



August 7, 2024

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Stuart D. Levi

Partner / New York
212.735.2750
stuart.levi@skadden.com

M. Oren Epstein

Partner / New York
212.735.2517
oren.epstein@skadden.com

Jordan Feirman

Counsel / New York
212.735.3067
jordan.feirman@skadden.com

Shannon N. Morgan

Associate / New York
212.735.3711
shannon.morgan@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West
New York, NY 10001
212.735.3000

Copyright Office Advocates for Federal 'Digital Replica' Law

On July 31, 2024, the United States Copyright Office (Copyright Office) published a report urging Congress to create a federal law protecting individuals against unauthorized artificial intelligence (AI) generated digital replicas, commonly known as “deepfakes” (Report). The Report is the first in a series of reports on the intersection of AI and copyright law that the Copyright Office plans to issue emanating from its [August 2023 Notice of Inquiry](#) (NOI).

In the NOI, the Copyright Office sought input from the public on a number of issues relating to AI and copyright, as well as the intersection of AI and unauthorized use of voice, image and likeness in connection with AI. In proposing a new federal law, the Report also presents important insight into the Copyright Office’s view on the application of Section 114(b) of the Copyright Act (which deals with sound recording imitations) and also hints at the Copyright Office’s views on training an AI model to copy a creator’s style.

What Is a Digital Replica?

The Report defines a “digital replica” as “a video, image, or audio recording that has been digitally created or manipulated to realistically but falsely depict an individual.” Although digital replicas are typically associated with malicious use (*e.g.*, fraud or portraying someone in a false light) or their potential negative impacts (*e.g.*, replacing human artists or impairing authenticity and creativity), the Report acknowledges that they can also be beneficial. For example, they can allow individuals to license, and be compensated for, the use of their voice, image and likeness, or support those with physical disabilities, such as by allowing them to generate works that mitigate the effect of their disability.

Current Legal Framework Falls Short

The Report surveys existing federal and state laws that might impact digital replicas, including statutes and common law concerning the rights of privacy (*e.g.*, the tort of presenting someone in a false light), rights of publicity, intellectual property; and unfair competition and consumer protection. The relevance of copyright law, according to the Report, is that: (i) digital replicas particularly impact creators of copyrighted works such as artists and performers; (ii) copyrighted works are often used to produce digital replicas; and (iii) the replicas themselves are often disseminated as part of larger copyrighted works.

The Report concludes that existing laws do not provide adequate protection against unauthorized digital replicas because the laws are inconsistent across states and often insufficient. For example, some state laws would only protect against use of digital replicas in connection with commercial use.

Copyright Office Advocates for Federal ‘Digital Replica’ Law

Proposed Federal Law and Guidance

Given the Copyright Office’s view that existing laws do not properly protect against unauthorized digital replicas, the Report proposes a new federal law that would take into account the following guidance and recommendations:

