

**Testimony before the U.S. Senate Committee on the Judiciary  
Subcommittee on Intellectual Property**

**Hearing on The NO FAKES Act:  
Protecting Americans from Unauthorized Digital Replicas**

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Chair Coons, Ranking Member Tillis, and other Members of the Subcommittee: Thank you for the opportunity to testify about the First Amendment implications of the U.S. Senate’s NO FAKES Act discussion draft and the U.S. House of Representatives’ No AI FRAUD Act bill.<sup>1</sup> As there was some discussion of whether Congress should adopt a federal right of publicity law at the Subcommittee’s July 12, 2023 hearing on Artificial Intelligence and Intellectual Property,<sup>2</sup> I will also address whether there are any free speech limits on laws that protect people from the misappropriation and misuse of their name, image, voice, or likeness (NIVL) in various commercial and noncommercial contexts.

I am a Professor of Law at the University of San Diego School of Law, where I teach and write in the intellectual property and international intellectual property law area. My scholarship primarily focuses on potential and actual conflicts between trademark law and the right to freedom of expression.<sup>3</sup> I have also written about how to balance trademark and free speech rights when someone is impersonating a company, organization, or individual in a fake website or social media account.<sup>4</sup>

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<sup>1</sup> Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023 (“No FAKES Act”) (discussion draft available at [https://www.coons.senate.gov/imo/media/doc/no\\_fakes\\_act\\_draft\\_text.pdf](https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf)) (circulated in the Senate on Oct. 11, 2023); No Artificial Intelligence Fake Replicas And Unauthorized Duplications Act of 2024, H.R. 6943, 118th Cong. (2024) (“No AI FRAUD Act”) (introduced in the House on Jan. 10, 2024).

<sup>2</sup> *Artificial Intelligence and Intellectual Property – Part II: Copyright and Artificial Intelligence Before the Subcomm. on Intellectual Property of the S. Committee on the Judiciary*, 118th Cong. (July 12, 2023).

<sup>3</sup> See, e.g., Christine Haight Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 1225 (2023); Lisa P. Ramsey, *Using Failure to Function Doctrine to Protect Free Speech and Competition in Trademark Law*, 104 IOWA L. REV. ONLINE 70 (2020); Lisa P. Ramsey, *Free Speech Challenges to Trademark Law after Matal v. Tam*, 56 HOUS. L. REV. 401 (2018); Lisa P. Ramsey, *A Free Speech Right to Trademark Protection?* 106 TRADEMARK REP. 797 (2016); Lisa P. Ramsey, *Free Speech and International Obligations to Protect Trademarks*, 35 YALE J. INT’L L. 405 (2010); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008); Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095 (2003).

<sup>4</sup> See, e.g., Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010) (providing examples of impersonation on Facebook and Twitter).

Recently bad actors have impersonated people using unauthorized “digital replicas” of them that are nearly indistinguishable from the actual voice, image, or visual likeness of that person.<sup>5</sup> The identities of famous musicians, politicians, comics, actors, and other celebrities are increasingly used in new songs, sound recordings, images, videos, and advertisements that are generated by artificially intelligent (AI) computer programs at the request of a human user of that AI technology. AI-generated digital replicas and other sound or audiovisual recordings that are digitally altered in ways that convincingly replace one person’s voice or likeness with that of another are commonly referred to as “deepfakes”. One example is the unauthorized AI-generated song “Heart on my Sleeve,” which contained a performance that closely imitated the voices of musicians Drake and The Weeknd.

There are many other examples. A simulated version of President Joe Biden’s voice was used in a robocall that spread election disinformation. The estate of George Carlin filed a lawsuit when a deepfake version of the deceased comic was featured in a comedy special. An AI-generated version of the actor Tom Hanks was used without his consent in an advertisement for a dental plan. Taylor Swift and other female celebrities have been targets of unauthorized sexually explicit deepfake images. Unfortunately ordinary people can also be the victims of nefarious use of AI technology. Teenage students have created deepfake nude images of female classmates and shared these doctored images with others online.

The federal Lanham Act’s false endorsement law and state right of publicity laws can often provide a remedy in such disputes involving digital replicas.<sup>6</sup> Still, I commend Congress for considering whether these laws—and other federal or state laws—are sufficient to stop and punish the creation and dissemination of unauthorized sexually explicit deepfakes and the deceptive impersonation of public figures and regular people. The U.S. Supreme Court’s First Amendment jurisprudence allows the government to ban and otherwise regulate the use of another individual’s NIVL without consent in obscene speech, child pornography, fraudulent speech, and misleading commercial speech. These categories of speech are outside the scope of the constitution’s protections. The proposed No FAKES Act and No AI FRAUD Act apply to such unprotected speech, but—like state right of publicity laws—these bills protecting a digital replica right also regulate noncommercial and commercial speech that is protected by the First Amendment. As these laws regulate the content of speech, Congress must prove that any law protecting a federal digital replica right or right of publicity satisfies at least intermediate constitutional scrutiny. Regulations of noncommercial speech are subject to strict scrutiny analysis, which often results in a finding of a First Amendment violation.

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<sup>5</sup> The discussion draft of the No FAKES Act provides that: “The term ‘digital replica means a newly-created, computer generated, electronic representation of the image, voice, or visual likeness of an individual that—(A) is [nearly indistinguishable] from the actual image, voice, or visual likeness of that individual; and (B) is fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear.” (brackets in original).

