

# Why Tennessee's ELVIS Act Is the King of Artificial Intelligence Protections

*Sarah Luppen Fowler and John D. Fowler\**

## ABSTRACT

*Artificial intelligence (AI) is evolving and advancing quickly. As AI advances, it presents novel legal issues for individuals and industries alike. For example, AI can now mimic the voices of famous musicians so well that it can be almost impossible for listeners to discern whether the vocals are from those musicians or generated with AI. Yet under the current legal framework, new works that mimic a famous artist's voice can be created and distributed by anyone without the consent of the musician and without any legal repercussions.*

*Fortunately, lawmakers are proposing legislation to protect against the unauthorized use of another's voice, image, or likeness in the face of AI. The first AI-focused state law, Tennessee's Ensuring Likeness Voice and Image Security Act (ELVIS Act), was passed on March 21, 2024, and went into effect on July 1, 2024. Multiple state and federal legislators have since proposed similar laws. This Article argues that the ELVIS Act is a gold standard for AI protections in general and for sound recording artists in particular, and that the protections that it provides should be incorporated into a federal right of publicity law. Indeed, many of the ELVIS Act's key provisions are included in introduced federal legislation relating to AI protection of voice, image, and likeness. Federal legislation that includes many of the themes from the ELVIS Act*

---

\* Sarah Luppen Fowler is Senior Deputy General Counsel at the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA). She is also an adjunct professor focusing on the intersection of entertainment and labor law at Vanderbilt University Law School and University of Southern California Gould School of Law. John D. Fowler is a Founding Partner at Kibler Fowler & Cave LLP, a Los Angeles and New York-based entertainment and commercial litigation firm. He is a trial attorney with a focus on entertainment, intellectual property and complex business disputes. This Article was prepared or accomplished by the authors in their personal capacities. The opinions expressed in this article are the authors' own and do not reflect the views of SAG-AFTRA or Kibler Fowler & Cave LLP. Special thanks to Tracy B. Rane, Counsel at Kibler Fowler & Cave LLP, and Kevin J. Cammisio, Senior Associate at Kibler Fowler & Cave LLP, for their superb assistance in brainstorming, researching, and drafting this article.

would protect artists from having their voice unfairly appropriated by emergent AI technology and used in ways that they did not authorize. It would provide uniform protections and thereby prevent the current patchwork system of publicity laws from growing even further apart. With AI evolving faster than any other sector in American society, including the law, lawmakers can shore up the gaps now by quickly passing national legislation.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	260
II.	STUCK ON YOU: HOW ELVIS PRESLEY SHAPED TENNESSEE'S RIGHT OF PUBLICITY AND THE ELVIS ACT .....	262
III.	IT'S NOW OR NEVER: THE NEED FOR FEDERAL PUBLICITY RIGHTS IN THE AGE OF AI .....	267
	A. <i>Federal Legislation Will Prevent Fractured Rights</i> .....	268
	1. Current AI Legislation in Other States .....	268
	2. Proposed AI Legislation at the Federal Level.....	270
	3. Reconciling State and Federal Measures.....	272
	B. <i>Federal Legislation Would Protect Recording Artists and     Individuals Alike</i> .....	274
	C. <i>Federal Legislation Can Co-Exist with State Law</i> .....	277
IV.	CONCLUSION .....	278

## I. INTRODUCTION

*“Well, the image is one thing, and a human being is another.”<sup>1</sup>*

Tennessee is the undisputed home of the recording artist.<sup>2</sup> Between Memphis and Nashville, singers (aspiring and celebrity alike) call Tennessee home, and they expect their state to protect their craft. That is why, on March 21, 2024, Tennessee Governor Bill Lee signed the Ensuring Likeness Voice and Image Security Act (“ELVIS Act” or “the Act”) into law, which went into effect on July 1, 2024.<sup>3</sup> The ELVIS

1. *Press Conference Before Madison Square Gardens Show – Hilton, New York, 19 June 1972, Rarest Interviews – Elvis Presley*, YOUTUBE (June 5, 2023), <https://www.youtube.com/watch?v=0unbc7wx6cM> [<https://perma.cc/WUN7-JG5Q>].

2. Andrew Van Dam, *The States That Produce the Most Musicians, and More!*, WASH. POST (Sept. 29, 2023, 6:00 AM), <https://www.washingtonpost.com/business/2023/09/29/states-that-produce-most-musicians-more/> [<https://perma.cc/8NSE-CXCR>].

3. TENN. CODE ANN. § 47-25-1101; H.R. 2091, 113th Gen. Assemb., 2024 Sess. (Tenn. 2024) (effective July 1, 2024); Murray Stassen, *ELVIS Act Signed into Law in Tennessee to Protect Artists' Voice and Likeness from the Misuse of AI*, MUSIC BUS. WORLDWIDE (Mar. 21, 2024),

Act is the first law that provides individuals, including recording artists, with much needed protection from the unauthorized use of their voice through artificial intelligence (AI) technology.<sup>4</sup>

Tennessee's most famous resident, Elvis Presley, was *the* recording artist of his time, and the state adopted its right of publicity laws specifically to protect his estate.<sup>5</sup> But, despite being created to protect one of the most famous singers in history, those laws did not protect a person's voice.<sup>6</sup> The ELVIS Act amends Tennessee's statutory right of publicity—the Personal Rights Protection Act (TPRPA)—by adding protections for a person's "voice."<sup>7</sup> The Act defines "voice" as "a sound in a medium that is readily identifiable and attributable to a particular individual, *regardless of whether the sound contains the actual voice or a simulation of the voice of the individual.*"<sup>8</sup> Thus, since July 1, 2024, when the law went into effect, it is illegal in Tennessee to replicate a creator's voice without their consent and enables creators to sue for damages.<sup>9</sup> This is critical for recording artists in particular because the law prevents individuals from using AI to mimic an artist's songs without authorization and thus avoid paying master licensing fees.<sup>10</sup>

---

<https://www.musicbusinessworldwide.com/elvis-act-signed-into-law-in-tennessee-to-protect-artists-voice-and-likeness-from-the-misuse-of-ai/> [https://perma.cc/H2LT-J4JB].

4. See Stassen, *supra* note 3.

5. Annie T. Christoff, *Long Live the King: The Influence of Elvis Presley on the Right of Publicity in Tennessee*, 41 U. MEM. L. REV. 667, 668 (2011); Peter Colin, *Elvis and Prince: Personality Rights Guidance for Dead Celebrities*, NAT'L L. REV. (Oct. 10, 2016), [https://natlawreview.com/article/elvis-and-prince-personality-rights-guidance-dead-celebrities-and-lawyers-and#google\\_vignette](https://natlawreview.com/article/elvis-and-prince-personality-rights-guidance-dead-celebrities-and-lawyers-and#google_vignette) [https://perma.cc/2WCA-923R].

6. Bill Kramer, *More and More States Are Enacting Laws Addressing AI Deepfakes*, MULTISTATE (Apr. 5, 2024), <https://www.multistate.us/insider/2024/4/5/more-and-more-states-are-enacting-laws-addressing-ai-deepfakes> [https://perma.cc/5Y2D-68EW].

