



MOTION PICTURE ASSOCIATION

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TO QUESTIONS FROM SENATOR THOM TILLIS

**REGARDING THE HEARING “THE NO FAKES ACT: PROTECTING AMERICANS FROM
UNAUTHORIZED DIGITAL REPLICAS” (APRIL 30, 2024)**

**SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY**

MAY 21, 2024

1. Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?

MPA agrees that if there is to be a digital-replica right, which of course must be subject to effective First Amendment protections, then rights holders should have a remedy for violations of such right, including a means for securing the removal of materials where dissemination is prohibited by the statute. Traditional principles of direct and secondary liability are one way to do that, as seen in the trademark context.¹ Notice-and-takedown and/or safe-harbor provisions are another. MPA is open to discussing any of these options, again with the goal of ensuring that remedies are available here as they should be in any statutory enforcement context, subject to constitutional protections. To this end, MPA does not believe it is appropriate to import the notice-and-takedown provisions of Section 512 of the Digital Millennium Copyright Act, 17 U.S.C. § 512, into the NO FAKES Act. The DMCA process is complex, and, as the U.S. Copyright Office has noted, has not “achiev[ed] the balance Congress originally intended”² in seeking to encourage collaborative efforts between service providers and copyright owners to detect and deal with the problem of online copyright infringement. In the end, it is crucial that the approach here align with the scope and nature of the right established—including the adequacy of protections adopted to safeguard First Amendment-protected speech interests—in order to ensure that the enforcement mechanisms do not encroach on legitimate, constitutionally protected expressive activity.

¹ See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

² U.S. Copyright Office, *Section 512 of Title 17, A Report of the Register of Copyrights* (May 2020), at 83, available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

2. Regarding the NO FAKES Act, do you agree that individuals should only have the right to license out their digital likeness if they are represented by counsel or a member of a union? If so, why?

No. Absent compelling reasons, parties should enjoy their traditional freedom to contract, including by licensing rights they own to others, typically in exchange for money. The motion picture, television, and music industries operate pursuant to countless such agreements, where, for example, a novelist may license to a producer the right to make a movie version of her book, or a songwriter may grant a license to a producer to have his song featured in a television show. The law does not require that either the licensor or licensee in such transactions be represented by counsel or a union (or by any other adviser, such as a talent agent or manager). MPA sees no compelling reason to deviate from this longstanding set of legal and business practices in the digital-replica context. We also note that the law permits individuals to engage in major, sometimes life-altering, transactions, such as buying and selling a home, making a will, enlisting in the military, or even adopting a child, without legal representation. It would be highly incongruous for Congress to require legal (or union) representation in the much lower-stakes context of licensing use of a digital replica.

3. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

Yes. A federal statute establishing a digital-replica right should preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works. MPA's members distribute their movies and television programs in all 50 states. Enacting a federal statute that lacks preemptive force would only exacerbate the problems associated with the "patchwork" of existing state laws in this area, some of which specifically regulate digital replicas. Approximately half of the states have enacted right-of-publicity statutes, while nearly all of the rest recognize similar rights through the common law. These laws typically cover uses of one's name, image, likeness, or voice ("NILV") for commercial purposes, i.e., in advertisements or on merchandise. Three states—New York, Louisiana, and Tennessee—have recently enacted statutes explicitly addressing the use of digital replicas in expressive works, such as sound recordings, movies, and television programs.³ While many state right-of-publicity statutes contain express statutory exemptions for uses of NILV of the type protected by the First Amendment, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray.⁴ If there is to be a federal digital-replica right,

³See N.Y. Civ. Rights Law § 50-f(2)(b) (2020); La. Rev. Stat. § 470.1-470.6 (2022); Tenn. H.B. 2091 (2024) (amending Tenn. Code. Ann. § 47-25-1101 *et seq.*, effective July 1, 2024).

⁴ 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.

it must be carefully crafted to avoid interference with First Amendment rights and should provide national uniformity. Notably, of the witnesses at the April 30 hearing who addressed the preemption issue, all (myself included) expressed support for including a preemption clause in the NO FAKES Act.⁵

Note that MPA is **not** seeking full preemption of all state right-of-publicity law, but only of state regulation of uses of NILV *in expressive works*. We see no compelling need for federal preemption of routine applications of traditional right-of-publicity law, for example, where a person's name or likeness is used without authorization in an advertisement or on a piece of merchandise. But in this novel area of regulation of the use of digital replicas in expressive works, a single, national standard should apply.

4. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

The creation of a digital-replica right that would apply in expressive works is novel. While three states—New York, Louisiana, and Tennessee—have recently enacted statutes creating such rights,⁶ MPA is unaware of a single claim being filed under any of these new provisions, so their practical effect remains uncertain. MPA remains hopeful that the version of the NO FAKES Act that will be introduced in coming weeks will adequately address the concerns we and others have raised about its broad scope. Nonetheless, the novelty of such a new right does create uncertainty and potential unintended consequences, which could include the following:

- **Chilling effect on legitimate uses of digital replicas.** In my written testimony, I noted several examples of uses of digital replicas that did not require the consent of the depicted individuals, involving the movie *Forrest Gump* and the streaming series *For All Mankind*. Depending on the final text of the NO FAKES Act, filmmakers may be uncertain whether they are permitted to depict individuals using such technology. That uncertainty could lead them to shy away from

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>.

⁵ 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...."

⁶ See *supra*, note 3.

engaging in such depictions—a classic chilling effect that the First Amendment does not allow.⁷

- **Interaction with copyright law.** Enactment of a federal digital-replica right is likely to raise thorny questions about how this new right would interact with copyright law. Professor Jennifer Rothman of the University of Pennsylvania, a leading scholar in this area, noted the potential conflict between a federal digital-replica right and copyright law in a recent written submission to the U.S. Copyright Office, opining that “[a]ny federal legislation restricting uses of such copyrighted works will need to address this potential conflict.”⁸ In other words, a federal digital-replica right, if not drafted and interpreted correctly, could potentially interfere with a copyright owner’s right to exploit its works under the Copyright Act. Added Rothman: “State right of publicity laws are sometimes preempted by federal copyright law when the two laws clash, but the case law does not provide a stable or predictable roadmap for Congress to employ at the federal level. The best way to read these cases and conflicts, however, and one which may provide some guidance is that when a person appears in a copyrighted work with permission, it is appropriate to provide some latitude for a copyright holder to make anticipated and related uses of the copyrighted work in derivative works, unless limited by contract or collective bargaining agreements.”⁹
- **Use of right to censor online depictions.** As noted in response to Question 1, MPA supports the inclusion of a notice-and-takedown process to facilitate enforcement of the rights created under the NO FAKES Act, provided that the rights, and such enforcement mechanism, include adequate protections for free expression. However, we recognize the potential for abuse by, for example, individuals who do not like how they are depicted in a post on a social-media platform and attempt to censor such depictions with meritless takedown notices that ignore that others have a First Amendment right to comment on the world around them.
- **Post-mortem dignitary rights.** MPA remains concerned that recognition of a post-mortem digital-replica right could encourage the heirs of deceased individuals, or their corporate successors, to attempt to use such right to censor portrayals of such individuals that they do not like. As noted in my written testimony, recognizing dignitary or reputational interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in longstanding American law, under which “there can

⁷ See *Walker v. Birmingham*, 388 U.S. 307, 345 (1967) (noting the Supreme Court’s “overriding duty to insulate all individuals from the ‘chilling effect’ upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise”).

⁸ Comments of Jennifer E. Rothman to the U.S. Copyright Office in response to Artificial Intelligence and Copyright, Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59942 (Aug. 24, 2023), Docket No. 2023-6 (Oct. 25, 2023), at 7, available at https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Prof-Rothman-Comments-to-Copyright-Office-on-Right-of-Publicity-and-AI_October-2023.pdf.

⁹ *Id.* (footnote omitted).

be no defamation of the dead.”¹⁰ MPA has acknowledged the legitimate interest in regulating unconsented uses of digital replicas to replace living performers’ performances because of the potential impact on their livelihoods. After the death of the performers, however, that interest no longer remains, and thus the restriction would be unlikely to meet the strict scrutiny standard, which is necessary to overcome the presumption of unconstitutionality for any content-based restriction on speech.¹¹

5. **State-level right of publicity laws restricting commercial speech have existed for many decades, have developed their own case law, and are now well-understood. The digital replica right proposed by the NO FAKES Act, however, would affect non-commercial speech – beyond what most state laws currently cover.**

Could you explain how novel this proposed right would be in the context of existing right of publicity laws, and how we should consider preempting similar state-level digital replica laws, especially when this is such new territory?