<sup>6</sup> 15 U.S.C. § 1125(a)(1); *see, e.g.*, CAL. CIV. CODE §§ 3344, 3344.1; *Comedy III Prods., Inc. v. Saderup* 21 P.3d 797 (Cal. 2001) (California’s common law right of publicity). Note the false endorsement law only applies when another’s identity is used without consent in connection with goods or services in a manner likely to cause confusion, so it may not apply in disputes involving sexually explicit deepfakes.

In my testimony today, I will discuss three ways that Congress can better protect First Amendment interests in the No FAKES Act or a broader federal right of publicity law. First, the federal statute should include specific exceptions to liability for expression protected by the First Amendment and categorical safe harbors for online service providers. These rules will increase clarity and predictability as to what uses of another's NIVL are allowed and prohibited.

Second, due to the distinct harms caused by different uses of a digital replica, Congress should revise the proposed bill into separate causes of action with different requirements and distinct speech-protective defensive doctrines. This should include a law targeting uses that impersonate individuals in deceptive ways, and could also include different provisions aimed at protecting a performer's right to make a living or preventing the use of digital replicas in unauthorized sexually explicit deepfakes regardless of any actual confusion. The U.S. Supreme Court's First Amendment jurisprudence requires the government to identify the purpose of each provision in a law, and ensure that law is narrowly drawn to further a compelling or substantial government interest without harming protected expression too much. As it is currently drafted, the single overbroad cause of action in Section 2(c) of the No FAKES Act does not satisfy constitutional scrutiny.

Third, the First Amendment requires consideration of whether each provision in a law regulating speech chills expression no more than necessary and is narrowly tailored to further its goals. Congress can better protect expressive values by ensuring that the federal statute preempts similar state laws. This will harmonize the law and simplify lawsuits, which can reduce the chilling effect on speech that may be caused by the cost of litigation and uncertainty about the scope of these laws. Congress should also impose limits on the transferability of digital replica and NIVL rights, and the scope of licensing agreements relating to such rights. This approach will help ensure that individuals retain control over their own identity and is consistent with the U.S. Constitution's requirements of freedom of speech, freedom of association, and of liberty. Allowing companies or organizations to control a person's identity rights either via transfer or a broad licensing agreement will work at cross-purposes with many of the stated goals of this proposed legislation. It could potentially lead to greater AI-generated deception of the public and exacerbate the circulation of sexually explicit images (authorized by these owners/licensors).

#### **I. Freedom of expression is better protected if a law has clear and predictable rules**

First, any law regulating the content of speech is more likely to be found consistent with the First Amendment if the law's defensive doctrines are clear and allow the litigants to predict what uses of expression are allowed and prohibited. Including specific exemptions from liability in the statute will make it easier for judges to grant motions to dismiss frivolous speech-harmful claims, and for online service providers to determine whether a user complaint alleging a violation of the digital replica right or the right of publicity is frivolous or legitimate.

Vague laws are inconsistent with the free speech right because they can have a chilling effect on speech. Thus, I commend the Senators who included specific exclusions from liability for constitutionally protected speech in the No FAKES Act. Congress should also adopt a safe harbor provision for online service providers willing to implement a notice and takedown system.

## A. Specific exceptions to liability

Section 2(c)(3) of the proposed No FAKES Act contains a list of specific exclusions for the applicable digital replica's

- (A) use as part of a news, public affairs, or sports broadcast or report;
- (B) use in documentaries, docudramas, or historical or biographical works that depict the applicable individual as that individual;
- (C) use for purposes of comment, criticism, scholarship, satire, or parody;
- (D) use in an advertisement or commercial announcement for the purposes described in (A), (B), or (C); or
- (E) use in ways that are de minimus or incidental.

As the No FAKES Act currently regulates speech that is not misleading and not commercial, these types of speech-protective rules—which apply regardless of the degree of dramatization or fictionalization—are essential in a democratic society and contribute to the marketplace of ideas and information. Congress should consider making some additional revisions to this list of exclusions to better protect speech interests.<sup>7</sup> One revision is adding “teaching” to Section 2(c)(3)(C) or otherwise allowing certain educational uses of digital replicas by teachers, professors, librarians, and similar types of educators who want to provide their students with information about AI-generated digital replicas or lawsuits involving them.

Another suggestion is to add a “catch-all” provision at the end of the list of exclusions which explicitly allows courts to limit application of the statute in other ways to protect freedom of expression and other public interests, such as fair competition. Congress could add a fair use defense here similar to the copyright fair use defense in Section 107 of the Copyright Act. This exclusion would allow decision-makers to consider whether the use is transformative and/or commercial, and the effect of the use upon the potential market for or value of the person's image, voice, or likeness. Legislators who want to protect a performer's right to perform or otherwise make a living will want courts to consider whether the digital replica could substitute for the actual person's performance. Copyright law contains several specific limitations on

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<sup>7</sup> If Congress decides to enact a federal right of publicity statute that covers nonconfusing uses of NIVL rather than one targeted at digital replicas, other state right of publicity laws may provide ideas of additional exclusions from liability. For example, California's current right of publicity statute regulating certain unauthorized uses of the “name, voice, signature, photograph, or likeness” of deceased personalities, CAL. CIV. CODE § 3344.1(a)(1) (covering uses “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”), excludes the following types of expression from its application: “For purposes of this subdivision, 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, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.” CAL. CIV. CODE § 3344.1(a)(2). For living individuals, California's right of publicity statute exempts “a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign,” CAL. CIV. CODE § 3344(d), along with other limitations on the statute's scope. CAL. CIV. CODE § 3344(e)–(f). *See also* Indiana's Right of Publicity statute, INDIANA CODE § 32-36-1-1c.

