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VIA REGULATIONS.GOV SUBMISSION PORTAL

United States Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559-6000

RE: NOTICE OF INQUIRY AND REQUEST FOR COMMENTS RELATED TO ARTIFICIAL INTELLIGENCE AND COPYRIGHT

Dear United States Copyright Office:

We submit the following comment on behalf of our law firm, Donaldson Callif Perez, LLP, in response to the Notice of Inquiry and Request for Comments that was issued on August 30, 2023.

Our firm was established in 2008 and represents hundreds of independent filmmakers and artists each year with respect to issues such as development, financing, production, rights clearance, and distribution. Three of the firm's partners are the authors of *Clearance and Copyright: Everything You Need to Know for Film, Television, and Other Creative Content*, which recently published its fifth edition.

As such, we believe that our firm is well equipped to provide insight into the independent film industry's relationship to artificial intelligence and its impact on copyright issues. In our opinion, artificial intelligence is here, and it shows no signs of slowing down. Rather than ignoring its proliferation, we urge the Copyright Office and Congress to find common sense ways to regulate its impact while keeping an open mind to the innovation that its utilization could spark.

This is undoubtedly an extremely complex issue, and one that is unlikely to be resolved without serious contemplation and discussion. We hope that our answers to the questions below provide valuable insight into our perspective and are helpful to the Copyright Office as it navigates this difficult topic.

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Question 1 - As described above, generative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

For better and for worse, artificial intelligence is a disrupter within the entertainment industry. Critics of artificial intelligence worry that the technology will eradicate jobs and be used to replace artists at the expense of human stories. Its proponents say that it is the way of the future and should be treated like just another tool in an artist's toolbox. The truth likely lies somewhere in the middle.

Under no circumstances should artificial intelligence be used to replace human creators. However, artificial intelligence can and should be wielded as a tool to allow human creators to maximize their efficiency and enhance their creative outputs. If artificial intelligence can simplify monotonous tasks or directly channel human creativity, the technology should be embraced. In this way, utilizing artificial intelligence is no different than a scientist who uses a calculator or a graphic designer who uses photoshop. Conversely, to the extent that artificial intelligence is used to replace artists and independently generate content or generate content using vague human-inputted parameters, the technology should be rejected. We must especially be wary of artificial intelligence in the hands of dominant corporations that have the capacity and incentive to utilize the technology at the expense of human labor and creativity.

We agree that copyright protection should only be granted to works created by humans. This seemingly clear position gets fuzzy with the introduction of generative AI. Accordingly, we think it important that there remains some flexibility in the law as to what constitutes "human creation." Similarly to a fair use analysis, the Copyright Office and the legislature should create laws that provide sufficient guidance while allowing courts to have some discretion to determine copyrightability on a case-by-case basis. For example, we agree that simple prompts by humans that result in a complex, creative work should not be granted copyright protection, but if someone spends a significant amount of effort creating very specific and detailed prompts to create a complex work, perhaps there should be some copyright protection for that work.

Question 2 - Does the increasing use or distribution of AI-generated material raise any unique issues for your sector or industry as compared to other copyright stakeholders?

Recently, the uncertainty surrounding AI's copyrightability has been a huge problem for our clients within the entertainment industry. Clients often come to our firm looking to incorporate AI-generated assets into their projects. However, given the multiple unsettled lawsuits against generative AI systems, the wide exploitation of our clients' projects leads to concerns about potential copyright infringement litigation that may arise if a work used to train the AI system appears sufficiently similar to a work generated for use in the project. As such, we are sometimes forced to counsel clients against including AI-generated creations in their projects, even though they may enhance their projects. It is vital that the Copyright Office and the legislature keep up with the rapidly expanding technology and continue to provide clarity

on the legality of AI-generated materials.

Question 8 - Under what circumstances would the unauthorized use of copyrighted works to train AI models constitute fair use? Please discuss any case law you believe relevant to this question.

