



MOTION PICTURE ASSOCIATION

STATEMENT OF THE MOTION PICTURE ASSOCIATION, INC.

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY

REGARDING THE HEARING

ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY – PART II: COPYRIGHT
JULY 12, 2023

I. INTRODUCTION

The Motion Picture Association, Inc. (“MPA”) appreciates the opportunity to provide this statement for the record following the subcommittee’s July 12, 2023 hearing titled “Artificial Intelligence and Intellectual Property – Part II: Copyright.” The MPA is a not-for-profit trade association founded in 1922. The MPA serves as the voice and advocate of the film and television industry, advancing the business and art of storytelling, protecting the creative and artistic freedoms of storytellers, and supporting the creative ecosystem that brings entertainment and inspiration to audiences worldwide. The MPA’s member companies are Netflix Studios, LLC, Paramount Pictures Corp., Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

While the title of the July 12 hearing indicated a focus on copyright, much of the discussion centered on a separate, non-copyright issue: the potential enactment of a new federal statute regulating the use of individuals’ names, images, and likenesses (“NIL”), as a means to address some of the concerns raised by recent developments in artificial intelligence. The MPA has been deeply engaged on NIL issues in state legislatures for many decades and stands willing to work with Congress and other stakeholders to address the concerns of recording artists, actors, and others about the use of digital replicas to replace their performances without their consent, as well as uses that deceive the public. Many of these concerns, and the proposed legislative responses to them, have been framed under the rubric of the “right of publicity.” As described in this statement, however, many of the concerns animating the discussion and proposed solutions have little in common with the traditional right of publicity—an area in which there exists a robust and established body of legal jurisprudence, the development of which the MPA and its

members have been actively engaged in to ensure the protection of important speech-related interests.

The concerns raised at the hearing regarding uses of digital replicas deserve attention. But it is vitally important that any legislation in this area respect First Amendment rights and creative freedoms, including those of filmmakers, broadcasters, photographers, journalists, and others who employ new technologies to entertain and educate audiences in the U.S. and around the world. In this statement, MPA summarizes the vital First Amendment issues implicated by a potential federal NIL statute, emphasizing that creation of such a right would constitute a content-based regulation of speech, subjecting it to strict scrutiny, which requires both the existence of a compelling state interest and narrow tailoring to serve that interest. MPA also offers the subcommittee guidelines should it pursue legislation in this area and stands ready to serve as a resource to the Committee as it examines these issues.

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

A. Existing State Right of Publicity Laws

Regulation of uses of an individual’s name, image, and likeness has traditionally been governed by the body of state law known as “right of publicity.” Approximately half the states have enacted right-of-publicity statutes, while almost all of the rest protect this right through the common law.¹ Importantly, the right of publicity applies only to commercial uses of an individual’s NIL—for example, in an advertisement or on merchandise. But right of publicity does not—and, consistent with the First Amendment, may not—regulate uses of or references to individuals’ NIL in “expressive works”—works such as books, plays, news articles and broadcasts, songs, and movies and television programs.² Such expressive works are non-commercial speech fully protected by the First Amendment.³

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

¹ See generally <https://rightofpublicityroadmap.com/>.

² See Restatement (Third) of Unfair Competition, § 47 (right of publicity does not include “the use of a person’s identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.”).

³ The Supreme Court has defined “commercial speech” as “speech which does no more than propose a commercial transaction.” *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983) (internal quotation marks omitted). “If speech is not ‘purely commercial’—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection.” *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894, 906 (9th Cir. 2002).

journalistic works.⁴ 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 routinely assert such claims. The courts just as routinely hold that the First Amendment bars these attempts at censorship.⁵

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

⁴ 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).

⁵ See, e.g., *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (N.Y. App. Div. 2021) (First Amendment barred claim by convicted murderer over portrayal in docudrama); *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.”).

⁶ 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”).

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

While several witnesses at the July 12 hearing expressed support for enactment of a federal “right of publicity,” the substance of what they were suggesting appears to be something quite different: a new right that—unlike state right-of-publicity statutes—would apply *in expressive works*. This new right, more accurately termed a “digital-replica right” than a “right of publicity,” would aim to prevent 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.⁷ MPA acknowledges the concerns raised by such developments and looks forward to working with Congress and stakeholders to address them. 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.

III. ANY DIGITAL REPLICA RIGHT WOULD BE A CONTENT-BASED RESTRICTION ON FREE SPEECH, AND WOULD BE SUBJECT 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”⁸—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.⁹ And the fact that movies or other works are distributed for profit does not lessen their First Amendment protection.¹⁰

⁷ 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>.

⁸ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

⁹ *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.”).⁹ 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).

¹⁰ 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.”).

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.¹¹ *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 message expressed.”¹² And a law that regulates speech based on “particular subject matter” is “obvious[ly]” a content-based law subject to strict scrutiny.¹³ 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.”¹⁴ *Reed*’s “stringent standard” applies to all content-based restrictions of speech.¹⁵ 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.¹⁶

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.¹⁷ Replacement of living professional performers with digital replicas without their consent might be found by courts to provide a compelling state interest sufficient to satisfy constitutional requirements, as such uses could interfere with those performers’ ability to earn a living.

¹¹ 576 U.S. 155, 163 (2015).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 165 (internal quotation marks omitted).

¹⁵ *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

¹⁶ *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.”).

¹⁷ *Reed*, 576 U.S. at 163.

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.¹⁸ 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. To the contrary, digital replicas have the potential to be an important new technological means for creators to tell their stories. Digital replicas 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. Digital replica technology follows in a long line of technological innovations in depictions of individuals that allow creators to achieve their visions. Examples 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*). 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 could 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.¹⁹ 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. Or documentarians could use digital replicas to re-create scenes from history where no actual footage exists, to enhance the visual appearance and verisimilitude of the scene (with disclosures where appropriate).

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

A. Scope of the Right

Given the high hurdles erected by the Supreme Court’s strict-scrutiny requirements, it is imperative that any statute establishing a digital-replica right clearly and expressly avoid encroaching on First Amendment-protected uses such as those described above. Thus, any

¹⁸ *Id.*

¹⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988).

right must be limited to the use of a digital replica to replace a living professional performer, where the replica is used to perform a role, and the performance is of the type that the professional performer regularly engages in for gain or livelihood. 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. 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 comment, criticism, or parody, or similar works, such as 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 are *de minimis* or incidental.²⁰

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. 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. But recognizing dignitary interests of deceased individuals would represent a radical change in centuries of American law, under which “there can be no defamation of the dead.”²¹

As to financial interests, while it is understandable that heirs of deceased actors would like additional money, that desire is insufficient to overcome fundamental First Amendment rights.²² 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

²⁰ States that have enacted statutes regulating the use of digital replicas have included such statutory exemptions. See N.Y. Civ. Rights Law §50-f(2)(d)(ii); La. Stat. Ann. § 51:470.5.

²¹ 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).

²² See *Sarver*, 813 F.3d at 905–06.

importance than the financial position of performers' heirs or their corporate successors.²³ To put it in the frame of strict scrutiny, heirs' 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.²⁴ 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.

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

July 19, 2023

²³ 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 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”).

²⁴ See 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>.