7. *Id.*; TENN. CODE ANN. § 47-25-1102.

8. TENN. CODE ANN. § 47-25-1102 (emphasis added).

9. *Id.* § 47-25-1106.

10. Kimberlee Kruesi, *Tennessee Just Became the First State to Protect Musicians and Other Artists Against AI*, ASSOCIATED PRESS (Mar. 21, 2024), <https://apnews.com/article/artificial-intelligence-ai-music-songwriting-tennessee-eb95c850f13fd78f9e65abce2ee45091> [https://perma.cc/CZ64-UGG3]. On this point, it is important to note the distinction between a musical composition and a sound recording. "A musical composition consists of the music—i.e., the melodic, harmonic, and percussive components—along with the title and any lyrics." Darren M. Richard, *Music Licensing 101*, INDIE SLATE MAG. 1 (Oct. 2011), <https://www.dinsmore.com/content/uploads/2017/06/indie20slate20-20richard.pdf> [https://perma.cc/V9F4-DB83]. "The sound recording—often referred to as a 'master recording' or 'master'—consists of the particular sounds the listener hears: the singer's voice, the bass, drums, guitars, strings, horns, etc." *Id.* Licenses governing sound recordings are generally referred to as "master use" licenses and typically give the licensee "the right to fix the master in specific media and to make copies of that recording in return for a flat fee or per-unit royalty payment to the copyright owner." *Id.* at 2. A master use license would be required, for example, if a producer wanted to use Bob Dylan's recording of "Forever Young" in a film, commercial, or other derivative work. *See id.*

But Tennessee is not the only place where AI is threatening the livelihoods of sound recording artists. While state and federal lawmakers have been quick to follow Tennessee's lead in proposing legislation aimed at protecting against unauthorized simulations of an individual's voice or likeness, those laws do not all prevent the same types of abuse or afford the same rights as the ELVIS Act.<sup>11</sup> Such an incomplete and inconsistent patchwork of laws across the country will only be as protective as its weakest link. In the face of what many call an "AI revolution," lawmakers must establish universal protections for those things that form the essence of our identities: our names, voices, likenesses, and images.<sup>12</sup>

Part II of this Article discusses the historical background of Tennessee's right of publicity laws, how those laws led to enactment of the ELVIS Act, and a general summary of the ELVIS Act's key provisions. Part III then identifies current AI legislation in other states, as well as proposed AI legislation at the federal level. After evaluating these competing pieces of legislation, Part III also argues that lawmakers should work quickly to adopt a federal right of publicity that includes many of the key provisions of the ELVIS Act.

## II. STUCK ON YOU: HOW ELVIS PRESLEY SHAPED TENNESSEE'S RIGHT OF PUBLICITY AND THE ELVIS ACT

The key right of publicity cases in Tennessee developed from efforts to protect the estate of Elvis Presley.<sup>13</sup> In fact, "Tennessee's right of publicity was not just developed *because of* Elvis, it was developed *for* Elvis."<sup>14</sup>

The first case, *Memphis Development Foundation v. Factors, Etc. Inc.*, "originated in Tennessee and involved the sale of pewter statuettes of Elvis Presley without the exclusive licensee's permission."<sup>15</sup> In this

---

11. Jason W. Callen & Christopher J. Valente, *Tennessee Moves First on AI Protections With Elvis Act*, K&L GATES CYBER L. WATCH (Mar. 22, 2024), <https://www.cyberlawwatch.com/2024/03/22/tennessee-moves-first-on-ai-protections-with-elvis-act/> [https://perma.cc/RWY5-JZ92].

12. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) ("A voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested . . . . To impersonate [a singer's] voice is to pirate her identity.").

13. Christoff, *supra* note 5; Peter Colin, Jr., *Elvis and Prince: Personality Rights Guidance for Dead Celebrities and the Lawyers and Legislatures Who Protect Them*, NAT'L L. REV. (Oct. 10, 2016), [https://natlawreview.com/article/elvis-and-prince-personality-rights-guidance-dead-celebrities-and-lawyers-and#\\_edn31](https://natlawreview.com/article/elvis-and-prince-personality-rights-guidance-dead-celebrities-and-lawyers-and#_edn31) [https://perma.cc/EFH9-PC6R]; Kramer, *supra* note 6.

14. Christoff, *supra* note 5, at 667, 669 (emphasis added).

15. See *State ex rel. Elvis Presley Int'l Mem. Found. v. Crowell*, 733 S.W.2d 89, 95 (Tenn. Ct. App. 1987) (discussing *Memphis Dev. Found. v. Factors, Etc. Inc.*, 441 F. Supp. 1323, 1330 (W.D. Tenn. 1977)).

case, the United States District Court for the Western District of Tennessee held that, under Tennessee law, Elvis's independent right of publicity descended to the Presley estate.<sup>16</sup> However, the United States Court of Appeals for the Sixth Circuit reversed the lower court's decision and found that the right of publicity did not survive a celebrity's death.<sup>17</sup>

In doing so, the Sixth Circuit identified several allegedly "strong reasons for declining to recognize the inheritability of the right" of publicity.<sup>18</sup> The first was that it would create a "whole set of practical problems of judicial line-drawing," such as: "How long would the 'property' interest last? In perpetuity? For a term of years? Is the right of publicity taxable?"<sup>19</sup> The court then analogized to the law of defamation, which does not exist after death.<sup>20</sup> According to the court, "[t]he two interests that support the inheritability of the right of publicity, namely, the 'effort and creativity' and the 'hopes and expectations' of the decedent, would also support an action for libel or slander for destruction of name and reputation after death," but neither reason "is sufficient to overcome the common law policy terminating the action for defamation upon death."<sup>21</sup> In general, the court found that fame is often "fortuitous and fleeting" so it was not "reasonable to expect that" recognizing a postmortem right of publicity "would enlarge the stock or quality of the goods, services, artistic creativity, information, invention or entertainment available," or that it would "enhance the fairness of our political and economic system."<sup>22</sup>

Subsequently, Tennessee's General Assembly sought to correct this outcome and enacted the Personal Rights Protection Act of 1984, which provided that "[e]very individual has a property right in the use of that person's name, photograph, or likeness in any medium in any manner."<sup>23</sup> The statute created a property right that continued after the death of the individual and is also descendible to their family or heirs.<sup>24</sup>

In 1987, three years after the Tennessee Right of Publicity Act was passed, the Tennessee Court of Appeals confirmed the

---

16. *Id.*

17. *Id.* (discussing *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 958 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980)).

18. *Memphis Dev. Found.*, 616 F.2d at 959.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 959–60.