The statutory approach under the current Copyright Act says that the following non-exclusive factors shall be considered in a determination of fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[1]

The first factor, the purpose and character of the use, asks "whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations."[2] Recently, in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*,[3] the Supreme Court exclusively considered the first fair use factor. In *Warhol,* the Court held that a specific "challenged use" of a copyrighted image, namely the commercial licensing of a portrait of deceased musician Prince to illustrate a Conde Nast magazine article about Prince was not sufficiently transformative, since the photograph underlying that portrait had also been used for substantially the same purpose, specifically a commercial licensing to a Conde Nast magazine to illustrate an article about Prince. Under those facts, the Court held that the two images at issue were used for "substantially the same purpose."[4] Conversely, in *Google LLC v. Oracle America, Inc.*, the Court held that Google's use of about 11,500 lines of Oracle's Sun JAVA SE code in its Application Programming Interface for the Android operating system was a fair use.[5] In considering the "purpose or character" of Google's use, the Court noted that Google's aim in using the code was "to create new products," which is "consistent with that creative 'progress' that is the basic constitutional objective of copyright itself."[6]

The second factor, the nature of the copyrighted work, recognizes that certain works are closer to the core of intended copyright protection than others.[7] Generally, the more creative an underlying work is, the "thicker" the copyright protection to which it is entitled.[8] Furthermore, infringement of unpublished works generally disfavor fair use while a work's publication generally favors fair use.[9] For example, in *Swatch Group Management Services, Ltd. v. Bloomberg L.P.*, the Second Circuit affirmed the Southern District of New York's conclusion that the unauthorized dissemination of a sound recording of an earnings report for

[1] 17 U.S.C. § 107.
[2] Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023).
[3] *Id.*
[4] *See id.* at 1258, 1266 ("In this Court, the sole question presented is whether the first fair use factor . . . weighs in favor of AWF's recent commercial licensing to Condé Nast. On that narrow issue, and limited to the challenged use, the Court agrees with the Second Circuit: The first factor favors Goldsmith, not AWF.").
[5] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).
[6] *Id.* at 1203.
[7] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[8] 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13F.06 (2023).
[9] *Id.*

Swatch Group constituted fair use.[10] In addressing the second factor, the court stated that the nature of the copyrighted work strongly favored the use being fair, since the sound recording consisted of entirely factual information that published via public dissemination by Swatch Group.[11]

The third fair use factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, looks at "the proportion of the original work used" and whether "the quantity and value of the materials used . . . are reasonable in relation to the purpose of the copying."[12] In *Fitzgerald v. CBS Broadcasting*, the Massachusetts District Court found that the third factor did not favor fair use when a CBS affiliate used a freelance photographer's images of a well-known mobster during coverage of the mobster's arrest.[13] Although the court acknowledged that CBS edited the photo in ways "more than superficial," it also stated that CBS used "most of the 'heart' of the photo."[14] However, in some cases, courts have held that the use of the "heart" of a work or a substantial amount of the work can be proportional. In *Brownmark Films, LLC v. Comedy Partners*, the Seventh Circuit affirmed the district court's holding that a *South Park* episode parodying a viral YouTube video called "What What (In the Butt)" constituted fair use. [15] Though the *South Park* video used the "heart" of the original video, the court noted that parodies must use a substantial amount in order to "create the intended allusion."[16]

The last fair use factor, the effect of the use upon the potential market for or value of the copyrighted work, asks whether the infringing use functions as a market substitute for the original author's' work.[17] For example, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court addressed this factor while determining whether hip-hop group 2 Live Crew's irreverent take on Roy Orbison's iconic hit song "Oh, Pretty Woman" fell under fair use.[18] The Court found that the fourth factor favored fair use because 2 Live Crew's "Hairy Woman" was a parody and parodies typically serve different market functions than the underlying work.[19] Furthermore, in other cases, courts have held that a lost license fee is not a valid market analysis where the use is transformative.[20]

It is difficult to analyze whether developers that use copyrighted materials to train generative AI are protected by fair use because there is little transparency in the process. Regardless, we will walk through each factor of the fair use analysis in an attempt to determine when the use of these materials could fall under fair use.

