



**“Artificial Intelligence and Intellectual  
Property, Part II – Identity in the Age of AI”**

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**Before the House Committee on the  
Judiciary, Subcommittee on Courts,  
Intellectual Property and the Internet**

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## **Introduction**

Mr. Chairman, Ranking Member Johnson, and members of the Committee, on behalf of the Software and Information Industry Association (SIIA) and its members, thank you for this opportunity to share our views on Identity in the Age of AI.

SIIA represents over 350 companies in the business of information. Our members range from start-up firms to some of the largest and most recognizable corporations in the world. For over forty years, we have advocated for the health of the information lifecycle, advancing favorable conditions for its creation, dissemination, and productive use. Our members create educational software and content, e-commerce platforms, legal research and financial databases, and a variety of other products that people depend on in wide swaths of commercial life. We are the place where information and technology meet.

Our members have wholeheartedly embraced the promise of AI and predict advances that will revolutionize information management, creation, analysis, and dissemination. They actively use AI on many fronts—in the classroom, in fraud detection, in market data, in money laundering investigations, and in locating missing children. They have invested billions in its development, acquisition, and use.

In general, SIIA advocates for technology-neutral solutions to policy problems. We acknowledge, however, that in some cases “AI is different,” and support the adoption of a risk-based framework to regulate this technology. Our members have been leaders in advancing AI accountability and governance. The reason is simple: AI that generates the most accurate and trustworthy information, limits unintentional bias, is based on reliable data will be most useful to governments, businesses, and consumers.

Our members actively use artificial intelligence on many fronts. For example, in the education field, the promise of AI technologies coupled with the potential risks spurred our members to create industry-wide principles for AI in education.<sup>1</sup> The potential of AI to further educational objectives is immense. For example, one of our members uses AI to track where students are in their studies and where they are ready to learn next with key, complex courses through grades 3-12. This technology is an AI learning and assessment tool that can accurately and efficiently discern gaps in student knowledge in tough subjects: math, chemistry, statistics, and accounting. Using deep learning, which is a form of machine learning that uses neural networks in a way that resembles the human brain, the AI reduces the amount of time students spend on the program's assessments by more than 20%, therefore allowing students more time to learn new topics within the program.

Another member company uses generative AI features in their student assessment platform that helps educators save time while building and grading assessments. The question generator automatically crafts questions based on teachers' criteria, while the assisted rubrics feature automatically designs rubrics for essay questions and recommends grades. These features save teachers hours of time manually grading assessments with rubrics, giving them valuable time back to their day, empower them to better meet each student's individual needs. Our members are exploring the use of these tools as demonstrative aids through videos and accessibility via text-to-speech.

SIIA's members are not only involved in education. Our members include publishers of scientific, technical, and medical journals, platforms and search engines, and market data firms. Each of them is experimenting with or developing generative AI models, ranging from general purpose large language models like Gemini and LLaMA to specific generative AI applications for use in legal research and

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<sup>1</sup> SIIA, Principles for the Future of AI in Education, available at, <https://edtechprinciples.com/principles-for-ai-in-education/>.

writing. All our members are excited about the opportunities that AI presents for both their businesses and the public.

Similarly, all of them believe that respect for and protection of intellectual property is key to the health of the information ecosystem. We believe that the use of AI must comply with existing statutory requirements and respect for established intellectual property rights. These rights exist to provide an ongoing incentive to authors, artists, technologists, and scientists to create original works. The use of copyrighted works without permission to train generative artificial intelligence models remains the subject of active litigation, and the legality of its use will be heavily fact dependent. Our members are confident that courts will sort out the fair uses from the unfair and do not support any changes to the copyright law at this time.

With that said, we recognize the non-copyright harms that misuse and abuse of AI can cause. We are seeing examples in the media of digital replicas used to fool the public or maliciously target an individual. When abused, this technology can cause severe harm to a person's privacy rights, and we commend the Committee for examining potential legal remedies.

At the same time, as Congress moves to consider name and likeness legislation, we encourage Congress to consider the existing federal and state legal landscape that already addresses many of these harms in a technologically neutral manner. Digital tools that can be used to deceptively manipulate media are not new. To the extent there are harms left unaddressed by existing laws protecting privacy or name and likeness, we believe the courts currently considering these issues will help to provide guidance and would urge Congress not to prejudge the outcome of ongoing litigation.

There are three questions we think that Congress should ask when examining this issue.

- First, are the injuries that Congress is looking to remedy addressed by existing law, and are those injuries caused by existing technologies as well as by generative AI?

- Second, are there areas of specific risk that are unique to generative AI?
- And third, what limits should there be on this kind of regulation, including First Amendment limits?

