster further creativity."86 The 2025 version of the Bill now hews more closely to that recommendation.

As a result, the current version of the Bill permits individuals to create digital replicas for recreational purposes, as it imposes no liability for mere reproduction. However, a person's ability to produce a deepfake will depend on the availability of tools that facilitate its creation. While the Bill's language aims to reduce access to such tools, it currently allows services to avoid liability if they are sufficiently diversified—i.e., if they support substantial non-infringing uses and do not explicitly promote creation of unauthorized deepfakes.[87] Accordingly, the Bill's practical impact hinges on whether most services involved in production of unauthorized deepfakes are primarily or exclusively dedicated to that purpose. In practice, most are not.[88]

The creation of a deepfake typically involves five key stages that a user must actively initiate and manage: data collection, preprocessing, model training, synthesis, and post-processing.[89] Deepfake creators complete the pre-processing and other steps using a variety of tools. They first gather photos, videos, or audio of the target. That data is then preprocessed using tools to crop faces or clean audio.[90] Machine learning platforms use the data to train a model that mimics the target's likeness or voice.[91] Alternatively, some users skip these initial steps by downloading a pre-trained model created by others and proceed directly to the synthesis stage.[92] Synthesis tools take the trained model and apply it to new content. In the case of video, these tools generate footage by replacing the face in a source video with the target's face learned by the model, adjusting for movements, expressions, and angles.[93] For audio, they generate new

85. U.S. COPYRIGHT OFF., *supra* note 10, at 33.

86. *Id.* (citing Chapman v. Maraj, No. 18 Civ. 9088 (VAP) (SS), 2020 WL 6260021, at *10 (C.D. Cal. Sept. 16, 2020) (holding that the creation of a derivative work without disseminating it was a fair use, and noting that "artists usually experiment with works before seeking licenses from rights holders")).

87. No Fakes Act, § 2(c)(2)(B)(i)–(ii).

88. Thanks to Makena Binker Cosen for the following description of the creation of deepfakes.

89. Catherine Bernaciak & Dominic A. Ross, *How Easy Is it To Make and Detect a Deepfake?*, SOFTWARE ENG'G INST. BLOG (Mar. 4, 2022), https://insights.sei.cmu.edu/blog/how-easy-is-it-to-make-and-detect-a-deepfake/ [https://perma.cc/YT54-HHH3] [https://web.archive.org/web/20250421235721/https://insights.sei.cmu.edu/blog/how-easy-is-it-to-make-and-detect-a-deepfake/]; Edward Hays, *Unraveling the Deepfake Creation Process: A Step-by-Step Guide*, MEDIUM (Aug. 4, 2024), https://medium.com/@toddkslater/unraveling-the-deepfake-creation-process-a-step-by-step-guide-682dcfb5e53d [https://perma.cc/NYY8-NUB6] [https://web.archive.org/web/20250421235849/https://medium.com/@toddkslater/unraveling-the-deepfake-creation-process-a-step-by-step-guide-682dcfb5e53d].

90. *Id.*

91. *Id.*

92. *See* Brian Timmerman et al., *Studying the Online Deepfake Community*, 2 J. ONLINE TRUST & SAFETY 1, 8 (2023).

93. *See supra* note 89.

speech in the target's voice from input text or sound.[94] Post-processing tools refine the output for realism.[95] Each stage of creating a deepfake can be facilitated by widely available programs or services—many of which are not explicitly designed for deepfakes but may be used to address one or more steps in the process. These tools may also be used for a variety of legitimate purposes.