- **Subject Matter.** The proposed law should bear on replicas that “convincingly appear to be the actual individual being replicated,” rather than provide broader protection for the use of an individual’s “name, image, likeness,” as some state laws do.
- **Persons Protected.** Since digital replicas can impact all individuals, the proposed law should therefore offer protection to everyone and not be limited to politicians or celebrities.
- **Term of Protection.** The Copyright Office notes that there was no consensus from the NOI as to whether a digital replica law should provide postmortem protection. The Report therefore proposes that protections against digital replicas would extend for an individual’s lifetime, and if postmortem rights are included that they be limited in length (*e.g.*, 20 years, with a possible extension if the individual’s persona is being continuously commercially exploited).¹
- **Infringing Acts.** Merely creating a digital replica should not automatically create liability, but rather liability should arise only from the distribution of an *unauthorized* digital replica, if done with *actual knowledge* that the representation was both a digital replica of a particular individual and that it was unauthorized. The Report also proposes that the law should not be limited to commercial uses of digital replicas since much of the harm caused by digital replicas can result from non-commercial uses as well.
- **Secondary Liability.** Traditional principles of secondary liability from copyright law (*e.g.*, contributory or vicarious liability) may apply to digital replicas, as would a notice-and-takedown and safe harbor mechanism (akin to that in the Digital Millennium Copyright Act) that incentivizes online service providers to remove unauthorized digital replicas once put on notice.
- **Licensing and Assignment.** Interestingly, the Report proposes that, under the new law, individuals should be prohibited from assigning away their digital replica rights. While this would seemingly deprive individuals of the right to make their own decisions regarding the conveyance of digital replica rights, the Copyright Office is concerned with protecting those with limited leverage or understanding in negotiations who might assign away this important right. In place of assignments, the Report suggests that the law provide for a licensing scheme with limited periods, and that once a license terminates, the licensee should have no further rights to create new digital replicas.
- **First Amendment Concerns.** The line between prohibited usage of digital replicas and the exercise of First Amendment rights has been murky. The Copyright Office acknowledges this tension and believes that a balancing tests in a new law would provide maximize flexibility given the “unique and evolving nature of the threat to an individual’s identity and reputation” rising from digital replicas.
- **Remedies.** In order to disincentivize the distribution of digital replicas, the Report lays out various remedies a new law might include, such as injunctive relief, monetary damages, and statutory damages.
- **State Law Preemption.** The proposed law would not preempt state laws protecting similar rights in order to achieve some of the benefits of clarity and uniformity without “imposing a one-size-fits-all solution on all states.”
- **Preemption Through Section 114(b).** With respect to digital replicas of an individual’s voice, the Report specifically addresses whether the proposed new law would be preempted by Section 114(b) of the Copyright Act. Section 114(b), which provides that independent creation of sound recordings that “imitate or simulate” an original (*i.e.*, that do not technically replicating the recording) is not infringement of the sound recording owner’s reproduction and derivative work rights. The Copyright Office notes that some have questioned whether this provision of the Copyright Act would preempt digital replica laws, and that Louisiana and New York explicitly carved out the activity permitted under Section 114(b) from their digital replica laws. Notably, the Copyright Office states in the Report that in its view “these concerns are misplaced, and Section 114(b) does not preempt state laws prohibiting unauthorized voice replicas.” The Copyright Office’s rationale is that an individual’s voice is not itself a “work of authorship” that comes within the subject matter of the Copyright Act, and therefore states are free to regulate digital replicas of an individual’s voice without fear of Section 114(b) preemption. “[C]opyright and digital replica rights serve different policy goals; they should not be conflated,” the Report concludes. “Section 114(b) shields vocal imitations and other soundalike recordings against claims of copyright infringement. But nothing indicates that Congress intended for this limitation on copyright to deprive individuals of rights in their unique voices, whether under state right of publicity laws or a new federal statute.” The Report therefore recommends that a new federal digital replica law explicitly state that it is not preempted by Section 114(b).

¹ The Report noted a lack of consensus regarding postmortem protections during the NOI.

Copyright Office Advocates for Federal ‘Digital Replica’ Law

Replicating ‘Artistic Style’

The Report acknowledges the issues with replicating a creator’s style, including that it could harm the market for the creator’s original works. However, the Report concludes that current laws, such as the Lanham Act’s prohibitions on passing off and unfair competition or state right of publicity laws, allow for “in the style of” claims, and thus a new federal digital replica law need not specifically address replication of a “style.”

Interestingly, the Report does state that a future report will address situations where the use of an artist’s own works to train AI systems to produce material imitating the artist’s style can support an infringement claim, suggesting that there are instances where, in the view of the Copyright Office, infringement can be found.

Looking Ahead

At present, there are a series of proposals in Congress for a digital replica law, including the No Artificial Intelligence Fake Replicas And Unauthorized Duplications (No AI FRAUD) Act, and the discussion draft of the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023. The views of the Copyright Office reflected in the Report will likely provide important support for those advocating for these or similar bills in the future.

As noted, the Report is only the first in a series that the Copyright Office intends to issue as a result of the NOI. This includes the copyrightability of works created using generative AI, training of AI models on copyrighted works, licensing considerations, and allocation of any potential liability in connection with the foregoing.