



## **Legislation On Deep Fakes (Digital Replicas)**

**SPONSORING COMMITTEES:** U.S. Subcommittee of the Legislation and Regulation Committee  
U.S. Subcommittee of the Right of Publicity Committee

**RESOLUTION:** Presented on February 25, 2025

**WHEREAS**, INTA has long recognized the important roles that trademarks play in identifying and distinguishing the sources, sponsorships, or affiliations of goods and services, in instilling trust and building brand loyalty, and in protecting consumers from confusion and deception, as well as the role that the right of publicity or right of personality (as alternatively described in different jurisdictions) play in protecting the proprietary rights of individuals in their names, images, likenesses, voices, and personas;

**WHEREAS**, INTA has supported federal right of publicity legislation and in that regard has adopted the U.S. Federal Right of Publicity resolution on March 3, 1998, and the Right of Publicity Minimum Standards resolution on March 27, 2019, setting forth certain recommended minimum standards for such legislation;

**WHEREAS**, recent advances in Artificial Intelligence (“AI”) technology have dramatically eased access and lowered the cost of tools that may be used to create “digital replicas,” also referred to as “deep fakes,” that are deceptive digital replications of individuals, that may misappropriate those individuals’ rights of publicity but also cause harms that may or may not be classified as implicating a right of publicity;

**WHEREAS**, INTA has been following the introduction and development of proposed legislation responding to the increased prevalence of AI generated deep fake digital replicas, especially as it applies to consumers and commercial stakeholders;

**WHEREAS**, INTA seeks to set forth policy principles not only with respect to the traditional right of publicity but also with respect to more recently proposed legislation that seeks to address harms from deep fake digital replica technologies that affect businesses, individual human beings, and consumers and brands more broadly or be misused for other forms of unfair competition;

**WHEREAS**, INTA maintains its commitment to the appropriate balance of intellectual property rights with protections for bona fide commentary, criticism, satire, parody, scholarship, educational and creative endeavors, and news coverage that is not false or likely to cause consumer confusion or other legally cognizable harms; and



**WHEREAS**, INTA favors policies that allow for the safe development and use of innovative technologies;

**BE IT RESOLVED**, that the International Trademark Association desires to assist lawmakers in the evaluation of proposed legislation and supports the following policy principles:

- I. INTA continues to support the minimum standards set forth in the March 3, 1998, and March 27, 2019, Board Resolutions, except:
  - A. to the extent that these resolutions require that any U.S. federal right of publicity legislation must be limited to an amendment to the U.S. Trademark Act of 1946 (the “Lanham Act”). INTA could support legislation that meets the “minimum standards” even if it is not located in the Lanham Act or the equivalent national trademark law of jurisdictions outside of the United States.
  - B. INTA would be willing to support legislation limited to digital replicas that does not preempt all applicable state (local/provincial) law or common law (where applicable) so long as such legislation provides sufficient clarity as to how the new digital replica right would interact with relevant related legal regimes.
  - C. INTA could also support legislation specifically designed to address harms caused by deep fake/digital replicas that is not limited to those who have commercially exploited their rights of publicity.
- II. INTA supports the legislative creation of specific protections outside the context of national trademark law against harms to individuals caused by digital replicas that are false, misleading or likely to cause confusion, mistake, or deception or other cognizable privacy, proprietary, or dignitary harms that may not be construed as commercial in nature.
- III. INTA supports amendments to existing trademark law to make clear that trademark laws can encompass commercial use of a digital replica that is likely to cause confusion, mistake, or deception, or to misrepresent the nature or origin of goods, services, or commercial activity. When a digital replica infringes trademark rights, INTA would support an appropriately balanced and tailored rebuttable presumption or procedural mechanism to facilitate actions against unauthorized digital replicas, as long as such a mechanism contains sufficient due process, free speech, and fair use protections.
- IV. INTA supports legislation that creates a notice and takedown framework for infringing digital replicas and a safe harbor for online services as long as a service removes or disables access to an infringing digital replica as soon as technically and practically feasible after receiving notice of a claimed violation, also with sufficient due process, free speech, and fair use protections. INTA recommends that any notice and takedown

provisions be designed to address the same concerns outlined in its December 14, 2021, Board Resolution on the proposed SHOP SAFE Act, to the extent applicable.