Image generation platforms—which popularly serve many purposes—can also be used to create deepfakes by uploading small add-on models called low-rank adaptations, more commonly referred to as, "LoRAs", which can adjust the base system to mimic a specific individual's appearance.[96] Face-swapping tools streamline the creation of deepfakes even further, but are typically bundled with other visual effects services, such as changing the appearance of an individual's age, gender, or facial expression.[97] Voice cloning technology is frequently marketed to generate authorized digital replicas of a person's voice for use in podcasts, social media, and other content.[98] Even if a platform offers unauthorized voice replicas, it may still avoid liability under the Bill if it provides a substantial number of models of fictional or cartoon characters, which are not protected under its definition of an "individual."[99] Lip-syncing models that align images

94. Jeong-Eun Choi, Karla Schäfer & Sascha Zmudzinski, *Introduction to Audio Deepfake Generation: Academic Insights for Non-Experts*, ACM DIGIT. LIBR. (June 10, 2024), [https://dl.acm.org/doi/pdf/10.1145/3643491.3660286] [https://web.archive.org/web/20250422001329/https://dl.acm.org/doi/pdf/10.1145/3643491.3660286].

95. *See supra* note 89.

96. Joshua Noble, *What Is LoRA (Low-Rank Adaption)?*, IBM (Jan. 28, 2025), https://www.ibm.com/think/topics/lora [https://perma.cc/ZUL7-W4SJ] [https://web.archive.org/web/20250421224303/https://www.ibm.com/think/topics/lora]; @rocketguyishere, *Lora Models and How To Use Them with Stable Diffusion (by ThinkDiffusion)*, CIVITAI (Sept. 5, 2023), https://civitai.com/articles/2099/lora-models-and-how-to-use-them-with-stable-diffusion-by-thinkdiffusion [https://perma.cc/MMG7-6YJD] [https://web.archive.org/web/20250421224706/https://civitai.com/articles/2099/lora-models-and-how-to-use-them-with-stable-diffusion-by-thinkdiffusion].

97. *See, e.g.*, *FaceSwapper*, https://faceswapper.ai [https://perma.cc/QU95-XPT7] [https://web.archive.org/web/20250421223839/https://faceswapper.ai/] (last visited Apr. 21, 2024).

98. *See, e.g.*, *Use Cases*, ELEVENLABS, https://elevenlabs.io/use-cases [https://perma.cc/6DP4-D9ZG] [https://web.archive.org/web/20250310233109/https://elevenlabs.io/use-cases] (last visited Apr. 21, 2024). *See also* Grace Geyde, *AI Voice Cloning: Do These 6 Companies Do Enough to Prevent Misuse?*, CONSUMER REPS. (Mar. 10, 2025), https://innovation.consumerreports.org/AI-Voice-Cloning-Report-.pdf [http://perma.cc/M76R-PV6U [https://web.archive.org/web/20250411223906/https://innovation.consumerreports.org/AI-Voice-Cloning-Report-.pdf].

99. The Bill exclusively protects the voice and likeness of "individual[s]," who are defined as "human being[s], living or dead". *See* No Fakes Act, 119th Cong. §§ 2(a)(3), 2(a)(6), 2(b)(1) (2025) (unintroduced bill) (on file with authors). Thus, the Bill does not cover fictional or cartoon characters like SpongeBob or a "Minecraft Villager," which were the top two trending voice clones on Jammable at the time of publication. *See* @Yazi, *AI SpongeBob (1000) Voice*, JAMMABLE, https://www.jammable.com/custom-spongebob-1000 [https://perma.cc/D5JJ-7RKD] [https://web.archive.org/web/20250421224702/https://www.jammable.com/custom-spongebob-1000] (last visited Apr. 21, 2025); @q9du0qwdiq, AI Minecraft Villager Voice, JAMMABLE, https://www.jammable.com/custom-minecraftvillager [https://perma.cc/JJ56-KPLS] [https://web.archive.org/web/20250421224832/https://www.jammable.com/custom-minecraftvillager] (last visited Apr. 21, 2025). For example, while Tom Kenny—the voice actor behind SpongeBob—is

or videos with audio—including potential digital replicas—are also widely used in corporate training videos, AI-powered dubbing and translation, and virtual assistants.[100] Even real-time face substitution tools may be used to anonymize a streamer's identity during livestreams.[101] Since these services support diverse, non-infringing uses—and typically include terms of service prohibiting misuse, even if enforcement is limited—they are unlikely to incur liability under the Bill as currently drafted.[102]

