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**The “NO FAKES Act” Would Protect Americans’ Rights Against Harmful  
Digital Replicas**

by

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On July 31, 2024, the “Nurture Originals, Foster Art, and Keep Entertainment Safe Act” (“[NO FAKES Act](#)”) was introduced in the Senate. “Deepfake” images and sound files can inflict serious economic and other personal harm on individuals, with little or no legal consequence. If it becomes law, the NO FAKES Act would secure all Americans’ rights in their likenesses and voices from the creation of digital replicas created without their consent. The Act would establish a federal standard of legal protection in one’s persona from unauthorized digital image and voice replicas.

The NO FAKES Act features bipartisan sponsorship by Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis. And it is endorsed by a cross-section of the creative and tech industries, including the Recording Industry Association of America (RIAA), the Motion Picture Association (MPA), the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), OpenAI, and IBM. This broad coalition of support is a result of revisions made to the 2023 draft bill – and incorporated into the Act – that expressly protect digital replica uses for news, documentary, parody, and other free speech purposes.

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The 118th Congress should consider adoption of [the bill](#) a priority.

Generative (AI) and other digital technologies are capable of creating highly realistic electronic images and sound files of individuals' likenesses and voices. Services operating these technologies and offering them via the Internet allow users to generate digital replicas of individuals' physical likenesses and voices.

The emergence of AI technologies that generate different forms of media content – including images, video, sound, and more – pose complex challenges for intellectual property (IP) law. My November 2023 *Perspectives from FSF Scholars*, "[Copyright Case Affirming Human Creativity Sets the Stage for AI Issues](#)," addressed the challenge of copyrightability from (supposedly) autonomously generated AI. My July 2024 *Perspectives from FSF Scholars*, "[It Sounds Like Generative AI Music Services Are Infringing Copyrights](#)," addressed copyright law's protections for creative works from unauthorized third-party use as inputs for generative AI technologies.

In many situations, potential damaging misuses of generative AI tech exceed the limited scope of copyright protections. My January 2024 *Perspectives from FSF Scholars*, "[The 'No AI Fraud Act' Would Secure IP Rights Consistent With the First Amendment](#)," addressed a bill introduced in the 118th Congress that would secure IP rights in individuals' likenesses against harms posed by AI deepfakes, and it defended that bill's consistency with constitutional free speech principles. This *Perspectives from FSF Scholars* reviews this new bipartisan bill also introduced in the 118th Congress – the NO FAKES Act – and explains how it will protect individuals' rights to their likenesses and voices from unauthorized digital replicas.

Digital replicas can be used for commercial and personal benefits. For example, the user of a generative AI service may create digital replicas to make a historical documentary about famous deceased figures and events of the past. Also, digital replicas may be used for parodies and social commentary on important public topics of the day. In May 2024, country singer Randy Travis released "Where That Came From," a song that was produced and recorded using a digital replica of his voice. Due to a physical condition, Mr. Travis is no longer able to sing. By using AI tech, he was able to complete the recording and make it available to the public.

However, public displays and dissemination of digital replicas of non-consenting individuals can cause them significant harm. Replicas of the voices of well-known music recording artists have been used – without consent – to make digital files of songs that those artists never sang. Those "deepfake" songs misappropriate the value of recording artists' voices, damaging the artists economically. Additionally, generative AI tools and services on the Internet allow users to create "deepfake" explicit pictures and videos of individuals. Such malicious use of digital replicas such as "revenge porn" can inflict reputational damage and severe emotional distress.

There is no baseline of clear and consistent legal protections for unauthorized digital replicas of individuals' likenesses and voices. The U.S. Copyright Office's July 31, 2024, report "[Copyright and Artificial Intelligence, Part 1: Digital Replicas](#)" observed that "a broad range of actual or potential harms arising from unauthorized digital replicas has emerged." But the Copyright Act "does not prevent the unauthorized duplication of an individual's image or voice alone." And the Lanham Act for trademark protection is insufficient. For example, the Lanham Act would not

apply in instances of deepfake “revenge porn” where there was no commercial motive. Individuals harmed commercially by a digital replica would likely encounter difficulty satisfying the likelihood of consumer confusion requirement.

