MOTION PICTURE ASSOCIATION

STATEMENT OF THE MOTION PICTURE ASSOCIATION, INC.
FOR THE
AI INSIGHT FORUM: TRANSPARENCY, EXPLAINABILITY, INTELLECTUAL PROPERTY & COPYRIGHT

NOVEMBER 29, 2023

I. INTRODUCTION

The Motion Picture Association ("MPA") and our member studios thank Leader Schumer and Senators Heinrich, Rounds, and Young for the opportunity to participate in the AI Insight Forum addressing Transparency, Explainability, Intellectual Property, and Copyright. MPA is a not-for-profit association founded in 1922 to address issues of concern to the motion picture industry. Over its more than 100-year history, MPA has grown to become the premier global advocate of the film, television, and streaming industry. MPA's members are: Walt Disney Studios Motion Pictures; Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; and Warner Bros. Entertainment Inc. MPA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

Throughout their history, MPA's members and the countless people working with them to bring the magic of moviemaking to the screen have been pioneers and beneficiaries of technological innovation. Creators are innovators by nature; they always rely on a range of tools, including technological tools, to give life to their artistic vision and to connect their works with widespread and diverse audiences. To that end, MPA's members have invested substantially in developing, and supporting others who develop, cutting-edge technological tools for creators to use in creating motion pictures and television programs.

MPA's members have a uniquely balanced perspective regarding the interplay between artificial intelligence and intellectual property, including copyright. Our members' copyrighted works are enormously popular and valuable. Strong copyright protection is the backbone of our industry, which supports over 2.4 million jobs in the United States and has been the unchallenged world leader in this sector for over a century. At the same time, MPA's members have a strong interest in the development of creator-driven tools, including AI technologies, to enhance human creativity and support the creation of world-class content. To be clear, MPA believes that human creativity is, and will remain, at the heart of the filmmaking process. We view AI as a tool that **enhances** human creativity—not replaces it.

MPA's overarching view, based on the current state of the law and technology, is that while AI technologies raise a host of novel questions, those questions implicate well-established

copyright law doctrines and principles, and that new copyright legislation is not warranted or advisable at this time. Regarding the non-copyright issue of protection for name, image, likeness, and voice, MPA shares the legitimate concerns of performers in this area and agrees that targeted legislation to address those concerns may be appropriate. However, as detailed below, any such legislation must be carefully and narrowly drafted to ensure that it does not encroach on fundamental First Amendment rights.

II. TRANSPARENCY

A. Inputs to AI Models

MPA sees benefits in developers of AI models keeping and making available appropriate records regarding the materials used to train their models. These records would allow the public and regulators to meaningfully assess the lawfulness as well as the reliability of the developers' activities. Maintenance of such records may also be required because of anticipated litigation.

In all events, MPA's members believe policymakers should be thoughtful about the context and nuances of any recordkeeping requirements to ensure that policies are narrowly targeted to achieve the desired goal. It is important that any suggested transparency and disclosure requirements not be overbroad in scope. For example, where content creators use AI tools developed with their own content (or content licensed from others), a requirement to track and disclose the materials used for such internal purposes would provide no benefit but could impose significant burdens.

B. Output from AI Systems

The topic of potential requirements to label or disclose the use of AI in producing video or audio content also requires a nuanced, context-specific approach. The ability of AI to facilitate the creation of realistic but false videos or audio recordings that deceive consumers or mislead the public about political candidates is concerning, and Congress may wish to consider labeling or disclosure requirements to address these distinct and concrete (but non-IP) harms. However, MPA opposes any requirement to label or disclose when AI tools are used in low-risk activities, such as the creation of works for expressive and entertainment purposes. Such a requirement is unnecessary; there is no reason, for example, to require a "MADE WITH AI" label on a scene in a movie where visual-effects tools that incorporate AI are used to depict a superhero zooming between skyscrapers to save a fictionalized version of New York, or to place historic figures in a fictional setting (*e.g.*, the depiction of Presidents Kennedy, Johnson, and Nixon in *Forrest Gump*). In fact, such hypothetical labeling requirements would hinder creative freedom and could conflict with the First Amendment's prohibition against compelled speech. Because strict constitutional scrutiny applies under those circumstances, courts have routinely struck down laws requiring speakers to include certain matters within their protected speech, thus preventing the speakers from expressing the message they wish to convey.

III. INTELLECTUAL PROPERTY AND COPYRIGHT

A. MPA Members' Use of Artificial Intelligence as a Tool

The MPA's members and the visual-effects vendors with whom they partner have long used tools that incorporate artificial intelligence. While the creative expression of human beings is, and always will be, the lifeblood of the motion picture industry, AI-powered tools can, and do, facilitate that human creativity, including by freeing creators from tedious and repetitive tasks that are a necessary component of creating world-class audiovisual content. AI provides more time and tools for content creators to be creative.

For example, animators and visual-effects artists for decades have used a process called rotoscoping, which involves manually altering individual frames within a single shot to align live-action and computer-generated images. That work is incredibly detail oriented and time consuming. Contemporary visual-effects artists now have sophisticated tools, some of which incorporate AI technology, to assist with this type of work. Using these tools frees artists to focus their energies on the creative aspects of the visual effects.