exclusive rights in addition to the flexible four-part fair use defense in Section 107, so this approach has precedent.<sup>8</sup>

The proposed No FAKES Act does a better job than the No AI FRAUD Act in setting forth specific exemptions for certain nonconfusing uses of another’s image, voice, or likeness.<sup>9</sup> Section 3(d) of The No AI FRAUD Act includes a general statement that provides “First Amendment protections shall constitute a defense to an alleged violation of subsection (c). In evaluating any such defense, the public interest in access to the use shall be balanced against the intellectual property interest in the voice or likeness.”<sup>10</sup> This statement is vague and insufficiently speech-protective because it is impossible to predict what uses are permitted by the law until a court rules on this issue. Some parties may settle because they cannot afford to litigate, so this type of unclear rule could have a chilling effect on speech.

Importantly, some of the speech-protective exclusions in Section 2(c)(3) of the No FAKES Act should arguably not apply when an AI-generated digital replica is used to impersonate individuals in a deceptive manner or used in sexually explicit deepfakes. The exclusion relating to use for purposes of comment, criticism, scholarship, satire, or parody is an example. An accused infringer should not be able to claim a satire or parody defense if this use would mislead a reasonable person as to the identity of the actual person that is heard in a sound recording or depicted in a video recording. As explained later, this is just one reason why Congress should create separate causes of action to address the different harms caused by digital replicas.

## **B. Safe harbors for online service providers**

Secondary liability is permitted under Section 2(c) of the proposed No FAKES Act. Once an individual files a complaint with an online service provider alleging that a certain video, image, song, or message violates this law, that platform will likely automatically take down that expression to avoid being held liable for infringement regardless of whether that speech is protected by the First Amendment.

It is critical that Congress not enact a strict liability rule for companies that host commercial and noncommercial expression. Instead, the federal legislature should require or encourage online service providers to adopt and implement a notice and takedown system similar to the system created by Section 512 of the Digital Millennium Copyright Act. Accused infringers should also have the ability to challenge take-down requests by filing a counternotification with the platform. This is essential for two reasons. First, bad actors may falsely claim they are the person who owns an individual’s digital replica or NIVL right when they file a frivolous complaint with the

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<sup>8</sup> 17 U.S.C. §§ 107-122. Some state right of publicity laws include a defense which focuses on whether the use is transformative. *See, e.g., Comedy III Prods. v. Saderup* 21 P.3d 797 (Cal. 2001).

<sup>9</sup> For criticism about the broad scope and lack of specific exceptions for protected speech in the No AI FRAUD Act, see Jennifer E. Rothman, *House Draft AI Bill Risks Loss of Control over Our Own Voices and Likenesses*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Jan. 23, 2024), [https://rightofpublicityroadmap.com/news\\_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/](https://rightofpublicityroadmap.com/news_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/).

<sup>10</sup> The provision then lists three factors that may be considered, some of which are similar to the copyright fair use factors.

online service provider. Second, the statute may allow the accused infringer to use the image, voice, or likeness under one of the exclusions (such as news reporting or parody). Congress should discourage—rather than encourage—private censorship and self-censorship of expression protected by the First Amendment in any new anti-impersonation or right of publicity law.

## **II. The First Amendment analysis of the proposed statutory provisions will differ depending on the distinct harms targeted by Congress**

The proposed No FAKES Act contains a single cause of action that broadly seeks to remedy several different harms, and the provisions are not narrowly tailored to further the goals of the law. Overbroad laws are more likely to violate the First Amendment than narrowly drawn laws. Congress should use separate causes of action with different requirements and speech-protective defensive doctrines to address the distinct harms caused by the misuse of digital replicas. My understanding is that some members of Congress are interested in stopping the use of digital replicas to impersonate others in a deceptive manner, preventing unauthorized sexually explicit deepfakes, protecting the rights of performers to make a living, and ensuring that everyone can control and get compensated for use of their NIVL through a federal right of publicity law.

### **A. The Supreme Court’s First Amendment Jurisprudence**

The U.S. Supreme Court has held that fraudulent speech, misleading commercial speech, obscenity, and child pornography are included in the list of categories of speech that the government can generally prohibit, punish, and otherwise regulate without violating the First Amendment.<sup>11</sup> A federal statute that narrowly targets these types of unprotected expression will likely be found constitutional unless the law discriminates based on the viewpoint of the speaker or message.<sup>12</sup> If the law also applies to expression not categorically excluded from the First

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<sup>11</sup> *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (discussing the historic and traditional categories of speech that can be restricted without violating the First Amendment, including obscenity and fraud) (citing *Roth v. United States*, 354 U.S. 476, 483 (1975) and *Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)); *United States v. Williams*, 553 U.S. 285 (2008) (holding that the PROTECT Act of 2003’s criminalization of child pornography, sexually explicit visual portrayals that feature children, was not overbroad under the First Amendment); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565–66 (1980) (discussing misleading commercial speech as not protected by the First Amendment). *See also* *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring) (“Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition.”); *id.* at 252 (“It is well settled . . . that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners”) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011)). While a plurality of Justices refused to recognize a “categorical rule. . . that false statements receive no First Amendment protection,” *United States v. Alvarez*, 567 U.S. 709, 719, 729–30 (2012) (Kennedy, J.) (plurality opinion), other Justices are willing to allow the government to regulate false factual statements, *see id.* at 746 (Alito, J., dissenting) (“Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”).

