MOTION PICTURE ASSOCIATION

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BY EMAIL ONLY
Maria Strong
Associate Register of Copyrights
and Director of Policy and International Affairs
United States Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559

May 20, 2024

Re: Summary of *Ex Parte* Meeting on May 13, 2024 Regarding the Office's Artificial Intelligence Study

Dear Ms. Strong:

This letter summarizes the May 13, 2024 *ex parte* meeting that occurred via videoconference between the Motion Picture Association, Inc ("MPA"), MPA's member studios,[1] and the U.S. Copyright Office (the "Office") in connection with the Office's ongoing Artificial Intelligence Study (Docket No. 2023-6).

Participating in the meeting from the Office were: Maria Strong, Associate Register of Copyrights and Director of Policy and International Affairs; Emily Chapuis, Deputy General Counsel; Chris Weston, Senior Counsel for Policy and International Affairs; Danielle Johnson, Counsel for Policy and International Affairs; Caitlin Costello, Counsel for Policy and International Affairs; Heather Walters, Ringer Fellow; and Gabi Rojas-Luna, Paralegal.

Participating from MPA were: Ben Sheffner, Senior Vice President & Associate General Counsel, Law & Policy; Josh Rogin, Senior Vice President, Federal Government Affairs; and Terrica Carrington, Senior Counsel & Director, Law, Policy & International. Participating from MPA's member studios were: Neil Fried, Senior Vice President,

[1] The MPA's member studios are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

Public Policy & Government Affairs, Trevor Albery, Group Vice President, Legal, Global IP Policy and Content Protection & Analytics, and Tami Sims, Vice President, Intellectual Property, Warner Bros. Discovery; Aimée Wolfson, Executive Vice President, Intellectual Property & Deputy General Counsel and Samantha Kantor, Assistant General Counsel, Intellectual Property, Sony Pictures; Ian Slotin, Senior Vice President, Intellectual Property, NBCUniversal; Diana Oo, Head of U.S. Federal Affairs, Netflix; Gabe Miller, Senior Vice President Intellectual Property & Content Protection and Kira Alvarez, Vice President, Government Relations, Paramount; and Troy Dow, Vice President & Counsel, Government Relations and IP Legal Policy & Strategy and Catherine Bridge, Associate General Counsel, Intellectual Property, Disney.

The May 13 meeting focused on the topic of legislation regulating the use of "digital replicas" of individuals in expressive works including movies and television programs. MPA highlighted the importance of this issue to our members, given the ubiquity of depiction of individuals in docudramas, biopics, and similar works. And we argued that use of digital-replica technology is simply an evolution of the type of technology our members have long used to make actors more closely resemble the people they portray, including make-up and prosthetics. MPA explained how legislation regulating digital replicas in expressive works is fundamentally different from traditional right-of-publicity law, which is generally limited to commercial uses, i.e., in advertisements or on merchandise. That is because, unlike such commercial uses, expressive works receive full protection under the First Amendment. And, as with any content-based restriction on speech, a digital-replica statute would be "presumptively unconstitutional" and would survive constitutional challenge only if it clears the exacting strict-scrutiny hurdle, pursuant to which it must: 1) serve a compelling government interest and 2) be narrowly tailored to serve that interest.[2]

MPA summarized our position on legislation regulating the use of digital replicas in expressive works by stating that performers have legitimate concerns about the unauthorized use of digital replicas to replace performances by them, which could harm their ability to make a living practicing their craft, and noting that this is an appropriate subject of legislation. However, we expressed concern that some of the legislation that has been recently proposed (or, in the case of Tennessee, enacted[3]) is drafted in an overbroad manner that encroaches on the First Amendment rights and creative freedoms of our members and would chill protected speech.[4]

Regarding proposed legislation regulating the use of digital replicas, MPA highlighted the following specific issues:

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[2] *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015).

[3] Tennessee House Bill 2091 ("ELVIS Act") (effective July 1, 2024), *available at* https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2091.

[4] A detailed explication of MPA's positions on these issues is contained in my written testimony in connection with the April 30, 2024 hearing of the Senate Judiciary Committee Subcommittee on Intellectual Property titled "The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas," *available at* https://www.judiciary.senate.gov/download/2024-04-30-testimony-sheffner.

STATUTORY EXEMPTIONS

MPA explained that any legislation in this area must contain statutory exemptions specifying the types of uses that remain outside the scope of the statute. These exemptions are crucial to giving filmmakers clarity and certainty so that they know what uses are allowed, or not allowed, before spending tens or hundreds of millions of dollars to produce a movie or TV series. And the lack of sufficient exemptions would chill speech. The exemptions are especially important in digital-replica legislation given that the rights being proposed are so novel (only New York,[5] Louisiana,[6] and Tennessee[7] have enacted legislation specifically regulating the use of digital replicas in expressive works). Unlike with traditional right of publicity, there is not a well-developed body of case law that cabins the right and provides adequate guidance to filmmakers.

MPA explained that the exemptions it favors are carefully crafted to encompass the types of uses that are protected by the First Amendment, such as to depict real people in works including docudramas or biopics, or where a fictional character interacts with real people, or to parody or satirize individuals. We further explained that our preferred exemptions are crafted to exclude ***deceptive*** uses of digital replicas. MPA noted that the recent white paper commissioned by the Human Artistry Campaign, and cited in RIAA's *ex parte* letter of April 29, 2024,[8] inaccurately suggests that proponents of such exemptions are seeking "categorical exemptions for 'expressive' works."[9] MPA emphasized that it is **not** seeking an exemption for all uses of digital replicas in expressive works, but, rather, only for the types of uses noted above, which would leave uses of digital replicas to replace a performer's performances within the scope of the statute.