23. Christoff, *supra* note 5, at 691–92.

24. *See id.* at 692.

descendibility of the right under common law.<sup>25</sup> The court found that the recognition of individual property rights was deeply embedded in Tennessee's jurisprudence, that such rights were "absolute," and that "intangible property rights such as a corporate or trade name or good will [*sic*] are recognized, demonstrating Tennessee's "expansive view of property."<sup>26</sup> It further found that because, "[u]nquestionably, a celebrity's right of publicity has value" and can be possessed, used, and assigned, there was ample basis to conclude that the right of publicity was a species of "intangible personal property" that is descendible.<sup>27</sup>

The court also identified a number of policy reasons supporting the descendibility of the right of publicity. "First, it is consistent with [Tennessee's] recognition that an individual's right of testamentary distribution is an essential right."<sup>28</sup> Second, it recognizes the "principles of Anglo-American jurisprudence that 'one may not reap where another has sown nor gather where another has strewn.'"<sup>29</sup> Third, it is "consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death."<sup>30</sup> Fourth, it "recognizes the value of the contract rights of persons who have acquired the right to use a celebrity's name and likeness," which would be undermined if it suddenly expired upon death.<sup>31</sup> "Fifth, recognizing that the right of publicity can be descendible will further the public's interest in being free from deception with regard to the sponsorship, approval or certification of goods and services."<sup>32</sup> And, finally, "recognizing that the right of publicity can be descendible is consistent with the policy against unfair competition through the use of deceptively similar corporate names."<sup>33</sup>

It is no surprise, then, that Tennessee's latest amendment to its right of publicity statute was named after Elvis Presley.<sup>34</sup> The ELVIS

---

25. *Id.* at 693 (citing *State ex rel. Elvis Presley Int'l Mem'l. Found. v. Crowell*, 733 S.W.2d 89 (Tenn. Ct. App. 1987)).

26. *State ex rel. Elvis Presley Int'l Mem'l. Found.*, 733 S.W.2d at 96–97.

27. *Id.* at 97–99.

28. *Id.* at 97.

29. *Id.* at 98 (quoting *M.M. Newcomer Co. v. Newcomer's New Store*, 217 S.W. 822, 825 (Tenn. 1919)).

30. *Id.*

31. *Id.*

32. *Id.* at 99.

33. *Id.*

34. See H.B. 2091, 113th Gen. Assemb., 2nd Reg. Sess. (Tenn. 2023); Andy Sher, *Comeback Special? Gov. Bill Lee Takes ELVIS Act on the Road*, TENN. J. (May 6, 2024), <https://pro.stateaffairs.com/tn/news/tennessee-artificial-intelligence> [<https://perma.cc/HWU8-GXJM>] ("ELVIS—it's named, of course, after the late Elvis Presley—is an acronym for the Ensuring Likeness, Voice and Image Security Act.").

Act was signed into law by Governor Bill Lee on March 21, 2024.<sup>35</sup> The legislation received support from the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) as well as a coalition of organizations within the music industry, including the Recording Academy, the Recording Industry Association of America, Nashville Songwriters Association International, Nashville Music Publishers' Association, and the Songwriters of North America.<sup>36</sup>

The Act amends Tennessee's prior right of publicity statute and now provides that "every individual has a property right in the use of that individual's name, photograph, *voice*, or likeness in any medium in any manner."<sup>37</sup> These property rights are freely assignable, licensable, and descendible—meaning they do not expire upon the death of the individual whether or not such rights were commercially exploited by the individual during the individual's lifetime, and can be bequeathed to heirs.<sup>38</sup>

The following sets forth the three types of "unauthorized uses" subject to civil liability under the Act:

- (1) Any person who knowingly uses or infringes upon the use of an individual's name, photograph, voice, or likeness in any medium, in any manner directed to any person other than such individual, for purposes of advertising products, merchandise, goods, or services, or for purposes of fundraising, solicitation of donations, purchases of products, merchandise, goods, or services, without such individual's prior consent, or, in the case of a minor, the prior consent of such minor's parent or legal guardian, or in the case of a deceased individual, the consent of the executor or administrator, heirs, or devisees of such deceased individual, is liable to a civil action.
- (2) A person is liable to a civil action if the person publishes, performs, distributes, transmits, or otherwise makes available to the public an individual's voice or likeness, with knowledge that use of the voice or likeness was not authorized by the individual or, in the case of a minor, the minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heirs, or devisees of such deceased individual.
- (3) A person is liable to a civil action if the person distributes, transmits, or otherwise makes available an algorithm, software, tool, or other technology, service, or device, the primary purpose or function of such algorithm, software, tool, or other technology, service, or device is the production of a particular, identifiable individual's photograph, voice, or likeness, with knowledge that distributing, transmitting, or otherwise making available the photograph, voice, or likeness was not authorized by the individual or, in the case of a minor, the

---

35. See Murray Stassen, *ELVIS Act Signed into Law in Tennessee to Protect Artists' Voice and Likeness from the Misuse of AI*, MUSIC BUS. WORLDWIDE (Mar. 21, 2024), <https://www.musicbusinessworldwide.com/elvis-act-signed-into-law-in-tennessee-to-protect-artists-voice-and-likeness-from-the-misuse-of-ai/> [<https://perma.cc/KP4D-DZBM>].

36. See *id.*

37. See TENN. CODE ANN. § 47-25-1103(a) (emphasis added); see also H.B. 2091 (noting amendments to prior act and adding "voice" as among the property rights an individual has in addition to name and photograph).

38. See § 47-25-1104.

minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heirs, or devisees of such deceased individual.<sup>39</sup>

Importantly, the ELVIS Act defines “voice” as “a sound in a medium that is readily identifiable and attributable to a particular individual, regardless of whether the sound contains the actual voice or a simulation of the voice of the individual.”<sup>40</sup> This definition may extend to “use of an existing sound recording of someone’s voice” and “to digitally generated recording or audiovisual content that approximates individual voices.”<sup>41</sup>

The Act also has a fair use exception that applies to (1) uses of name, photograph, voice or likeness in news, public affairs, or sports broadcasts; (2) uses for comment, criticism, scholarship, satire, or parody; (3) representing the individual as the individual’s self in an audiovisual work “unless the audiovisual work containing the use is intended to create, and does create the false impression that the work is an authentic recording in which the individual participated”; (4) fleeting or incidental uses; and (5) an advertisement or commercial announcement for any of the above.<sup>42</sup> Notably, however, these “exceptions” are still subject to the First Amendment, meaning courts must analyze the work as a whole to determine whether it is protected speech.<sup>43</sup>

Additionally, there is no presumption under the Act that the use of a name, photograph, voice or likeness in a commercial medium automatically constitutes a use for purposes of advertising solely because the material containing such use is commercially sponsored or contains paid advertising.<sup>44</sup> Rather, it is a question of fact whether the use of the complainant individual’s name, photograph, voice, or likeness is so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for purposes of advertising or solicitation.<sup>45</sup>

The remedies available under the Act are injunctive relief, actual damages suffered from knowing use or infringement of an individual’s rights, and any profits that are attributable to such use or

---

39. *Id.* § 47-25-1105(a).

40. *Id.* § 47-25-1102.

