

**From Merchandise to Movies: The Rapid—and Potentially
Worrisome—Expansion of NILV Regulation to Cover Uses in
Expressive Works**

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INTRODUCTION

Drive down the highway and see your face on a billboard advertising a product, when you had never given permission to use your likeness? Notice your visage used on a piece of merchandise when you had never consented to such use? Hear your voice used in a jingle to plug a product? The law in virtually every state provides a clear remedy for such commercial uses of one’s name, image, likeness, or voice: Sue for violation of your right of publicity, or, as termed in some jurisdictions, your right of privacy.¹ But what if your likeness or voice appears in a movie or television show, or a YouTube or TikTok video, not to hawk a product, but to tell a story, or as part of a parody or satire, or to make a political point? Such uses have traditionally remained outside of the ambit of right of publicity law.

Now? It’s not so clear. As this Article will detail, there has been a recent sea change in U.S. state law regulating name, image, likeness, and voice (“NILV”). Concerned by technological developments that have enabled the easy creation of “digital replicas” or “deepfakes” of individuals, and fueled by lobbying by the recording industry and representatives of actors and singers, states have, over the past decade, proposed and in some cases enacted numerous new laws regulating the use of NILV outside the advertising/merchandising context, and explicitly in the context of expressive works such as movies and songs.² And Congress is considering a bill that, if enacted, would establish an entire new federal intellectual property right covering likeness and voice.³ The emergence of new forms of harm may justify new laws regulating NILV. But these

1. See, e.g., CAL. CIV. CODE § 3344(a) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof”); N.Y. CIV. RIGHTS LAW § 51 (“Any person whose name, portrait, picture, likeness or voice is used within this state for advertising purposes or for the purposes 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. . .”). For a comprehensive overview of state right of publicity laws, see JENNIFER E. ROTHMAN, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <https://rightofpublicityroadmap.com/> [<https://web.archive.org/web/20260216052417/https://rightofpublicityroadmap.com/>] (last visited Feb. 23, 2026).

2. See *infra* Part II.

3. See Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2025 (“NO FAKES Act”), S. 1367, 119th Cong. (2025).

new laws, which by their very terms regulate the content of speech—which makes them “presumptively unconstitutional”⁴—raise serious questions about whether they are consistent with First Amendment protections for non-commercial speech, and will likely be the subject of litigation challenging their constitutionality in coming decades.

I. EXISTING STATE RIGHT OF PUBLICITY LAWS

Right of publicity is the body of state law prohibiting unauthorized exploitation of an individual’s name, image, likeness, or voice, typically for commercial purposes, such as in an advertisement or on merchandise. Today, in virtually every state, an individual has a cause of action if his or her likeness is used without permission on a billboard or in a television advertisement, or on a product like a coffee mug or cereal box. These laws are by their terms technology-neutral; they apply to uses of an individual’s NILV whether done using traditional technologies like photography, or via new technologies like digital replicas created by artificial intelligence-powered tools.⁵

Of crucial importance, right of publicity properly understood has no place in the context of non-commercial speech—speech in the form of movies, television programs, books, news articles and broadcasts, songs, etc., often termed “expressive works”⁶—which receives full First Amendment protection.⁷ Recognizing the need to prevent right of publicity statutes from encroaching on First Amendment rights, states that have enacted or amended such statutes in the past several decades have routinely included explicit statutory exceptions, known as “expressive-works exemptions,” which make clear that this body of law has no application in the context of creative and journalistic works.⁸ States have codified these exemptions precisely because they know that, if not properly cabined to commercial uses, right of publicity statutes risk chilling

4. *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 163 (2015).

5. *See Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 121–22 (2018) (holding that a digital avatar may qualify as a “portrait” under New York right of privacy law).

6. The term “expressive works” refers to works that are “not an advertisement for or endorsement of a product.” *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396 (2001).