D. EXCEPTIONS

The bill incorporates a variety of exclusions from liability, primarily for the benefit of certain expressive or informational uses. Thus, § 2(c)(5)(A) excludes, among other things, use of a digital replica "in a bona fide news, public affairs, or sports broadcast or account, provided that the digital replica is the subject of, or is materially relevant to, the subject of such broadcast or account."[103] As a result, incorporation of a digital replica in a news story about AI-generated deepfakes would satisfy the requirement of a nexus between the news use and the digital replica. The nexus requirement would, by contrast, preclude uses such as digital replica of a sportscaster to provide an account of a sporting event.

The exclusions also cover "a representation of the applicable individual as the individual in a documentary or in a historical or biographical manner, including some degree of fictionalization," so long as "the production or use of that digital replica [does not] create[] the false impression that the work is an authentic sound recording, image,

protected as an "individual," a voice clone that mimics SpongeBob does not identify Kenny; it identifies the fictional character, who is not covered by the Bill. While Jammable also offers voice clones of Taylor Swift, Donald Trump, and hundreds of other individuals the Bill aims to protect, it arguable is not *primarily* designed to produce unauthorized digital replicas, nor is it clear that Jammable's non-infringing voice clone offerings serve a "limited commercially significant purpose." *See generally* JAMMABLE, https://www.jammable.com [https://perma.cc/XYQ9-JFWQ] [https://web.archive.org/web/20250407024537/https://www.jammable.com/] (last visited Apr. 21, 2025).

100. *See, e.g.*, *AI Lip Sync Video Generator*, VOZO, https://www.vozo.ai/lip-sync [https://perma.cc/65XM-HLYK] [https://web.archive.org/web/20250421223235/https://www.vozo.ai/lip-sync] (last visited Apr. 21, 2024).

101. For other legitimate uses, see *Deepfake Live: Real-Time Face Swaps Made Easy with Deep Live Cam*, VAARHAFT, https://www.vaarhaft.com/post/deepfake-live-real-time-face-swaps-made-easy-with-deep-live-cam [https://perma.cc/B5QV-K5U7] [https://web.archive.org/web/20250421225107/https://www.vaarhaft.com/post/deepfake-live-real-time-face-swaps-made-easy-with-deep-live-cam] (last visited Apr. 21, 2025).

102. As explained, the Bill does not allow websites that host user-uploaded models to be shut down if they also offer substantial non-infringing content—a likely sensible safeguard. However, it still permits rights holders to seek an injunction against a specific unauthorized model. Yet, the burden remains on individuals to monitor these services and request takedowns. *See* No Fakes Act, § 2(h)(2). This is a particularly heavy burden given the wide range of services that facilitate deepfake creation and rights holders' likely lack of familiarity with the services they must monitor.

103. *Id.* § 2(c)(5)(A)(i).

transmission, or audiovisual work in which the individual participated."[104] This exception would permit a music documentary that uses a digital replica of Taylor Swift in scenes that reimagine certain parts of her life, so long as the scenes are labeled as AI-generated. (This provision appears to be the only part of the NO FAKES Act to address transparency concerns, even obliquely.)

The bill also includes a general exemption, inspired by the U.S. copyright fair use exception for uses "consistent with the public interest in bona fide commentary, criticism, scholarship, satire, or parody."[105] For example, a skit uses a digital replica of a politician that exaggerates her speech patterns or gestures to criticize her policies, or for comedic effect. The bill does not exempt expressive uses generally; such a carve-out would effectively nullify protection, since the bulk of the uses of digital replicas are likely to be produced or used for entertainment purposes.[106]