As the question correctly notes, state right-of-publicity laws regulating commercial uses of names, images, and likenesses have existed for a very long time—well over a century. For example, New York’s statute, enacted in 1903 in response to unauthorized use of a woman’s image to advertise flour,¹² has always applied only to uses of one’s likeness “for advertising purposes or for the purposes of trade.”¹³ But more modern right-of-publicity statutes are typically limited to commercial uses as well. The law is clear, however, that expressive works such as movies, television shows, and books are not commercial speech and are fully protected under the First Amendment,¹⁴ notwithstanding that such works are typically made and distributed for profit.¹⁵ Thus, since the late 1990s, states that have enacted right-of-publicity statutes have taken

¹⁰ Restatement (Second) of Torts § 560, comment a (1977); *see also, e.g., Bradt v. New Nonpareil Co.*, 108 Iowa 449 (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).

¹¹ *See Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015).

¹² *See Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 119 (2018) (explicating history of New York law in this area).

¹³ New York Civil Rights Law § 51. While technically a “right of privacy” statute, Section 51 operates similarly to a right-of-publicity law, though it applies only to living individuals. *See Smith v. Long Island Jewish-Hillside Med. Ctr.*, 118 A.D.2d 553, 554 (1986).

¹⁴ *See Joseph Burstyn, Inc. v. Wilson*, 343 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.”).

¹⁵ *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*, 600 U.S. 570, 594 (2023) (rejecting argument that speech receives lesser First Amendment protection when sold for a profit or by a corporation: “none of that makes a

great care to limit their scope to include only commercial uses, and have included explicit statutory exemptions to ensure that they cannot be misapplied to interfere with depictions of individuals in expressive works.¹⁶

Regulating the use of digital replicas in expressive works is indeed novel. New York did so in 2020, Louisiana in 2022, and Tennessee this year.¹⁷ MPA is unaware of a single case being brought under the digital-replica provisions of either the New York or Louisiana statutes, and the new Tennessee law does not go into effect until July 1, 2024. MPA believes that the novelty of the right that would be created by the NO FAKES Act does counsel in favor of having the bill preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works.¹⁸ Enacting a federal statute that lacks preemptive force would only exacerbate the problems associated with the emerging “patchwork” of state laws in this area. The MPA’s members typically distribute their movies and television programs in all 50 states, and evaluating how novel statutes, uninterpreted by any court, apply to uses of new technologies, would create a significant and unnecessary burden, and the inherent uncertainty would chill speech. 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.¹⁹ If there is to be a federal digital-replica right, it should be carefully crafted to avoid interference with First Amendment rights and should provide national uniformity. As noted above, of the witnesses at the April 30 hearing who addressed the preemption issue, all (myself included) expressed support for including a preemption clause in the NO FAKES Act.²⁰

difference”); *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016) (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.”).

¹⁶ See, e.g., Cal. Civ. Code § 3344.1(a)(2) (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).

¹⁷ See *supra*, note 3.

¹⁸ To be clear, MPA is *not* advocating that a federal statute establishing a digital-replica right preempt “traditional” state right-of-publicity laws that apply to commercial uses of an individual’s NILV (i.e., in advertisements or on merchandise). Rather, we are only advocating for preemption as to state statutes that regulate NILV *in expressive works*.

¹⁹ 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.”), available at <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)), available at <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>.

²⁰ See *supra*, note 5.

6.

a. **In practice, how do film and television productions use “expressive works exemptions” found in most state right of publicity laws?**

Expressive-works exemptions in existing state right-of-publicity laws provide clarity and certainty to producers so that they know what uses of an individual’s NILV are permitted, and which are not (absent consent), before they spend tens or even hundreds of millions of dollars producing a movie or television series. This clarity helps avoid much litigation over depictions of real people in the MPA’s members’ works. For example, the MPA’s members routinely receive letters from individuals (or their attorneys) who learn that they, or their deceased family members, will be depicted in a movie or television show. These letters either demand payment for such depiction or insist that the depiction is simply not permitted absent consent.²¹ Where a statute contains an expressive-works exemption, such meritless claims can typically be resolved quickly with a straightforward letter in response, citing to the exemption.