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[10] Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 92 (2d Cir. 2014).
[11] *Id.* at 87–89.
[12] Campbell, 510 U.S. at 586 (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).
[13] Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177 (D.C. Mass. 2007).
[14] *Id.*
[15] Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012).
[16] *Id.*
[17] Nimmer, *supra* note 8, at § 13F.08.
[18] Campbell, 510 U.S. at 569.
[19] *Id.* at 591.
[20] *See* Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006); Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F. Supp. 2d 701, 711 (N.D. Miss. 2013).

When assessing the first factor of the fair use analysis, the use of unlicensed works to train AI models is perhaps best analogized to Google's unauthorized use of Oracle code to train its Android operating system in *Google, LLC v. Oracle America, Inc*.[21] Like Google, AI generators seek to "create new products" by using the unlicensed content as building blocks. A However, it is a notable that the Supreme Court noted that Google's creation was consistent the constitutional objective of creative progress and this objective has been traditionally limited to progress via human creation.[22] Whether human creation of the generative AI programs would be enough to connect the creation to copyright's historical objective is unclear.

With regards to the nature of the copyrighted works, this factor would vary greatly depending on the type of material used to train the AI system. Is the material factual in nature, or is it the product of creativity? Have these works been widely published, or have they been scraped from the deepest corners of the internet? Without more information, we cannot make a determination on this factor of the fair use analysis.

With regards to the amount and substantiality of the work used, it appears that this factor would weigh against fair use. Our understanding is that generative AI systems are being fed works, in their entirety, in order to train the systems. However, some might feel that this taking is reasonable in relation to the purpose of the copying. If these generative AI systems are a vital new tool of public importance, perhaps the use of the entirety of the work is outweighed by the resulting product's utility.

Whether the use of unlicensed materials to train generative AI systems causes harm to the commercial market for the underlying work depends on whether the challenged use is considered transformative under the first factor within the meaning of Warhol. The analysis of this depends in turn on what the challenged use is. If the challenged use is the ingestion of copyrighted artworks into an AI system, then perhaps whether that is "substantially the same purpose" of the underlying work will depend on whether the author of the work has licensed their works for AI systems. If the challenged use is the AI system's output of artistic creations, then perhaps that would be a substantially similar purpose as the original. For example, if a user is attempting to generate a photo of a flower and the generative AI system is pulling from licensable photos of other flowers to do so, there is a chance that the new photo is being used in lieu of the licensable photos and, thus, is usurping its market. However, if an individual generated a lifelike photograph of President Joe Biden standing on the moon, hugging former President Donald Trump, this photo would likely not supplant the market for any photos of the moon, President Biden, or President Trump because an individual who wanted to create such a unique photo would not view basic photos of the moon, President Biden, and President Trump as an adequate substitute.

As the above discussion illustrates, applying a traditional fair use analysis is difficult, if not impossible, to apply to AI systems across the board.

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[21] Google, LLC, *supra* note 5.

[22] *See* Thaler v. Perlmutter, No. 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823, at *12 (D.D.C. Aug. 18, 2023) ("The act of human creation – and how to best encourage human individuals to engage in that creation, and thereby promote science and the useful arts – was . . . central to American copyright from its very inception.").

There is another line of fair use cases, which may be closer in character and should be considered by the Office and by the courts. These are the "social utility" cases, such as *Sony Corp. of America v. Universal City Studios, Inc.*,[23] *Sega Enterprises v. Accolade, Inc.*,[24] *Kelly v. Arriba Soft Corp.*,[25] *Authors Guild v. Google, Inc.*,[26] and, to some extent, *Google LLC v. Oracle America, Inc*.[27]

