October 30, 2023

The Honorable Shira Perlmutter
Register of Copyrights and Director
U.S. Copyright Office
101 Independence AVE S.E.
Washington, DC 20559

Dear Ms. Perlmutter,

I write on behalf of Screen Actors Guild-American Federation of Television Artists (SAG-AFTRA) in response to the notice of inquiry dated August 30, 2023 from the United States Copyright Office (USCO) regarding its study on artificial intelligence (AI).

SAG-AFTRA is the nation's largest labor union representing working media artists. Its more than 160,000 members include actors, recording artists, broadcasters, disc jockeys, stunt performers, background actors, narrators, and many others. They are the faces and voices that entertain and inform America and the world. The union exists to secure strong protections for media artists, including through collective bargaining agreements negotiated with motion picture and television production companies, television networks, and commercial producers, as well as record labels and other employers, that govern the wages, hours, and working conditions of SAG-AFTRA's members.

The workers represented by SAG-AFTRA are among those who are most directly at risk from unchecked use of generative AI, not just in entertainment but beyond. SAG-AFTRA therefore appreciates the USCO's efforts to examine the impact AI has on copyright as well as its impact on creators, like our members. Given that this impact is immediate, growing, and constitutes an existential threat to the livelihood of our members, we respectfully request that the USCO move quickly to analyze comments and make strong recommendations to Congress to act.

Since July 14, SAG-AFTRA has been on strike against the companies who produce scripted television, film, and streaming entertainment content. AI is one of the issues at the forefront of the strike as our members fight for protections from exploitative uses of this rapidly developing technology. In fact, many of our members have identified AI as their number one issue, more important to them than increases in wages or improvements in other working conditions, because it poses an existential threat to their very livelihoods. It is an issue

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that also impacts workers more broadly, particularly in the media and entertainment industry, but also throughout the American workforce.

AI offers many advantages when used safely and ethically. When used properly, it can offer many workers, including SAG-AFTRA's members, new opportunities to engage in their professions and to earn a living. But, it is critical that any approach to regulating AI, particularly as it relates to copyright and creative works, respects the artistry and skills of humans as paramount to creativity and creation. Technology ultimately should serve the needs of the people and not the reverse.

The number of AI technologies and the quality of AI-generated content has increased exponentially in a very short time. Unchecked, we are rapidly barreling toward a future where creators will have to compete with unauthorized versions of themselves or their works. This is already starting to happen in the creative fields; it is unfair and it will discourage future human creativity and expression. Technology already exists to digitally recreate anyone and exploit them in ways heretofore impossible. Digital replicas can be made to do things the person hasn't done and to say things the person hasn't said. And, it takes from people, like SAG-AFTRA's members, not just their livelihoods, but their agency.

SAG-AFTRA appreciates the USCO's attention to this important and rapidly-evolving issue. In the digital era, copyright protections, and other intellectual property rights, have become increasingly vital for union creative professionals who rely on them to safeguard their livelihood and careers.

Of note, SAG-AFTRA is a member of, or collaborator with, other organizations that have submitted comments with respect to this inquiry. In particular, we draw attention to the filings by the Department for Professional Employees, AFL-CIO (DPE) and the Copyright Alliance and have endeavored not to repeat the same information. Instead, in the following responses, we have answered the questions we believe to have the most direct impact on SAG-AFTRA's members.

5. Is new legislation warranted to address copyright or related issues with generative AI? If so, what should it entail? Specific proposals and legislative text are not necessary, but the Office welcomes any proposals or text for review.

One of the greatest threats to SAG-AFTRA members from generative AI is the loss of control over their image and/or voice. This is not just limited to the more egregious uses, such as sexually-explicit deepfakes, or fraudulent and deceptive uses, such as the recent incident involving an AI-generated Tom Hanks in a dental insurance ad, but also includes more mainstream uses in works that may be submitted for registration before the USCO. This is work that would compete in the marketplace directly and unfairly with the actual work performed by talent. For SAG-AFTRA members and other talent who work in commercials and advertising, have endorsement deals, serve as spokespeople, or otherwise engage in activities that involve

agreements to service exclusivity, it even has potential to put them at risk of litigation for breach of those exclusivity agreements.