7. Under well-established First Amendment doctrine, the term “commercial speech” refers to “speech which does no more than propose a commercial transaction.” *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted). Artistic, literary, journalistic, and similar forms of speech are not “commercial speech”—even if sold for a profit. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“It is urged that motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree.”); *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023) (rejecting argument that speech receives lesser First Amendment protection when sold for a profit or by a corporation: “none of that makes a difference”); *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016) (The movie “*The Hurt Locker* is not speech proposing a commercial transaction. Accordingly, our precedents relying on the lesser protection afforded to commercial speech are inapposite.”); *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 850 (Cal. Ct. App. 2018) (The fact that “creative works generate income for their creators does not diminish their constitutional protection.”); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 58 (2006) (The protections of the First Amendment extend to “music, films, paintings, and entertainment, whether or not sold for a profit.”).

8. *See, e.g.*, CAL. CIV. CODE § 3344.1(a)(1)(B)(i) (2024); OHIO REV. CODE ANN. § 2741.09 (1999); ARK. CODE ANN. § 4-75-1110 (2016); N.Y. CIV. RIGHTS LAW § 50-f(2)(d)(i) (2020); LA. STAT. ANN. § 51:470.5 (2022).

vast swaths of speech, including art, humor, political commentary, journalism, and criticism, all of which are the lifeblood of a free and well-functioning democracy, allowing us to debate, scrutinize, and laugh at the world around us. And absent such exemptions, right of publicity defendants sued over references to and depictions of real people would bear the burden of asserting their First Amendment rights as affirmative defenses in individual cases, an expensive and arduous task that itself chills speech.

Despite the inapplicability of right of publicity laws to uses in expressive works, individuals unhappy with their portrayals in such works nonetheless sometimes assert such claims (typically invoking statutes or common-law doctrines that lack explicit expressive-works exemptions). The courts just as routinely hold that the First Amendment bars these attempts at censorship, though often only after lengthy and expensive litigation.⁹

Several new forms of harm stemming from unauthorized uses of an individual's image or likeness have led to calls for new legislation to address uses outside the advertising/merchandising context. First, so-called "deepfake pornography," or "non-consensual intimate images." As with other internet-related technologies, the pornography sector was among the early adopters.¹⁰ In late 2017, videos in which the faces of prominent actresses and singers including Gal Gadot, Scarlett Johansson, Taylor Swift, and Aubrey Plaza were swapped onto the bodies of pornographic actresses in explicit scenes began proliferating on the internet.¹¹ Second, the replication of actors' or singers' likenesses or voices in new works in which they did not actually perform. While the potential for such a phenomenon had been recognized decades earlier,¹² and a short film that premiered in 1987 at the Canadian Engineering Centennial Convention actually featured "computer-generated and synthetic" versions

9. See, e.g., *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (N.Y. App. Div. 2021) (holding that the First Amendment barred claim by convicted murderer over portrayal in docudrama, but only after *eight years* of litigation in New York state courts, including multiple appeals and an initial court order—later overturned—that barred broadcast of television movie); *De Havilland*, 21 Cal. App. 5th at 845 (First Amendment barred claim by actress over portrayal in docudrama (reversing trial court order allowing claim to proceed)); *Sarver*, 813 F.3d at 896 (First Amendment barred claim by individual allegedly portrayed in movie *The Hurt Locker*); *Tyne v. Time Warner Ent. Co., L.P.*, 901 So.2d 802 (Fla. 2005) (First Amendment barred claims involving movie *The Perfect Storm*); *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) ("Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features, or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona." (quoting George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 467 (1991))).

10. See, e.g., Michael Brooks, *The Porn Pioneers*, THE GUARDIAN (Sep. 29, 1999), <https://www.theguardian.com/technology/1999/sep/30/onlinesupplement> [<https://web.archive.org/web/20260207001545/https://www.theguardian.com/technology/1999/sep/30/onlinesupplement>] (describing pornography industry's early adoption of internet technologies).

11. See Samantha Cole, *AI-Assisted Fake Porn Is Here and We're All Fucked*, VICE (Dec. 11, 2017), <https://www.vice.com/en/article/gal-gadot-fake-ai-porn/> [<https://web.archive.org/web/20260207001752/https://www.vice.com/en/article/gal-gadot-fake-ai-porn/>].

