



# MOTION PICTURE ASSOCIATION

STATEMENT OF THE MOTION PICTURE ASSOCIATION, INC.

REGARDING THE HEARING

“ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY: PART II – IDENTITY IN THE AGE OF AI”

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

FEBRUARY 2, 2024

## I. INTRODUCTION

For over a century, the studios represented by the Motion Picture Association, Inc. (“MPA”)<sup>1</sup> have employed innovative new technologies to tell compelling stories to audiences here in the U.S. and around the globe. From the introduction of recorded sound in the 1920s and color in the 1930s, to the dazzling special effects of *2001: A Space Odyssey*, *Star Wars*, *Jurassic Park*, *Avatar*, and *The Curious Case of Benjamin Button*, the MPA’s members have long used technology to allow filmmakers to bring their vision to the screen in the most compelling way possible.

Artificial intelligence is the latest technological innovation that has captured the attention of the world. Advancements in AI will likely lead to dramatic advancements in myriad industries from medicine to motion pictures. But with these developments also come significant concerns about potential misuses, including to create non-consensual pornographic deepfakes or spread disinformation about elections or national security matters, or otherwise deceive the public. MPA sees great promise in AI as a way to enhance the filmmaking process and provide an even more

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<sup>1</sup> The MPA serves as the global voice and advocate of the motion picture, television, and streaming industries. It works in every corner of the globe to advance the creative industry, protect its members’ content across all screens, defend the creative and artistic freedoms of storytellers, and support innovative distribution models that expand viewing choices for audiences around the world. 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.

compelling experience for audiences. But we also share the concerns of actors and recording artists about how AI can facilitate the unauthorized replication of their likenesses and voices to supplant performances by them, which could potentially undermine their ability to earn a living practicing their craft.

Congress is now considering whether to legislate a new federal right to bar the unauthorized replication of individuals' (including actors' and recording artists') likenesses and voices. MPA agrees that legislation to address these concerns may be warranted. However, in drafting any such bill, Congress must recognize that it would be doing something that the First Amendment sharply limits: regulating speech. Enacting new legislation to address specific harms from the misuse of digital replicas likely can be done consistent with the First Amendment. But it will take very careful drafting to accomplish the goal of addressing these harms without inadvertently chilling legitimate, constitutionally protected uses of technologies to enhance storytelling in our industry, along with other creative endeavors.

This statement will summarize the vital First Amendment issues implicated by a potential federal statute creating a "digital replica" right, emphasizing that creation of such a law would constitute a content-based regulation of speech, subjecting it to strict scrutiny, which requires both the existence of a compelling state interest to justify the regulation and narrow tailoring to serve that interest. MPA stands ready to work with Congress to ensure that any new legislation governing voices or likenesses respects First Amendment rights and creative freedoms, including those of filmmakers, broadcasters, photographers, journalists, and others who employ technologies to entertain and educate audiences in the U.S. and around the world.

## **II. REGULATION OF USES OF NAME, IMAGE, AND LIKENESS**

### **A. Existing State Right of Publicity Laws**

Right of publicity is the body of state law prohibiting unauthorized exploitation of an individual's name, image, likeness, or voice ("NIL") for commercial purposes, such as in an advertisement or on merchandise. Today, in virtually every state, an individual has a cause of action if his or her likeness is used without permission on a billboard or in a television advertisement, or on a product like a coffee mug or cereal box. These laws are typically technology-neutral; they apply to uses of an individual's NIL whether done using traditional technologies like photography, or via new technologies like digital replicas created by AI-powered tools. Thus, no new laws are needed to address the unauthorized use of a digital replica of an individual to endorse a commercial product,<sup>2</sup> an activity clearly prohibited by existing law.<sup>3</sup>

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<sup>2</sup> See, e.g., Derrick Bryson Taylor, *Tom Hanks Warns of Dental Ad Using A.I. Version of Him*, N.Y. Times (Oct. 2, 2023), <https://www.nytimes.com/2023/10/02/technology/tom-hanks-ai-dental-video.html>.