41. Sy Damle, Ivana Dukanovic, Britt Lovejoy & Alli Stilliman, *The ELVIS Act: Tennessee Shakes Up Its Right of Publicity Law and Takes On Generative AI*, LATHAM & WATKINS CLIENT ALERT COMMENT. (Apr. 8, 2024), <https://www.lw.com/admin/upload/SiteAttachments/The-ELVIS-Act-Tennessee-Shakes-Up-Its-Right-of-Publicity-Law-and-Takes-On-Generative-AI.pdf> [<https://perma.cc/9EZN-QYFA>].

42. TENN. CODE ANN. § 47-25-1107(a).

43. *Id.*

44. *Id.* § 47-25-1107(b).

45. *Id.*



infringement which are not taken into account in computing the actual damages.<sup>46</sup> The Act clarifies that either the individual or the record company can enforce the rights where an exclusive license agreement exists.<sup>47</sup>

### III. IT'S NOW OR NEVER: THE NEED FOR FEDERAL PUBLICITY RIGHTS IN THE AGE OF AI

Recognizing the need for additional protections against AI, other state lawmakers were quick to propose bills like the ELVIS Act.<sup>48</sup> These efforts demonstrate that while this influx of common-minded legislation is a welcomed step forward, their different protections could lead to disparate rights that ultimately undermine their goals. Moreover, AI's fast advancement requires swift action by state and federal legislatures.<sup>49</sup> By the time each of the fifty states and the United States' territories adopt similar legislation, an untold number of people could see their name, voice, or likeness used without their consent and without any legal recourse. To make matters worse, AI has the potential to completely undermine the master licensing scheme that recording artists, record labels, and creators of derivative content rely on to make new works.<sup>50</sup> As such, the proposed federal legislation, which includes many of the ELVIS Act's most important provisions, should be adopted as soon as possible.

---

46. *Id.* § 47-25-1106(a)–(d)(1).

47. *Id.* § 47-25-1106(f) (“Where a person has entered into a contract for an individual’s exclusive personal services as a recording artist or an exclusive license to distribute sound recordings that capture an individual’s audio performances, an action to enforce the rights set forth in this part may be brought by the person or the individual.”).

48. Bill Kramer, *More and More States Are Enacting Laws Addressing AI Deepfakes*, MULTISTATE (Apr. 5, 2024), <https://www.multistate.us/insider/2024/4/5/more-and-more-states-are-enacting-laws-addressing-ai-deepfakes> [https://perma.cc/QM5Q-UXDF]; Yusef Abutouq, Matthew Berlin, Pamela Deese, Matthew Finkelstein, Emily Lewis & Helenka Mietka, *Elvis is Alive as Tennessee is First to Implement Rights of Publicity Protections Against AI Clones, Deepfakes, and Impersonations*, JD SUPRA (July 1, 2024), <https://www.jdsupra.com/legalnews/elvis-is-alive-as-tennessee-is-first-to-7755932/> [https://perma.cc/W9ME-3JF2].

49. Will Henshall, *4 Charts That Show Why AI Progress is Unlikely to Slow Down*, TIME (Aug. 2, 2023, 4:50 PM), <https://time.com/6300942/ai-progress-charts/> [https://perma.cc/Y4EG-3FHG].

50. James Vincent, *The Scary Truth About AI Copyright is Nobody Knows What Will Happen Next*, THE VERGE (Nov. 15, 2022, 9:00 AM), <https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data> [https://perma.cc/4WFH-Y5ZK].

### A. Federal Legislation Will Prevent Fractured Rights

California, Illinois, Kentucky, and Louisiana, among others, have each drafted laws to protect publicity rights in the face of AI.<sup>51</sup> However, these laws offer different protections, which could lead to nationwide gaps.<sup>52</sup> Perhaps even more problematic, there remain many other states and territories that may not specifically protect against AI.<sup>53</sup> Fortunately, federal lawmakers have stepped in to fill the state gaps with proposed federal legislation that shares many of the key provisions that make the ELVIS Act the king of AI protections.<sup>54</sup>

#### 1. Current AI Legislation in Other States

In September of 2023, California Governor Gavin Newsom signed Executive Order N-12-23 “to address the[] accelerating advancements and utilization of AI in state government.”<sup>55</sup> This Executive Order, in turn, spurred a host of proposed legislation aimed at addressing AI.<sup>56</sup> One of those was Assembly Bill 1836 (AB 1836), which was signed into law on September 17, 2024.<sup>57</sup> This bill amended California’s post-mortem right of publicity statute, California Civil Code section 3344.1, to prohibit the use of a “digital replica” of a

---

51. Jennifer E. Rothman, *California Considers a Digital Replica Law for the Dead*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Mar. 21, 2024), [https://rightofpublicityroadmap.com/news\\_commentary/california-considers-a-digital-replica-law-for-the-dead/](https://rightofpublicityroadmap.com/news_commentary/california-considers-a-digital-replica-law-for-the-dead/) [https://perma.cc/5J63-D7MM]; Jennifer E. Rothman, *Louisiana Reintroduces Right of Publicity Bill*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Mar. 9, 2018), [https://rightofpublicityroadmap.com/news\\_commentary/louisiana-reintroduces-right-publicity-bill/](https://rightofpublicityroadmap.com/news_commentary/louisiana-reintroduces-right-publicity-bill/) [https://perma.cc/K5AP-67L3]; see also Jennifer E. Rothman, *Senate Formally Introduces Digital Replica Bill*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (July 31, 2024), [https://rightofpublicityroadmap.com/news\\_commentary/senate-formally-introduces-digital-replica-bill/](https://rightofpublicityroadmap.com/news_commentary/senate-formally-introduces-digital-replica-bill/) [https://perma.cc/ZSR7-ZFQP].

52. Anuj Gupta & Rebecca Neipris, *AI Protection in ELVIS Act Signals Dire Push for Federal Action*, BLOOMBERG L. (Apr. 29, 2024, 3:30 AM), <https://news.bloomberglaw.com/us-law-week/ai-protection-in-elvis-act-signals-dire-push-for-federal-action> [https://perma.cc/L3HK-RDVW].

53. Jennifer E. Rothman, *Right of Publicity State-by-State*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <https://rightofpublicityroadmap.com/> [https://perma.cc/AZA9-3YP8] (last visited Oct. 28, 2024).

54. Jennifer E. Rothman, *House’s Draft AI Bill Risks Loss of Control Over Our Voices and Likeness*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Jan. 23, 2024), [https://rightofpublicityroadmap.com/news\\_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/](https://rightofpublicityroadmap.com/news_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/) [https://perma.cc/GDZ7-V67R].

55. *California at the Forefront: Steering AI Towards Ethical Horizons, Hearing Before the S. Governmental Org. Comm. & S. Budget and Fiscal Rev. Subcomm.*, 2024 Leg., S. 4, at 1 (Cal. 2024), <https://sbud.senate.ca.gov/sites/sbud.senate.ca.gov/files/California%20at%20the%20Forefront%20Background.pdf> [https://perma.cc/4H7J-LU5N].