12. See Joseph J. Beard, *Casting Call at Forest Lawn: The Digital Resurrection of Deceased Entertainers—A 21st Century Challenge for Intellectual Property Law*, 8 HIGH TECH. L.J. 101, 102 (1993).

of Marilyn Monroe and Humphrey Bogart,¹³ it was the rapid developments in generative artificial technologies beginning in the early 2020s that fueled alarm among actors and recording artists, as “deepfake Tom Cruise”¹⁴ and a song sung by “Fake Drake” and a voice clone of The Weeknd¹⁵ went viral on the internet.¹⁶ And third, politicians raised concerns that digital replicas of them doing something they never did, or saying something they never said, could be deployed by political opponents, or pranksters, to harm their election prospects.¹⁷

Why were existing state right of publicity and related laws inadequate to address such bad acts? At least two reasons. First, many state right of publicity laws are by their terms limited to commercial uses, either through the scope of the right itself,¹⁸ or via “expressive works exemptions” that explicitly carve out uses of one’s likeness in movies, television programs, books, songs, plays, etc. from the ambit of such statutes.¹⁹ Second, even where state right of publicity statutes were not explicitly limited to commercial uses, as a practical matter, enforcement actions to remove material containing unlawful digital replicas or deepfakes could not be undertaken against platforms (YouTube, Twitter/X, Instagram, Facebook, etc.) that hosted them, due to the protections afforded to such platforms by section 230 of the Communications Decency Act of 1996.²⁰ While section 230 contains a carve-out for “any law pertaining to intellectual property,”²¹ some courts—including the U.S. Court of Appeals for the Ninth Circuit, which includes California, where many performers live, and where most of the major social

13. See *id.* at 104 (citing Nadia Magnenat-Thalmann & Daniel Thalmann, *The Direction of Synthetic Actors in the Film* *Rendezvous à Montréal*, IEEE COMPUT. GRAPHICS & APPLICATIONS, Dec. 1987, at 9).

14. See Rachel Metz, *How a Deepfake Tom Cruise on TikTok Turned into a Very Real AI Company*, CNN BUS. (Aug. 6, 2021), <https://www.cnn.com/2021/08/06/tech/tom-cruise-deepfake-tiktok-company> [<https://web.archive.org/web/20260208225121/https://www.cnn.com/2021/08/06/tech/tom-cruise-deepfake-tiktok-company>].

15. See Joe Coscarelli, *An A.I. Hit of Fake “Drake” and “The Weeknd” Rattles the Music World*, N.Y. TIMES (April 19, 2023), <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html> [<http://web.archive.org/web/20230419210519/https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html/>].

16. See *Who Owns You? SAG-AFTRA Steps Up the Fight to Ensure Members Have Control of Their Own Likenesses*, SAG-AFTRA MAG., Summer 2018, at 30–33, <https://digital.copcomm.com/i/1012073-summer-2018/31?m4=> [<https://perma.cc/MY7X-UC73?type=image>].

17. See, e.g., Shannon Bond, *How AI Deepfakes Polluted Elections in 2024*, NAT’L PUB. RADIO (Dec. 21, 2024), <https://www.npr.org/2024/12/21/nx-s1-5220301/deepfakes-memes-artificial-intelligence-elections> [<https://web.archive.org/web/20260207003848/https://www.npr.org/2024/12/21/nx-s1-5220301/deepfakes-memes-artificial-intelligence-elections>] (reporting on phone calls to New Hampshire voters using fake “Joe Biden” voice and urging them not to vote in primary election).

18. See, e.g., ARK. CODE § 4-75-1108 (“[A] person who commercially uses the name, voice, signature, photograph, or likeness of an individual is liable to the holder of the property right provided by this subchapter . . .”); N.Y. CIV. RIGHTS LAW § 51 (limited to uses “for advertising purposes or for the purposes of trade”).