<sup>12</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–92 (1992) (suggesting that viewpoint-discriminatory laws are presumptively unconstitutional and subject to strict constitutional scrutiny even if the law regulates expression that is historically or traditionally outside the scope of the First Amendment’s protections). Intellectual property laws that discriminate based on viewpoint are likely to be found inconsistent with the First Amendment. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 582 U.S. 218 (2017).

Amendment’s protections and regulates the content of the speech,<sup>13</sup> then the Court’s current free speech jurisprudence requires the government to prove the statutory provisions protecting an individual’s image, voice, or likeness satisfy intermediate scrutiny analysis (for nonmisleading commercial speech) or strict scrutiny analysis (for noncommercial speech).<sup>14</sup>

The Court has defined commercial speech as “speech which does no more than propose a commercial transaction,” such as an advertisement for pharmaceuticals or insurance services, and held such expression is protected by the First Amendment.<sup>15</sup> Commercial messages are currently subject to a lesser degree of protection than noncommercial messages, but government regulations of commercial speech must still satisfy *Central Hudson*’s intermediate scrutiny test.<sup>16</sup> If the speech is not misleading and concerns a lawful activity, regulations of commercial expression are constitutional under this analysis only if the government can show the law directly and materially advances a substantial government interest and is narrowly drawn so as to not endanger free speech more than necessary to serve that goal.<sup>17</sup>

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<sup>13</sup> A content-based regulation is a law that “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). As explained by Justice Kennedy in his concurring opinion in *Matal v. Tam*, “The First Amendment guards against laws ‘targeted at specific subject matter,’ a form of speech suppression known as content based discrimination. . . . This category includes a subtype of laws that go further, aimed at the suppression of ‘particular views . . . on a subject.’ . . . A law found to discriminate based on viewpoint is an ‘egregious form of content discrimination,’ which is ‘presumptively unconstitutional.’” *Tam*, 582 U.S. at 248 (Kennedy, J., concurring) (citations omitted). For example, a law banning expression about a certain war in a foreign country is a content-based regulation, while a viewpoint-based regulation would be a law that targeted only speakers or messages that oppose that war.

<sup>14</sup> *Reed*, 576 U.S. at 163 (strict scrutiny analysis for content-based regulations of speech); *Central Hudson*, 447 U.S. at 564 (intermediate scrutiny analysis for commercial speech regulations). See generally Ramsey, *Free Speech Challenges*, *supra* note 3, at 423–55 (applying the Court’s traditional First Amendment tests to trademark law).

<sup>15</sup> *Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

<sup>16</sup> *Central Hudson*, 447 U.S. at 565–66 (1980).

<sup>17</sup> *Edenfield v. Fane*, 507 U.S. 761, 767–71 (1993) (discussing and applying the intermediate scrutiny test for commercial speech regulations first set forth in *Central Hudson*, 447 U.S. at 565–66). Justice Alito (writing for a plurality of four Justices) applied the *Central Hudson* test to a Lanham Act provision in *Matal v. Tam*, 582 U.S. 218, 245–47 (2017) (Alito, J.) (plurality opinion) (explaining that the challenged federal trademark law banning registration of matter that may disparage others, 15 U.S.C. § 1052(a), could not even satisfy the intermediate scrutiny test for evaluating the constitutionality of regulations of commercial speech that are not misleading), but the Supreme Court did not hold in that opinion that intermediate or strict scrutiny analysis should be applied in trademark disputes. After the oral argument in *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), *cert granted sub nom. Vidal v. Elster*, 143 S. Ct. 2579 (2023), it is still unclear whether the Justices believe the Court’s traditional constitutional scrutiny tests should be applied in trademark disputes implicating the First Amendment.

In the copyright law context, the U.S. Supreme Court declined to apply heightened scrutiny analysis to content-based laws regulating noncommercial expression when a First Amendment challenge was raised to two different revisions to the U.S. Copyright Act. See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (holding that “further First Amendment scrutiny is unnecessary” when “Congress has not altered the traditional contours of copyright protection”); *Golan v. Holder*, 565 U.S. 302, 327–30 (2012) (explaining that the idea/expression dichotomy and broad fair use defense were sufficient to protect expressive values in copyright law, and that copyright law itself is the “engine of free expression”) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)). See generally Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *HOUS. L. REV.* 697, 713–18 (2003) (discussing the “copyright exception” in the Court’s First Amendment jurisprudence). However, those cases are unique due to the narrow scope of copyright protection only for original expression (and not ideas or facts), copyright law’s broad fair use defense, and the fact that copyright

Importantly, movies, television and radio programs, plays, musicals, video games, books, magazines, comic books, news reporting, and other forms of entertainment or journalism that communicate ideas or information are—like political speech—fully protected by the First Amendment regardless of whether they are sold for profit.<sup>18</sup> Laws regulating such noncommercial expression based on the content of the message are presumptively unconstitutional and must usually satisfy strict scrutiny analysis.<sup>19</sup> Under this rigorous test, the government must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>20</sup> “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”<sup>21</sup> The No FAKES Act applies to commercial and noncommercial speech, so some of the provisions will be subject to strict scrutiny analysis unless Congress exempts noncommercial uses of the digital replica or NIVL from application of the law or that part of the law regulates expression that is not protected by the First Amendment.

