

Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity

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Recent uses of artificial intelligence (AI) to create realistic images, videos, replicas, or voice simulations of real people have prompted some Members of Congress to [call for federal legislation](#) to protect the “right of publicity” (or ROP, for short). The ROP is [often defined](#) as the right to prevent unauthorized commercial uses of one’s name, image, or likeness (NIL) or other aspects of one’s identity (such as one’s voice). The ROP is not comprehensively protected by current federal laws.

This Legal Sidebar surveys existing state-level legal protections for the ROP, explains how they intersect with federal laws regarding intellectual property (IP), describes potential ROP concerns raised by AI, and presents constitutional and other legal considerations for Congress. Another [Legal Sidebar](#) discusses questions AI raises for copyright law, while a separate [Legal Sidebar](#) and a [CRS report](#) discuss the ability of college student-athletes to receive compensation for uses of their NIL.

State Right of Publicity Laws

The ROP is protected in some form by the laws of most U.S. states, and the number of states that recognize this right has [expanded](#) over the past several decades. One [study](#) found that 35 states recognized the ROP as of 2020. ROP laws generally create a private right of action for the unauthorized commercial use of another person’s NIL. For example, if a manufacturer uses a famous athlete’s name or face in a TV commercial without her permission, the athlete could sue the manufacturer for violating her ROP, and a court could order the manufacturer to pay damages and stop showing the commercial.

What constitutes an unauthorized commercial use of NIL can vary from state to state. Some states’ ROP laws [may apply only to advertising](#), while others [more broadly apply](#) to any use that commercially benefits the user, such as video game or comic book characters based on real people.

Other notable differences between the ROP laws of various states concern questions such as:

- **Is the ROP protected by statute, common law, or both?** [Twenty-five](#) states have enacted statutes protecting the ROP. In some of these states, including [California](#), the ROP is protected by both statutes and common law (law derived from court opinions). In

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other states, including [Delaware](#), the ROP is protected by common law only, sometimes as an application of a common law “right of privacy.”

- **What parts of a person’s identity does the ROP protect?** The ROP often only [protects](#) a person’s NIL, voice, and signature. In some states, the ROP also includes someone’s “[distinctive appearance, gestures, or mannerisms](#).” Courts have construed certain states’ ROP laws to protect more abstract aspects of personal identity, finding defendants liable for using an image of a famous driver’s [race car](#), a [blonde robot](#) performing Vanna White’s role on a game show, or the catch phrase “[here’s Johnny](#).”
- **Do all individuals enjoy the ROP?** State laws vary as to whether all persons or only those with “[commercially valuable](#)” NIL (such as celebrities) may assert ROP claims.
- **Does the ROP survive a person’s death?** In some states, the ROP is [descendible](#), meaning it can be asserted by one’s heirs after a person dies. States that recognize a descendible (or postmortem) ROP differ as to their duration, with postmortem rights [lasting](#) 20 years in Virginia, 70 years in California, and 100 years in Oklahoma, for instance. Under [Tennessee](#) law, postmortem ROP may last indefinitely. In other states, the ROP is [not descendible](#), or else courts [have not resolved](#) the issue.

Often, the law of the state in which a person is [domiciled](#)—or, where they were domiciled when they died—[governs](#) their ROP. [Indiana’s ROP statute](#), however, allows suit “regardless of a personality’s domicile” for infringing materials “disseminated within Indiana.” This law [may allow](#) non-Indiana plaintiffs to sue for infringing materials that are made available in Indiana via television or the internet.

Intersection of Right of Publicity and Federal IP Laws

Although the ROP is distinct from the forms of IP already protected by federal law, it is related in some ways to trademarks and copyrights. If Congress chooses to regulate the ROP via federal law, it may consider how best to harmonize the ROP with existing trademark and copyright laws.

Trademarks

While the ROP generally protects commercial uses of a person’s identity, [trademarks](#) protect commercial uses of words, names, and other symbols that distinguish one person’s goods from others. The ROP may overlap with trademarks in cases where aspects of a person’s NIL can be trademarked. A person’s name, for instance, may be trademarked if it acquires a distinctive meaning and is used commercially to identify goods or services (e.g., McDonald’s). The ROP may be seen as serving a [similar function to trademarks](#), although some scholars have criticized the [theoretical foundations](#) and [expansion](#) of the ROP.