The first case, *Sony Corp.*, arose after Universal Studios and Disney filed suit against Sony, alleging that the technology company was responsible for copyright infringement resulting from Sony customers' recordation of certain television programs on Betamax video tape recorders for "time-shifting" purposes.[28] The Supreme Court reversed the Court of Appeal's finding of liability against Sony and held the Betamax was capable of substantial noninfringing uses and that unauthorized time-shifting was protected as a fair use.[29] In support of its finding of fair use, the Court noted that the creation of tapes for personal viewing was not a commercial or profit-making endeavor.[30] Additionally, the Court emphasized that use of the Betamax to engage in time-shifting had no negative effect on Universal or Disney's commercial markets.[31] The Court also said that the fair use argument was supported by the fact that "to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits."[32]

In *Sega Enterprises*, Sega, the creator and producer of the Genesis video game console, filed a copyright infringement and trademark infringement suit against Accolade after the video game company reverse engineered Sega games to determine how to produce their own games that were compatible with the Genesis console.[33] The Ninth Circuit held that Accolade's use of the games was permissible as a fair use since it was Accolade's "only way to gain access to the ideas and functional elements" within Sega's games.[34] In analyzing the first factor of the fair use analysis, the court noted that it was "free to consider the public benefit resulting from a particular use" and found that Accolade's use had led to an increase in the number of independently designed game programs offered for use with the Genesis console.[35] According to the court, "[i]t is precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas created in those works, that the Copyright Act was intended to promote."[36]

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[23] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984)
[24] Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
[25] Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
[26] Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
[27] Google LLC, *supra* note 5.
[28] Sony Corp. of America, 464 U.S. at 421-423. "Time-shifting" was a process by which an average member of the public used a video tape recorder to record a program that they could not view during its original airing and then watched the recording once at a later time. *Id.* at 421.
[29] *Id.* at 447, 456.
[30] *Id.* at 448.
[31] *Id.* at 454.
[32] *Id.*
[33] Sega Enters., 977 F.2d at 1514-1515.
[34] *Id.* at 1528.
[35] *Id.* at 1523.
[36] *Id.*

In *Kelly*, the Ninth Circuit determined that the use of low-quality thumbnails of photographs in an internet search database was a fair use.[37] Kelly, a professional photographer filed a copyright infringement suit against Arriba Soft Corp. after its search engine database used small, low-resolution versions of the photographs for display in search results.[38] The court held that Arriba's use of the images was transformative.[39] According to the court, while Kelly's images were "artistic works intended to inform and engage the viewer in an aesthetic experience," "Arriba's search engine function[ed] as a tool to help index and improve access to images on the internet and their related websites."[40] The court acknowledged that this "functionality distinction" benefitted the public by "enhancing information gathering techniques on the internet."[41]

In *Authors Guild*, the Second Circuit considered whether Google's reproduction and storage of books in its Google Books database constituted copyright infringement.[42] The Second Circuit found for Google and held that Google's unauthorized digitation of the works and subsequent utilization in its "search" and "snippet" functions were protected under the doctrine of fair use.[43] While the court reached its conclusion by analyzing all four of the statutory fair use factors, it placed special emphasis on the first factor: the transformative nature of Google's use.[44] According to the court, the search function served a "highly transformative purpose" by making additional significant information about the books available to the public by allowing a search to identify works that contain a word or term of interest.[45] Likewise, the snippet view transformed the original works by allowing searchers to identify books of interest.[46] The court noted that this functions new forms of research, known as "text mining" and "data mining," possible.[47]

Most recently, in *Google LLC v. Oracle America, Inc.,* the Supreme Court held that Google's copying of Oracle's programing language into their Android platform was a fair use.[48] The Court found that Google's use was transformative because the use sought to "create new products" and "expand the use and usefulness of Android-based smartphones."[49] According to the Court, "shared interfaces are necessary for different programs to speak to each other" and, therefore, Google's utilization was "consistent with that creative 'progress' that is the basic constitutional objective of copyright itself."[50]

A common thread through each of these cases is the respective courts' focus on the

[37] Kelly, 336 F.3d at 822.
[38] *Id.* at 815,
[39] *Id.* at 818.
[40] *Id*.
[41] *Id.* at 819-20.
[42] Authors Guild, 804 F.3d at 229.
[43] *Id.* The
[44] *Id.* at 214-15.
[45] *Id.* at 217.
[46] *Id.* at 218.
[47] *Id.* at 209.
[48] Google, LLC, 141 S. Ct. at 1209.
[49] *Id.* at 1203.
[50] *Id.* at 1203-04.

social utility that each of the allegedly infringing uses provided. To the extent that any court assessing whether the use of underlying copyrighted materials in producing generative AI falls under fair use determines that this process or the resulting output provides a social utility, the court may cite these cases and find that the use is fair.