19. See, e.g., CAL. CIV. CODE § 3344.1(a)(1)(B)(i) (2024); OHIO REV. CODE ANN. § 2741.09 (1999); ARK. CODE ANN. § 4-75-1110 (2016); N.Y. CIV. RIGHTS LAW § 50-f(2)(d) (2020); LA. STAT. ANN. § 51:470.5 (2022).

20. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

21. 47 U.S.C. § 230(e)(2).

media platforms are headquartered and often mandate venue for disputes²²—have interpreted that carve-out to apply only to *federal* intellectual property claims, meaning that the platforms face no liability for state right of publicity claims based on user-posted material, and thus are under no legal obligation to remove material that violates such state laws.²³

II. NEW LEGISLATION

The last decade has seen the introduction, and in many cases enactment, of legislation intended to address the three distinct forms of harm noted above.²⁴ While the statutes vary in scope, as of September 2025 at least forty-five states had enacted laws addressing deepfake pornography.²⁵ And in May 2025, President Trump signed into law the “TAKE IT DOWN Act,” federal legislation that criminalizes the nonconsensual publication of intimate images, including both actual photographs²⁶ as well as “digital forgeries” (i.e., deepfakes), and requires platforms to remove such material within 48 hours of receipt of a notice.²⁷ Regarding election-related deepfakes, “[b]y the end of 2024, twenty states had election deepfake laws, two of them outlawing such media material even if it was labeled not authentic.”²⁸

New York was the pioneer in enacting legislation seeking to protect actors and recording artists from unauthorized replication of their likeness and voices in new performances. By enacting Civil Rights Law § 50-f in 2020, the New York Legislature created a new postmortem right of publicity that covered commercial uses of a “deceased personality’s” name, voice, signature, photograph, or likeness, for advertising or merchandising purposes, for forty years after the personality’s death.²⁹ But separately, this new statute contained in § 50-f(2)(b) a novel right against deceptive uses

22. See, e.g., *Terms of Service*, YOUTUBE (Dec. 15, 2023), <https://www.youtube.com/t/terms> [<https://web.archive.org/web/20260221144433/https://www.youtube.com/t/terms>] (designating the “federal or state courts of Santa Clara County, California” as forum for disputes).

23. *Compare Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (IP carve-out in § 230(e)(2) applies only to federal IP claims), with *Hepp v. Facebook*, 14 F.4th 204, 210 (3d Cir. 2021) (Section 230’s IP carve-out applies to both federal and state IP claims.).

24. See *supra* Part I.

25. *Tracker: State Legislation on Intimate Deepfakes*, PUB. CITIZEN (updated Oct. 20, 2025), <https://www.citizen.org/article/tracker-intimate-deepfakes-state-legislation/> [<https://web.archive.org/web/20260221174741/https://www.citizen.org/article/tracker-intimate-deepfakes-state-legislation/>].

26. The non-consensual dissemination of actual photographs of an individual who is nude or engaging in sexual conduct is often referred to as “revenge porn.”

27. See Pub. Law No. 119-12, 139 Stat. 55, 119th Congress (May 19, 2025); see also Victoria Killion, *The TAKE IT DOWN Act: A Federal Law Prohibiting the Nonconsensual Publication of Intimate Images*, CONG. RSCH. SERV. (May 20, 2025), <https://www.congress.gov/crs-product/LSB11314> [<https://web.archive.org/web/20260211145324/https://www.congress.gov/crs-product/LSB11314>].

28. Chris Hables Gray, *Political Deepfakes and Elections*, FREE SPEECH CTR., MIDDLE TENN. STATE UNIV. (updated Jan. 11, 2025), <https://firstamendment.mtsu.edu/article/political-deepfakes-and-elections/#> [<https://web.archive.org/web/20260221175615/https://firstamendment.mtsu.edu/article/political-deepfakes-and-elections/>].