Trademark infringement occurs when someone without authorization uses a trademark in a way that creates a likelihood of confusion for consumers. [The Lanham Act](#)—the federal trademark law—also establishes a cause of action for “false endorsement,” which provides additional protection that overlaps with the ROP. False endorsement occurs when a person’s identity is used in a way that is likely to confuse consumers into believing that the person recommends a product. In 2023, for instance, actor Tom Hanks [alerted fans](#) that an AI-generated replica of him was being used to advertise a dental plan without his permission; such scenarios might give rise to both state ROP and Lanham Act false endorsement claims. State ROP laws can provide broader protection than the Lanham Act, however, as they often prohibit unauthorized commercial uses of NIL regardless of whether they imply any sponsorship or confuse consumers. In addition, some courts have held only individuals with “[recognizability](#)” (such as Hanks) may sue for false endorsement, whereas many state laws allow all individuals to sue for ROP violations.

Copyrights

Copyrights protect original works of authorship that are “fixed” (i.e., recorded) in a “**tangible medium**,” including books, paintings, music recordings, and films. The Copyright Act gives copyright owners the “**exclusive right**” to reproduce (copy), perform, display, and distribute copyrighted works and to make derivative works (adaptations) from them. Generally, a work’s author **automatically owns** the copyright but may sell or license it to others. In short, whereas ROP laws prohibit unauthorized uses of another person’s identity, copyright law prohibits unauthorized uses of another’s creative works. As one illustration, in January 2024, the estate of comedian George Carlin filed a **lawsuit** based on an unauthorized comedy program delivered in an AI-generated imitation of Carlin’s voice. The complaint claims defendants **infringed their copyrights** by making copies of Carlin’s works to train the AI model—similar to other AI-related copyright lawsuits noted in a separate **Legal Sidebar**—and that defendants **violated Carlin’s ROP** under California law by using his NIL to promote the comedy program and other media.

The ROP intersects with copyright law inasmuch as both fictional and nonfictional copyrighted works often include the NIL of real people, including descriptions, portrayals, recordings, or performances of those people. For example, people depicted in photographs often **do not hold the copyright**, since the photographer is usually considered the author, but they may have ROP interests implicated by how those photos are used. These rights may come into conflict, such as when a copyright owner displays photographs in a way that commercially exploits the NIL of people shown in the photographs.

Section 301 of the Copyright Act provides that the Copyright Act preempts (supersedes) any state law rights that are “equivalent to” a copyright holder’s exclusive rights. Some commentators **argue** courts have inconsistently applied Section 301 in cases where copyrights conflict with the ROP. Some courts have dismissed lawsuits that allege copyright holders violated the ROP by exercising their exclusive rights under the Copyright Act. For instance, in 2017, one court held that Section 301 preempted a suit claiming the sale of **photographs of NCAA athletes** violated the athletes’ ROP. **Other courts have held** that Section 301 does not preempt ROP claims based on advertising. For example, one court held that a **sports announcer’s ROP claim** was not preempted where an excerpt of his voice from a copyrighted broadcast was used in a commercial for a video game. Congress could clarify the scope of copyright preemption of ROP claims by amending Section 301. In addition, if Congress enacts any new protections for ROP at the federal level, it may specify under what circumstances copyright would preempt such protections.

ROP laws can protect commercial interests in live performances, which cannot be copyrighted unless they are “fixed” (e.g., filmed). In **the Supreme Court’s only ROP case** to date, for instance, a performer sued a television company for broadcasting his “human cannonball” act, undermining ticket sales for the act. The Supreme Court held that the First Amendment did not prevent the performer from asserting a ROP claim against the company. As an exception to the rule that live performances have no copyright protection, in 1994 Congress provided **criminal** and **civil** liability for recording and distributing live music performances without permission, although some courts have **questioned** these laws’ constitutionality.

Right of Publicity Concerns Regarding AI

Recent advances in **generative AI** systems, which are trained on large volumes of data to generate new content that may mimic likenesses, voices, or other aspects of real people’s identities, have stimulated **congressional interest**. Like the above-noted uses of AI to imitate Tom Hanks and George Carlin, the examples below illustrate that some AI uses raise concerns under both ROP laws and myriad other laws.

One example of AI’s capability to imitate voices was an AI-generated song called “**Heart on My Sleeve**,” which sounded like it was sung by the artist Drake and was heard by millions of listeners in 2023. Simulating an artist’s voice in this manner could make one liable under ROP laws, although these laws

differ as to whether they cover [voice imitations](#) or vocal styles as opposed to the artist's actual voice. Voice imitations are not, however, prohibited by [copyright laws](#). For example, the alleged copyright violation that caused YouTube to remove "Heart on My Sleeve"—namely, that it [sampled another recording](#) without permission—was unrelated to the Drake voice imitation. In August 2023, Google and Universal Music were in discussions to [license artists' melodies and voices](#) for AI-generated songs.