Careful consideration should also be given to traditional principles of direct versus secondary liability, and caution should be exercised lest premature laws or regulations impede reasonable marketplace solutions in the vein of YouTube's Content ID system.

Question 28 - Should the law require AI-generated material to be labeled or otherwise publicly identified as being generated by AI? If so, in what context should the requirement apply and how should it work?

With regards to expressive works, the law should only require that AI-generated material be labeled or otherwise publicly identified when the use could reasonably cause confusion. The major concerns associated with support for labeling AI-generated materials are that the public may become confused and think that a provocative image is true to life or that an individual could be portrayed in a false light. For example, take the examples that we gave when analyzing the fourth factor of the fair use analysis above. There seems to be no reason for an innocuous image of a flower generated for personal use to be required to contain a disclaimer of origin. What is the harm if the public thinks that an artificially generated photograph of a flower is real? Likewise, if an individual generated a lifelike photograph of President Joe Biden standing on the moon, hugging former President Donald Trump, there would also be no need to state that the photograph was generated by artificial intelligence. The photo would be so obviously artificial that no reasonable individual could believe that it is real.

When material must be labeled or publicly identified in expressive works, it would be unreasonable to compel artists to include such disclaimers contemporaneously with the materials' depiction. For audiovisual mediums such as film and television, it would be more practical for artists to include a disclaimer prominently within the credits of such program.

Question 30 - What legal rights, if any, currently apply to AI-generated material that features the name or likeness, including vocal likeness, of a particular person?

Use of an individual's name or likeness is protected under states' establishment of an individual's right of publicity, both via statute and common law. Stated generally, the right of publicity is the inherent right of every individual to control the commercial use of his or her identity.[51] A plaintiff's "identity" has traditionally encompassed their name, likeness, voice, and signature. Although there is no federal right of publicity, twenty-two states recognize a statutory right of publicity and seventeen states recognize the right under common law. Even more states recognize a similar cause of action through the tort of invasion of privacy by appropriation under which a plaintiff can recover for a defendant's unpermitted use of plaintiff's identity with damage to plaintiff's dignitary interests and peace of mind.[52]

[51] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1.3 (2d ed. 2010).
[52] MCCARTHY, *supra* note 1 at § 1.23.

Other laws, including Lanham Act §43(a) prohibiting false endorsements and state laws addressing "deepfakes" and "revenge porn," as well as collective bargaining agreements that address AI generated performances by actors and output affecting writers, would also apply to AI-generated likenesses. All laws should (and many do) contain express exemptions protecting expressive works and free speech or should be interpreted to not extend to expressive works or otherwise conflict with or chill free speech.

In addition, currently two states, Louisiana[53] and New York,[54] provide very limited protection against the use of "digital replicas" of certain performers under limited circumstances, including in expressive works such as films. The purpose of such laws is to protect performers from being replaced by AI generated performers. Both statutes appropriately contain numerous exceptions and limitations to allow for such uses in the furtherance of free speech and expression. However, both statutes exist within a right of publicity statute, which is inappropriate since right of publicity laws should not extend to expressive works such as films. Any protections against the replacement of performers by digital replicase should contain sufficient exceptions and limitations to protect free speech and expression and should be enacted under a labor code or sector other than the right of publicity so as to not allow any confusion or spillover which could result in restrictions on free speech. Such laws may also conflict with the terms of freely negotiated collective bargaining agreements and such conflict should be avoided.