And, in the event a claim results in litigation, a court can usually determine whether an expressive-works exemption applies at the motion-to-dismiss stage, before the parties engage in expensive and burdensome litigation. For example, in *Marshall v. ESPN Inc.*, a group of college athletes brought a putative class action under Tennessee right-of-publicity law, alleging that television networks violated their rights by broadcasting games in which they played. The district court quickly granted the defendants’ motion to dismiss, citing the statute’s explicit exemption for “sports broadcast[s].”²² And the Sixth Circuit took only three paragraphs to affirm, holding that “the plaintiffs’ statutory claim under the Tennessee Personal Rights Protection Act is meritless because that Act expressly permits the use of any player’s name or likeness in connection with any ‘sports broadcast.’”²³

By contrast, when a statute lacks an expressive-works exemption, even completely meritless cases can take years and vast amounts of legal fees to resolve. For example, take the case of Christopher Porco, an individual convicted of murdering his father and attempting to murder his mother, now serving a life sentence in a New York prison. Upset that a Lifetime docudrama about his notorious case depicted him without his permission, Porco sued in 2013 under New York’s 1903 law, which lacks an expressive-works exemption.²⁴ It was not until 2021—after *eight years* of litigation, including an injunction against broadcast of the movie

²¹ To be clear, such claims that depiction of individuals in docudramas, biopics, and similar works requires consent from the depicted individuals (or their heirs) are without merit. Indeed, the ability to engage in such depictions is guaranteed by the First Amendment. *See, e.g., De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018) (First Amendment barred claim by actress over portrayal in docudrama (reversing trial court order allowing claim to proceed)); *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.”).

²² *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 827 (M.D. Tenn. 2015) (citing Tenn. Code Ann. § 47–25–1107(a) (exempting from the statute’s scope “any news, public affairs, or sports broadcast or account”).

²³ *Marshall v. ESPN*, 668 F. App’x 155 (6th Cir. 2016).

²⁴ N.Y. Civil Rights Law § 51.

(later overturned)²⁵ and multiple appeals—that a court finally put an end to Porco’s attempt to use New York’s law to censor Lifetime’s movie.²⁶ Had New York’s statute included an expressive-works exemption, that utterly meritless lawsuit would likely have been dismissed early in the litigation.

b. How do these exemptions affect the production process for film and television projects?

A key part of producing a movie or television program is the “clearance” process, where attorneys and other specialists carefully vet the in-progress work to assess legal risks and determine whether it is necessary to obtain permission from third parties for inclusion of certain material. For example, attorneys conducting clearance analyze whether, or to what extent, the studio faces risk of claims for copyright and trademark infringement, or for defamation or invasion of privacy. When a project depicts real people—an extremely common occurrence—the clearance process includes evaluation of potential right-of-publicity claims. The analysis of potential right-of-publicity claims is greatly aided by the inclusion of an expressive-works exemption in a right-of-publicity statute, which makes clear whether the statute, on its face, would require the consent of the depicted individual. By contrast, when a statute does not contain an expressive-works exemption, the producer must engage in analysis under what the California Assembly Judiciary Committee counsel recently termed the “convoluted and murky” case law in this context to determine the validity of a potential claim.²⁷ Where the answer is unclear, producers may decide not to proceed with the depiction of an individual—a classic example of a First Amendment “chilling effect.”

7. In your testimony you talk about the Supreme Court’s “overbreadth” standard. Can you explain what that means and how that relates to the NO FAKES Act?

