



MOTION PICTURE ASSOCIATION

MEMORANDUM IN OPPOSITION UNLESS AMENDED HB 185

I. INTRODUCTION

The Motion Picture Association, Inc. (“MPA”)¹ respectfully opposes HB 185 (the “Bill”) in its current form. MPA and its members appreciate the concerns this Bill aims to address with respect to protecting individuals from unauthorized and harmful uses of AI-generated representations of an individual’s likeness. However, the Bill’s reach significantly departs from traditional right of publicity laws – and is contrary to a robust body of caselaw around the country establishing that the right of publicity cannot be used to stop filmmakers from telling stories about real people and events. The Bill’s malicious deepfake recordings provisions are likewise overly broad and restrict speech protected by the First Amendment. In this memorandum, MPA provides an overview of our areas of concern with the Bill and suggests changes to bring the Bill within the guardrails of the First Amendment and decades of precedent, while still meeting the policy objectives with respect to potentially harmful uses of AI technologies.

II. THE BILL SUBSTANTIALLY EXPANDS OHIO’S RIGHT OF PUBLICITY

Ohio’s existing right of publicity law mirrors many other states by imposing restrictions on the use of an individual’s likeness only if the likeness has “commercial value,” and by restricting third parties from using a likeness for a “commercial purpose.” This strikes an appropriate balance between protecting an individual who may use their own likeness for commercial gain (like celebrity endorsements) from harmful, fraudulent, or unauthorized commercial representations, without impeding speech protected by the First Amendment. But the Bill would substantially expand Ohio’s existing law and impose restrictions on any use of any individual’s likeness. This means nobody could use an individual’s likeness without consent even if the individual (or their heirs)² never used, or intended to use, the individual’s likeness. This would be true even if a person did not seek to use an individual’s likeness for a commercial

¹ The MPA serves as the global voice and advocate of the motion picture, television, and streaming industries. It works in every corner of the globe to advance the creative industry, protect its members’ content across all screens, defend the creative and artistic freedoms of storytellers, and support innovative distribution models that expand viewing choices for audiences around the world. The MPA’s member studios are: Netflix Studios, LLC; Paramount Pictures Corporation; Prime Video & Amazon MGM Studios; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment, Inc.

² As under the current law, this expanded right would extend for 60 years after the individual’s death. This creates substantial practical challenges if the right is expanded to every individual and captures non-commercial uses— including the difficulty of identifying the rights-holder for post-mortem terms.

purpose—unless that person can establish that their intended use falls under one of the existing exemptions to the law. This in and of itself is a substantial expansion of the right of publicity and materially shifts the balance from protecting free speech to protecting individual likenesses, departing from the practice of many states that have more tailored rights of publicity.³

In seeking to cover digitally created replicas under the law, the Bill expands the right of publicity *even further* by removing the law’s remaining First Amendment protections for “modified facsimiles.” While the current law provides some protections for some literary and dramatic works, the Bill exempts “modified facsimiles” from those protections if a reasonable person “would confuse the modified facsimile and the individual” being depicted. *See* Section 2741.09(A)(1)(a). This may have far-reaching implications. While the term “modified facsimile” is not defined,⁴ film and television studios have used digital technologies to render lookalikes of real-life people as part of realizing their creative visions for decades. For instance, in the movie *Forrest Gump*, filmmakers used digital technologies to have the lead character encounter and converse with Presidents Kennedy, Johnson, and Nixon. In its current form, the Bill makes such uses presumptively impermissible, and liability turns on whether a viewer would “confuse” the representation with the depicted individual—rather than the clearly established protections for such works that exist in the current law. This is a particularly strange result, since there is no legitimate basis for such disparate treatment. First Amendment protections do not rise and fall based on the tools used to create a representation.

III. THE PROPOSED RIGHT OF PUBLICITY FOR MODIFIED FACSIMILES RESTRICTS CONSTITUTIONALLY PROTECTED SPEECH

Expanding the right of publicity to cover “modified facsimiles” without exemptions for expressive works restricts the ability of film studios to create expressive works that reflect real-world events and individuals, despite well-established legal precedent protecting such speech. Courts have recognized that speech on matters of public concern merits the highest level of protection—reflecting our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That protection is not lessened because technology is used to create the representation, nor because the representation is realistic. *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (“[W]hatever the challenges of applying the Constitution to ever-advancing technology,

