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# The "No AI Fraud Act" Would Secure IP Rights Consistent With the First Amendment

**by**

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On January 10, 2024, Reps. Maria Elvira Salazar and Madeleine Deane introduced in the U.S. House of Representatives the "No AI Fraud Act," H.R. 6943. If it were to become law, the No AI Fraud Act would secure Americans' intellectual property (IP) rights in their likenesses and voices from commercial misappropriation and personal harm caused by digital AI replicas and explicit deepfakes. The Act's establishment of a federal baseline of protection for IP rights in individuals' likenesses and voices would be commensurate with the nationwide scope of the problem and potential harms posed by deepfakes or other artificial intelligence (AI) replica technology.

Importantly, the No AI Fraud Act mirrors First Amendment jurisprudence in requiring that IP interests must be balanced against protected free speech interests. As the Supreme Court and lower courts have recognized, reconciling individuals' IP rights in aspects of one's persona with protected free speech rights requires fact-specific inquiries in each case. The First Amendment provides free speech protections for unauthorized uses of individuals' likenesses using generative AI that are transformative or that are commentaries or parodies on

newsworthy matters and public figures. Nothing in the Act would remove or reduce those protections. Congress should give the No AI Fraud Act full and fair consideration.

As with many other technologies, generative AI replica capabilities offer tremendous potential for good – and for harm. On the one hand, digital tools and services present abundant creative opportunities, including being used to generate original or transformative musical and video works as well as for making commentary or parody on topics of public interest. And on the other hand, AI may be wrongfully used to infringe individuals' rights to their names, likenesses, voices, or other identifiable aspects of their personas. There have been publicized instances of AI replicas improperly appropriating the value of others' voices for music sound recordings and misappropriating their likenesses for videos. So-called "deepfake" technologies and services have been employed maliciously to create explicit depictions of individuals, causing them reputational damage and inflicting severe emotional distress.

The status of state law protections regarding misappropriations or exploitations of individuals' personas or by AI digital replicas is undeveloped and uncertain. It could take years to develop sufficient legal protections at the state level and the eventual results would likely prove uneven, if not insufficient, in the fifty states. Given that deepfake and other digital simulator technologies are made widely available and used via the Internet, the threat, or at least risk of harm, is a matter of nationwide concern.

The No AI Fraud Act would fill the gaps in existing IP laws by providing a nationwide baseline of protection for an individual's identifying characteristics against emerging risks of misappropriation and exploitation from deepfakes or other digital simulations. A uniform standard of law would help address the matter and jump-start the development of proper legal doctrines to address generative AI rip-offs of individuals' personas.

The No AI Fraud Act would secure limited rights in an individual's face, likeness, voice, and other distinguishing characteristics from unauthorized commercialization or exploitation through the use of deepfake or other AI digital simulator technologies. The Act declares: "Every individual has a property right in their likeness and voice" and declares this right an intellectual property right. And the Act expressly secures those intellectual property (IP) rights for the life of the person. Under the Act, an individual's IP rights in one's likeness and voice can be freely transferred, and given to one's heirs.

Under the No AI Fraud Act, a private right of action could be brought against those who make digital replica tools – or "personal cloning services" – and also against users of those services, when such technologies are used to make available unauthorized digital depictions or voice replicas of an individual's likeness or voice without consent. Remedies under the Act include recovery of actual damages to an individual proved in court or statutory damages of $50,000 per violation for service providers and $5,000 per violation by a user of a digital replica service, disgorgement of profits from misappropriation, as well as punitive damage awards. No cause of action exists if the harm is negligible. A required showing of harm includes financial or physical injury or elevated risk of such injury, severe emotional distress, or likelihood of public deception. The required showing of harm also is satisfied in cases

involving specific categories of *per se* harm identified in the Act, such as child sexual abuse material or sexually explicit images.

By recognizing private property rights in one's likeness and voice, the No AI Fraud Act is consistent with first principles of American constitutionalism. In his influential *Second Treatise of Government* (1690), John Locke wrote that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself." Echoing Locke, James Madison wrote in his famous 1792 *National Gazette* essay "Property" that "[i]n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*." Madison also listed many illustrative categories of things in which individuals hold property rights, including land, merchandize, money, one's profession, and "the free use of his faculties and free choice of the objects on which to employ them."

As Free State Foundation President Randolph May and I describe in our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (2015, Carolina Academic Press), Madison and other Founding Fathers regarded copyrights and patent rights as valuable types of property rights, rooted in the concept that a person has a right of ownership in one's self as well as the right to enjoy the fruits of one's intellectual labors, free from unjustified interference. Based on property rights principles recognized by the Founding Fathers, American law has developed IP protections in an individual's name, image, likeness, or other identifiable aspects of one's persona.