56. See generally *id.*

57. A.B. 1836, 2024 Leg., Reg. Sess. (Cal. 2024).

“deceased personality.”<sup>58</sup> “Digital replica” is defined in the bill as “a digital simulation of the voice or likeness of an individual that so closely resembles the individual’s voice or likeness that a layperson would not be able to readily distinguish the digital simulation from the individual’s authentic voice or likeness.”<sup>59</sup> These rights “are property rights, freely transferable or descendible, in whole or in part.”<sup>60</sup>

Significantly, California Civil Code section 3344.1 now includes an express First Amendment defense by permitting the use of a digital replica without consent if the use is: (a) “in connection with any news, public affairs, or sports broadcast or account”; (b) “for purposes of comment, criticism, scholarship, satire, or parody”; (c) “a representation of the individual as the individual’s self in an audiovisual work, unless the audiovisual work containing the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated”; (d) “fleeting or incidental”; or (e) appears in “an advertisement or commercial announcement” for any of the foregoing uses.<sup>61</sup>

Illinois is also considering a law that would prohibit “digital replicas that impersonate [musicians] unique voices and likenesses without consent.”<sup>62</sup> That legislation, Senate Bill 3325 (SB 3325), would broaden the definition of “identity” in Illinois’ current right of publicity statute to include “any attribute of an individual . . . that is readily identifiable and attributable to a particular individual.”<sup>63</sup> Like California, these rights are transferable, but unlike California Civil Code section 3344.1, SB 3325 does not have an explicit fair use defense and it is not limited to “deceased personalities.”<sup>64</sup>

Kentucky’s Senate Bill 317 (SB 317) similarly prohibits “a digital voice replica or digital depiction with knowledge that the digital voice replica or digital depiction was not authorized by the individual or the holder of the property rights.”<sup>65</sup> SB 317, like California Civil Code section 3344.1, also provides an explicit fair use defense and states that the right is “freely transferrable and descendible.”<sup>66</sup> Although SB 317

58. CAL. CIV. CODE § 3344.1(a)(2)(A)(i).

59. *Id.* § 3344.1(a)(1)(B)(ii)(I).

60. *Id.* § 3344.1(b).

61. *Id.* § (a)(2)(A)(ii)

62. Sophia Andrews, *How the Recording Academy is Redoubling Its Efforts to Protect Creators from AI Risks*, RECORDING ACAD. (Mar. 20, 2024, 8:48 AM), <https://www.recordingacademy.com/advocacy/news/illinois-legislation-protect-creators-ai> [https://perma.cc/YWW2-22J6].

63. *Compare* S.B. 3325, 103d Gen. Assemb., Reg. Sess. (Ill. 2024), *with* ILL. COMP. STAT. 765 § 1075 (1999).

64. *Compare* Ill. S.B. 3325, *with* CAL. CIV. CODE § 3344.1.

65. S.B. 317, 2024 Leg., Reg. Sess. (Ky. 2024).

66. *Compare* Ky. S.B. 317, *with* CAL. CIV. CODE § 3344.1.

appears to provide comprehensive protections against digital replicas, some critics have called for “the Kentucky government [to] look to the example set by Tennessee and consider amending the bill to address its shortcomings.”<sup>67</sup>

Louisiana has proposed AI legislation, but unlike California, Illinois, and Kentucky, its proposed legislation, Senate Bill 217 (SB 217), is limited to the use of “deepfakes.”<sup>68</sup> As defined by the bill, deepfakes are “synthetic media created with the intent to mislead or deceive others which depicts a candidate via video, image, or sound recording without his consent,” in campaign materials *unless* the media “conspicuously displays a notice clearly identifying that the media is computer generated or not a genuine depiction of a person or events.”<sup>69</sup> While SB 217 appears to be a critical step forward to ensuring election security, it does not prohibit the use of deepfakes in any other context, or the use of digital replicas as other states are poised to do, which could leave Louisianans with disparate protections.<sup>70</sup>

## 2. Proposed AI Legislation at the Federal Level

Federal lawmakers have also joined the fray with three new bills: (1) the Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2024 (No FAKES Act); (2) the Artificial Intelligence Labeling Act of 2023 (AI Labeling Act); and (3) the No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act of 2024 (No AI FRAUD Act).<sup>71</sup>

If passed, the No FAKES Act, would “prohibit the unauthorized use of digital replicas without informed consent” and “offer historic intellectual property protection against the misappropriation of voice and likeness performances at the federal level.”<sup>72</sup> On April 30, 2024, Duncan Crabtree-Ireland, National Executive Director of SAG-AFTRA, testified before Congress to voice the organization’s support for the

---

67. Carl Szabo, *NetChoice Testimony Opposing Kentucky SB 317 – Blocking AI*, NETCHOICE (Mar. 21, 2025), <https://netchoice.org/netchoice-testimony-opposing-kentucky-sb-317-blocking-ai/> [<https://perma.cc/L9HH-UFVW>].

68. See S.B. 217, 2024 Leg. Reg. Sess. (La. 2024).

69. *Id.*

70. See *id.*

71. See generally *GAPP AI Bills Report*, SAG-AFTRA (Sept. 9, 2014), [https://www.sagaftra.org/sites/default/files/sa\\_documents/gapp\\_a.i.\\_bills\\_report\\_0.pdf](https://www.sagaftra.org/sites/default/files/sa_documents/gapp_a.i._bills_report_0.pdf) [<https://perma.cc/HSG8-V9WU>] (outlining recently proposed legislation relating to AI including: (1) the No FAKES Act, (2) the AI Labeling Act, and (3) the No AI Fraud Act).

72. *SAG-AFTRA Advocates for A.I. Protections on Capitol Hill*, SAG-AFTRA (May 1, 2024) [hereinafter *SAG-AFTRA*], <https://www.sagaftra.org/sag-aftra-advocates-ai-protections-capitol-hill> [<https://perma.cc/275A-U2QS>]; see also No Fakes Act, H.R. 9551, 118th Cong. (2024).

bill.<sup>73</sup> Crabtree-Ireland explained that the bill was necessary to protect guild members' ability to: "one, require consent for the creative use of their digital representation; two, receive fair payment for use of their voice and likeness; and three, to protect against having to compete against themselves, their own digital self, in the marketplace."<sup>74</sup>

The No AI FRAUD Act would create a federal "property right" in an individual's "likeness and voice."<sup>75</sup> "Likeness" is defined in the bill as "the actual or simulated image or likeness of an individual, regardless of the means of creation, that is readily identifiable as the individual by virtue of the individual's face, likeness, or other distinguishing characteristic, or from other information displayed in connection with the likeness."<sup>76</sup> Under the proposed statute, "voice" covers a person's actual voice, as well as "a simulation of the voice of an individual, whether recorded or generated by a computer, artificial intelligence, algorithm, or other digital technology."<sup>77</sup>

Specifically, the No AI FRAUD Act creates liability for "any person or entity who, in a manner affecting interstate or foreign commerce . . . and without the consent of the individual holding the voice or likeness rights affected thereby" that does any of the following:

distributes, transmits, or otherwise makes available to the public a personalized cloning service;

publishes, performs, distributes, transmits, or otherwise makes available to the public a digital voice replica or digital depiction with knowledge that the digital voice replica or digital depiction was not authorized by the individual holding the voice or likeness rights affected thereby; or

materially contributes to, directs, or otherwise facilitates any of the conduct proscribed in subparagraph (A) or (B) with knowledge that the individual holding the affected voice or likeness rights has not consented to the conduct.<sup>78</sup>

The AI Labeling Act would, among other things, require developers of generative AI tools to "incorporate a prominently displayed disclosure to clearly identify content generated by AI."<sup>79</sup> In addition to AI-focused legislation, the Congressional Research Service is also evaluating the need for and viability of a federal right of publicity.<sup>80</sup>

---

73. See SAG-AFTRA, *supra* note 72.

74. *Id.*

75. No AI Fraud Act, H.R. 6943, 118th Cong. § 3(b)(1) (2023).

76. *Id.* § 3(a)(6).