<sup>3</sup> One whose likeness is misused in such fashion would likely have a cause of action under the federal Lanham Act, 15 U.S.C. § 1125(a), as well as state right-of-publicity law. See, e.g., Cal. Civ. Code § 3344 ("Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise,

Of crucial importance, right of publicity properly understood has no place in the context of *non-commercial* speech—speech in the form of movies, television programs, books, news articles and broadcasts, songs, etc.—which receives full First Amendment protection. Recognizing the need to prevent right-of-publicity statutes from encroaching on First Amendment rights, states that have enacted or amended such statutes in the past several decades have routinely included explicit statutory exceptions, known as “expressive-works exemptions,” which make clear that this body of law has no application in the context of creative and journalistic works.<sup>4</sup> States have codified these exemptions precisely because they know that, if not properly cabined to commercial uses, right-of-publicity statutes risk chilling vast swaths of speech, including art, humor, political commentary, journalism, and criticism, all of which are the lifeblood of a free and well-functioning democracy, allowing us to debate, scrutinize, and laugh at the world around us. And absent such exemptions, right-of-publicity defendants sued over references to and depictions of real people would bear the burden of asserting their First Amendment rights as affirmative defenses in individual cases, an expensive and arduous task that itself chills speech. Despite the inapplicability of right-of-publicity laws to uses in expressive works, individuals unhappy with their portrayals in such works nonetheless sometimes assert such claims. The courts just as routinely hold that the First Amendment bars these attempts at censorship, though often only after lengthy and expensive litigation.<sup>5</sup>

The U.S. Supreme Court has addressed state regulation of NIL just once, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which involved an entertainer who performed a “human cannonball” act at an Ohio county fair. *Zacchini* sued a broadcaster that aired his entire act, alleging infringement of his “right to the publicity value of his performance.” *Id.* at 565. The Supreme Court held that the First Amendment did not bar *Zacchini*’s claim. But crucial to the Court’s reasoning was that *Zacchini* was not merely alleging misappropriation of his identity, but instead misappropriation of his *entire act*. And scholars have recognized that *Zacchini* was not about the “right of publicity” as that phrase is commonly used, but, rather,

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goods or services, without such person’s prior consent...shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

<sup>4</sup> See, e.g., Cal. Civ. Code § 3344.1 (1999); Ohio Rev. Code Ann. § 2741.09 (1999); Ark. Code Ann. § 4-75-1110 (2016); N.Y. Civ. Rights Law § 50-f(2)(d) (2020); La. Stat. Ann. § 51:470.5 (2022).

<sup>5</sup> See, e.g., *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (N.Y. App. Div. 2021) (holding that First Amendment barred claim by convicted murderer over portrayal in docudrama, but only after *eight years* of litigation in New York state courts, including multiple appeals and an initial court order—later overturned—that barred broadcast of television movie); *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (Cal. Ct. App. 2018) (First Amendment barred claim by actress over portrayal in docudrama); *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016) (First Amendment barred claim by individual allegedly portrayed in movie *The Hurt Locker*); *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So.2d 802 (Fla. 2005) (First Amendment barred claims involving movie *The Perfect Storm*); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (“Courts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features, or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual’s identity in advertising infringes on the persona.”).

about a right akin to a common-law copyright, which protects event producers from unauthorized broadcasts of their events.<sup>6</sup>

## B. A Potential Federal Name, Image, Likeness, and Voice Right

As the subcommittee is aware, several bills that would establish a new federal NIL right are already under discussion.<sup>7</sup> The substance of these bills is fundamentally different from existing state right-of-publicity statutes: unlike state right-of-publicity statutes, whose scope is typically limited to commercial uses, which receive lesser forms of First Amendment protection, these proposed new federal rights would apply *in expressive works*, which are fully protected by the First Amendment. These new rights, more accurately termed a “digital-replica right” than a “right of publicity,” would aim to prevent, among other things, the unauthorized digital creation of what appears to be a performance by a recording artist or an actor—for example, the “Heart on my Sleeve” song that falsely appeared to be sung by Drake and The Weeknd.<sup>8</sup> MPA acknowledges the concerns raised by such developments and has been working with Congress and stakeholders to address them (just as MPA’s members and other producers successfully reached an agreement with SAG-AFTRA on these issues last fall in the context of a collective bargaining agreement). But in doing so, policymakers must tread carefully, as creation of a new right that would apply in expressive works raises serious First Amendment concerns and risks interfering with core creative freedoms. MPA would be able to support legislation in this area only if it complies with the First Amendment.