The bill incorporates a *de minimis* exception for uses that are "fleeting or negligible."[107] This exclusion would appear to be innocuous, until one realizes that much of the work of motion picture "extras" could fall into this category. Under the bill, it seems that a film producer could replace these actors with crowds of digital replicas. Background actors would need to look to private agreements, such as the one recently negotiated between the Screen Actors Guild and motion picture producers, to ensure continued employment and compensation.[108]

E. WHAT GOALS SHOULD A NO FAKES ACT PURSUE, AND HOW MIGHT IT BETTER ACHIEVE THEM, DOMESTICALLY AND INTERNATIONALLY?

Apart from the provision disqualifying the exception for biographical or documentary uses of digital replicas if these do not dispel false impressions that the replica was part of an authentic performance, the bill does not focus on deceit. On the contrary, the bill declares that "[i]t shall not be a defense . . . that the defendant displayed or otherwise communicated to the public a disclaimer stating that the

104. *Id.* § 2(c)(5)(A)(ii) (also including a further condition on this exclusion: "[T]he digital replica is [not] embodied in a musical sound recording that is synchronized to accompany a motion picture or other audiovisual work, except to the extent that the use of that digital replica is protected by the First Amendment to the Constitution of the United States.").

105. *Id.* § (2)(c)(5)(A)(iii).

106. The bill also excludes uses of digital replicas for certain pornographic purposes. *See id.* § 2(c)(5)(B) (the exclusions "shall not apply where the applicable digital replica is used to depict sexually explicit conduct, as defined in section 2256(2)(A) of title 18, United States Code.").

107. *Id.* § (2)(c)(5)(A)(iv).

108. SAG-AFTRA, BACKGROUND ACTORS CONTRACTS DIGEST: A HANDBOOK FOR PERFORMERS WORKING AS BACKGROUND ACTORS (July 2024), https://www.sagaftra.org/sites/default/files/Digest%20-%20Background%20Actors.pdf [https://perma.cc/C44C-J3R9] [https://web.archive.org/web/20250307024047/https://www.sagaftra.org/sites/default/files/Digest%20-%20Background%20Actors.pdf]; Tom Ara et al., *Inside the SAG-AFTRA Collective Bargaining Agreement*, DLA PIPER (Dec. 20, 2023), https://www.dlapiper.com/en-cn/insights/publications/2023/12/inside-the-sag-aftra-collective-bargaining-agreement [https://perma.cc/CH3V-SQUB] [https://web.archive.org/web/20250208031218/https://www.dlapiper.com/en-cn/insights/publications/2023/12/inside-the-sag-aftra-collective-bargaining-agreement].

applicable digital replica, or the applicable product or service described in subsection (c)(2)(B), was unauthorized or disclosed that the digital replica, product, or service was generated through the use of artificial intelligence or other technology."[109] In other words, and contrary to our speculations about trademarks law,[110] clear disclaimers are unavailing. This provision establishes that the true purpose of the NO FAKES Act is to provide individuals (primarily celebrities) an enforceable property right to prevent—or perhaps more significantly—to control the marketing of their voices and visual likenesses. Or more accurately, and potentially perniciously, given the ambiguities surrounding the granting of rights, to provide licensee right holders, especially motion picture and record producers, with rights exclusively to exploit digital replicas.

By contrast, transparency concerns more fully inform the E.U. AI Act, which imposes labelling obligations on users of AI systems that generate or manipulate image, audio or video content that appreciably resembles existing persons and would falsely appear to be authentic or truthful. Such users must clearly and distinguishably disclose that the content has been artificially created or manipulated "by labelling the AI output accordingly and disclosing its artificial origin."[111] Where the content forms part of an "evidently creative, satirical, artistic, fictional or analogous work" the transparency obligations are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work.[112] The AI Act tasks the E.U. AI Office with encouraging and facilitating the drawing up of codes of practice to facilitate effective implementation of the labeling obligations.[113]