77. *Id.* § 3(a)(5).

78. *Id.* § 3(c)(1)(A)–(C).

79. Press Release, Rep. Tom Kean Jr., Kean Introduces Bill to Provide More Transparency on AI-Generated Content (Nov. 27, 2023), <https://kean.house.gov/media/press-releases/kean-introduces-bill-provide-more-transparency-ai-generated-content> [<https://perma.cc/NMD4-ZJ4Z>]; see also AI Labeling Act, H.R. 6466, 118th Cong. (2023).

80. See generally CHRISTOPHER T. ZIRPOLI, CONG. RSCH. SERV., LSB11052, ARTIFICIAL INTELLIGENCE PROMPTS RENEWED CONSIDERATION OF A FEDERAL RIGHT OF PUBLICITY 1 (2024).

### 3. Reconciling State and Federal Measures

Evidently, state and federal legislative measures addressing AI concerns are anything but uniform.<sup>81</sup> Those differences will only increase as more states adopt their own laws.<sup>82</sup> Commentators have long called for a federal right of publicity statute, and with unprecedented advancements in AI technology, time is of the essence for right of publicity laws to catch up.<sup>83</sup> That is why the ELVIS Act was “fast-tracked in light of increasing attention to concerns over [AI] technology, particularly in the recording industry.”<sup>84</sup> Those concerns, coupled with the risk of exacerbating the patchwork system of right of publicity law by disjunctive state efforts, warrant adopting nationwide AI protections.<sup>85</sup> Fortunately, federal lawmakers have heeded the call with the No FAKES Act and No AI FRAUD Act, which share many of the key provisions of the ELVIS Act.<sup>86</sup>

The most important provision of the ELVIS Act—protection over one’s voice—is paramount for recording artists to be able to control the use of their voice or digital replicas.<sup>87</sup> The No FAKES Act would create a federal “digital replication right” that prohibits the use not only of “digital replicas” of an individual but also of an individual’s “visual likeness, which is expressly incorporated into the definition of “digital replica”:<sup>88</sup>

[A] newly-created, computer-generated, highly realistic electronic representation that is readily identifiable as the voice or visual likeness of an individual that (A) is embodied in a sound recording, image, audiovisual work that does not have any accompanying sounds, or transmission (i) in which the actual individual did not actually perform or appear; or (ii) that is a version of a sound recording, image, or audiovisual work in which the actual individual did perform or appear, in which the

---

81. See *id.*

82. See *id.*

83. See, e.g., Jonathan L. Faber & Wesley A. Zirkle, *Spreading Its Wings and Coming of Age: With Indiana’s Law as a Model, the State-Based Right of Publicity Is Ready to Move to the Federal Level*, 45 RES GESTAE 31, 31 (2001); Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW 14, 14 (2011); Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should be a Federal Law*, 20 UCLA ENT. L. REV. 190, 191–92 (2013); Mark Roesler & Garrett Hutchinson, *What’s in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, 13 LANDSLIDE 20, 24 (2020); Varun Lakshminarayanan, *“Thanks Karen!” How a Federal Circuit Split Demonstrates the Need for a Federal Right of Publicity*, 50 RUTGERS COMPUT. & TECH. L.J. 90, 109–10 (2023).

84. Jennifer E. Rothman, *Tennessee Legislature Sends Right of Publicity Bill to Governor’s Desk*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (Mar. 18, 2024) [hereinafter Rothman, *Tennessee Legislature*], [https://rightofpublicityroadmap.com/news\\_commentary/tennessee-legislature-sends-right-of-publicity-bill-to-governors-desk/](https://rightofpublicityroadmap.com/news_commentary/tennessee-legislature-sends-right-of-publicity-bill-to-governors-desk/) [https://perma.cc/45T6-48UN].

85. See *id.*

86. See *id.*; No Fakes Act, H.R. 9551, 118th Cong. (2024); H.R. 6943, 118th Cong. § 2(1)–(6) (2024).

87. See Rothman, *Tennessee Legislature*, *supra* note 84.

88. No Fakes Act, H.R. 9551, 118th Cong. (2024).

fundamental character of the performance or appearance has been materially altered; and, (B) does not include the electronic reproduction, use of a sample of one sound recording or audiovisual work into another, remixing, mastering, or digital remastering of a sound recording or audiovisual work authorized by the copyright holder.<sup>89</sup>

The No AI FRAUD Act provides similar protections for the unauthorized use of an individual's "voice or likeness," both of which cover a person's actual voice or likeness or simulations thereof.<sup>90</sup> These are key protections that any federal right of publicity must cover to ensure that the most critical protections found in the ELVIS Act are enforced nationwide.<sup>91</sup>

Another key component of the ELVIS Act is the creation of a "property right in the use of [an] individual's name, photograph, voice, or likeness."<sup>92</sup> As a property right, it is "freely assignable and licensable," and "descendible to the executors, assigns, heirs, or devisees of the individual so protected."<sup>93</sup> The No FAKES Act and No AI FRAUD Act both create property rights in an individual's voice and likeness that are descendible and licensable or transferable.<sup>94</sup> As Crabtree-Ireland explained, "[t]hese rights should be transferable and descendible, just like any other intellectual property or any kind of property someone owns," and should therefore be included in any eventual federal right of publicity.<sup>95</sup>

First Amendment considerations are also central to the ELVIS Act. Although the Act includes a number of exemptions, they "are contingent and only fair to the extent such use is protected by the First Amendment."<sup>96</sup> The No AI FRAUD Act also contains an express First Amendment defense that, like the ELVIS Act, requires courts to balance "the public interest in access to the use . . . against the intellectual property interest in the voice or likeness."<sup>97</sup> In contrast, the No FAKES Act contains bright line exclusions.<sup>98</sup> Although a bright line rule such as the one currently included in the No FAKES Act may minimize or obviate the need for courts to balance the competing