³ While the rights vary across the country, many surrounding states require the individual asserting their rights to have commercial value to their likeness—*see Hauf v. Life Extension Found.*, 547 F. Supp. 2d 771, 777 (W.D. Mich. 2008) (Michigan common law requires plaintiff show identity has “commercial value”); Ind. Code § 32-36-1-6 (Indiana statute requires showing “personality . . . has commercial value,” for right of publicity statute to apply); Penn. Stat. tit. 42 § 8316(a) (cause of action exists for persons whose likeness “has commercial value”); Ky. Rev. Stat. § 391.170 (post-mortem right limited to “public figure”)—and/or limit the right to controlling commercial uses of an individual’s likeness—*see* Penn. Stat. tit. 42 § 8316(a) (cause of action exists for uses in “any commercial or advertising” setting); Ky. Rev. Stat. § 391.170 (post-mortem right is limited to use of an individual’s likeness “for commercial exploitation”).

⁴ The lack of a definition for the term “modified facsimile” creates substantial uncertainty as to the scope of this Bill. MPA proposes a definition that will clarify that these revisions to the law are intended to ensure that the existing right of publicity applies to certain computer-generated representations of an individual.

‘the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.”). There are, of course, some permissible limitations on speech—certain fraudulent misrepresentations can be restricted, and limited “rights of publicity” can protect an individual’s ability to profit off their likeness, for instance. But these limitations do not permit individuals to prevent others from telling their stories, or to avoid critical or satirical portrayals, which are squarely protected by the First Amendment. That a representation is “modified” does not exempt it from protection—indeed, even entirely false or inaccurate representations can be protected. *See, e.g., United States v. Alvarez*, 567 U.S. 709, 718, 731 (2012) (plurality and concurring opinions affirming that the First Amendment extends protections to false speech), *see also id.* 567 U.S. at 750 (Alito, J. dissenting) (“[A]ny attempt by the state to penalize purportedly false speech could present a grave and unacceptable danger of suppressing truthful speech.”).

This body of law is used to protect parody and satire—which are critical elements of protected speech. *See Hustler Mag. v. Falwell*, 485 U.S. 46, 53–54 (1988) (restricting speech based on “bad motive” would subject all “political cartoonists and satirists” to liability, which the First Amendment does not permit). Satirized portrayals of real-life individuals on television shows like *Saturday Night Live* and cartoon representations on shows like *The Simpsons* or *South Park* thus enjoy strong protections. But the Bill—which includes restrictions on facsimile’s of a person’s voice, not just their visual likeness—threatens these protections with expansive restrictions on “modified facsimiles” that run afoul of this legal principle and reflect an unconstitutional restraint on protected speech.

Crucially, codifying expressive works protections in the statute is critical to ensure that frivolous litigation does not effectively chill protected speech. Without specific protections in a statute, a defendant must raise Constitutional defenses to any lawsuit, no matter how meritless. This is an expensive endeavor, and the prospect of having to raise such costly defenses itself discourages studios, artists, and other creators from making protected content in the first place. Clear statutory protections for these works are thus essential to ensuring the First Amendment’s protections are realized.

IV. MALICIOUS DEEPPFAKE PROVISIONS

The Bill separately creates liability for using unauthorized “malicious deepfake recordings,” in an apparent effort to tackle harm that may be caused by deepfake technology. MPA appreciates that generative artificial intelligence technologies may facilitate fraudulent conduct and false impersonations that have historically been subject to legitimate regulation, and MPA does not oppose expansions of existing law to ensure that conduct which has long been unlawful remains so even if new technology is used. However, the same First Amendment principles described above require that such regulations strike a balance to avoid imposing improper restrictions on protected speech.

As drafted, the Bill does not limit liability to instances where the transmission of a deepfake recording is done *knowingly*. In addition, it requires only a vague showing of “harm” without any

indication of what sort of harm is actionable. This is particularly concerning given the Bill creates a private right of action, which may invite frivolous litigation based on inconsequential and unsubstantiated harms. Amendments that limit liability to specifically identified harms based on a knowing and intentional distribution would better balance First Amendment protections.

In addition, the Bill’s existing exemption for First Amendment protected works (except political advertisements) is substantially undermined by relying on the understanding of the viewer that the work is “inauthentic.” Section 2742.02(C)(1). As noted above, the First Amendment protects works that are in the public interest, including parody and satire, and so the exemption for such works should be expanded to ensure that the deepfake provisions do not improperly restrict protected speech.

V. PROPOSED AMENDMENTS

To address the concerns outlined above, MPA proposes the following amendments:

- Restore the limitations on the right of publicity for people whose likeness has a commercial value, and limit liability to uses for a commercial purpose, by restoring the bracketed language below.