The potential for AI to replicate both voices and likenesses was also a [point of contention](#) in last year's negotiations for a collective bargaining agreement between the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)—a union that represents movie, television, and radio actors—and television and movie studios, including streaming services. SAG-AFTRA expressed concern that AI could be used to alter or replace actors' performances without their permission, such as by [using real film recordings to train AI](#) to create "digital replicas" of actors and voice actors. The [Memorandum of Agreement](#) between SAG-AFTRA and studios [approved](#) in December 2023 requires studios to obtain "clear and conspicuous" consent from an actor or background actor to create or use a digital replica of the actor or to digitally alter the actor's performance, with certain exceptions. It also requires that the actor's consent for use of a digital replica or digital alterations be based on a "reasonably specific description" of the intended use or alteration. The agreement provides that consent continues after the actor's death unless "explicitly limited," while consent for additional postmortem uses must be obtained from the actor's authorized representative or—if a representative cannot be identified or located—from the union. In January 2024, SAG-AFTRA [announced](#) it had also reached an agreement with a voice technology company regarding voice replicas for video games, while a [negotiation](#) to update SAG-AFTRA's agreement with video game publishers is reportedly ongoing.

Commentators have also raised concern with deceptive AI-generated or AI-altered content known as "deepfakes," including some videos with sexually explicit content and others meant to denigrate public officials. To the extent this content includes real people's NIL and is used commercially, ROP laws might provide a remedy. Where deepfakes are used to promote products or services—such as the [AI replica of Tom Hanks](#) used in a dental plan ad—they may also constitute false endorsement under the Lanham Act. In addition to these laws, some states have enacted laws prohibiting sexually explicit deepfakes, with [California](#) and [New York](#) giving victims a civil claim and [Georgia](#) and [Virginia](#) imposing criminal liability. In addition, [Section 1309](#) of the federal Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) provides a civil claim for nonconsensual disclosure of "intimate visual depictions," which might be interpreted to prohibit intimate deepfakes—as might some states' "revenge porn" [laws](#). A bill introduced in the House of Representatives in May 2023, the Preventing Deepfakes of Intimate Images Act, [H.R. 3106](#), would amend VAWA 2022 by creating a separate civil claim for disclosing certain "intimate digital depictions" without the written consent of the depicted individual, as well as providing criminal liability for certain actual or threatened disclosures. Deepfakes may also give rise to liability under state defamation laws where a party uses them to communicate reputation-damaging falsehoods about a person with a [requisite degree](#) of fault.

Regarding the use of AI in political advertisements, some [proposed legislation](#) would prohibit deepfakes or require disclaimers for them in federal campaigns, although such proposals may raise [First Amendment concerns](#). The Protect Elections from Deceptive AI Act, [S. 2770](#) (118th Cong.), for instance, would [ban](#) the use of AI to generate materially deceptive content falsely depicting federal candidates in political ads to influence federal elections, while excluding news, commentary, satires, and parodies from liability. Google [announced](#) that, as of mid-November 2023, verified election advertisers on its platform "must prominently disclose when their ads contain synthetic content that inauthentically depicts real or realistic-looking people or events."

Another concern some commentators raise is that AI-generated material might be falsely [attributed to real persons](#) without their permission. One writer who focuses on the publishing industry, for instance, [found](#) that books apparently generated by AI were being sold under her name on Amazon. Although the

company ultimately removed these titles, the writer claimed that her “[initial infringement claim with Amazon went nowhere](#),” since her name was not trademarked and the books did not infringe existing copyrights. As she [noted](#), however, this scenario might give rise to claims under state ROP laws as well as the Lanham Act. In addition, the [Federal Trade Commission \(FTC\)](#) states that “books sold as if authored by humans but in fact reflecting the output of [AI]” violate the FTC Act and may result in civil fines.

It is unclear how [Section 230 of the Communications Act of 1934](#) might apply when ROP-infringing content from a third party, including content made with AI, is disseminated through social media and other interactive computer services. Although the law generally bars any lawsuits that would hold online service providers and users liable for third party content, there is an exception allowing lawsuits under “any law pertaining to intellectual property.” Courts differ as to whether state ROP laws and the Lanham Act’s prohibition on false endorsement are laws “pertaining to” IP within the meaning of Section 230. Another [Legal Sidebar](#) discusses the application of Section 230 to generative AI more broadly.