---

89. *Id.*

90. H.R. 6943, 118th Cong. § 2(1)–(6) (2024).

91. See Rothman, *Tennessee Legislature*, *supra* note 84.

92. H.B. 2091, 113th Gen. Assemb., Reg. Sess. (Tenn. 2024).

93. TENN. CODE ANN. § 47-25-1103(b) (2024).

94. Compare No Fakes Act, H.R. 9551, 118th Cong. (2024), with H.R. 6943 § 2(1)–(6).

95. SAG-AFTRA, *supra* note 72.

96. Rothman, *Tennessee Legislature*, *supra* note 84; TENN. CODE ANN. § 47-25-1107.

97. H.R. 6943 § 3(d).

98. Compare No Fakes Act, H.R. 9551, 118th Cong. (2024) § 2(c)(4), with H.R. 6943 § 3(d).

See also Jennifer E. Rothman, *Summary and Analysis of Proposed NO FAKES Act of 2023*, PENN CAREY L. (Oct. 11, 2023), <https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Professor-Rothman-Analysis-of-NO-FAKES-ACT-of-2023-Discussion-Draft-of-October-11-2023.pdf> [<https://perma.cc/FHF9-NGTG>].

interests at play, the balancing tests included in the ELVIS Act and the No AI FRAUD Act have some significant upsides. Particularly, the balancing tests:

Ensure that the depicted individual is protected and rewarded for the time and effort put into cultivating their persona, while not unduly burdening the right of the press to report on matters of public interest or the entertainment media to tell stories. At the same time, these tests help ensure the depicted individual is not compelled to speak for the benefit of third parties who would misappropriate the value associated with the persona they have carefully crafted with new A.I. technologies that can now realistically depict an individual's voice or likeness with just a few seconds of audio or even a single photograph. And with constantly evolving capabilities of these technologies, it is even more important that broad categorical exemptions be avoided and that the courts be empowered to balance the competing interests.<sup>99</sup>

Accordingly, federal lawmakers should pay particular attention to how the First Amendment protections are balanced with the proposed property right in a person's image, voice, and likeness. Lawmakers should weigh the pros and cons of a bright line rule that is easy to apply versus a holistic balancing test that ensures all competing interests are considered. The ELVIS Act opted for the balancing test approach and its benefits and drawbacks will become apparent as litigation is brought under the new Act.<sup>100</sup>

### *B. Federal Legislation Would Protect Recording Artists and Individuals Alike*

Absent a federal level of protection against the use of AI to appropriate the use of one's voice, right holders may lose the valuable right to license the artist's master recordings to appear in such works as television shows and films.<sup>101</sup> To use music in a film or a television show, one must obtain a license from the publisher (a synchronization license), a license to publicly perform the music from the performing rights organization, and a master license from the owner of the sound recording.<sup>102</sup> As a result of these licensing schemes, films or television shows likely will use a famous song performed by an unknown artist rather than the famous artist with whom the work is associated.<sup>103</sup> This

---

99. *The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas: Hearing on S. 4875 Before the Subcomm. on the Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) [hereinafter *The NO FAKES Act*] (statement of Duncan Crabtree-Ireland, National Executive Director and Chief Negotiator, Screen Actors Guild).

100. TENN. CODE ANN. § 47-25-1107; see also *The NO FAKES Act*, *supra* note 99.

101. See Jordan Pearson, *The RIAA Versus AI, Explained*, THE VERGE (June 26, 2024, 7:00 AM), <https://www.theverge.com/24186085/riaa-lawsuits-udio-suno-copyright-fair-use-music> [<https://perma.cc/EA4S-4EJ5>].

102. ALLEN BARGFREDE, *MUSIC LAW IN THE DIGITAL AGE: COPYRIGHT ESSENTIALS FOR TODAY'S MUSIC BUSINESS* 53–54 (Berklee Press 2d ed. 2017).

103. See, e.g., Black Dagger, *Will Using a Cover of a Song in a Film Free Me from Legal Obligations?*, STACK EXCH. (Oct. 20, 2016, 3:48 PM), <https://law.stackexchange.com/questions/1>



is likely because the content creator could not afford, or did not want to pay for, a master license.<sup>104</sup>

This is entirely permissible under Section 114 of the Copyright Act.<sup>105</sup> Pursuant to that section, “[t]he exclusive right of the owner of copyright in a sound recording . . . is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”<sup>106</sup> This means there is no prohibition on making or duplicating a new sound recording “that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.”<sup>107</sup> In fact, the House Judiciary Committee’s notes on Section 114 even acknowledge that “[m]ere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another’s performance as exactly as possible.”<sup>108</sup> This statutory scheme is what allows musicians to record cover songs without infringing the original’s sound recording (assuming they also obtain a license for the musical composition in the original work).<sup>109</sup>

However, with the advent of AI, content creators may forego the cost and effort of obtaining master licenses altogether and, instead, use AI to create an exact sound-alike.<sup>110</sup> Indeed, using AI, parties may be able to create a cover song that is indistinguishable from the original, without having to pay for a master license and without infringing the sound recording.<sup>111</sup> This would rob recording artists or record labels of substantial master licensing fees, and trick listeners into believing that a particular artist approved of the use of their copyright or is the one actually appearing on a track.<sup>112</sup>

---

4713/will-using-a-cover-of-a-song-in-a-film-free-me-from-legal-obligations [https://perma.cc/J6JT-B27D].

104. Of course, there could be other reasons why a content creator would choose not to use the original artist in a work, and instead choose to rerecord the song, but in general, it would seem that cost would be the primary factor why the original sound recording would not be used in a film or television show. *Id.*

105. *See* 17 U.S.C. § 114(b).

106. *Id.*

107. *Id.*

108. H.R. Rep. No. 94-1476 (1976); Section 114 of the Copyright Act allows musicians to record cover songs without infringing the original’s sound recording, although they must nevertheless obtain a license for the musical composition in the original work. *See* 17 U.S.C. §§ 106, 114.

109. *See* 17 U.S.C. §§ 106, 114, 115(a)(1)(A).

110. *See* Rachel Reed, *AI Created a Song Mimicking the Work of Drake and The Weeknd. What Does that Mean for Copyright Law?*, HARV. L. TODAY (May 2, 2023), <https://hls.harvard.edu/today/ai-created-a-song-mimicking-the-work-of-drake-and-the-weeknd-what-does-that-mean-for-copyright-law/> [https://perma.cc/ZL66-ER7H].