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<sup>6</sup> See, e.g., Lee Levine & Stephen Wermiel, *The Court and the Cannonball: An Inside Look*, 65 Am. U. L. Rev. 607, 637–38 (2016) (“[A]lthough the Court used the shorthand phrase ‘right of publicity’ to describe the cause of action before it ... the Justices’ focus ... strongly suggests that the right they believed they were confronting was in the nature of a common law copyright (as the Ohio Court of Appeals had indeed characterized it) and had little to do with the right to control the use of one’s image in an otherwise distinct creative work....”); *Wisconsin Interscholastic Athletic Ass’n v. Gannett Co.*, 658 F.3d 614, 628 (7th Cir. 2011) (observing that a “producer of the entertainment,” such as “the NFL, FIFA, or the NCAA,” “normally signs a lucrative contract for exclusive, or semi-exclusive, broadcast rights for the performance,” and that “*Zacchini* makes clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast”).

<sup>7</sup> E.g., H.R. 6943 (“NO AI FRAUD Act”) (introduced Jan. 10, 2024); NO FAKES Act (discussion draft released Oct. 12, 2023), <https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-announce-draft-of-bill-to-protect-voice-and-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas>.

The NO AI FRAUD Act in particular has come under heavy criticism for its extremely broad scope and lack of adequate exceptions for legitimate, constitutionally protected uses of digital replicas, among other issues. See, e.g., Jennifer Rothman, *House’s Draft AI Bill Risks Loss of Control over Our Own Voices and Likenesses*, Rothman’s Roadmap to 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/); Elizabeth Nolan Brown, *AI Fraud Act Could Outlaw Parodies, Political Cartoons, and More*, Reason (Jan. 17, 2024), <https://reason.com/2024/01/17/ai-fraud-act-could-outlaw-parodies-political-cartoons-and-more/>; Corynne McSherry, *The No AI Fraud Act Creates Way More Problems Than It Solves*, EFF Deeplinks Blog (Jan. 19, 2024), <https://www.eff.org/deeplinks/2024/01/no-ai-fraud-act-creates-way-more-problems-it-solves>. MPA shares many of these concerns and looks forward to working with the bill’s sponsors to address them.

<sup>8</sup> See Joe Coscarelli, *An A.I. Hit of Fake ‘Drake’ and ‘The Weeknd’ Rattles the Music World*, N.Y. Times, April 19, 2023, <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html>.

### **III. ANY DIGITAL REPLICA RIGHT WOULD BE A CONTENT-BASED RESTRICTION ON SPEECH, SUBJECTING IT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT.**

The First Amendment’s free-speech guarantee provides extraordinary freedom for creators of expressive works, including by protecting the ability of creators to use the names and likenesses of real people. Indeed, the creative freedom guaranteed by the First Amendment, coupled with the robust protections of the Copyright Act—itsself an “engine of free expression”<sup>9</sup>—undergird this nation’s position as the unchallenged world leader in motion pictures, music, and other creative endeavors. Over 70 years ago, the Supreme Court recognized that “motion pictures are a significant medium for the communication of ideas,” and are thus fully protected by the First Amendment.<sup>10</sup> And the fact that movies or other creative works are distributed for profit does not render them “commercial speech”<sup>11</sup> or otherwise lessen their First Amendment protection.<sup>12</sup> *See, e.g., Sarver*, 813 F.3d at 905 (The movie “*The Hurt Locker* is not speech proposing a commercial transaction. Accordingly, our precedents relying on the lesser protection afforded to commercial speech are inapposite.”).