In recognition of the fundamental importance of the First Amendment, the Supreme Court has established various doctrines to facilitate challenges to statutes that may infringe upon the right to free speech. One such doctrine is “overbreadth.” Under the overbreadth doctrine, “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.’”²⁸ In other words, if a statute that regulates speech applies on its face both to speech that may properly be proscribed, but also to a substantial amount of speech that is protected by the First Amendment, a court may strike down the entire statute on overbreadth grounds. Put another way, Congress (or a state legislature) may not simply pass a broad speech regulation that encompasses both protected and unprotected speech and leave it to the courts to adjudicate

²⁵ *Porco v. Lifetime Ent. Servs., LLC*, 116 A.D.3d 1264 (N.Y. App. Div. 2014) (holding that temporary restraining order enjoining the impending broadcast of the movie was an unconstitutional prior restraint on speech).

²⁶ *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (N.Y. App. Div. 2021) (reversing trial court’s denial of Lifetime’s motion for summary judgment).

²⁷ Bill Analysis of A.B. 1836 by the California Assembly Committee on Judiciary (April 30, 2024), at 8, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB1836#.

²⁸ *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)).

which is which in particular cases. Rather, it must draft carefully to ensure that the scope of the statute does not include substantial amounts of First Amendment-protected speech.

United States v. Stevens is a good example of how the overbreadth doctrine operates in practice. That case involved a criminal statute passed by Congress in 1999 to regulate depictions of cruelty to animals, specifically “animal crush” videos that “appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.”²⁹ A defendant charged with violation of the law moved to dismiss his indictment, arguing that the statute was facially invalid because its scope encompassed substantial amounts of speech that is protected by the First Amendment. For example, it would cover photographs of dead animals in a hunting magazine, even where the animal had been hunted in full compliance with relevant law.³⁰ And, the Court held, the exemptions in the statute for certain First Amendment-protected activities were insufficient.³¹ Therefore, the Court held, the entire statute was “substantially overbroad, and therefore invalid under the First Amendment.”³²

Another example involved the Communications Decency Act of 1996, an “unusually important legislative enactment”³³ whereby Congress attempted to restrict minors’ access to sexually explicit material on the then-nascent internet. Despite what the Supreme Court termed the “legitima[te] and importan[t] ... congressional goal of protecting children from harmful materials,” it nonetheless struck down, on overbreadth grounds, major portions of the statute aimed at restricting minors’ access to indecent, obscene, and “patently offensive” material.³⁴ The Court was compelled to do so because the means by which Congress attempted to accomplish its goals would have restricted *adults*’ access to material that they had the First Amendment right to view: “[T]he CDA places an unacceptably heavy burden on protected speech, and ... the defenses do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”³⁵

If enacted, potential First Amendment challenges to the NO FAKES Act would be evaluated under the overbreadth doctrine (among other First Amendment tests). Therefore, in order to survive, the statute must not encompass “a substantial number of ... applications [that] are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”³⁶ To meet this test, Congress must take care to carefully craft the statute to encompass its legitimate goals (e.g., protecting the ability of professional performers to earn a living practicing their craft) without sweeping in uses of digital replicas that are protected by the First Amendment (e.g., to parody or satirize an individual, or to depict an individual in a

²⁹ *Stevens*, 559 U.S. at 466.

³⁰ *See id.* at 476.

³¹ *See id.* at 477-80. The exemptions provision that the Court found inadequate to save the statute from overbreadth challenge covered “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

³² *Id.* at 482.

³³ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997).

³⁴ *Id.* at 849.

³⁵ *Id.* at 882.

³⁶ *Stevens*, 559 U.S. at 473.

docudrama or biopic, or to have fictional characters interact with historical figures (for example, in works such as *Forrest Gump*, *For All Mankind*, and *Once Upon a Time in Hollywood*). Thus, various provisions in the bill, including the scope of the right, the term of protection, and the statutory exceptions, all must be calibrated to target the categories of speech that may properly be the subject of regulation without encroaching on those categories that may not.

8. **In your testimony you suggest that any statute defining “digital replica” to include only “highly realistic” representations of an individual.**

Could you elaborate on why that is important and whether the NO FAKES Act addresses this issue?

