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September 6, 2024

**VIA U.S. MAIL**

Governor Gavin Newsom  
1021 O Street, Suite 9000  
Sacramento, CA 95814

**RE: AB-1836 USE OF LIKENESS: DIGITAL REPLICAS LEGISLATION**

Dear Governor Newsom:

We submit this letter on behalf of Film Independent<sup>1</sup>, International Documentary Association (“IDA”)<sup>2</sup>, and Women in Film (“WIF”)<sup>3</sup>, in support of Assembly Bill No. 1836 (the “Bill”) relating to digital replicas. Film Independent, IDA, and WIF are tax-exempt membership organizations that represent hundreds of artists who work within the independent film and television industry. We understand that the Bill is currently on your desk and are writing to express our strong support for the expressive works exemptions within the Bill.

Section 2(a)(ii) of the Bill provides that a “digital replica” of a deceased personality’s voice or likeness may be used:

- (1) In connection with any news, public affairs, or sports broadcast or account;
- (2) For purposes of comment, criticism, scholarship, satire, or parody;
- (3) In representation of the individual as the individual’s self in a documentary or in a historical or biographical manner, including some degree of fictionalization, unless the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated;
- (4) In a fleeting or incidental manner; or
- (5) In an advertisement or commercial announcement for a work that falls within the preceding categories.

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<sup>1</sup> Film Independent is a non-profit 501(c)(3) organization with over 8,000 members in all 50 states dedicated to independent filmmakers and increasing public awareness of independent filmmakers. Film Independent was founded in 1984, and it exists to serve the needs of those who create independent film.

<sup>2</sup> IDA is a non-profit 501(c)(3) organization dedicated to documentary filmmakers and increasing public awareness of the documentary film genre. IDA was founded in 1982, and it exists to serve the needs of those who create this vital documentary art form. IDA’s programs and resources reach over 30,000 filmmakers and supporters annually.

<sup>3</sup> WIF is a non-profit 501(c)(3) organization dedicated to promoting women in the film industry both in front of and behind the camera. WIF was founded in 1973, and it exists to advance women in the screen industries.

Exemptions of this type for expressive works within any digital replica legislation are crucial to protecting free speech and to “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 . . . .”<sup>4</sup> The members of Film Independent, IDA and WIF regularly create and distribute hundreds of documentaries, docudramas, and other films and series, which tackle tough issues and tell stories of historical significance and public importance. As recognized by the Supreme Court of California in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, “[E]xpression is an integral part of the development of ideas, of mental exploration, and of the affirmation of self.”<sup>5</sup> Without the exemptions provided in Section 2(a)(ii) cited above, our client’s members’ works would be put into jeopardy, beholden to the individuals who are the subjects of the works, or who may have played some role in history. As recognized by the California Court of Appeals in *De Havilland v. FX Networks, LLC*, this is antithetical to the First Amendment. “Whether a person portrayed in . . . an expressive work[] 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.”<sup>6</sup>

The exemptions contained within Section 2(a)(ii) of the Bill are critical to ensuring that the Bill complies with freedom of speech, the First Amendment and the United States and California Constitutions. We respectfully urge you to ensure that any digital replica legislation enacted contains these provisions or similarly protective language.

Respectfully Submitted,



DALE NELSON  
Partner, Donaldson Callif Perez LLP

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<sup>4</sup> *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

<sup>5</sup> *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)).

<sup>6</sup> *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 850 (2018).

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