29. N.Y. CIV. RIGHTS LAW § 50-f(2)(a), (8).

of a digital replica of a deceased performer in expressive works, where the performer died domiciled in New York. The new right created by the 2020 law was narrow and is more accurately described as a consumer-fraud provision than an intellectual property right. The provision applied only to uses of a “digital replica” (as defined in § 50-f(1)(c)) in a “scripted audiovisual work as a fictional character or for the live performance of a musical work.”³⁰ And it only applied “if the use is likely to deceive the public into thinking it was authorized by” specified heirs of the deceased performer.³¹ (As described below, the 2020 law was significantly amended in 2025.)³²

Louisiana followed suit in 2022 with the Allen Toussaint Legacy Act, named after the New Orleans jazz musician whose relatives, following Toussaint’s death, objected to vendors selling t-shirts and beer koozies depicting their departed loved one.³³ The Louisiana statute contains a traditional right of publicity (i.e., limited to commercial uses) that applies during an individual’s life plus up to fifty years after. But it also includes a provision, which applies only to living individuals, barring “use [of] a digital replica in a public performance of a scripted audiovisual work, or in a live performance of a dramatic work, if the use is intended to create, and creates, the clear impression that the professional performer is actually performing in the role of a fictional character.”³⁴

The floodgates opened in 2024, with broad digital replica legislation introduced in at least ten states, and enacted in three: California, Tennessee, and Illinois. California’s A.B. 1836³⁵ tore down the firewall in that state’s post-mortem right of publicity statute, Civil Code section 3344.1, that had unambiguously excluded expressive works from the scope of the statute.³⁶ As amended by A.B. 1836, section 3344.1 now provides a cause of action against one “who produces, distributes, or makes available the digital replica of a deceased personality’s voice or likeness *in an expressive audiovisual work or sound recording* without prior consent from the relevant right holder,” albeit with exceptions for uses typically protected by the First Amendment, including comment, criticism, scholarship, satire, parody, and depictions in biopics and docudramas.³⁷ Tennessee’s ELVIS Act (“Ensuring Likeness Voice and Image Security Act”), enacted following a heavy lobbying effort by that state’s influential music industry, greatly expanded its existing right of publicity statute, adding “voice” to its scope of protection and creating a broad new cause of action against one who “publishes, performs, distributes, transmits, or otherwise makes available to the public an individual’s voice or likeness,

30. *Id.* at § 50-f(2)(b) (with definitions at § 50-f(1)(c)).

31. *Id.*

32. *See infra* note 44 and accompanying text.

33. *See Meeting of Apr. 30, 2019, H. Comm. on Civ. Law & Proc.*, 2019 Reg. Sess. (La. 2019) (statement of Tim Kappel, Louisiana Music Creators, in support of H.B. 377 (Allen Toussaint Legacy Act)).

34. LA. STAT. ANN. §§ 51:470.1–470.6 (2022), also known as the Allen Toussaint Legacy Act.

35. A.B. 1836, 2023–24 Sess. (Cal. 2024).

36. *See* CAL. CIV. CODE § 3344.1(a)(1)(B) (exempting uses in “a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works . . . if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.”).

37. CAL. CIV. CODE § 3344.1(a)(2)(A)(i)–(ii) (emphasis added).

with knowledge that use of the voice or likeness was not authorized by the individual.”³⁸ Tennessee’s right lasts for the life of the individual and extends postmortem for a term of potentially *forever*, assuming continuing exploitation of the right.³⁹ While the statute includes a set of exemptions intended to protect free expression,⁴⁰ the ELVIS Act considerably muddied the waters by providing that those exemptions now apply only “[t]o the extent such use [of one’s NILV] is protected by the First Amendment to the United States Constitution.”⁴¹ This new language would essentially require a full First Amendment analysis to determine whether the statutory exemptions apply, which undermines the very purpose of the exemptions: to provide clarity so that parties can easily determine whether the statute applies to proposed conduct. And Illinois enacted H.B. 4875, which amended its existing right of publicity law to cover uses “for the purposes of distributing, transmitting, or otherwise making available a sound recording or audiovisual work that contains a simulated or artificially created version of an individual’s identity, as a substitute for, in place of, or in a competitive fashion with, a sound recording or audiovisual work the individual would otherwise have personally created using the individual’s identity.”⁴²