### **Section 301 of the Copyright Act Preempts Equivalent State Laws**

On January 1, 1978, the Copyright Act of 1976 took effect. When it revised the copyright act in 1976, Congress made uniformity a centerpiece of the statute. Section 301(a) of title 17 preempts all state causes of action that purport to grant equivalent rights.<sup>2</sup> To the extent that the statutory language left any doubt, Congress’s report language removed it, emphasizing that “The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law.”<sup>3</sup>

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<sup>2</sup> Section 301 states:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by [section 106](#) in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

<sup>3</sup> H. Rep. 94-1476 at 130 (1976). See also *id.* at 131 (“As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory

Courts have policed the line that Congress drew by applying an “extra element” test: in order to survive a challenge under section 301, a state cause of action must contain an element that is qualitatively different from wrongful copying.<sup>4</sup> Even in construing other federal statutes, the Supreme Court has maintained the distinction between, for example, copyright and federal unfair competition law.<sup>5</sup> For example, a claim that a defendant was “unjustly enriched” by virtue of copying and selling works created by another are routinely preempted by the courts.<sup>6</sup>

SIIA urges the Committee not to expand the scope of copyright protection by creating an overbroad new cause of action in which the heart of the harm claimed is the unauthorized copying of an expressive work. Rather, the scope of an appropriate name and likeness bill must begin by identifying the non-copyright harm that it seeks to remedy.

### Federal and State Law Provide Remedies for Non-copyright Harms.

The gravamen of claims for name and likeness protection involves harms that are qualitatively different from those formed by wrongful copying. These doctrines protect an individual’s right to control the use of their persona for commercial purposes, and to remedy actions that harm their human dignity. For example:

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copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.”).

<sup>4</sup> See generally 6 Patry on Copyright 18:19.

<sup>5</sup> E.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003) (rejecting Lanham Act claim in copying of public domain work because it causes the Lanham Act to conflict with the law of copyright, which addresses that subject specifically.”); cf. *TraFFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 34-35 (2001) (rejecting Lanham Act claim for trade dress infringement on subject of expired utility patent unless secondary meaning in the trade dress was proven).

<sup>6</sup> See generally 6 Patry on Copyright 18:20, 18:21.

- Section 43(a) Lanham Act and state rights of unfair competition protect against false endorsements using a celebrity's name, image, or likeness. Thus, the use of a celebrity's name or likeness in a way that suggests that they endorse a product will infringe their persona rights, which is analogous to a trademark.<sup>7</sup> For example, the use of a celebrity's likeness on T shirts and merchandise can create a false impression of endorsement.<sup>8</sup>
- State rights of publicity will protect against the use of a person's identifiable name, image, or likeness in the context of trade or merchandise even if consumer confusion does not exist. For example, courts found the use of the late Johnny Carson's catchphrase as applied to portable toilets ("Here's Johnny") as a violation of his state law rights of publicity.<sup>9</sup>

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<sup>7</sup> See generally 5 McCarthy on Trademarks and Unfair Competition § 28:15 & n.7 (5th ed.) (stating that § 43(a)(1)(A), 15 U.S.C.A. § 1125 (a)(1)(A), "a human persona or identity is a kind of "trademark" which is infringed by a false endorsement," and collecting cases).

<sup>8</sup> See *Bruce Lee Enterprises, LLC v. A.V.E.L.A., Inc.*, No. 10 CIV. 2333 LTS, 2011 WL 1327137, at \*4 (S.D.N.Y. Mar. 31, 2011). See also, e.g., Cal. Civil Code 3344(a) (1); N.Y. Civ. Rights Law § 50, 51 (prohibiting the use of name or image of a living person for purposes of trade without consent).

<sup>9</sup> See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983). See also generally Restatement of Unfair Competition (3d) § 46 (stating that appropriating the commercial value of another's name image or likeness for purposes of trade leads to liability). The scope of this right is analogous to trademark dilution, which provides rights against blurring and tarnishment for famous marks.<sup>9</sup> See 15 U.S.C. 1125(c) (prohibiting dilution of trademarks that are widely recognizable to the consuming public, but also exempting expressive uses); see also Restatement (Third) of Unfair Competition § 46, comment c ("The right to prohibit unauthorized commercial exploitation of one's identity allows a person to prevent harmful or excessive commercial use that may dilute the value of the identity.").