MPA believes that a digital-replica right that applies in expressive works could survive First Amendment challenge if it is tailored to protect the ability of professional performers to earn a living—which might be threatened by the use of digital replicas to replace their performances. Indeed, in the *Zacchini* case, in rejecting Scripps-Howard’s First Amendment defense, the Supreme Court cited the effect of the broadcast of the human-cannonball performer’s “entire act” on his “ability to earn a living as an entertainer.”³⁷

MPA acknowledges that replacement of performers with highly realistic digital replicas of their likenesses or voices in new works in which they would typically perform could jeopardize their ability to earn a living as performers. However, that would not be the case with cartoon versions of an actor’s likeness, or with an imitator—as opposed to replicator—of a recording artist’s voice. Additionally, if the bill is not confined to highly realistic representations, that increases the likelihood that it would encompass significant amounts of First Amendment-protected speech, such as parodic or satirical cartoon versions of individuals that regularly appear on television programs like *South Park* or *The Simpsons*, or tribute bands. As noted in response to Question 7, an overbroad scope would make the statute vulnerable to being struck down on overbreadth grounds.

The definition of “digital replica” in the October 12, 2023, NO FAKES Act discussion draft goes much of the way toward addressing the issues described above. However, MPA recommends several edits to tighten the definition. Most importantly, the bracketed “nearly distinguishable” language in the discussion draft should be included in the bill. Also, MPA has proposed a slightly re-worked definition, modeled on language in digital-replica legislation enacted in New York in 2020 and Louisiana in 2022,³⁸ which we believe would best address concerns about overbreadth:

³⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

³⁸ See N.Y. Civ. Rights Law § 50-f(1)(c) (defining “digital replica” as “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.”); see also La. Rev. Stat. § 470.2(4).

The term “digital replica” means a newly-created, computer-generated, electronic visual or audio performance of an individual in a separate and newly created, original expressive audiovisual work or sound recording in whose creation the individual did not actually participate, that is so realistic that a reasonable observer would believe it is a performance by the individual and that of no other individual. A digital replica does not include the electronic reproduction, computer generated or other digital remastering of an expressive sound recording or audiovisual work consisting of an individual’s original or recorded performance.

9. We have numerous state digital replica bills this session. And one even passed into law – the Tennessee ELVIS Act.

Are any takeaways that we should consider for the NO FAKES Act?

As noted, legislation to regulate the use of digital replicas has been introduced in numerous states this year, including Tennessee, California, Illinois, Kentucky, Mississippi, Virginia, and Louisiana (despite the fact that it enacted a bill on this subject only two years ago). Generally speaking, this state legislation has raised similar issues as those that the subcommittee and the sponsors of the NO FAKES Act are currently considering, including the scope of the right, the definition of “digital replica,” the statutory exemptions, and the existence and length of a post-mortem term.

MPA will specifically address Tennessee’s bill, which is the only one of these to have actually been enacted thus far in 2024. MPA does have significant concerns about the breadth and scope of Tennessee’s new law, which led us to oppose passage. The law creates an extremely broad new cause of action for “publish[ing], perform[ing], distribut[ing], transmit[ing], or otherwise mak[ing] available to the public an individual’s voice or likeness, with knowledge that use of the voice or likeness was not authorized.”³⁹ Note that this cause of action is not limited to addressing the issues that the sponsors of the bill cited as their motivation: protecting recording artists and other performers from unauthorized digital replicas. The new law may appear to include in Section 47-25-1107 most of the statutory exemptions favored by MPA and others, including for parody, satire, comment, criticism, and where the use of the voice or likeness is “a representation of the individual as the individual’s self in an audiovisual work.” However, the statute dictates that those exemptions only apply “[t]o the extent such use is protected by the First Amendment,” which negates the effectiveness of the exemptions by requiring courts to engage in the First Amendment analysis to determine whether the statutory exemptions apply. Put another way, what the legislature gave with the exemptions, it took away with the “to the extent” clause, which renders them a virtual nullity. And lastly, the Tennessee statute has an unjustifiably and absurdly long post-mortem term of *forever*.⁴⁰

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³⁹ Tenn. Code Ann. § 47-25-1105(a)(2) (effective July 1, 2024).

⁴⁰ *Id.* § 47-25-1104. To be sure, the right terminates if, following a period of ten years after the individual’s death, the right is not commercially exploited for two years. *Id.* § 47-25-1104(b)(2)(A). But if the commercial exploitation continues, the right continues to exist, potentially in perpetuity.