In 2025, Montana enacted its own digital replica statute, modeled on Tennessee’s ELVIS Act, though with a shorter (twenty-year) post-mortem term and application only to Montana domiciliaries.⁴³ New York’s legislature also enacted a bill amending its 2020 post-mortem right of publicity statute to create a true intellectual property right that applies to expressive works rather than an anti-fraud provision.⁴⁴ Also, California, Illinois, and New York have enacted bills that do not themselves create new digital replica rights, but instead establish rules governing the licensing of such rights; a similar bill is pending in Massachusetts.⁴⁵ In short, these bills require that a digital replica license include a “reasonably specific description of the intended uses of the digital replica,” unless the individual is represented by counsel or by a union whose “collective bargaining agreement expressly addresses uses of digital replicas.”⁴⁶ (The

38. TENN. CODE ANN. § 47-25-1105(a)(2); see Press Release, Office of the Governor, Tennessee First in the Nation to Address AI Impact on Music Industry (Jan. 10, 2024), <https://www.tn.gov/governor/news/2024/1/10/tennessee-first-in-the-nation-to-address-ai-impact-on-music-industry.html>

[<https://web.archive.org/web/20260324234619/https://www.tn.gov/governor/news/2024/1/10/tennessee-first-in-the-nation-to-address-ai-impact-on-music-industry.html>].

39. TENN. CODE ANN. § 47-25-1104.

40. TENN. CODE ANN. § 47-25-1107.

41. *Id.* at (a).

42. H.B. 4875, 103rd Gen. Assem., Reg. Sess. (Ill. 2023–24).

43. H.B. 513, 69th Leg. (Mont. 2025).

44. 2025-S8391, 2025–26 Reg. Sess. (N.Y. 2025).

45. See A.B. 2602, 2023–24 Sess. (Cal. 2024); H.B. 4762, 103d Gen. Assem., Reg. Sess. (Ill. 2024), amended by H.B. 3178, 104th Gen. Assem., Reg. Sess. (Ill. 2025); S.B. 7676-B, 2023–24 Gen. Assem. (N.Y. 2024); H.B. 74, 194th Gen. Ct., Reg. Sess. (Mass. 2025); see also H.B. 388, 2025–26 Gen. Assem., Reg. Sess. (Vt. 2025) (a similar bill introduced in Vermont which failed to advance).

46. See e.g., CAL. LAB. CODE § 927(a)(2)(A)(3) (enacted via A.B. 2602 (2024)).

topic of digital replicas is indeed addressed in the 2023 collective bargaining agreement between producers and SAG-AFTRA, the union representing actors.)⁴⁷

Also in the 2024–2025 period, at least twelve states introduced but, at least so far, failed to enact, broad right of publicity/digital replica bills that would apply to uses in expressive works, including in Texas,⁴⁸ Mississippi,⁴⁹ Kentucky,⁵⁰ Louisiana,⁵¹ New Jersey,⁵² New Mexico,⁵³ Georgia,⁵⁴ Maryland,⁵⁵ Oklahoma,⁵⁶ South Carolina,⁵⁷ Ohio,⁵⁸ and Massachusetts.⁵⁹

At the federal level, the NO FAKES Act, a bill that would establish a new federal intellectual property right in one's voice and likeness, including against uses in expressive works, was introduced by a bipartisan group of senators in 2024 and re-introduced with some changes in 2025.⁶⁰ The rights under NO FAKES would last for the life of the depicted individual plus seventy years (mirroring the term of copyright, but with earlier termination in the event of a specified period of nonuse) and includes exceptions for uses including parody, satire, commentary, and to depict the "individual as the individual in a documentary or in a historical or biographical manner, including some degree of fictionalization," though with a carve-out for deceptive uses.⁶¹ And it includes a comprehensive intermediary-liability regime, roughly modeled on section 512 of the Digital Millennium Copyright Act, providing a notice-and-takedown process and a safe harbor shielding from liability online services that promptly disable access to works containing unauthorized digital replicas upon receipt of notices.⁶² The NO FAKES Act has been endorsed by a wide array of stakeholders with an interest in regulation of digital replicas, including the Recording Industry Association of America (representing record labels), the Recording Academy (recording artists), SAG-AFTRA, the Motion Picture Association (major motion picture and television studios), OpenAI,