The NO FAKES Act's lack of transparency provisions exemplifies its shortcomings relative to the general public. But even as to the subjects of deepfakes, the bill appears to favor grantees who exploit deepfakes over individual subjects. For example, despite the ten-year ceiling on the licensing of *inter vivos* rights, the grant of digital replica rights will in many instances in fact endure for the length of the digital rights term, seventy years after the death of the individual. That is because, as we have seen,[114] expiration of the license terminates rights only as to new uses; digital replicas already created and used during the ten-year license period may continue to be exploited after the license's expiration. This means, for example, that if Taylor Swift granted her record producer rights to create a music video of a digital replica's performance of a song, and the producer exercised those rights during the license's ten-year term, the record producer could continue exclusively to exploit that music video for another five years, and then for renewals of successive five-year periods until the extinction of the rights, seventy years after Swift's death. As a result, the rights may never fully return to the individual who licenses them.

109. No Fakes Act, § 2(e)(3).
110. *See supra* Part I.B.
111. E.U. AI Act, *supra* note 15, art. 50.4, recital (134).
112. *Id.*, recital (134).
113. *Id.*, art. 50.7.
114. *See supra* Part II.B.

The scope of the licensing provisions draws attention to another gap in coverage of individuals' interests: the absence of protections analogous to moral rights. Once rights are licensed, or, in the case of deceased celebrities, assigned "in whole," there appears to be no recourse anticipated in the case of uses that impugn the dignity or integrity of the person depicted. Perhaps the provision for licensing rights "in part,"[115] allows individuals to retain greater control over the uses made of the deepfake, particularly because the required signed writing must "include[] a reasonably specific description of the intended uses of the applicable digital replica."[116] But much may depend on the interpretation of "a reasonably specific description."[117] Dignitary interests may be implicated, for example, if, in the exercise of a grant for uses in musical performances, a digital likeness of a renowned Latina opera singer depicts her singing an anthem associated with white supremacists. But how may the singer draft the grant to limit the authorization to artistically or politically appropriate uses in deepfake musical performances?

The Court of Justice of the European Union ("CJEU") has suggested in the copyright context that the association of the works of an author—in the specific case, a deceased one—with a racist message might weigh against the availability of the parody defense,[118] perhaps a step on the way toward harmonized E.U. moral rights protections.[119] If, as the CJEU suggested, such associations are defense-disqualifying in E.U. member states in the case of an author's copyright-protected work, the case for protections seems just as strong for imposing comparable limits on the rights obtained by a grantee under a license or assignment to use an individual's likeness. The U.S. is notoriously lax in its protection of authors' moral rights,[120] and one may fear a similar *laissez-faire* approach to digital replica rights, once licensed. Protections equivalent to moral rights, it might be argued, are too significant a discouragement to innovating with AI, one of the expressed aims of the NO FAKES bill. At the same time, the bill's aims also evince at least some concern with dignity interests that might be compromised by the creation and dissemination of deepfakes. If the NO FAKES Act or similar bill is reproposed in the current Congress, we would encourage some further

115. No Fakes Act, § 2(b)(2)(A)(i)(III), (iii)(I) (2025) (unintroduced bill) (on file with authors).

116. *Id.* § 2(b)(2)(B)(i)(II)(bb).

117. *Id.* § 2(b)(2)(B).

118. Case C-201/13, Deckmyn v. Vandersteen, ECLI:EU:C:2014:2132 (Sept. 3, 2014).

119. Aaron Schwabach, *Bringing the News from Ghent To Axanar: Fan Works and Copyright After* Deckmyn *and Subsequent Developments*, 22 TEX. REV. ENT. & SPORTS L. 37, 68 (2021) (suggesting that the right of an author to keep his work free from a racist message is "based on a moral rights theory with no equivalent in U.S. copyright law").