Considerations for Congress

Some commentators have called for [federal ROP legislation](#) to provide more uniform and predictable protection for the ROP in the United States. Others have argued that Congress should leave ROP protection to the states on [federalism](#) grounds. If Congress decides to craft federal ROP legislation, it might consider the scope of the ROP protections it seeks to enact, the effect of those enactments on state ROP laws, and constitutional authorities and limitations on Congress’s power to enact ROP protections. As noted below, some Members have proposed legislation that would prohibit certain unauthorized uses of digital replicas or depictions of individuals while leaving state ROP laws in place.

Scope and Preemptive Effect of Federal ROP Legislation

Congress has many options to determine how broadly to protect the ROP via possible federal legislation. Federal ROP legislation might specify, for instance, which aspects of a person’s identity are protected, whether individuals without a commercially valuable identity may assert the ROP, and how long—if at all—the ROP survives a person’s death. Legislation might also specify whether a federal ROP applies broadly to all uses of NIL or only to specific uses. For example, a discussion draft circulated in October 2023 by [four Senators](#), the [NO FAKES Act of 2023](#), would create a civil action for producing, publishing, distributing, or transmitting a “digital replica” of a real person’s image, voice, or likeness without consent, with some exceptions. A bill introduced in the [House of Representatives](#) in January 2024, the No AI FRAUD Act, [H.R. 6943](#), would create a civil action for certain conduct involving “digital depictions,” “personalized cloning services,” and “digital voice replicas” of real people without their consent. These proposals differ as to how long postmortem rights may last, among other differences.

Additionally, Congress may consider whether federal ROP legislation should preempt or leave in place existing state ROP laws. Existing federal IP laws provide examples of both approaches, as the Patent Act and Copyright Act largely [preempt](#) state laws while the [Lanham Act](#) and [Defend Trade Secrets Act](#) do not. [Some commentators](#) argue Congress should preempt state ROP laws to promote greater uniformity and predictability. Alternatively, Congress could create [a minimum level of ROP protection](#) under federal law, letting individual states provide greater ROP protections if they wish. The NO FAKES Act of 2023 and No AI FRAUD Act, for instance, state that they do not preempt other ROP protections.

Constitutional Authority and Limitations for Federal ROP Legislation

While Congress has [express constitutional authority](#) to enact patent and copyright laws, its power to protect other IP, such as trademarks and [trade secrets](#), derives from its authority to regulate interstate commerce. Some have [argued](#) the [Commerce Clause](#) of the Constitution gives Congress the power to

establish a federal ROP and preempt state ROP laws. ROP laws would likely fall within Congress's commerce authority so long as they regulate uses of NIL [in or substantially affecting](#) interstate commerce.

ROP laws create civil liability for certain NIL-containing speech—potentially including media such as books, films, and [video games](#)—and therefore raise questions about defendants' First Amendment rights. Some scholars [argue](#) that courts apply inconsistent tests to resolve clashes between the ROP and First Amendment protections. The Ninth Circuit, for example, held that the First Amendment did not shield the use of [football players' avatars in a video game](#) from a ROP lawsuit, since the avatars were not a “transformative use” of the players' identity under a test first articulated by the [Supreme Court of California](#). The Ninth Circuit reached a [different result](#) in a Lanham Act false endorsement case involving another football player's avatar, holding that the use of the plaintiff's NIL was “artistically relevant” to the video game and therefore protected under a test developed by the [Second Circuit](#). In a third case, the Ninth Circuit held that the [film portrayal of an army veteran](#) was not subject to the transformative use test because, unlike the football players, the veteran had not built up “a marketable performance or identity.” The court therefore applied [strict scrutiny](#), a standard requiring that a law be narrowly tailored to serve a compelling governmental interest. The court held that application of California's ROP statute would violate the First Amendment because the plaintiff could not demonstrate a “compelling state interest,” given his lack of a marketable identity.

Congress might have [more latitude](#) to enact ROP laws aimed at [commercial speech](#), such as advertising, which merely proposes a commercial transaction or relates solely to the speaker's and the audience's economic interests. Courts typically subject commercial speech regulations to [intermediate scrutiny](#), a less stringent standard than strict scrutiny that requires the government to show that its regulation directly advances a substantial government interest and is not broader than necessary to serve that interest.

If Congress enacts federal protections for the ROP, it may seek to mitigate the need for judicial resolution of conflicts between the ROP and the First Amendment, or it may try to give wider latitude to free speech than courts might hold is constitutionally required. To limit the reach of ROP claims, Congress could consider enacting statutory exceptions to ROP liability, possibly similar to the “[fair use](#)” defenses in the [Copyright Act](#) and the [Lanham Act](#). Congress could also consider limiting federal ROP protections to commercial speech.

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