47. See *Digital Replicas 101*, SAG-AFTRA (2024), https://www.sagaftra.org/sites/default/files/sa_documents/DigitalReplicas.pdf [https://web.archive.org/web/20250406043659/https://www.sagaftra.org/sites/default/files/sa_documents/DigitalReplicas.pdf].

48. H.B. 3950, 89th Leg. (Tex. 2025).

49. S.B. 2778, 2024 Reg. Sess., Miss. Gen. Assemb. (Miss. 2024).

50. S.B. 317, 2024 Reg. Sess., Ky. Gen. Assemb. (Ky. 2024).

51. S.B. 6, 2024 Reg. Sess., La. Gen. Assemb. (La. 2024) (passed after amended to cover only sexually explicit images).

52. A. 4480, 2024–25 Reg. Sess. (N.J. 2024).

53. H.B. 221, 57th Leg., 2025 Reg. Sess. (N.M. 2025).

54. H.B. 566, 159th Gen. Assemb., Reg. Sess. (Ga. 2025).

55. H.B. 1407, 2025 Reg. Sess., Md. Gen. Assemb. (Md. 2025).

56. H.B. 2216, 2025 Reg. Sess., Okla. Gen. Assemb. (Okla. 2025).

57. H.B. 3404, 126th Gen. Assemb., 2025–26 Reg. Sess. (S.C. 2025).

58. H.B. 185, 136th Gen. Assemb., Reg. Sess. (Ohio 2025).

59. H.B. 1751, 194th Gen. Ct., Reg. Sess. (Mass. 2025).

60. Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2025 ("NO FAKES Act"), S. 1367, 119th Cong. (2025).

61. *Id.*

62. 17 U.S.C. § 512.

the National Association of Broadcasters, Authors Guild, the National Center on Sexual Exploitation, Television Academy, Google/YouTube, IBM, and others.⁶³

III. LOOKING FORWARD

In 2019, the law around depiction of individuals in motion pictures and television programs appeared settled. Cases like *Sarver*, *De Havilland*, and *Tyne* held clearly and emphatically that right of publicity law could not be used by individuals to censor portrayals of them, whether because they did not like those portrayals or they simply wanted to be paid for them.⁶⁴ But no longer. New “digital replica” laws enacted in California, New York, Tennessee, Illinois, and Montana, and proposed in Congress and more than a dozen other states, have upended once settled law, creating significant uncertainty around the ability to use new technology, fueled by advances in artificial intelligence, to depict people on screen. While these laws or bills typically include exemptions intended to protect First Amendment rights, those exemptions’ clarity is blurred by vague language and carve-outs, and their application has yet to be tested by the courts.⁶⁵

The lengthy post-mortem terms of such laws and bills are especially concerning, as they could affect the ability of filmmakers to tell stories about historical figures, particularly deceased performers, many of whose rights are aggressively exploited and protected by corporate rights holders, as well as other deceased individuals.⁶⁶ And they are of questionable constitutionality. As with any law regulating the content of speech,⁶⁷ right of publicity laws are subject to strict First Amendment scrutiny, which

63. *Blackburn, Coons, Salazar, Dean, Colleagues Introduce “NO FAKES Act” to Protect Individuals and Creators from Digital Replicas*, OFF. OF SEN. MARSHA BLACKBURN (Apr. 9, 2025), <https://www.blackburn.senate.gov/2025/4/technology/blackburn-coons-salazar-dean-colleagues-introduce-no-fakes-act-to-protect-individuals-and-creators-from-digital-replicas> [<https://web.archive.org/web/20260127233119/https://www.blackburn.senate.gov/2025/4/technology/blackburn-coons-salazar-dean-colleagues-introduce-no-fakes-act-to-protect-individuals-and-creators-from-digital-replicas>].