## **B. Applying the Court’s First Amendment Jurisprudence to the No FAKES Act**

The First Amendment analysis of provisions in the proposed No FAKES Act that regulate constitutionally protected speech will vary depending on the goals of the law, the type of speech at issue, and whether that content-based law is narrowly tailored to further those purposes without harming protected expression too much under the applicable test. Congress should strongly consider setting forth the intent of the various statutory provisions within the text of the No FAKES Act, similar to what it did in Section 45 of the Lanham Act.<sup>22</sup> Professors Robert Post and Jennifer Rothman have identified four distinct “rights of publicity” that are protected by right of publicity laws: (1) the right of performance, (2) the right of commercial value, (3) the right of control, and (4) the right of dignity.<sup>23</sup> These rights—along with other rights—may be invoked to justify laws that ban the use of a digital replica in deceptive speech and in sexually

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law itself is the “engine of free expression,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985), and is specifically mentioned in the Intellectual Property clause of the U.S. Constitution. U.S. CONST. art., I, § 8, cl. 8.

<sup>18</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790–98 (2011) (video games); *Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (motion pictures).

<sup>19</sup> *Reed*, 576 U.S. at 163 (2015).

<sup>20</sup> *Id.* at 171 (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)).

<sup>21</sup> *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

<sup>22</sup> 15 U.S.C. § 1127 (setting forth the intent of the Lanham Act). If Congress wants courts to apply this federal law in an extraterritorial manner to conduct outside the borders of the United States, it should say this in a clear and affirmative statement and clarify whether there are any limits on the statute’s foreign application. *See Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023). Other international law issues that Congress should consider are whether non-U.S. citizens living in foreign countries whose digital replica or NIVL are used by others without consent in the United States, or by U.S. citizens anywhere in the world, should have standing to file a claim under this new federal law.

<sup>23</sup> Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020). *See also* Jennifer E. Rothman, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018).



explicit deepfakes, or other laws which protect an individual’s right of publicity. The No FAKES Act does not currently include a provision giving courts discretion to issue an injunction that enjoins unauthorized uses of an individual’s image, voice, or likeness. Congress should consider revising this part of the law since injunctive relief is a common remedy in state right of publicity statutes, trademark and copyright laws, and other intellectual property laws.

**Preventing deceptive impersonation of people to protect their dignity and other rights of publicity, and reduce consumer confusion in the marketplace and community.** One intent of the No FAKES Act may be to target the use of digital replicas to impersonate individuals in a deceptive manner and thereby cause confusion about the identity of the speaker. These uses of the digital replica can mislead reasonable persons about the source of a message. A digital replica right that bans the unauthorized creation of a digital replica and inclusion of it in a song, movie, television program, advertisement, or other sound or audiovisual recording disseminated to others will target some fraudulent speech and misleading commercial speech, which are both categorically outside the scope of the First Amendment’s protections. The problem with the current version of the Act—which regulates commercial and noncommercial speech—is that it does not *require* proof this use of the digital replica is false, misleading, or otherwise confusing for liability. The government interest in preventing the use of digital replicas to impersonate others is arguably compelling, but the Act is not narrowly tailored to only address this harm. It is an overbroad law.

Congress should consider revising the No FAKES Act to create a separate cause of action that targets the deceptive impersonation of politicians, musicians, actors, comics, models, artists, filmmakers, professional athletes, students, and other public figures and ordinary people. I believe such a law could satisfy strict scrutiny analysis even if some of the regulated speech is not categorically excluded from the First Amendment’s protections. In the trademark law area, the U.S. Supreme Court recently cited a Second Circuit case with approval that permitted application of federal trademark infringement law to a political organization’s confusing use of a competitor’s “United We Stand America” mark “as a source identifier” to falsely identify the source of its own political messages.<sup>24</sup> The No FAKES Act is more likely to be deemed constitutionally valid if it is applied when confused members of the public wrongly believe the digital replica is an authentic recording in which the individual participated and rely to their detriment on this false or misleading expression.

**Preventing sexually explicit deepfakes to protect human dignity.** Some legislators have expressed concern about unauthorized sexually explicit deepfakes. Uses of digital replicas in these circumstances would likely be covered by the statutory language in the No FAKES Act. If the deepfake is deemed to be obscene speech or child pornography, this expression is outside the First Amendment’s scope, but not all deepfakes fit into these categories of speech. If the images or videos are nearly identical to the real person portrayed in the deepfake, the Supreme Court

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<sup>24</sup> *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 89–90, 92–93 (2d Cir. 1997) (applying the infringement statute to defendant’s confusing use of the mark “United We Stand America” to associate itself with the political movement that sponsored Ross Perot’s presidential campaign and to solicit, collect, and otherwise raise money in support of his presidential candidacy, and holding that infringement laws are not limited to profit-seeking uses of trademarks), *quoted in* *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 155 (2023).

may find there is a compelling government interest in banning such expression even when it is noncommercial or nonconfusing because of the harm to the depicted person’s human dignity and reputation. The humiliation and distress that occurs when a fake nude image looks just like you (except for the lack of clothing) makes such a law different than a law regulating sexually explicit materials that do not contain visual images of actual children.<sup>25</sup>

Yet even if preventing the creation and dissemination of these types of pornographic images or videos is a compelling government interest, the language in the No FAKES Act is very broad and does not specifically mention unauthorized sexually explicit deepfakes. The proposed Act provides no guidance on what speech would be permitted or banned under a rule focused on this type of harm. This is another reason the Act is not narrowly tailored to achieve the goals of legislators and is not the least restrictive means of regulating this expression.