For instance, there is ample judicial recognition that the right of publicity, which protects an individual from having one's name, image, or likeness appropriated for another's use or benefit, is rooted in classic principles of private property rights in one's self and the fruits of one's intellectual labors. In *Hart v. Electronic Arts, Inc*. (2013), the U.S. Court of Appeals for the Third Circuit explained that "the goal of maintaining a right of publicity is to protect the property interest that an individual gains and enjoys in his identity through his labor and effort" and that "as with protections for intellectual property, the right of publicity is designed to encourage further development of this property interest."

In some states, unfair competition laws as well as common law rights of privacy or intentional infliction of emotional distress provide alternative bases of protection against commercialization or exploitation of one's name, reputation, and accomplishments. The No AI Fraud's protections against service providers or users of digital replica technology to create deepfakes containing fraudulent explicit content of individuals parallel those sources of law.

Importantly, the No AI Fraud Act contains provisions that the law be interpreted only in a manner that protects free speech rights under the First Amendment. Section (d) of the Act states: "First Amendment protections shall constitute a defense to an alleged violation." Subsection (d) adds that public interest in access to the unauthorized use of an individual's likeness or voice shall be balanced against the IP interest of the individual, including whether that use is commercial, whether the persona is necessary to the primary expressive purpose of

the work in question, and whether the use competes with or adversely affects the value of the rights in the IP owner's likeness or voice.

Furthermore, the No AI Fraud Act requires that the harm to IP rights from the misappropriation or exploitation caused by the unauthorized creation of AI digital replicas be subject to a balancing of equities with protective speech and expression. According to Subsection (e)(4), the balance of equities should include considerations of factors such as whether the unauthorized use of the likeness or image of an individual is "transformative" and whether it "constitutes constitutionally protected commentary on a matter of public concern."

These free speech-related provisions in the No Fraud Act adhere closely to First Amendment jurisprudence developed under the Supreme Court's decision in *Zacchini v. Scripps-Howard Broadcasting Company* (1977) for reconciling IP rights with free speech rights. *Zacchini* has been characterized by lower courts as requiring a balancing or weighing of underlying First Amendment interests against those underpinning the right of publicity."

Lower courts have adopted different standards or tests for balancing those rights. For instance, under the "Transformative Use" test, a court considers, based on the facts of each case, whether a third party's unauthorized use of an individual's identity or likeness is sufficiently transformed by the third party's creativity or whether the identity or likeness was merely used to misappropriate that individual's identity or likeness. Under the "Predominant Use" test, a court considers whether the predominant purpose of a third party's use of an individual's identity is to exploit the commercial value or to make an expressive comment on or about an individual. And under the "Relatedness" test, a court considers whether a third party's use of an individual's likeness is related to the third party's work as a whole. The terms of Subsections (d) and (e)(4) of the No AI Fraud Act effectively acknowledge and incorporate each of those judicial balancing tests for evaluating free speech interests implicated by unauthorized uses of individuals' IP.

Scattershot social media criticisms of the No AI Fraud Act based on standalone quotes of H.R. 6943's definitions of AI replica technologies appear to falsely insinuate everyday digital photos or the use of other commonplace digital technologies would be prohibited if the Act becomes law. Refinements regarding how technologies are defined in H.R. 6943's text may or may not improve the bill. But for First Amendment purposes, the key point is that the Act is rightly focused on wrongful and abusive uses of digital AI replica technology that inflict damage on a non-consenting individual by misappropriating IP rights in his or her persona. Thus, if it becomes law, the Act almost surely would survive any First Amendment facial challenge for overbreadth.

The Supreme Court and lower courts recognize that fact-specific evaluations in individual cases are necessary when IP interests and free speech interests appear to be in tension. Nothing in the Act would remove or reduce constitutional protections for free speech rights. And nothing in the Act would constrain the independence of courts to make determinations about which balancing tests apply and how to apply them to the facts in specific cases.

Protecting Americans' property right of self-ownership in their likeness and voices from unauthorized and illicit AI replicas that cause financial damage or personal harm is consistent with fundamental principles of American jurisprudence, including the First Amendment. The No AI Fraud Act – H.R. 6943 – is a timely measure that would put individuals' valuable IP rights to their personas on solid legal footing. Congress ought to give the No AI Fraud Act prompt and serious consideration.

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**Further Readings**


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