#### **A. Strict Scrutiny Would Apply to a Federal Digital-Replica Right.**

A digital-replica right would constitute a content-based restriction of speech. In *Reed v. Town of Gilbert, Arizona*, the Supreme Court made clear that a content-based law is “presumptively unconstitutional” and subject to the most demanding level of constitutional review: strict scrutiny.<sup>13</sup> *Reed* explained that “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or

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<sup>9</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

<sup>10</sup> *Joseph Burstyn, Inc. v. Wilson*, U.S. 495, 501 (1952); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”). Thus the “First Amendment... safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.” *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

<sup>11</sup> The Supreme Court has defined “commercial speech” as “speech which does no more than propose a commercial transaction.” *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted).

<sup>12</sup> *See Joseph Burstyn, Inc.*, 343 U.S. at 501 (“It is urged that motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree.”); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2316 (2023) (rejecting argument that speech receives lesser First Amendment protection when sold for a profit or by a corporation: “none of that makes a difference.”).

<sup>13</sup> 576 U.S. 155, 163 (2015).

message expressed.”<sup>14</sup> And a law that regulates speech based on “particular subject matter” is “obvious[ly]” a content-based law subject to strict scrutiny.<sup>15</sup> This is true “regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.”<sup>16</sup> *Reed*’s “stringent standard” applies to all content-based restrictions of speech.<sup>17</sup> Thus, applying *Reed*, the Ninth Circuit held that “California’s right of publicity law clearly restricts speech based upon its content,” and therefore must survive strict scrutiny to be constitutional.<sup>18</sup>

### **1. A Federal Digital-Replica Right Must Serve a Compelling Government Interest.**

As with any other content-based restriction on speech, a law establishing a digital-replica right could clear the strict-scrutiny hurdle only if it serves a compelling governmental interest.<sup>19</sup> Uses of digital replicas of living professional performers without their consent, to replace performances they might otherwise have been employed to render, might be found by courts to provide a compelling state interest sufficient to satisfy constitutional requirements, where such uses legitimately interfere with those performers’ ability to earn a living. But the government has no compelling interest in restricting creative depictions of public figures (including performers) in stories about them or the world they inhabit. Accordingly, and as discussed below, any digital-replica legislation must be narrowly tailored to address performers’ employment-based concerns without encroaching on a creator’s ability to tell stories about real people and events, or to criticize, parody or comment on public figures.<sup>20</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 165 (internal quotation marks omitted).

<sup>17</sup> *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>18</sup> *Sarver*, 813 F.3d at 903; see also Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 912 n.35 (“The right of publicity is clearly content-based: It prohibits the unlicensed use of particular content (people’s name or likenesses)... But even if it’s seen as content-neutral, strict scrutiny is still the proper test, because the right of publicity doesn’t leave open ample alternative channels for the speaker to convey the content that he wishes to convey.”).

<sup>19</sup> *Reed*, 576 U.S. at 163.

<sup>20</sup> Legislators, of course, have legitimate concerns about other misuses of digital replicas, including to create pornographic deepfakes without the consent of the depicted individual, or to deceive the public in election campaigns. Some of these concerns are already being addressed in narrowly targeted legislation enacted by several states. See, e.g., Cal. Civ. Code § 1708.86 (enacted 2019) (regulating non-consensual pornographic deepfakes); Cal. Elec. Code § 20010 (enacted 2019) (regulating election-related deepfakes); N.Y. Civ. Rights Law § 52-c (enacted 2020) (regulating non-consensual pornographic deepfakes). In addition, the Uniform Law Commission is considering drafting model legislation in these two areas: <https://www.uniformlaws.org/committees/community-home?CommunityKey=470ab30f-126e-4674-b265-0184eda6638c>. MPA believes that such targeted narrowly legislation directed at specific types of harm is the best approach. Broad legislation intended to address multiple

## 2. A Federal Digital-Replica Right Must be Narrowly Tailored.

But a digital-replica right must also clear a second constitutional hurdle: the requirement that any law establishing such a right be “narrowly tailored to serve” the asserted compelling government interest.<sup>21</sup> This is not merely a formal legal requirement, but a highly practical one that goes to the heart of filmmakers’ and others’ freedom to use technology to enhance creative process, for the ultimate benefit of audiences. Digital replicas are not something that Congress should simply aim to regulate out of existence, nor could it. To the contrary, technologies that enable depictions of real people have been used for decades in film and television. Such technologies have myriad entirely legitimate uses, ones that are fully protected by the First Amendment, and which must remain outside the scope of any digital-replica statute for it to survive strict scrutiny.