64. *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 871 (Cal. Ct. App. 2018); *Sarver v. Chartier*, 813 F.3d 891, 891–92 (9th Cir. 2016); *Tyne v. Time Warner Ent. Co.*, 901 So.2d 802, 802 (Fla. 2005).

65. As of this writing, the author is unaware of any lawsuits filed under the digital replica provisions of the five new such laws enacted since 2020.

66. CMG Worldwide, a leader in this sector, lists approximately 270 “clients,” including deceased actors James Dean, Bette Davis, Ingrid Bergman, Jimmy Stewart, and John Wayne; late sports figures from Arthur Ashe to Andre the Giant to Lou Gehrig; historical figures including Albert Einstein, Amelia Earhart, Frank Lloyd Wright, General George S. Patton Jr., Black Panther Huey P. Newton, Oscar Wilde, Rosa Parks, and Thomas Edison. See *Client List*, CMG WORLDWIDE (Aug. 2025), <https://www.cmgworldwide.com/wp-content/uploads/2025/08/CMG-Worldwide-Client-List-25.pdf> [<https://web.archive.org/web/20250913072612/https://www.cmgworldwide.com/wp-content/uploads/2025/08/CMG-Worldwide-Client-List-25.pdf>].

67. *Sarver*, 813 F.3d at 903 (“By its terms, California’s right of publicity law clearly restricts speech based upon its content.”); see also Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOU. L. REV. 903, 912 n.35 (2003) (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses) . . . But even if it’s seen as content-neutral, strict scrutiny is still the proper test, because the right of publicity doesn’t leave open ample alternative channels for the speaker to convey the content that he wishes to convey.”).

means that they are “presumptively unconstitutional” and can survive constitutional challenge only upon a showing that they: 1) serve a compelling government interest; and 2) are narrowly tailored to serve that interest.⁶⁸ A court could determine that certain unconsented uses of digital replicas to replace *living* actors or recording artists could interfere with their ability to earn a living, establishing a compelling state interest sufficient to satisfy the constitutional requirement. However, that employment-based interest does not exist for deceased individuals. And other purported justifications for protecting deceased performers are unavailing. Any interest in a performer’s reputation or dignity is already governed by defamation and privacy law, which is personal to the individual at issue.⁶⁹ But recognizing dignitary interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in centuries of American law, under which “there can be no defamation of the dead.”⁷⁰

IV. CONCLUSION

Right of publicity law is in the beginning stages of a revolution, reversing the last several decades’ trend of limiting its application, via statutory expressive-works exemptions as well as case law, to commercial (i.e., advertising/merchandising) uses. A handful of states have already enacted broad new laws, and Congress is actively debating one with national application. Litigation testing the scope, and constitutionality, of these new laws will inevitably follow. And it may take another several decades for the law governing the use of digital replicas to settle into a new equilibrium.

68. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

69. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted *on them* by defamatory falsehood.”) (emphasis added); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 821 (1979) (“It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded.”).

70. Restatement (Second) of Torts § 560, comment a (1977); *see also, e.g., Bradt v. New Nonpareil Co.*, 108 Iowa 449 (1899) (“The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action.”); *Meeropol v. Nizer*, 381 F. Supp. 29, 34, 35 n.3, 37 (S.D.N.Y. 1974), *aff’d*, 560 F.2d 1061 (2d Cir. 1977) (rejecting defamation and invasion of privacy claims by children of convicted and executed spies Julius and Ethel Rosenberg over statements in book because such claims expire upon the death of the subject of the statements at issue); *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 723 (1958) (“Defamation of a deceased person does not give rise to a civil right of action at common law in favor of the surviving spouse, family, or relatives, who are not themselves defamed. A libel on the memory of a deceased person is not deemed to inflict on the surviving relatives of the deceased any such legal damage as will sustain a civil action for the defamation.”).