120. Jane. C. Ginsburg, *Keynote Address: The Most Moral of Rights: The Right To Be Recognized as the Author of One's Work*, 8 GEO. MASON J. INT'L COM. L. 44, 46, 52 (2016); Jane C. Ginsburg, *Moral Rights in the U.S.: Still in Need of a Guardian* Ad Litem, 30 CARDOZO ARTS & ENT. L.J. 73, 74, 89 (2012); Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After* Dastar, 61 N.Y.U. ANN. SURV. AM. L. 111, 144–50 (2005).

thinking about how these interests might be protected following a grant of rights under a license or assignment.[121]

The question of the bill's international reach also warrants further consideration. Where uses are regulated through private arrangements—as in the case of the SAG-AFTRA 2023 Agreement with motion picture and television producers[122]—we may expect questions such as to whom and where the stipulations apply to be left to private ordering. Beyond those contexts, there is a case for attending to these matters in the legislation. Our brief survey of extant legal measures reveals a number of uncertainties about such questions.

Given its focus on the inadequacies of U.S. domestic laws, it is understandable that the Copyright Office did not address the international dimensions of the proposed NO FAKES regime. For future bills, there are both practical and legal reasons for identifying the international dimension as an area for further consideration. As for the protection of foreigners in the U.S., the NO FAKES draft discloses no discriminatory intent: The "individual" who is the beneficiary of the right is simply defined to mean "a human being, living or dead," conditioned on neither nationality nor domicile. Even so, the strength of protections for many foreign individuals may turn on the construction of "readily identifiable" in the definition of "digital replica." It would be unfortunate if the bill permitted backdoor parochialism, on the basis that many foreigners will be insufficiently well known to American audiences.

Congress should also work through the extent to which protected individuals may seek relief for infringements of the right in foreign territories. The means to seek relief in non-U.S. jurisdictions, under the applicable foreign laws, will be available to none but the wealthiest individuals—a result that is hardly consistent with the espoused aims to protect ordinary individuals. If anything, the suite of recent Supreme Court cases adopting a more stringent approach to the extraterritorial reach of domestic statutes—including intellectual property legislation[123]—teaches that it cannot be assumed that courts will, or any longer can, construe domestic legislation to reach foreign conduct, in the absence of explicit provision for extraterritorial application. But because the presumption against extraterritorial application is just that, a presumption, not a prohibition, those cases sketch a blueprint for legislative drafting. To surmount the presumption, the bill's drafting, and the policy analysis informing it, should clearly identify the intended geographical reach of any new intellectual property right.

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121. This may require, for example, providing additional detail on the meaning of "a reasonably specific description of the intended uses of the applicable digital replica" in the stipulations for a valid license under § 2(b)(2)(B). No Fakes Act, § 2(b)(2)(B)(i)(bb).

122. 2023 Memorandum of Agreement Between the Screen Actors Guild-American Federation of Television and Radio Artists and the Alliance of Motion Picture and Television Producers (2023), https://www.sagaftra.org/sites/default/files/2023_Theatrical_Television_MOA.pdf [https://perma.cc/73KQ-CMMR] [https://web.archive.org/web/20250208230725/https://www.sagaftra.org/sites/default/files/2023_Theatrical_Television_MOA.pdf].

123. *See* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412 (2023).

Congress might, for example, affirm the availability of supplemental jurisdiction to plead claims arising under foreign laws in conjunction with claims arising under U.S. law. [124] Application of foreign laws would align with the Supreme Court's determination, reflected in the presumption against extraterritorial application of domestic laws discussed above, to prevent unintended clashes with foreign laws,[125] including foreign intellectual property laws.[126] That said, given the recent emergence of issues surrounding the regulation of deepfakes, and the corresponding legislative vacuum in many jurisdictions, the prescriptive comity concerns underlying the Court's reticence about extraterritorial applications of U.S. laws might not apply with the same force. The risk of serious clashes with foreign laws might be diminished in an area of legal regulation in which many countries (outside of the E.U.) have yet to devise distinct domestic responses. Accordingly, it might also be appropriate for Congress to explore potential extraterritorial applications of the prescriptions in the NO FAKES Act, including reaching foreign dissemination of deepfakes if their creation or initial dissemination originated in the U.S. This approach echoes copyright's "predicate acts" doctrine,[127] which enables a U.S. court to award damages for foreign-distributed copies if the initial copy was made in the U.S.