The new digital-replica technology powered by generative AI follows in a long line of technological innovations in depictions of individuals that allow creators to achieve their visions. Perhaps the best illustration of the use of such technology came three decades ago in the beloved and now-classic 1994 film *Forrest Gump*. The film depicted Forrest—a fictional character played by Tom Hanks—navigating American life from the 1950s through the 1980s, including by interacting with real people from that era. Famously, the filmmakers, using digital-replica technology available at the time, had Forrest encounter, and even converse with, Presidents Kennedy, Johnson, and Nixon:



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distinct forms of harm is more likely to encroach on First Amendment-protected speech, which could lead courts to invalidate it on overbreadth grounds.

<sup>21</sup> *Id.*

Or to take a more recent example, the producers of the series *For All Mankind*, an alternative-history version of the U.S.-U.S.S.R. space race, use digitally manipulated videos to present a fictional version of history that incorporates real people and events. As one of the series' creators explained:

[W]e...wanted this version of our history to feel as close to reality as possible. And I think the way to do that is to use real figures. When I've seen shows like this and everyone's made up, it takes you out of it a little bit.... The nature of our show, the what-if alternate history, really makes moments like this even more important.<sup>22</sup>

For instance, in the series, John Lennon was not murdered in December 1980 but instead lived into the Reagan Administration and is depicted as being interviewed criticizing that president:



To be clear: the filmmakers did not need permission from the relevant estates to depict these individuals in fictional settings; indeed, the First Amendment guarantees the right to use “the raw materials of life...and transform them into art,”<sup>23</sup> so that creators can tell their stories in the most compelling way possible. Any digital-replica statute must be drafted in such a way that it would not interfere with the type of storytelling technique used here.

Other examples of using technology to depict individuals include using a real person's actual image (e.g., clips of interviews with real individuals in the end credits of *I, Tonya*); or using prosthetics, makeup, and visual effects to make an actor more resemble the real person he or she is portraying (e.g., Gary Oldman as Sir Winston Churchill in *The Darkest Hour*, Nicole Kidman as Virginia Woolf in *The Hours*, or Bryan Cranston as L.B.J. in *All the Way*<sup>24</sup>).

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<sup>22</sup> Ben Lindbergh, *How They Made It: The Deeply Real Deepfakes of 'For All Mankind'*, The Ringer (March 5, 2021), <https://www.theringer.com/tv/2021/3/5/22314809/for-all-mankind-season-2-deepfakes-ronald-reagan-john-lennon-johnny-carson>.

<sup>23</sup> *Sarver*, 813 F. 3d at 905.

<sup>24</sup> See Matt Grobar, '*All the Way*' Makeup Designer Bill Corso Delves Into His Latest Emmy-Nominated Actor Transformation, *Deadline* (Aug. 17, 2016) (describing techniques used to transform Cranston into L.B.J. for HBO film), <https://deadline.com/2016/08/bryan-cranston-all-the-way-bill-corso-makeup-emma-interview-1201803755/>.



Notably, many biopics focus on individuals who themselves are professional performers, for example, *Maestro* (Leonard Bernstein), *Being the Ricardos* (Lucille Ball and Ricky Ricardo), *Walk the Line* (Johnny Cash), *Bohemian Rhapsody* (Freddie Mercury), *Ray* (Ray Charles), *Rocketman* (Elton John), *Elvis* (Elvis Presley), *Straight Outta Compton* (the members of N.W.A.), *Love and Mercy* (Brian Wilson of the Beach Boys), *Marilyn* and *Blonde* (Marilyn Monroe), and *The Dirt* (Tommy Lee of Mötley Crüe and Pamela Anderson), among countless others. No one questions that the First Amendment protects a creator’s ability to use these and similar techniques to bring verisimilitude to their work. Technology simply allows the filmmaker to do the same thing with greater realism. It supports the audience’s immersion in the story and suspension of disbelief, which are critical elements of cinematic storytelling. Realism, whether enhanced by technology or not, can bring to life the historical and cultural markers that enrich a story and bring the creator’s artistic vision to life.