111. *See id.*

112. *See id.*

This is not a hypothetical threat or academic musing. Some of the world's most recognizable musicians have already seen their voices replicated via generative AI. For example, in April 2023, “[a] song featuring AI-generated vocals purporting to be Drake and the Weeknd” went viral on social media and streaming platforms before Universal Music Group managed to take it down.<sup>113</sup> Rihanna and Kanye West have also seen their voices replicated by AI in various cover songs without their consent.<sup>114</sup> In a statement to the US Senate Committee on the Judiciary Subcommittee on Intellectual Property, the musician FKA twigs explained how threatening such technology can be for recording artists:

[M]y music, my dancing, my acting, the way that my body moves in front of a camera and the way that my voice resonates through a microphone is not by chance; they are essential reflections of who I am. My art is the canvas on which I paint my identity and the sustaining foundation of my livelihood. It is the essence of my being. Yet this is under threat. AI cannot replicate the depth of my life journey, yet those who control it hold the power to mimic the likeness of my art, to replicate it and falsely claim my identity and intellectual property. This prospect threatens to rewrite and unravel the fabric of my very existence.<sup>115</sup>

Since the ELVIS Act prevents parties from using AI to replicate individuals' voices, it gives rightsholders a means of preventing knock-off songs independent of copyright law.<sup>116</sup> That remedy should be available to all rights holders—not just those residing in Tennessee or other locations that eventually adopt a bill similar to the ELVIS Act. Fortunately, both the No FAKES Act and No AI FRAUD Act would appear to provide such a remedy since they both prohibit digital replicas of a recording artist's voice.<sup>117</sup>

But recording artists are not the only ones that stand to benefit from federal legislation addressing AI. As Crabtree-Ireland testified to Congress on April 30, 2024, AI-created deepfakes can affect those that do not make a living from their voices.<sup>118</sup> After the SAG-AFTRA strike in 2023, “an unknown party on the internet created an unauthorized deepfake video of [Crabtree-Ireland] saying false things about [the

---

113. Laura Snapes, *AI Song Featuring Fake Drake and Weeknd Vocals Pulled From Streaming Services*, THE GUARDIAN (Apr. 18, 2023), <https://www.theguardian.com/music/2023/apr/18/ai-song-featuring-fake-drake-and-weeknd-vocals-pulled-from-streaming-services> [<https://perma.cc/7F5E-4UP5>].

114. Joe Coscarelli, *An A.I. Hit of Fake 'Drake' and 'The Weeknd' Rattles the Music World*, N.Y. TIMES (Apr. 19, 2023), <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html> [<https://perma.cc/B5EV-PLLD>].

115. *Hearing on The No FAKES Act: Protecting Americans from Unauthorized Digital Replicas Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 118th Cong. (2024) (statement of FKA twigs).

116. See SAG-AFTRA, *supra* note 72.

117. See *id.*; No AI Fraud Act, H.R. 6943, 118th Cong. § 3(b)(1) (2023).

118. SAG-AFTRA, *supra* note 72.

SAG-AFTRA] contract and urging members to vote against it,” which was “anathema” to Crabtree-Ireland’s work for the guild.<sup>119</sup> He had “no federal rights protecting” him, “[n]o takedown rights,” “[a]nd tens of thousands of people were misled about something that really mattered to” the guild.<sup>120</sup> That is why he, and others, have urged lawmakers to “proceed expeditiously” with respect to AI regulations.<sup>121</sup>

These concerns are not necessarily new. The United States Court of Appeals for the Ninth Circuit has observed that “[a] voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested. We are all aware that a friend is at once known by a few words on the phone.”<sup>122</sup> But “the times they are a-changin’” with the advent of AI.<sup>123</sup> Since the ELVIS Act prohibits the use of AI to replicate or reproduce someone’s voice,<sup>124</sup> adopting similar such protections nationally would give ordinary people like Crabtree-Ireland recourse when their voice (or an imitation of it) is used without their consent.<sup>125</sup>

### *C. Federal Legislation Can Co-Exist with State Law*

The right of publicity is widely recognized as a form of intellectual property.<sup>126</sup> And yet, it is the only type of intellectual

119. *Id.*

120. *Id.*

121. See SAG-AFTRA, *supra* note 72.

122. See *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988).

123. BOB DYLAN, *The Times They Are A-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Columbia Records 1964).

124. See TENN. CODE ANN. § 47-25-1105(3).

125. *SAG-AFTRA Advocates for A.I. Protections on Capitol Hill*, SAG-AFTRA (May 1, 2024), <https://www.sagaftra.org/sag-aftra-advocates-ai-protections-capitol-hill> [<https://perma.cc/ZV2R-HWUT>].

126. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (explaining the right of publicity is an individual property right that is “closely analogous to . . . patent and copyright” because it focuses “on the right of the individual to reap the reward of his endeavors and [has] little to do with protecting feelings or reputation”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (stating that “[t]he right of publicity is an intellectual property right of recent origin which has been defined as the inherent right of every human being to control the commercial use of his or identity”); *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2015) (noting the right of publicity “protects a form of intellectual property in one’s person that society deems to have some social utility” (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 399 (Cal. 2001))); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1323 (11th Cir. 2006) (“[T]here appears to be no dispute that the right of publicity is a type of intellectual property right.”); *Intellectual Property*, BLACK’S L. DICTIONARY (11th ed. 2019), (“[I]ntellectual property . . . comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, publicity rights, moral rights, and rights against unfair competition.”); J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. 2000) (“The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category, not just a ‘kind of’ trademark, copyright, false advertising or right of privacy.”).

property that does not have a federal counterpart.<sup>127</sup> For example, patents are protected by the Patent Act, and copyrights are protected by the Copyright Act of 1976—both of which were authorized by Article I, Section 8 of the US Constitution.<sup>128</sup> Trademark and trade secret laws developed under state common law, but are now governed principally by the Lanham Act of 1946 and Defend Trade Secrets Act of 2016 (DTSA), respectively.<sup>129</sup> Notably, though, neither the Lanham Act nor the DTSA preempt state common law.<sup>130</sup> Although publicity rights have been left exclusively to the states, the federal laws currently proposed could be adopted without displacing the states' underlying right of publicity laws in the same way as the Lanham Act and DTSA have supplemented—but not preempted—state law.<sup>131</sup> This would allow the contours of state right of publicity law to stand, while providing additional, uniform protections against exploitive AI.

#### IV. CONCLUSION

With AI advancing faster than the law can keep up, it is imperative that Congress act quickly to ensure universal protection for the right of publicity. To prevent AI from undermining the master licensing scheme the music industry depends upon, recording artists and record labels need a remedy where a sound recording has not been infringed, and yet the derivative work is indiscernible from the original. Just as the ELVIS Act addresses these concerns in Tennessee, so too should federal protections. A federal protection would afford uniform protection across the United States and its territories.

Given that time is of the essence, Congress would do well to make “[a] little less conversation, a little more action, please.”<sup>132</sup>

---

127. MCCARTHY, *supra* note 126, § 1:3.

128. Patent Act, 35 U.S.C. § 100 (2015); Copyright Act of 1976, 17 U.S.C. § 101 (2024); U.S. CONST. art. 1, § 8 (“The Congress shall have the power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”).

129. Lanham Act, 15 U.S.C. §§ 1051–1127; Defend Trade Secrets Act, 18 U.S.C. § 1836 (2024).

130. MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 22:2 (5th ed.) (collecting cases and noting that “[c]ourts have uniformly held that the federal Lanham Act does not occupy the whole field of trademark and unfair competition law in such a way that it would preempt parallel state law”); 18 U.S.C. § 1838(b) (“[The DTSA] shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret.”).

131. For a comprehensive summary of publicity laws in each of the United States and its territories, see Jennifer E. Rothman, *The Law*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <https://rightofpublicityroadmap.com/law/> [<https://perma.cc/UQK3-2Y5Q>] (last visited October 3, 2024).

132. See ELVIS PRESLEY, *A Little Less Conversation*, on ALMOST IN LOVE (RCA Victor 1968).