- V. INTA objects to amending existing laws or other trademark protections in order to:
- A. impose a new artificial limitations period for trademarks that incorporate the image, voice, or likeness of an actual individual person that have acquired distinctiveness and attained secondary meaning, and that continue to serve the same type of source identifying function as other protected trademarks;
  - B. preempt state statutory or common law protection for some types of trademarks but not others;
  - C. create new trademark rights for characteristics of creative works such as artistic style elements; or
  - D. weaken or insufficiently protect the fair use of an individual’s persona in speech or expression.

## **BACKGROUND<sup>1</sup>**

INTA’s expedited consideration of these issues has been driven by the fact that the U.S. Congress is considering various legislation to address certain issues arising from use of AI in the context of image, voice and visual likeness uses, including the proposed Nurture Originals, Foster Art, and Keep Entertainment Safe (“NO FAKES”) Act in the U.S. Senate and U.S. House of Representatives, the proposed No Artificial Intelligence Fake Replicas And Unauthorized Duplications (“No AI FRAUD”) Act in the House of Representatives, and the proposed Preventing Abuse of Digital Replicas Act (“PADRA”) in the U.S. House of Representatives.

Specifically, both the NO FAKES Act and the No AI FRAUD Act would create a federal descendible, licensable property right of individuals in the digital replicas of their image, voice and likeness and set out post-mortem limitations for licensing of such a right along with parameters for liability, defenses and remedies for violation of such rights, where the property right would not preempt state law or be considered intellectual property under Section 230 of title 47. At the same time, the NO FAKES Act and the No AI FRAUD Act differ in their specific treatment of post-mortem rights, damages, scope of definition of harm, and statute of limitations, among other ways.

In contrast, the proposed PADRA bill would amend the Lanham Act to add to Section 43 a provision defining digital replicas as digitally created representations of an identifying characteristics of a human being that are identical with or substantially indistinguishable from the actual identifying characteristics of a subject person from an objective standard, with digital

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<sup>1</sup> For greater clarity, references to “national trademark law” should be read to include trademark laws promulgated by multinational bodies with supranational decision-making authority such as the European Union.



replicas to be considered intellectual property under Section 230 of title 47, and adding to Section 43(a)(1)(A) language that would expressly provide the Section’s application to digital replicas and creating a rebuttable presumption of a likelihood of confusion.

The U.S. Subcommittee of the Legislation and Regulation Committee and the U.S. Subcommittee of the Right of Publicity Committee have convened a cross-committee task force to evaluate these proposed pieces of legislation and to use the experience to crystalize certain principles that will be important to all INTA members as other nations evaluate similar proposals. In particular, the Subcommittees’ task force has attempted to develop a consensus that reflects the views of the brand owning community, the attorneys and agents that represent brand owners, and other members of the business community who offer platforms where digital replicas are likely to be used and where INTA’s views may be helpful in the development of policy. This resolution is the fruit of that effort.

Among others, the task force has consulted with members of the Legislation and Regulation Committee and the Right of Publicity Committee from other countries, INTA’s Advisory Group Counsel and Global Advisory Committees, the INTA Board, and members of other INTA committees who have contributed to INTA’s thought processes on issues related to deep fakes and digital replicas.

INTA offers the following additional explanation for the positions set forth above:

- I. INTA’s March 3, 1998, and March 27, 2019 Right of Publicity Board Resolutions were drafted and approved with an eye toward traditional right of publicity protections designed for the commercial use of individuals’ names, images, voices, likenesses, and other elements of persona, incorporating elements and protections that were more analogous to the protection of trademarks and that were developed by courts and legislatures over decades. But the advancement of AI and deep fake technologies since those resolutions were passed, and the application of those technologies to online forums, social media, mobile devices, and other developing technological formats has made clear that the risks posed by these technologies go beyond the focus of trademark law on consumer confusion and protection and also cause harms to individuals that are unrelated to lost sales or direct commercial harm, such as by threatening individuals’ dignitary and privacy rights. As a result, there is no compelling reason that INTA could only support legislation that is codified as a part of a national trademark law. Moreover, the rapid development of AI and deep fake technologies—compounded by the need for flexibility to respond to evolving harms caused by these technologies—requires corresponding flexibility in designing the architecture of laws designed to address these issues. Specifically, although INTA supports clarity and harmonization of the law as a goal, INTA can support digital replica laws that provide sufficient clarity as to how the new digital replica right would interact with state, local, and common law protections even if



the law does not preempt all such alternate protections. Similarly, INTA can support legislation that is designed to address specific deep fake or comparable AI harms even if the legislation is not designed for a full traditional right of publicity.