Digital replicas can also be highly effective tools for parody and satire, forms of social or political commentary that the Supreme Court has held deserve high levels of protection.<sup>25</sup> Imagine, for example, a late-night comedy show using digital replicas to poke fun at celebrities, politicians, athletes, or whoever happens to be in the news that week.

#### **IV. BASELINE CONSIDERATIONS FOR CONTOURS OF ANY POTENTIAL FEDERAL DIGITAL-REPLICA RIGHT**

Before legislating a new right governing the use of individuals’ NIL, MPA urges Congress to first pause and ask whether the harms it seeks to address are already covered by existing law. Often the answer will be “yes,” indicating that a new law is not necessary. For example, employing a digital replica to make a false statement about someone that harms his reputation is (subject to First Amendment limits) already actionable under state defamation law. Using a digital replica of an individual to endorse a product without the individual’s consent would be actionable under state right-of-publicity law and the federal Lanham Act. Creating a deepfake of a CEO that tells lies about her company’s financial performance could constitute securities fraud. Laws addressing these subjects operate without regard to the particular technology employed to violate them, and the emergence of a new technology that can be abused does not mean that a new law to address the abuse is necessary or advisable. And, where truly new forms of harm that are not adequately addressed by existing law are identified, any legislation should be narrowly and carefully tailored to address them.

##### **A. Scope of the Right**

Given the high hurdles erected by the Supreme Court’s strict-scrutiny requirements, any statute establishing a digital-replica right must clearly and expressly avoid encroaching on First Amendment-protected uses such as those described above. Thus, any right must be limited to the use of a digital replica to replace a performance by a living professional performer, where the performance is of the type that the professional performer regularly

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<sup>25</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

engages in for gain or livelihood, and the use is likely to deceive the public into believing that the digital replica constitutes an authentic recording in which the individual participated. Such a formulation would ensure that the MPA’s members and other creators remain free to use technology to *depict* (rather than *replace*) individuals engaging in performances—including musicians and actors—in expressive works such as biopics and parodies.

It is also vitally important that any statute define “digital replica” to include only highly realistic representations of an individual.<sup>26</sup> A statute must not regulate, for example, the type of cartoon versions of real-life individuals like Don King or Bono that appear in television shows such as *The Simpsons* and *South Park*, even when such depictions are easily recognizable as the people they portray:



Such depictions are obviously protected by the First Amendment and must remain outside the scope of any statute.

And, as with existing state right-of-publicity laws, any federal digital-replica right must include clear statutory exemptions to provide certainty to both creators and depicted individuals, which helps avoid unnecessary litigation as well as constitutional vagueness and overbreadth concerns. At a minimum, a bill establishing a federal digital-replica right must include exemptions where the use is in a work of political, public interest, educational, or newsworthy value, including for purposes such as comment, criticism, or parody, or in documentaries, docudramas, or historical or biographical works, or a representation of an individual as himself or herself, regardless of the degree of fictionalization, and for uses that

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<sup>26</sup> New York’s 2020 digital-replica provision, which was enacted with MPA’s support, provides an example of a well-crafted definition of digital replica: “a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.” N.Y. Civ. Rights Law § 50-f(1)(c).

are *de minimis* or incidental.<sup>27</sup>

## B. Limitation to Living Performers

Additionally, to survive strict scrutiny, any digital replica-right must apply only to living performers. Some state right-of-publicity laws apply *post mortem*. However, those laws generally cover only commercial speech (i.e., advertising and merchandising uses)—not uses in fully First Amendment-protected speech like motion pictures.<sup>28</sup> As discussed above, a court could determine that certain unconsented uses of digital replicas to replace living actors or recording artists could interfere with their ability to earn a living, establishing a compelling state interest sufficient to satisfy the constitutional requirement. However, that employment-based interest does not exist for deceased individuals. And other purported justifications for protecting deceased performers are unavailing. Any interest in a performer’s reputation or dignity is already governed by defamation and privacy law, which is personal to the individual at issue. But recognizing dignitary interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in centuries of American law, under which “there can be no defamation of the dead.”<sup>29</sup>