Looking beyond extraterritoriality, a bill regulating digital replicas might also provide a context in which Congress could experiment with a site blocking regime[128]—a remedy that is available in over fifty nations,[129] including members of the European

124. In the copyright context, the ability to identify and adjudicate foreign laws was confirmed in Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co., 145 F.3d 481 (2d Cir. 1998). The Supreme Court of the United Kingdom held in Lucasfilm Ltd. v. Ainsworth [2011] UKSC 39 that a domestic court may exercise jurisdiction over foreign copyright disputes, applying foreign laws, only where proceedings are not principally concerned with question of title. U.S. courts sitting in diversity have also applied foreign copyright laws even in the absence of a copyright infringement allegedly occurring in the U.S. *See, e.g.*, London Film Prods. Ltd. v. Intercont'l Commc'ns., Inc., 580 F. Supp. 47 (S.D.N.Y. 1984) (holding that no U.S. copyright claim existed because the films' U.S. copyrights had expired, while adjudicating copyright claims concerning their unauthorized exhibitions in several Latin American nations).

125. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013) (quoting Equal Emp'. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). *See* Rochelle Dreyfuss & Linda Silberman, *Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases*, 8 CYBARIS INTELL. PROP. L. REV. 265, 272 (2017).

126. *See* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007); *Abitron Austria GmbH*, 600 U.S. at 426–28.

127. *See, e.g.,* Tire Engineering and Distribution, LLC v. Shandong Linglong Rubber Company, Ltd., 682 F.3d. 292, 306-08 (4th Cir. 2012); Los Angeles News Serv. v. Reuters TV Int'l., 149 F.3d 987, 990-92 (9th Cir. 1998); Update Art, Inc. v. Modiin Pub., Ltd., 843 F.2d 67, 73 (2d Cir. 1988). Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 52 (2d Cir. 1939).

128. In 2023, the U.S. Patent and Trademark Office held a series of roundtables focusing on anti-piracy efforts, including website blocking. Legislation providing for the issuing of orders requiring the blocking of access to foreign websites was introduced into Congress in 2025 by Representative Zoe Lofgren. Foreign Anti-Digital Piracy Act H.R.791, 119th Cong. (2025).

129. WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) ADVISORY COMM. ON ENFORCEMENT, SHARING EXPERIENCES AND BEST PRACTICES ON SITE BLOCKING/NO-FAULT INJUNCTIONS (2025), https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_17/wipo_ace_17_14_prov.pdf [https://perma.cc/M7BW-FRMV]

Union,[130] enabling right holders to seek a court order requiring local internet service providers to block subscribers' access to websites that facilitate copyright and other forms of intellectual property piracy.[131] U.S. proposals for introducing site blocking to combat industrial scale copyright piracy attracted pushback,[132] and skeptics continue to decry the case for bringing U.S. copyright law into line with other jurisdictions.[133] Even so, the normative case for blocking access to sites peddling or facilitating access to deepfakes is perhaps even more compelling than for copyright. Deepfake technology is frequently (on some accounts overwhelmingly) [134] used to generate pornographic material—and the individuals left without recourse under current laws are likely to be the "everyday" people to whom the NO FAKES Act's congressional sponsors referred, rather than corporate owners of lucrative portfolios of personality rights. Seen in this light, the need to secure effective relief for deepfake victims should, we hope, garner greater sympathy than advocates of site-blocking to remedy copyright infringement have enlisted. Site blocking orders are, however, only a localized remedy—the defendants are the internet service providers operating within the jurisdiction.[135] They therefore affect only the availability of the offending websites in the territory in which

[https://web.archive.org/web/20250220020248/https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_17/wipo_ace_17_14_prov.pdf].

