

# No AI FRAUD Act Is A Significant Step For Right Of Publicity

By **Rachel Hofstatter and Aaron Rosenthal** (February 28, 2024)

Despite its positive applications, unrestricted artificial intelligence can impinge upon individual rights, including privacy and personality rights, if unchecked.

Examples like circulating deepfakes and misappropriating recording artists' voices abound. Congress proposes protecting against these harms through the proposed No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024.

The No AI FRAUD Act would create an intellectual property interest in one's voice and likeness and a federal right of publicity protection for the first time.

The U.S. House of Representatives Judiciary Subcommittee on Courts, Intellectual Property and the Internet's Feb. 2 hearing on AI and IP examined the need to have federal protections that improve upon protections already available through the Lanham Act and state laws.

While the legislative work continues, the act, should it pass, would represent a significant step toward harmonizing right of publicity law, especially post-mortem rights.



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## Post-Mortem Litigation

Deceased celebrities are attractive targets for those eager to associate themselves with fame. The top dozen or so deceased celebrity estates' gross annual revenue has jumped from \$363.5 million to \$1.6 billion in the past decade. Most of these revenues derive from exploiting IP rights held by the estates.

Yet as AI seems to gain new science fiction-level capabilities each month, those estates' IP rights are suddenly vulnerable to new kinds of theft. The Feb. 2 hearing began with a discussion of the recent viral unauthorized AI Johnny Cash cover of Aqua's song "Barbie Girl," and how advancements in AI-generated works are becoming increasingly proficient at mimicking an artist's likeness and voice.

The discussion then turned to the existence of deepfake pornography and how AI's uses can tarnish and irreparably damage a person's reputation.

Recent events — and current litigation — show that the risks to the personas and estates of deceased celebrities are very real.

On Jan. 9, the comedy podcast "Dudesy" uploaded a YouTube video titled "I'm Glad I'm Dead." The video features AI-generated images of George Carlin's likeness and trademark gray ponytail with an AI-generated facsimile of Carlin's voice, telling jokes. "Dudesy" claimed the special was created by an AI model trained on the entirety of Carlin's works to write jokes mimicking his signature wit.

Carlin's estate has sued on the grounds of copyright infringement and violations of California's statutory and common law rights of publicity.

### **Potential Effects of the No AI FRAUD Act**

If enacted, the No AI FRAUD Act might provide a stronger cause of action for Carlin's estate and others similarly situated. The act provides that a person has an IP right in their own likeness and voice, which passes to their heirs upon death.

It would protect that property right for 10 years after death, granting the decedent's executors, heirs, transferees or devisees the right to control use of the decedent's likeness and voice. This automatic extension of protection would grant heirs and devisees time to seek longer-lasting commercial protections, such as trademark registrations or copyright extensions.

The act, by virtue of its language on transferability, also grants living celebrities the opportunity to preclude bad actions on behalf of their descendants: A celebrity might prophylactically assign all rights to exploit their image to a trust for the express purpose of avoiding the commercial exploitation of their likeness.

The current draft also provides that the act would not preempt existing state law protections that may extend the right of publicity even longer after death, making the federal act a tool for estates to use along with state claims, where available, to deter bad actors.

The No AI FRAUD Act would represent a significant expansion of post-mortem right of publicity protections for a large portion of the population. While 38 states recognize a right of publicity, only 23 recognize the right post-mortem. The extent of protection varies widely.

### **The State of Post-Mortem Publicity Rights**

California grants 70 years of post-mortem protection to individuals who died in or after 1915. Illinois' statute only protects those who died after its enactment on Jan. 1, 1999. New York's post-mortem right of publicity applies solely to individuals who died on or after May 29, 2021.

Some state statutes require the deceased be domiciled in the state at death or resided there at death. Indiana, Washington, Nevada and Hawaii have post-mortem right statutes that expressly extend to nonresidents. Indiana only requires that a violation of the publicity right to have occurred within the state.

In addition to issues of domicile and residence, state laws also differ with respect to the applicability of post-mortem right. For example, California and Texas require that the deceased's name and likeness have commercial value at the time of death, or sometime after death.

Utah requires that the deceased had exploited his or her publicity right during his or her lifetime. Nevada requires heirs or assignees to register their intent to protect the decedent's likeness with the secretary of state within six months of actual or constructive notice of an unauthorized use; if that period expires, any claim of a violation of the right of publicity is waived.

The variability of the right of publicity reflects individual states' conceptions of the right: a

privacy interest, a form of property or some nonproperty product of an individual's labor.

Many also view the rights of control inherent in the right of publicity in opposition to First Amendment rights. This view concerns the suppressive effect on speech that granting a control over a person's likeness has on certain types of expression, such as performing or writing something that is merely in the style of a famous person, rather than coopting their likeness.

### **Improving Lanham Act Protections With a Federal Publicity Act**

Without the No AI FRAUD Act, individuals in states that do not recognize a right of publicity are not without options. The Lanham Act protects rights closely akin to publicity by expressly barring the registration of trademarks that employ another person's name or signature without that person's permission, without requiring a demonstration of likely confusion as to source or sponsorship, but this section protects only living individuals and does not recognize a post-mortem right.

Sections 32 and 43(a) of the Lanham Act also protect a person's name and likeness if they qualify as trademarks through commercial exploitation and allowing claims under allegations of infringement, false endorsement and false designation of origin. Courts have recognized a post-mortem right under these sections of the Lanham Act.

The Lanham Act only protects an individual's likeness when it is used in commerce: The No AI FRAUD Act would expand the right of individuals and their heirs to police their voice and likeness against bad actors, regardless of commercial exploitation.

Section 3(b)(2) of the No AI FRAUD Act would close a gap in the Lanham Act by establishing that the right of publicity is enforceable even without commercial exploitation or the need to qualify one's voice or likeness as a trademark.

### **No AI FRAUD Act Concerns**

At the Feb. 2 hearing, professor Jennifer E. Rothman testified to her concerns about the NO AI FRAUD Act's expansion of the current recognition of the right of publicity, suggesting that the extension of the right to transfer and the indefinite grant of publicity rights of an individual might go too far. These are valid points that stem from the language in the act regarding transmissibility of one's image.

Rothman foresees a risk that individuals who license away their likeness in perpetuity will be at the same risk of losing control of their likenesses to unscrupulous parties that many recently passed individuals are now. Additionally, Rothman's comments primarily concerned the publicity rights of the living, but she did address one potentially concerning aspect of a blanket grant of a post-mortem right to publicity; specifically, how current estate tax laws would treat an automatic grant of a right of publicity.

If a post-mortem right to publicity is valued at the time of a person's death, she proposes that an exemption be available to their heirs in the event they do not wish to pursue the commercialization of the deceased's likeness. This exemption would prevent the heirs from being forced to commercialize their relative's likeness to avoid an onerous tax burden.

### **Conclusion**

Rothman's concerns are well-considered, demonstrating the work to be accomplished in

redrafting to protect the very artists the act intends to protect. However, the problems the act addresses are likely to only become more significant as time passes and generative AI technology improves. Addressing the problem starts by acknowledging it exists.

The No AI FRAUD's consideration of a federal right of protection including post-mortem rights represents a significant step toward harmonizing the current landscape of publicity rights.

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