Question 31 - Should Congress establish a new federal right, similar to state law rights of publicity, that would apply to AI-generated material? If so, should it preempt state laws or set a ceiling or floor for state law protections? What should be the contours of such a right?

We support the implementation of a federal right of publicity. However, the extension of right of publicity to encompass creative and expressive works would have a disastrous impact on artists' rights under the First Amendment. To the extent any such law would prohibit filmmakers from producing films that contain references to real individuals without first obtaining that individual's consent, they should be squarely rejected. Such a requirement would effectively chill artists' freedom of speech and only allow for the creation of expressive works about individuals that the individuals deem favorable. At the very least, the creation of any federal right of publicity must explicitly exempt expressive works to ensure artists' First Amendment rights are protected.

Even in states that have established a right of publicity or similar cause of action, a majority of these states have recognized that an individual's right of publicity must not infringe upon the public's right of free speech under the First Amendment and explicitly exclude expressive works from the coverage of the right of publicity.

For example, Nevada's right of publicity statute prohibits any "commercial use by another of the name, voice signature, photograph or likeness of a person" without that person's consent.[55] However, the statute also states that the prohibition is inapplicable if the use is "an

[53] La. Rev. Stat. 51 §§ 470.1 - 470.6.
[54] N.Y. Civil Rights Law § 50(f).
[55] NEV. REV. STAT. § 597.790

attempt to portray, imitate, simulate or impersonate a person in a play, book, magazine article, newspaper article, musical composition, film, or a radio, television or other audio or visual program, except where the use is directly connected with commercial sponsorship."[56]

Likewise, California courts have also carved out an expressive works exemption for its common law right of publicity.[57] In *DeHavilland v. FX Networks, LLC*, California's Second District Court of Appeal explicitly held that the First Amendment protects expressive works such as films, plays, and television.[58] "Whether a person portrayed in one of these expressive works is a world-renowned film star—'a living legend'—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people."[59]

An exemption for expressive works within the right of publicity is necessary to ensure adherence to the principles underlying the First Amendment and "safeguard[] 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 . . . ."[60] For nearly as long as films have been made, those films have been used to tell stories of historical significance and of public importance. As recognized by the Supreme Court of California in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, creations do not "lose their constitutional protections because they are for the purposes of entertaining rather than informing . . . [E]ntertainment as a mode of self-expression, is entitled to constitutional protection irrespective of its contribution to the marketplace of ideas. 'For expression is an integral part of the development of ideas, of mental exploration, and of the affirmation of self.'"[61]

The fear that a federal right of publicity will wreak havoc among the artistic community is not hypothetical; the implementation of a right that does not explicitly exempt expressive works would have immediate negative consequences. Our firm represents hundreds of filmmakers and artists each year. All of them rely on the First Amendment to protect their right to create art that tells stories about our world. Oftentimes, these stories involve real people and real events. Our clients' works are regularly nominated for Academy Awards and five of these films have won the Academy Award for Documentary Feature Film: *20 Feet from Stardom* (2013), *Icarus* (2017), *Free Solo* (2018), *American Factory* (2019), and *Summer of Soul* (2021). Each of these films depict private and public individuals' names and likenesses and would have been significantly and negatively impacted by a federal right of publicity that does not provide a carve out for filmmakers.

If the legislature chooses to enact a federal right of publicity, the right must explicitly create a carve out for expressive works to ensure its Constitutionality.

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[56] *Id.*
[57] While California's statutory right of publicity under CAL. CIV. CODE § 3344 also contains an exemption for expressive works, this exemption is limited to individuals who are deceased.
[58] DeHavilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 849-50 (2018).
[59] *Id.* at 850.
[60] Sarver v. Chartier, 813 F.3d 891, 905 (9th Cir. 2016).
[61] Comedy III Productions, Inc. v. Gary Saderup, Inc., 35 Cal. 4th 387, 398 (2001) (citing Guglielmi v. Spelling-Goldberg Productions, 25 Cal. 3d 860, 867 (1979)).