Section 2741.01

(A) “Persona” means an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, **[if any of these aspects have commercial value]**.

...

(D) “Right of publicity” means the property right in an individual’s persona to use the individual’s persona **[for a commercial purpose]**.

Section 2741.02

(A) Except as otherwise provided in this section, a person shall not use any aspect of an individual’s persona **[for a commercial purpose]**. . .

...

(B) A person may use an individual's persona **[for a commercial purpose]** during the individual's lifetime if the person first obtains the written consent to use the individual's persona from a person specified in section 2741.05 of the Revised Code. If an individual whose persona is at issue has died, a person may use the individual's persona **[for a commercial purpose]** if either of the following applies:

Section 2741.05

(A) Except as otherwise expressly provided in an agreement transferring an aspect of an individual’s right of publicity, only the following persons may grant consent to use an individual’s persona **[for a commercial purpose]**: . . .

- Add a definition of “modified facsimile” to clarify the scope of the Bill’s changes to the

right of publicity law and limit the term to intentionally misleading depictions.

Section 2741.01

(C) “Modified Facsimile” means a newly created, computer-generated, highly realistic electronic representation of an individual’s persona that is transmitted or created with an intent to mislead and that depicts an individual in a way that the individual did not actually perform or appear, or in which the fundamental character of the performance or appearance has been materially altered.

- Amend the right of publicity with respect to modified facsimiles to clarify it is subject to the same protections as other representations of an individual’s persona.

Section 2741.02

(A) Except as otherwise provided in this section, a person shall not use any aspect of an individual’s persona, **including via a modified facsimile, [for a commercial purpose]** ~~or a modified facsimile of an individual’s persona~~

- Expand First Amendment protections to modified facsimiles and include protections for “false” representations that are protected First Amendment speech.

Section 2741.09(A)

(1)(a) A literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the work appears or is transmitted, other than an advertisement or commercial announcement not exempt under division (A)(1)(d) of this section ~~or an audiovisual work with a modified facsimile of an individual's persona wherein a reasonable trier of fact would confuse the modified facsimile and the individual;~~

(b) Material that has political or newsworthy value, **relates to a matter of public interest, or that is commentary, criticism, scholarship, satire, or parody;**

(c) Original works of fine art;

(d) An advertisement or commercial announcement for a use permitted by division (A)(1)(a), (b), or (c) of this section.

- Clarify requisite intent and harm for a deepfake recording to qualify as a “malicious deepfake recording.”

Section 2742.01

(B) “Malicious deepfake recording” means a deepfake recording created or altered

by, or on behalf of, a person **knowingly and with the intent** to harass, extort, or cause **physical** harm to **the another** person **depicted** due to the false nature of the speech or conduct recorded or depicted therein.

- Expand the First Amendment protections in the malicious deepfake recordings provisions.

Section 2742.02

(C) Divisions (A) and (B) of this section do not apply to any malicious deepfake recording that meets either of the following criteria:

(1) The material does not include a political or campaign advertisement, and appears in a **work that is evidently fictional based on the content or context of the depiction or relates to a matter of public interest, or that is commentary, criticism, scholarship, satire, or parody**~~context that would cause a reasonable person to believe that the material is inauthentic, such as in a parody or fictionalized movie.~~

- Clarify that deepfake recordings must appear authentic to a reasonable person.

Section 2742.01

(A) “Deepfake recording” means any visual or audio media in an electronic format, video recording, or sound recording that is created or altered in a manner such that it falsely appears **to a reasonable person** to be an authentic record of the actual speech or conduct of an individual depicted in the media or recording.

- Clarify that the private right of action related to violations of provisions related to malicious deepfake recording applies to individuals who purchased *malicious* deepfake recordings.

Section 2742.04

(B) Any person that purchases a **malicious** deepfake recording, while holding a good-faith belief that the recording is authentic, may commence a civil action in a court of competent jurisdiction against a person who violates division (A) or (B) of section 2742.02 of the Revised Code for either of the following:

- (1) Treble the amount of actual economic damages;
- (2) At the direction of the plaintiff, statutory damages in the amount of two hundred fifty dollars.

VI. CONCLUSION

The MPA appreciates the desire to regulate harmful AI protections and ensure that the existing law applies to new technologies with respect to protecting an individual's likeness. However, these changes implicate First Amendment protected speech and as such must be carefully balanced to ensure that they do not impede the ability to create and tell stories about real people and events. We look forward to working with the legislature to address these concerns. Please feel free to reach out to Steve Dimon, at steve@21consultingllc.com, with any questions.

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