130. Article 8(3) of the Information Society Directive requires that rightsholders should be in a position to apply for an injunction against an intermediary whose services are used by a third party to infringe copyright or a related right. Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10. The EU Enforcement Directive extends the obligation to all intellectual property rights. *See* Directive 2004/48/EC of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 157) 45.

131. The Digital Millennium Copyright Act (1998) gives courts the power to enter "[a]n order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider's system or network," but it is not clear how often copyright holders seek or obtain that remedy. 17 U.S.C. § 512(j)(1)(A)(i). *See* Mavrix Photographs LLC v. LiveJournal, Inc., No. SACV 13-517 (CJC), 2014 WL 6450094, at *9 (C.D. Cal. Sept. 19, 2014), *rev'd*, 853 F.3d 1020 (9th Cir. 2017), *opinion amended and superseded*, 873 F.3d 1045 (9th Cir. 2017), *and rev'd*, 873 F.3d 1045 (9th Cir. 2017) (finding that such relief is moot where internet service providers already disable access to infringing content and terminate repeat offenders who have uploading infringing content to the platform).

132. *See* Karyn A. Temple, *Beyond Whack-A-Mole: Content Protection in the Age of Platform Accountability*, 45 COLUM. J.L. & ARTS 147, 158–59, 167 (2022) (discussing widespread opposition to the adoption in the U.S. of site blocking orders).

133. *See, e.g.*, Mitch Stoltz & Katharine Trendacosta, *The Motion Picture Association Doesn't Get To Decide Who the First Amendment Protects,* ELEC. FRONTIER FOUND. (Apr. 10, 2024), https://www.eff.org/deeplinks/2024/04/mpa-doesnt-get-decide-who-first-amendment-protects [https://perma.cc/LQ56-48NK]
[https://web.archive.org/web/20250303000404/https://www.eff.org/deeplinks/2024/04/mpa-doesnt-get-decide-who-first-amendment-protects].

134. *See* Tom Simonite, *Most Deepfakes Are Porn, and They're Multiplying Fast*, WIRED (Oct. 7, 2019), https://www.wired.com/story/most-deepfakes-porn-multiplying-fast/ [https://perma.cc/3MFR-WG74] [https://web.archive.org/web/20250303001258/https://www.wired.com/story/most-deepfakes-porn-multiplying-fast/].

135. Foreign operators of the blocked websites are necessarily affected, raising due process concerns. For discussion of how these concerns were addressed by the Australian legislature, see Graeme W. Austin, *Legislating for Site-Blocking Orders*, 31 N.Z. U. L. Rev. 1, 12 (2024).

the internet service provider operates.[136] They would not assist where deepfakes continue to circulate in other jurisdictions. Hence our suggestions above focusing on other legal avenues for reaching foreign conduct.

III. CONCLUSION

We have examined the NO FAKES Act in some detail. The bill's as-yet unenacted state invites analysis in order to clarify its objectives, and, by identifying ways in which the text falls short of those objectives, we hope to improve the chances for those objectives' attainment. We also advance our critique of proposed U.S. legislation with an eye to law reform efforts in other countries, particularly in the British Commonwealth of Nations.[137] We hope that other legislative drafters, informed by our endeavors, may avoid some of the pitfalls we have pointed out, and, most importantly, may strike a better balance between the transparency interests of the general public, the personal and pecuniary interests of the subjects of deepfakes, and the commercial interests of the exploiters of deepfakes.

136. The availability of a qualifying deepfake to an American audience should suffice for a connecting factor, and blocking access would further the deception-discouraging ends touted by bill's congressional sponsors.

137. *See, e.g.*, Ng-Loy Wee Loon, *Australian Legislation Abroad: Singaporean Pragmatism and the Role of Australian Scholarship in Singaporean Copyright Law, in* ACROSS INTELLECTUAL PROPERTY: ESSAYS IN HONOUR OF SAM RICKETSON 92, 92–94 (2020) (discussing the extensive borrowing from U.K. and Australian templates in the development of Singapore's copyright laws).