Moreover, the Copyright Office’s report found that “[s]tate laws are both inconsistent and insufficient in various respects” when it comes to protecting individuals from appropriation of their personas by the dissemination of digital replicas. Some states recognize statutory or common law rights of publicity and rights of privacy that might provide legal protection against unauthorized digital replicas of individuals’ likenesses or voices. But other states do not, and some only recognize them under limited circumstances. For instance, some states require a showing that the individual’s identity has commercial value, thus denying protection if the person harmed isn’t a celebrity or if the person was emotionally harmed by explicit deepfakes. The Copyright Office report calls for “prompt federal action” to protect all individuals’ images and voices from harm by unauthorized digital replicas.

The NO FAKES Act would fulfill the need for prompt federal action by establishing a national uniform baseline of legal protection for an individual’s likeness and voice from unauthorized digital replicas. If passed by Congress, the Act would secure every American’s right to his or her visual likeness and voice against unauthorized use in a digital replication.

The Act would make liable anyone who knowingly produces a digital replica without the consent of the rights owner. It also would make liable anyone who knowingly publishes, reproduces, displays, distributes, transmits, or makes available to the public the digital replica without the consent of the rights owner. Persons harmed under the Act would have a right to seek statutory or actual damages, recovery of costs and attorneys’ fees, and injunctive relief.

Recognizing the potential benefits of digital replicas, the Act provides that individuals would have the right to license their personas for digital replication by third parties. Licensing would be subject to requirements such as written agreements, license terms of up to 10 years that are renewable by the individual’s consent, and representation by counsel – unless an individual is subject to a collective bargaining agreement. Also, the Act would protect a person’s likeness and voice for a period of 10 years after death, which would be renewable for 5-year terms (up to 70 years total) if the digital replication right is shown to still be in use following the person’s death.

Importantly, the NO FAKES Act also contains carefully drafted exclusions to ensure consistency with First Amendment free speech protections. For instance, digital replicas produced or used in bona fide news, public affairs, or sports broadcasts do not trigger legal liability. Additionally, the Act’s exclusions protect digital replicas used in documentaries or historical biographies, as well as commentary, criticism, scholarship, satire, or parody on matters of genuine public interest. These exclusions address free speech concerns that previously had been raised regarding a 2023 draft version of the bill. The free speech-friendly revisions to the Act have increased support for it among creative artist constituencies and tech industry members.

Moreover, the NO FAKES Act would establish a “notice and takedown” framework for removing unauthorized digital replicas from Internet websites. Online services typically are familiar with the “notice and takedown” framework regarding copyright-infringing content under

Section 512 of the Digital Millennium Copyright Act. The NO FAKES Act would follow a somewhat similar approach. Under the Act, an online service that hosts an unauthorized digital replica would receive legal immunity from liability if it removes or disables access to it “as soon as is technically and practically feasible” after that online service gets a takedown notice. The Act includes elements of what must be contained in valid takedown notices and specifies penalties for filing false or deceptive takedown notices.

Given [the NO FAKES Act](#)’s bipartisan sponsorship, the Act’s broad coalition of support, and the urgent need for a federal standard of protection for all Americans’ likenesses and voices against harmful unauthorized deepfakes, the 118th Congress should make all reasonable efforts to advance the bill in this year’s session.

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### Further Readings

Seth L. Cooper, “[It Sounds Like Generative AI Music Services Are Infringing Copyrights](#),” *Perspectives from FSF Scholars*, Vol. 19, No. 24 (July 22, 2024).

Seth L. Cooper, “[American Copyright Owners Deserve Royalties When Radio Stations Use Their Property](#),” *FSF Blog* (July 5, 2024).

Seth L. Cooper, “[World IP Day 2024: Time to Step Things Up Against Online Copyright Piracy](#),” *FSF Blog* (April 26, 2024).

Seth L. Cooper, “[Music Revenue Report Should Spur Congress to Secure Copyrights Fully](#),” *FSF Blog* (March 27, 2024).

Seth L. Cooper, “[The ‘No AI Fraud Act’ Would Secure IP Rights Consistent With the First Amendment](#),” *Perspectives from FSF Scholars*, Vol 19, No. 3 (January 26, 2024).

Seth L. Cooper, “[Copyright Case Affirming Human Creativity Sets the Stage for AI Issues](#),” *Perspectives from FSF Scholars*, Vol. 18, No. 49 (November 2, 2023).

Seth L. Cooper, “[Supreme Court Should Clarify the Law on Direct Infringement of Copyrighted Works](#),” *Perspectives from FSF Scholars*, Vol. 18, No. 38 (September 20, 2023).

Seth L. Cooper, “[Internet Archive to Face the Music for Mass Copyright Infringement](#),” *Perspectives from FSF Scholars*, Vol. 18, No. 36 (September 7, 2023).

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