

# Report on deepfakes: what the Copyright Office found and what comes next in AI regulation

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On July 31, 2024, the Copyright Office released part one of its Report on Copyright and Artificial Intelligence, specifically addressing the topic of digital replicas, or “deepfakes” — i.e., AI-generated video, image, or audio recordings that realistically but falsely depict an individual. The report is the result of a broad initiative to explore the intersection of copyright and AI, informed by a series of listening sessions and meetings with stakeholders, as well as more than 10,000 public comments from authors, artists, publishers, lawyers, academics, industry groups, and more.

The report’s conclusions are stark: It finds that existing laws, in copyright and other intellectual property areas, are vastly insufficient to redress the harm posed by unauthorized digital replicas, which have the potential to threaten not only those in entertainment and politics, but private individuals, too.

Digital replicas are not new; the technology to produce fake images or recordings has been around for years. But digital replicas of the generative AI era are nothing like their predecessors. They are more sophisticated, leveraging generative AI’s powerful technology to create uncannily convincing material.

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As the report notes, AI-generated replicas can have positive applications; they can be “accessibility tools for people with disabilities, ... support creative work, or allow individuals to license, and be compensated for, the use of their voice, image, and likeness.” Deepfakes, however, can offer “a potent means to perpetrate fraudulent activities with alarming ease and sophistication,” the report finds. Moreover, because AI tools are broadly accessible, the potential for wrongdoing increases.

The examples cited by the Copyright Office are sobering. In 2023, researchers concluded that explicit images — overwhelmingly of women — make up 98% of all deepfake videos online. Scams involving the use of deepfakes have featured fraudsters luring individuals into bogus financial transactions or into buying products that they falsely claimed were endorsed by celebrities. Most alarming, the report warns that digital replicas pose a danger to our political system and news reporting “by making disinformation impossible to discern.”

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With these emerging problems in mind, the report surveyed existing laws, at both the federal and state level, with the goal of determining whether the necessary tools already existed or if there is a need for new legislation.

The report found existing federal laws largely inapplicable. For example, it is black-letter law that copyright does not “protect an individual’s identity in itself, even when incorporated into a work of authorship.” Thus, while it might be a copyright violation to reproduce a copyrighted image or song that contains the copyright owner’s likeness or voice, merely replicating someone’s image or voice in a deepfake would not implicate copyright protections.

The Lanham Act “require[s] proof of commercial use and a likelihood of consumer confusion,” so it is not useful in cases of harmful but personal and non-commercial deepfakes. Similarly, the Federal Trade Commission Act, which prohibits “unfair methods of competition in or affective commerce, and unfair or deceptive acts or practices in or affective commerce,” would be limited to the commercial context.

Meanwhile state laws were deemed uneven and often too narrow. For example, state false light and invasion of privacy laws may be applicable in some instances, but they often require showing that the depiction is “highly offensive to a reasonable person,” and

thus would not apply to deepfakes that are not offensive but still deceptive.

State right of publicity laws “may be the most apt state law remedy for unauthorized digital replicas,” the report noted. But “the contours of the right differ considerably from state to state,” and “some states restrict the right to limited groups of individuals,” such as professional performers, soldiers, or deceased people.

Based on this analysis, the Copyright Office did not mince words as to its conclusion. It stated in blunt terms: “new federal legislation is urgently needed.” Looking ahead, the call for action is likely to accelerate congressional focus on an issue that has already sparked numerous pieces of draft legislation.

Bills concerning digital replicas used for political advertising and sexually explicit images were already introduced when the Copyright Office issued its report. That same day, a bipartisan group of Senators introduced the NO FAKES (The Nurture Originals, Foster Art, and Keep Entertainment Safe) Act. The legislation garnered widespread support from industry groups representing artists, generative AI companies, and entertainment businesses.

The bill provides individuals with a new federal property right to authorize the use of their voice or visual likeness. Any entity or person who makes available an unauthorized digital replica without the consent of the rights holder is subject to liability. The bill also imposes liability upon digital platforms for displaying unauthorized digital replicas if they fail to remove them when given notice during a safe harbor period. Aimed at creating a national standard, the bill also broadly preempts conflicting state laws that prohibit similar conduct.

Although passage of the NO FAKES Act or comparable legislation is unlikely until after the new Congress is seated, states have been moving ahead to pass their own legislation. At least a dozen states have now enacted laws that concern deepfakes of sexual images, and more states have bills pending that will likely be passed in the coming year.

Local prosecutors are also taking action. In August 2024, San Francisco’s District Attorney filed a lawsuit against the owners of 16 websites that allow users to create non-consensual nude images of women and girls. Additional suits by state agencies, district attorneys, and private litigants against similar websites and their users are likely.

## About the authors



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