AI also helps creators realize their vision and enhance the audience experience by making visual effects more dramatic, realistic, and memorable. Creators can use AI for everything from color correction, detail sharpening, and de-blurring; to removing unwanted objects from a scene; to more involved work like aging and de-aging an actor; or to adjusting the placement of computer-generated images to make sure everything in a scene flows smoothly and aligns properly. Artists have expressed enthusiasm for AI tools that enhance their work and for continued technological development of these and similar tools. In short, the use of AI technology presents developing opportunities for creators and their audiences. MPA's members are optimistic about that future. And in crafting policy and potential legislation regulating AI, MPA urges lawmakers to take care not to impede either current or potential future uses of these creativity-enhancing technologies.

B. Use of Copyrighted Works to "Train" AI Models

The debate about whether reproduction of copyrighted works to "train" AI models constitutes copyright infringement, or is permitted by the fair use defense, has become highly polarized, with many participants staking out "all or nothing" positions on this issue. But sweeping generalizations that training is always, or is never, fair use, are not appropriate. As the Supreme Court instructed in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994), "The task [of determining whether a use is fair] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."

More than a dozen lawsuits raising the issue of AI training/fair use have been filed over the past year, and we expect courts to begin issuing substantive rulings in 2024. As mandated by Section 107 of the Copyright Act and the case law interpreting it, courts will apply the four fair use factors to the facts before them and reach decisions in each case. They will consider factors including whether the AI company is engaged in non-commercial or for-profit activities, 17 U.S.C. § 107(1), and whether the particular use of the plaintiffs' works harms "the potential market for or value of" those works, *id*. § 107(4). If courts reach different conclusions in these cases based on the different facts before them, that is an inherent feature of fair use, which is "an

equitable rule of reason," under which "each case raising the question must be decided on its own facts." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (quoting H. R. Rep. No. 94-1476, at 65 (1976)). As of now, there is no cause to believe the courts and existing law are not up to the task of applying existing copyright law to new technology—as courts have been doing for over a century—and thus MPA sees no reason for Congress to pre-emptively intervene by amending the Copyright Act to resolve these fair use issues.

C. Federal Regulation of Digital Replicas

MPA and its members share the concerns raised by actors and recording artists regarding unauthorized and harmful uses of AI-generated digital replicas of their likenesses or voices, including uses of such replicas in ways that could potentially replace performances by them in expressive (*i.e.*, non-commercial) works and impact their ability to earn a living. MPA's members (via their collective-bargaining entity AMPTP) and SAG-AFTRA recently reached a tentative agreement that includes what the union has justifiably characterized as "historic" protections for performers, which include rights to informed consent and compensation for use of their digital replicas.[1] In addition, MPA has been engaged in productive discussions with Senate staff and stakeholders regarding text of the "Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act," which would establish a new federal intellectual property right governing the creation and use of digital replicas. MPA has a long history of working successfully with its guild partners on related legislation at the state level, and we remain committed to engaging constructively with stakeholders on federal legislation to protect their legitimate interests, mindful of the need to draft carefully and narrowly to avoid encroaching on the First Amendment rights of filmmakers, documentarians, news organizations, and others to use generative AI tools as a legitimate and constitutionally protected filmmaking technique.

1. First Amendment Considerations

Unlike copyright, which is grounded in express constitutional authority and contains the "built-in First Amendment accommodations" of the fair use doctrine and the idea/expression dichotomy,[2] regulation of the uses of individuals' name, image, likeness, and voice is of relatively recent vintage, and must be strictly cabined to avoid a conflict with First Amendment rights. As regulation of digital replicas would constitute a content-based restriction on speech, any such statute would be "presumptively unconstitutional" and thus subject to the most demanding level of constitutional review: strict scrutiny. *See Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015). To overcome this presumption of unconstitutionality, proponents of a digital-replica statute would need to demonstrate that: 1) it serves a compelling government interest and 2) it is narrowly tailored to serve that interest. *Id*.

Replacement of professional performers with digital replicas without their consent may constitute an area of government interest that courts would find sufficiently compelling to satisfy constitutional requirements, as such uses could interfere with those performers' ability to earn a living.

Narrow tailoring is crucial to ensure respect and sufficient space for filmmakers' and others' freedom to use technology to enhance the creative process for the ultimate benefit of

[1] Voting on ratification of the agreement is ongoing and concludes December 5, 2023.
[2] *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

audiences. 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 used in depictions of individuals that allow creators to achieve their visions. Examples include using a depiction of an individual (*e.g.*, clips of interviews with real individuals in the end credits of *I, Tonya*), using digital technology to alter pre-existing footage to insert real people into fictional settings (*e.g.*, the depictions of the presidents in *Forrest Gump*), 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*). 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. 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. 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).

Any federal digital-replica right must include clear statutory exemptions to provide certainty to both creators and depicted individuals, which would help avoid unnecessary litigation as well as constitutional vagueness and overbreadth concerns. Such exemptions are routine in modern state right-of-publicity laws, which apply to uses in commercial speech (i.e., advertising and merchandising); they are even ***more*** crucial in potential digital-replica legislation, which would regulate uses of replicas in expressive works including movies and television programs, which are fully protected by the First Amendment.[3] At 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; for similar works, such as documentaries, docudramas, or historical or biographical works; for a representation of an individual as himself or herself, regardless of the degree of fictionalization; and for uses that are *de minimis* or incidental.

2. Preemption of State Laws

Further, 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, including movies and television programs. While many analogous state statutes contain express statutory exemptions for expressive works, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray. 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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[3] Indeed, in discussing analogous potential federal legislation in its 2019 moral rights report, the Copyright Office advised that "such a [right-of-publicity] law would…benefit from explicit carve-outs for expressive works and other exceptions for First Amendment-protected activities." U.S. Copyright Office, *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* (April 2019) at 119, https://www.copyright.gov/policy/moralrights/full-report.pdf.