Section 2(d)(3)(A) of the No FAKES Act provides a good example of why Congress should use separate causes of action to target the different harms caused by digital replicas. That provision says that simply including a disclaimer stating that the digital replica was unauthorized should not excuse liability under the law. This provision makes sense when the individual’s image, voice, or visual likeness is used in sexually explicit material. On the other hand, this rule relating to disclaimers may not be sufficiently speech-protective for a law targeting deceptive impersonation, as a disclaimer may dispel any confusion about the speaker’s identity or the source of the message.

**Protecting the right of performance, or a person’s right to make a living.** In *Zacchini*, the U.S. Supreme Court rejected a First Amendment defense to application of Ohio’s misappropriation law when a television station broadcast the “entire act” of a human cannonball entertainer at an Ohio county fair without his consent.<sup>26</sup> *Zacchini* alleged this broadcast infringed his “right to the publicity value of his performance” and the Court described this as a “right of publicity” claim.<sup>27</sup> Some members of Congress may intend for the No FAKES Act to protect a “right of performance” of musicians, actors, comics, and other individuals, or their right to use certain aspects of their identity to make a living. Such a goal would likely be deemed a substantial (and possibly a compelling) government interest depending on the legislator or judge. Again, the problem here is that the Act is not narrowly tailored at protecting this particular right.

Congress could enact a separate cause of action aimed at protecting a performer’s right to make a living. Such a law would likely be constitutional under *Zacchini*. AI-generated digital replicas can be nearly indistinguishable from the actual image, voice, or visual likeness of a real person. They might be used to replace performances by living individuals and harm the performer’s

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<sup>25</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding the Child Pornography Prevention Act of 1996 was overbroad and unconstitutional because it banned fake child pornography that was not obscene nor produced by the exploitation of real children; it applied to speech that creates no victims by its production or dissemination).

<sup>26</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 564, 575 (1977).

<sup>27</sup> *Id.* at 565, 573-75. Commentators have noted the constitutional approach in this case may be limited to disputes involving the unlawful appropriation of an “entire act” or similar circumstances where the government wants to protect an individual’s “right of performance” in furtherance of the copyright-like goal of incentivizing the creation of new performances. Post & Rothman, *supra* note 23, at 99-102.

ability to get compensated for singing, acting, or telling jokes. Thus, the U.S. Supreme Court will likely conclude the law is consistent with the First Amendment if the No FAKES Act is revised to ban the creation or dissemination of a digital replica that substitutes for a human who is still alive and who normally provides that performance in a creative or informational work (such as a movie or news program). As deceased people cannot perform or work, a narrowly tailored law that protects expressive values would likely state that this right ends at the death of the living person.<sup>28</sup> In other words, there would be no post mortem right under this cause of action.

### **Protecting the property right to control and be compensated for use of your NIVL.**

Congress may want to enact a broader federal right of publicity law that protects the property or quasi-property rights of individuals (or their heirs or assignees) to decide whether or not their NIVL is used on commercial products like labels of beer or laxatives; or used on the front of T-shirts or other expressive merchandise; in the title or content of movies, television series, videogames, artwork, books, news reporting, and other artistic or literary expression; or in advertising for these types of goods or services.<sup>29</sup> For the law to satisfy First Amendment analysis, the government would have to establish this goal was a compelling government interest when the law is regulating noncommercial speech (e.g., movies), and a substantial government interest for uses of the NIVL in commercial speech (e.g., commercial advertising). The language of the No FAKES Act is not limited to commercial uses of another's image, voice, or likeness.

As of this writing, the U.S. Supreme Court has not provided sufficient guidance on how to balance free speech rights against an individual's rights of publicity and privacy when uses of their NIVL are not fraudulent, deceptive, or misleading. The Court may discuss right of publicity law when it issues its decision before the end of June 2024 in *Vidal v. Elster*.<sup>30</sup> The *Elster* case involved a First Amendment challenge to the application of a trademark registration law that protects the rights of publicity and privacy of living individuals and deceased presidents when someone tries to register a mark comprising their name, signature, or image without consent. During oral argument in *Elster* some Justices asked questions in such a manner that suggested they think people have a property right in their name. Perhaps the Court will conclude that there

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<sup>28</sup> On the other hand, if the goal of the right of publicity statute is to protect property rights in a person's NIVL, Congress may want to consider including a limited post mortem right in the law. See Mark Bartholomew, *A Right to Be Left Dead*, CALIF. L. REV. (forthcoming 2024), <https://ssrn.com/abstract=4610679> (last revised March 5, 2024).

<sup>29</sup> See, e.g., CAL. CIV. CODE §§ 3344–3344.1 (covering uses “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”); *Comedy III Prods. v. Saderup*, 21 P.3d 797 (Cal. 2001). The California common law claim requires proof: (1) the defendant used the plaintiff's identity; (2) the appropriation was for defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

<sup>30</sup> *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), cert. granted sub nom. *Vidal v. Elster*, 143 S. Ct. 2579 (2023); see Lisa P. Ramsey, Guest Blog Post, *Evaluating the Constitutionality of Viewpoint-Neutral Trademark Registration Laws That Do Not Restrict Speech--Vidal v. Elster*, TECH. & MKTG. L. BLOG (Nov. 27, 2023), <https://blog.ericgoldman.org/archives/2023/11/evaluating-the-constitutionality-of-viewpoint-neutral-trademark-registration-laws-that-do-not-restrict-speech-vidal-v-elster-guest-blog-post.htm> (discussing the oral argument held at the Supreme Court on November 1, 2023); Lisa P. Ramsey, Guest Blog Post, *Trademark Registration of Political Messages for Expressive Merchandise--In re Elster*, TECH. & MKTG. L. BLOG (Mar. 4, 2022) <https://blog.ericgoldman.org/archives/2022/03/trademark-registration-of-political-messages-for-expressive-merchandise-in-re-elster-guest-blog-post.htm> (criticizing the Federal Circuit's decision).

is a substantial (and even compelling) government interest in protecting an individual's rights of publicity and privacy to protect human dignity, an individual's right to make a living, or other personality, property, or quasi-property interests that we have in our human identity. Yet even if this occurs, any right of publicity law adopted by Congress must be narrowly tailored and, at a minimum, not harm expressive values more than necessary.