In response to the Office's request during the meeting, MPA here provides its preferred list of exemptions from the scope of a statute that would regulate the use of digital replicas in expressive works:[10]

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[5] New York Civil Rights Law § 50-f(2)(b).

[6] La. Rev. Stat. § 51:470.1- 470.6.

[7] *See supra*, note 3.

[8] *See* Letter of Kenneth L. Doroshow, Chief Legal Officer, Recording Industry Association of America, to Suzanne Wilson, General Counsel and Associate Register of Copyrights, United States Copyright Office (April 29, 2024), *available at* https://www.copyright.gov/policy/artificial-intelligence/ex-parte-communications/letters/Recording-Industry-Association-of-America-Apr-29-2024.pdf.

[9] *See* Joshua Matz, *Right of Publicity and the First Amendment* (April 2024), at 6, *available at* https://www.humanartistrycampaign.com/rop-first-amendment.

[10] These exemptions assume that a single right would cover both the use of digital replicas of an actor in audiovisual works, and use of a replica of a recording artist's voice in sound recordings. In MPA's view, it would be preferable to have one right for use of digital replicas of actors in audiovisual works, and a separate right covering the voices of recording artists in sound recordings. In that case, the exemptions would be appropriately tailored for each separate context. For example, the concept of a biopic or docudrama is less relevant in the context of using a voice replica in a new song.

Use of a digital replica would not constitute a violation where:

1. the digital replica is used to depict the individual in a documentary, docudrama, or historical or biographical work, or any other representation of the individual as such individual, regardless of the degree of fictionalization, unless use of the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated;
2. the digital replica is used for purposes of a news, public affairs, or sports broadcast or report, or for a purpose that has political, public interest, educational, or newsworthy value, unless use of the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated;
3. the use of the digital replica is for purposes of comment, criticism, scholarship, satire, or parody;
4. the use of the digital replica is de minimis, incidental, or fleeting;
5. the use of the digital replica is addressed by a collective bargaining agreement; or
6. the digital replica is used in an advertisement or commercial announcement for a work that includes the use of the digital replica as described in [1 through 5].

DEFINITION OF "DIGITAL REPLICA"

MPA stated that the definition of "digital replica" in legislation must be focused on highly realistic depictions of individuals. It should not encompass, for example, cartoon versions of individuals commonly used in works like *The Simpsons* or *South Park*.

SCOPE OF THE DIGITAL-REPLICA RIGHT

MPA stated that the scope of the right should focus on the replacement of performances by living performers. Going beyond that risks sweeping in wide swaths of First Amendment-protected speech, which would make the statute vulnerable to being struck down on overbreadth grounds. Under the overbreadth doctrine, "In the First Amendment context, a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[11] MPA explained that, pursuant to this doctrine, Congress (or state legislatures) may not simply enact broad statutes that encompass both protected and unprotected uses of digital replicas, and leave it to the courts to decide in individual cases which is which. Rather, legislators must carefully craft legislation so that it does not apply to "substantial" amounts of First Amendment-protected speech. As examples of cases where the Supreme Court has struck down federal legislation on First Amendment overbreadth grounds, MPA cited *United States v. Stevens*, 559 U.S. 460 (2010) (striking down on overbreadth grounds statute barring the creation, sale, or possession of depictions of animal cruelty)

[11] *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008)).

and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down on overbreadth grounds major provisions of the Communications Decency Act of 1996).

In response to a question from the Office, MPA explained that a digital-replica right covering deceased performers would be vulnerable to First Amendment challenge, given that courts would be unlikely to find a compelling government interest in this context. However, we noted that concerns over a *post-mortem* right would be significantly mitigated if a statute contains adequate exemptions for First Amendment-protected uses of digital replicas.

PREEMPTION

MPA stated that any federal legislation regulating the use of digital replicas should preempt state laws that regulate the use of digital replicas in expressive works. We noted broad support for federal preemption among the witnesses who addressed this issue at the April 30, 2024 hearing in the Senate Judiciary Committee's Subcommittee on Intellectual Property.[12] MPA clarified that it is not seeking preemption of traditional commercial state right-of-publicity claims involving uses of digital replicas in advertisements or on merchandise. But simply adding a federal layer on top of the emerging patchwork of state laws regulating digital replicas in expressive works would only exacerbate the problems associated with inconsistent laws in this area.

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MPA and our members thank the Office for its engagement on this issue and are available to respond to further questions as they arise.

Very truly yours,

Benjamin S. Sheffner

cc: Suzanne Wilson, Esq.
MPA Member Studios

[12] *See* Hearing in the Senate Judiciary Committee's Subcommittee on Intellectual Property on "The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas" (April 30, 2024), *available at* https://www.judiciary.senate.gov/committee-activity/hearings/the-no-fakes-act-protecting-americans-from-unauthorized-digital-replicas, https://www.techpolicy.press/transcript-us-senate-judiciary-subcommittee-hearing-on-the-no-fakes-act/ (transcript). Robert Kyncl, CEO of Warner Music Group, testified: "Doing anything state by state is a very cumbersome process. Twigs' content getting on a platform unauthorized, if we have to fight that state by state, it's untenable. It just doesn't work."). Graham Davies, President and CEO of the Digital Media Association, testified: "We support the committee's efforts to bring forward legislation at the federal level, which should preempt existing state laws to keep pace with new technology." Prof. Lisa Ramsey of the University of San Diego testified: "Congress can better protect expressive values by allowing the new federal statute to preempt the inconsistent state laws that protect the right of publicity and digital replica rights…."