- Common law privacy torts such as defamation, false light, and intentional infliction of emotional harm are also available for instances in which an individual is harmed by lies, or extreme and outrageous affronts to personal dignity.<sup>10</sup> Thus, the creation of nonconsensual deep fake pornography could implicate any number of these causes of action.
- Federal laws also protect dignity interests. For example, section 6851 of title 15 creates a civil action against a person whose intimate images are distributed without consent, even if the images themselves were made consensually.<sup>11</sup> The statute requires that the defendant either know or have a reckless disregard for the fact that the plaintiff has not consented to the disclosure of that particular image.<sup>12</sup> Importantly, section 1309 contains a number of exemptions to comport with the First Amendment, including matters of public interest or concern.<sup>13</sup>

Outside of the realm of (un)truthful advertising which receives no First Amendment concerns, the First Amendment picture becomes much more complex, as it privileges certain kinds of speech relating to matters of public concern. Defamation, as the Committee knows, applies far differently to public figures versus private persons, as does false light publicity. In addition, every right of publicity statute contains some sort of expressive works exemption that permits the use of NIL for education, news reporting, and creative expression.<sup>14</sup> State "revenge porn" statutes (some of which expressly address deep

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<sup>10</sup> See Restatement (Third) of Torts: Phys. & Emot. Harm § 46 (2012); Restatement (Second) of Torts § 652E & Comment b Illustration 1 (describing the difference between false light and defamation).

<sup>11</sup> 15 U.S.C. § 6851(b)(1).

<sup>12</sup> *Id.* § 6851(b)(2).

<sup>13</sup> *Id.* § 6851(b).

<sup>14</sup> Restatement (Third) of Unfair Competition § 47 comments b, c (describing limits on the right of publicity for news reporting, commentary, works of fiction and nonfiction).



fakes, and some of which do not) also contain provisions that privilege First Amendment protected activity.<sup>15</sup> Similarly, consumer privacy laws exempt publicly available information from their definitions of covered information.<sup>16</sup> A broad NIL law that required consent for any digital replica but lacked protection for expressive works and other important safety valves will face a number of First Amendment problems, including surviving strict scrutiny.<sup>17</sup>

## A Way Forward

Federal and state laws create multiple levels of protection for the interests implicated by injuries to name and likeness. To the extent that Congress elects to act, it should act in areas in which AI poses a particular risk of harm left unaddressed by current federal or state law. For example, we recognize the risk that deep fakes can pose to privacy when used to create nonconsensual, sexually explicit deep fakes. VAWA's application to deep fakes seems at best ambiguous because it relies on provisions of the law that apply to actual (and not simulated) sexual conduct.<sup>18</sup> Drawing from exemptions in existing rights of publicity law<sup>19</sup> as well as VAWA and existing state revenge porn statutes, it would be possible for Congress to write a bill that both respected free expression and

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<sup>15</sup> See, e.g., Cal. Penal Code 647(j)(4); Ga. Code Ann. 16-11-90 (b) (cause of action), (e) (privileged uses); Ohio Rev. Code 2917.211(B) (cause of action), (D) (privileged uses).

<sup>16</sup> See, e.g., Cal. Civil Code 1798.140 (v)(2) (exempting publicly available information from scope of consumer privacy law); Va. Code Ann. 59.1-575 (same). See also generally Memorandum from Andrew J. Pincus to SIIA, available at <https://fisd.net/wp-content/uploads/2021/06/Memo-re-CCPA-FINAL.pdf> (describing free speech infirmities in the original CCPA).

<sup>17</sup> See *Sarver v. Chartier*, 813 F.3d 891, 905-907 (9th Cir. 2016) (finding application of publicity statute as subject to strict scrutiny).

<sup>18</sup> 15 U.S.C. 6851 (a) (citing 18 U.S.C. 2257). Compare 18 U.S.C. § 2257A (dealing only with registration requirements for simulated explicit sexual conduct).

<sup>19</sup> E.g., Cal. Civ. Code § 3344.1; Ohio Rev. Code Ann. § 2741.09 (1999); N.Y. Civ. Rights Law § 50-f(2)(d) (2020).

protected both celebrities and ordinary people from the violation of privacy rights committed by individuals who create nonconsensual deep fake pornography. These laws contain three elements that would be significant in withstanding a First Amendment defense: (1) a lack of consent by the individual, who is identifiable in the deep fake; (2) an intent element in that the deep fake was created with reckless disregard of the lack of consent or knowledge that it did not exist; and (3) suitable exceptions for expressive works and other privileged uses. A federal statute accomplishing these ends would be worthwhile.

**Conclusion.**

In closing, we believe that legislation that both focuses on a discrete privacy harm and is tailored to address that harm is a far preferable solution to overbroad name and likeness legislation. We stand ready to work with the Committee and all affected stakeholders to help resolve these issues.

Thank you again for the opportunity to present our views.