Note that Congress could protect speech interests in various ways if it decides to create a new federal right of publicity law. First, it could impose limits on what can qualify as protectable subject matter, just like copyright law only protects expression but not ideas or facts. An individual's NIVL should be protected by the law, but not that person's style of music, acting, dancing, art, writing, filmmaking, or performing. Elvis impersonators should not be liable under this law just because they look and sound like Elvis. Second, to avoid application of strict scrutiny analysis to the law, Congress should consider limiting the law's scope to uses of the NIVL in advertising and on commercial products, or exempt noncommercial uses of the NIVL from application of the law. Third, if the federal right of publicity law regulates the secondary liability of online service providers, Congress should require specific and actual knowledge of the direct infringer's unauthorized use of another individual's NIVL for liability.<sup>31</sup> As discussed previously, it should also provide safe harbors for online service providers acting in good faith that want to protect both free speech rights and the right of publicity.

Finally, the legislature should give courts flexibility on remedies in certain circumstances where a ban on protected speech would significantly harm expressive values. For example, rather than grant an injunction, a court could only require a disclaimer stating that the digital replica was not authorized. Or it could require the accused infringer to disclose that the image, video, or sound recording was generated by an AI computer program and/or is inaccurate or of questionable authenticity. Implementing these rules into the law may help the government satisfy intermediate scrutiny analysis, but it is not clear whether a right of publicity law with these speech-protective provisions could satisfy strict scrutiny analysis.

As the constitutional analysis will vary depending on the alleged harms and the specific ways each statutory provision attempts to stop these harms, Congress should consider creating separate causes of action targeted at: (1) deceptive impersonation of individuals, (2) sexually explicit deepfakes, (3) protecting an individual's right of performance, and/or (4) protecting the right to control and be compensated for use of your NIVL, including in nonconfusing and nonsexual contexts. There is precedent for using separate causes of action to target disparate harms in other areas of intellectual property law. For example, the federal trademark statute contains different causes of action for unauthorized uses of another's trademark that are (1) likely to cause confusion with a prior distinctive mark (infringement) and (2) likely to cause dilution by blurring or dilution by tarnishment of a famous mark, regardless of the presence or absence of actual or

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<sup>31</sup> The proposed statute requires "knowledge" for liability when an accused infringer publishes, distributes, transmits, or makes available to the public the digital replica. Congress should clarify whether this refers to actual or constructive knowledge, or general or specific knowledge, as this issue has arisen in the copyright and trademark law areas. A more speech-protective approach would require actual and specific knowledge.

likely confusion (dilution).<sup>32</sup> Due to their dissimilar purposes, the infringement and dilution provisions have different requirements for liability and distinct defensive doctrines.<sup>33</sup> Congress could follow a similar approach here. For example, it could enact an anti-impersonation law that targets deceptive impersonation of individuals and sexually-explicit deepfakes in commercial or noncommercial expression, but exempt noncommercial use of an individual's NIVL in a right of publicity law that applies to nonmisleading speech as long as the dispute does not involve the creation or dissemination of an AI-generated digital replica of that individual.

In sum, Congress should ensure that the final version of the No FAKES Act or a federal right of publicity law directly and materially furthers its goals, and includes sufficient defensive doctrines that protect the free speech rights of all individuals, organizations, and companies.

### **III. Freedom of expression may be better protected if the federal law preempts state laws, and imposes limits on transferability of a person's digital replica right**

The First Amendment requires consideration of how a law may chill speech and whether that law is narrowly tailored to alleviate the targeted harms. Free speech values are better protected if it is easy to determine whether government laws prohibit or allow certain uses of a digital replica or another's NIVL. Today this is complicated. State right of publicity laws differ in various ways, and some state common law rights of publicity have a broader scope of protection than the state's statutory right of publicity.<sup>34</sup> Moreover, there are at least five different tests that lower courts use to balance First Amendment rights against the right of publicity, which can "often lead to inconsistent results, [and] leave creators and publishers uncertain about what they may say."<sup>35</sup> For these reasons, Congress should consider revising the No FAKES Act to state that the federal

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<sup>32</sup> 15 U.S.C. §§ 1114(1), 1125(a)(1), 1125(c).

<sup>33</sup> *Id.*; 15 U.S.C. §§ 1115(b) (defenses to infringement), 1125(c)(3) (exclusions from dilution liability). For more information about the statutory and common law defensive doctrines in trademark infringement law, see Parts I and II of Farley & Ramsey, *supra* note 3. Some of the remedies are also different for violations of the trademark dilution law. See 15 U.S.C. § 1125(c)(5). Note that while I believe trademark dilution law is an unconstitutional regulation of nonmisleading commercial speech, Ramsey, *Free Speech Challenges*, *supra* note 3, at 453–55, the First Amendment analysis will be different for right of publicity law because the laws have different goals, requirements for liability, defensive doctrines, and remedies.