- II. At the same time, INTA remains concerned about the use of AI and deep fake technologies that cause consumer confusion and related harms that are traditionally addressed in trademark law. As a result, INTA would like to make clear that it continues to support legislation that creates specific protections against harms caused by deep fakes that are false, misleading or likely to cause confusion, deception, or mistake as to the affiliation, connection, or association of one person with another person, or as to the origin, sponsorship, or approval of a good or service, as well as other legally cognizable privacy, proprietary, or dignitary harms that may not be construed as commercial in nature.
- III. Similarly, INTA also supports appropriate amendments to national trademark laws that are reasonably tailored to address consumer confusion caused by AI and deep fake technologies, and that include corresponding substantive and procedural limitations.
- IV. Unfortunately, many of the harms being caused by deep fake and AI technologies can cause immediate and irreparable harm to individuals and their names, voices, or likenesses that may not be remedied through monetary relief, and the affected individuals may not have the resources and economic incentives to commence formal litigation to seek court orders to remove harmful digital replicas. INTA's December 14, 2021 Board Resolution on the SHOP SAFE Act recognized in the context of counterfeit products sold through online platforms, such platforms should provide tools that allow demonstrated rights holders to trigger infringing listing removals, subject to appropriate policies and procedures to deter the use of these tools to remove lawful listings. Similarly, INTA's November 14, 2023 Board Resolution on "Establishing a Framework for Protecting Consumers from Third-Party Sales of Counterfeit Goods via Online Marketplaces" recognized that the responsible administration of a notice and takedown system for reporting and removing listings advertising counterfeit goods balances the ability of brand owners to submit good faith reports of sellers of and/or listings for counterfeit goods with the ability of the seller to provide good faith counter notices. Victims of deep fake technologies would similarly benefit from a reasonable regime that would allow individuals to request the swift removal of content that incorporates digital replicas of those individuals to protect them against harms such as invasions of their privacy, dignitary harms caused by the use of digital replicas for "revenge porn," the use of individuals' images, voice, or likeness for creative works that they did not participate in creating, or other fraudulent or harmful enterprises that exploit deep fake recreations. Any such regime, however, must incorporate reasonable and specific standards for platforms to follow, and offer a safe harbor for platforms that comply with such

standards. INTA supports legislation that creates a notice and takedown framework and safe harbor for online services that would provide that such online services are not liable as long as the service removes or disables access as soon as technically and practically feasible after receiving notice of a claimed violation. Individuals seeking to employ such a notice and takedown mechanism should be required to provide a statement identifying the relevant individual and including the individual's signature, among other reasonable requirements to confirm the individual's right and allow the platform to easily determine whether their image, voice, or likeness is being used without authorization. And third-parties responsible for such challenged content must be provided with notice of such takedown requests and an opportunity and reasonable procedures to contest the takedown request. INTA's 2021 and 2023 Board Resolutions cited above provide a helpful model for the balancing of interests that should be incorporated into any notice and takedown regime.

- V. INTA has long been dedicated to refining trademark and related IP laws to foster consumer trust, economic growth, and innovation. INTA takes seriously its role in advocating reasonable legislative standards to regulate the use and protection of trademarks, such as those embodied in INTA's Model Trademark Law Guidelines, updated most recently on November 12, 2024. INTA cannot, however, support legislative proposals that would introduce excessive ambiguity into trademark law, invite litigation over vague or overly expansive provisions, or create new tiers or classes of trademarks based solely on whether those trademarks incorporate the image, voice, or likeness of a real individual. Section V of this Board resolution is designed to provide guideposts for proposals that INTA believes will be inconsistent with its goals. Specifically, INTA cannot support proposals that will create artificial time limits for trademarks that incorporate replicas of individuals that continue to operate as trademarks and cannot support a system where some state or common law trademark rights are preempted for trademarks that incorporate replicas of individuals while other trademark rights are not similarly preempted. Although INTA does not oppose application of existing trademark law in cases where a creator can demonstrate that the use of characteristics of creative works or artistic style elements materially contribute to a likelihood of confusion, there is no well-established body of law setting forth the limits of protection for characteristics of creative works or artistic style. An amendment to trademark laws that creates a new form of trademark right would invite litigation and create serious practical and logistical impediments to the evaluation and clearance of a new mark or proposed advertisement against existing creative works or artistic styles and may create potential conflicts with international trademark rights and obligations. Finally, INTA will not support amendments to trademark law that weaken or insufficiently protect the fair use of an individual's persona in speech or expression.