As to financial interests, while it is understandable that heirs of deceased performers (or their corporate licensees) would like additional compensation, that desire is insufficient to overcome fundamental First Amendment rights. Indeed, the Supreme Court has held that the First Amendment must prevail over interests—such as national security concerns—that are orders of magnitude greater in importance than the financial position of performers’ heirs or their corporate successors.<sup>30</sup> To put it in the frame of strict scrutiny, heirs’ or corporate

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<sup>27</sup> States that have enacted statutes regulating the use of digital replicas have included such statutory exemptions, which MPA urges Congress to consider as models. *See* N.Y. Civ. Rights Law §50-f(2)(d)(ii); La. Stat. Ann. § 51:470.5.

<sup>28</sup> The 2023 collective bargaining agreement between the Alliance of Motion Picture and Television Producers (“AMPTP”) (which includes the MPA’s members) and SAG-AFTRA does address the use of digital replicas of deceased SAG-AFTRA members. It is important to recognize that an agreement between private parties, which of course binds only those parties, is much different from legislation, which binds all subject to the law’s jurisdiction and must comply with the Constitution. For example, parties to an agreement (e.g., an NDA or non-disparagement agreement) may agree not to engage in speech that would otherwise be protected by the First Amendment. But that does not mean that Congress may ban that speech.

<sup>29</sup> Restatement (Second) of Torts § 560 (1977); *see also, e.g., Bradt v. New Nonpareil Co.*, 108 Iowa 449 (Iowa Sup. Ct. 1899) (“The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action.”); *Meeropol v. Nizer*, 381 F. Supp. 29, 34-35 & n.3 (S.D.N.Y. 1974), *aff’d*, 560 F.2d 1061 (2d Cir. 1977) (rejecting defamation and invasion of privacy claims by children of convicted and executed spies Julius and Ethel Rosenberg over statements in book because such claims expire upon the death of the subject of the statements at issue).

<sup>30</sup> *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case); *see also* Diane Leenheer Zimmerman, *Money As A Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503, 1514, 1524 (2009) (stating that the strict scrutiny test “normally requires a clear showing of necessity for the protection of human life, public safety, or national security—not profit aggrandizement” and arguing that

licensees' desire to profit here is not a governmental interest at all, much less a compelling governmental interest required to satisfy incursions into a fundamental constitutional right.

### C. Preemption

Any federal statute establishing a digital-replica right must preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works. While many state right-of-publicity statutes contain express statutory expressive-works exemptions, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray.<sup>31</sup> If there is to be a federal digital-replica right, it must be carefully crafted to avoid interference with First Amendment rights and should provide national uniformity.

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MPA and our members thank the subcommittee for its attention to this issue of critical importance to our members and stand ready to work with Congress and stakeholders to arrive at a solution that respects performers' concerns, while safeguarding First Amendment protections and creative freedoms.

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economic interests do not justify encroachment on First Amendment rights, except in highly unusual circumstances where denying a celebrity's claim would result in "significant, highly particularized, and non-speculative" risk of "failure in the primary market for his talents").

<sup>31</sup> See Eugene Volokh, *The First Amendment, the right of publicity, video games and the Supreme Court*, The Washington Post (Jan. 4, 2016) ("Unfortunately, there are now five different First Amendment tests that lower courts use in right of publicity cases (setting aside cases involving commercial advertising, which is less constitutionally protected than other speech)... Unsurprisingly, these different tests often lead to inconsistent results, which leave creators and publishers uncertain about what they may say.), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/04/the-first-amendment-the-right-of-publicity-video-games-and-the-supreme-court/>; Amicus Brief of 31 Constitutional Law And Intellectual Property Law Professors as Amici Curiae in Support of Petitioner in *Electronic Arts, Inc. v. Davis* (Supreme Court Case No. 15-424) (identifying five different tests: 1) the transformative use test, 2) the transformative work test; 3) the relatedness test; 4) the predominant purpose test; and 5) the balancing test)), <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>.