<sup>34</sup> See Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022); ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://rightofpublicityroadmap.com/> (last visited Apr. 25, 2024) (providing useful information about state right of publicity laws in statutes and the common law); see, e.g., *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992) (applying California's statutory and common law right of publicity, and only finding liability under the common law).

<sup>35</sup> Brief of 31 Constitutional Law And Intellectual Property Law Professors as Amici Curiae in Support of Petitioner, *Electronic Arts, Inc. v. Davis* at 3, 577 U.S. 1215 (2016) (No. 15-424) (discussing the (1) the transformative use test, (2) the transformative work test, (3) the relatedness test, (4) the predominant purpose test, and (5) the balancing test), <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>. I was one of the signatories of this Amicus Brief filed in 2015 in a dispute involving California's right of publicity law. See also Post & Rothman, *supra* note 23.

law preempts similar state laws, and use that same approach if it adopts a new federal right of publicity law.<sup>36</sup>

National uniformity will have several benefits. Just like in federal patent and copyright law, preempting state law will simplify and clarify this area of the law. It will reduce the cost of litigation for everyone and save time by focusing the parties and the court on the federal right of publicity claim. This benefits musicians, actors, comics, models, documentary and independent filmmakers, nonprofit organizations, small businesses, and others with limited financial resources.

The federal government should do what it can to stop the creation and dissemination of music, videos, images, or text that impersonate individuals without their consent in a fraudulent or deceptive manner, or in sexually explicit contexts. Like other members of the public who are fans of music, movies, television programs, comedy, news reporting, and other creative and informational works, I generally want to know if the person singing, talking, or appearing on my radio, smartphone, computer, television, or film screen is a real human or is an AI-generated digital replica. If I am following someone on social media, I generally want to know if the text is written by the human with that photograph and name (or a known pseudonym), or if a different person or an AI computer program is engaging in impersonation of that individual.

At the same time, I am a fan of cover bands, biopics (biographical films and television series), docudramas (dramatized re-enactments of actual events), historical musicals and plays, parodies, and satire. I enjoyed Kingsley Ben-Adir's performance as the Jamaican singer-songwriter in the film *Bob Marley: One Love*; Val Kilmer's portrayal of Jim Morrison in the film *The Doors*; and the performances by the actresses in the television series *Feud* who helped bring attention to the ageism and sexism faced by Joan Crawford (Jessica Lange) and Bette Davis (Susan Sarandon) during their careers in Hollywood. I attend live music performed both by rock stars and by music tribute bands with members who sound, look, and act just like the musical artists whose songs they are performing in their cover band show. Therefore, I hope that any new federal law protecting an individual's digital replica or NIVL right will not discourage, punish, or prevent these types of creative performances and works of authorship that depict performers (rather than replace them). These types of performances are unlikely to mislead a reasonable person regarding the identity of the person who is performing.

Unfortunately, I believe it is likely that we will all be confused in the future by AI-generated digital replicas that are nearly indistinguishable from a real person's image, voice, or visual likeness. Allowing individuals to transfer or broadly license their digital replica right or other aspects of their personal identity to a company, organization, or other individual who speaks or acts on their behalf can lead to consumer confusion about whether communications by the authorized digital replica are authentic or fake. If one of the goals of the No FAKES Act is to protect an individual's right to perform or to otherwise make a living, we should be wary of allowing individuals to transfer their digital replica right to a third party in a manner which

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<sup>36</sup> The International Trademark Association supports the adoption of a federal right of publicity law that preempts state right of publicity laws. RIGHT OF PUBLICITY MINIMUM STANDARDS (INT'L TRADEMARK ASS'N, proposed March 27, 2019), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf>.

allows that person to lose control over their identity or engage in expression protected by the First Amendment.<sup>37</sup> The *Joan is Awful* episode of Netflix’s anthology *Black Mirror* television series, in which Joan’s life becomes part of a real-time fictional TV show because she agreed to this in the terms and conditions of a contract with her streaming service, does a great job warning of the dangers of relying solely on freedom of contract to decide who controls our identity.

#### IV. Conclusion

I support many of the provisions in the proposed NO FAKES Act, but not all of them. I encourage Congress to continue consulting with stakeholders in the creative and technology industries, and with academics and attorneys with expertise in right of publicity, trademark, and copyright law to improve the Act. Finally, I am glad that Congress is considering the impact that any new anti-impersonation or federal right of publicity statute will have on freedom of expression, creativity, and innovation. I look forward to answering your questions.

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<sup>37</sup> Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012). In a statement submitted to the House’s Subcommittee on Courts, Intellectual Property, and the Internet, Professor Rothman provided informative and insightful written testimony about the issue of transferability in right of publicity law and the two proposed bills intended to address unauthorized AI-generated performances. *Artificial Intelligence and Intellectual Property: Part II – Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (Feb. 2, 2024) (statement of Jennifer E. Rothman, Nicholas F. Gallicchio Professor of Law, U. Penn.), [https://rightofpublicityroadmap.com/wp-content/uploads/2024/02/Rothman\\_Statement\\_Subcommittee-on-IP\\_February-2\\_2024\\_Submitted.pdf](https://rightofpublicityroadmap.com/wp-content/uploads/2024/02/Rothman_Statement_Subcommittee-on-IP_February-2_2024_Submitted.pdf).