We provide more detail on the threat AI poses to individuals later in this submission. For purposes of this question, SAG-AFTRA believes that any legislation or other rulemaking in connection with AI and copyright must take into account the importance of human creativity and its role in authorship, as the USCO has previously acknowledged. Just as copyright protection does not extend to parts of a work that incorporates copyrighted material that has been used unlawfully, it also should not extend to those portions of a work that incorporate digital replicas of an individual's likeness or vocal likeness that is used without affirmatively expressed authorization.

8.3. The use of copyrighted materials in a training dataset or to train generative AI models may be done for noncommercial or research purposes. How should the fair use analysis apply if AI models or datasets are later adapted for use of a commercial nature? Does it make a difference if funding for these noncommercial or research uses is provided by for-profit developers of AI systems?

As this generative AI industry has developed, we have already seen massive non-commercial training sets, often created based on various fair use arguments, converted to commercial use. For many of SAG-AFTRA's members, this is leading to potential existential threats, particularly as non-commercial voice datasets are being commercialized by for-profit companies that are directly competing professional narrators, spokespeople, and other voice talent.

For example, one of the major audio sets used to train voice AI models is a public domain audiobook project called LibriVox. LibriVox's own wiki describes it as "a hope, an experiment, and a question: can the net harness a bunch of volunteers to help bring books in the public domain to life through podcasting."[1] LibriVox acknowledges that AI did not exist when it was founded in 2005, but then goes on to note that "all LibriVox recordings are released into the public domain," therefore, "it is legal for AI trainers to use them for anything without our/your permission, for free."[2] Ironically, LibriVox prohibits the use of AI in its own project.

While this is (arguably) accurate, it is hard to imagine that everyone who provided services to this project anticipated that their work would be used to train AI voice systems

[1] https://wiki.librivox.org/index.php/Main_Page (last visited Oct. 29, 2023).

[2] https://wiki.librivox.org/index.php?title=LibriVox_and_Artificial_Intelligence_(AI) (last visited Oct. 29, 2023).

that could one day replace them, let alone would have consented had they known companies like Google would develop datasets and tools using their voices.[3]

8.5. Under the fourth factor of the fair use analysis, how should the effect on the potential market for or value of a copyrighted work used to train an AI model be measured. Should the inquiry be whether the outputs of the AI system incorporating the model compete with a particular copyrighted work, the body of works of the same author, or the market for that general class of works?

One thing not often accounted for in the fourth factor, that perhaps should be, is the impact the challenged use has on works that are subject to a collective bargaining agreement; it is all the more relevant here. When works produced under a SAG-AFTRA collective bargaining agreement are reused in another market or medium, the collective bargaining agreement requires negotiation, consent, and compensation for the reuse. This is an important protection for SAG-AFTRA members and is part of the value of the work that should be considered (*i.e.* use of the work deprives not only the copyright holder of licensing fees, it deprives the depicted SAG-AFTRA member bargained-for compensation).

In the context of works generated by an AI system that utilize an individual's digital replica, particularly when it is trained on works for which reuse payments would otherwise have been made, this inquiry becomes more important. These works are no longer only competing with the author's work(s), but the performers are being denied bargained-for compensation and/or potential employment.

9.1. Should consent of the copyright owner be required for all uses of copyrighted works to train AI models or only commercial uses?

Affirmative opt-in consent should be required for nearly all uses for the reasons stated throughout this submission. In order to protect against misuses of voice and likeness, when content containing individuals' voices or likenesses is used to train content, the depicted individual(s) should also have a consent right. An opt-out opportunity is not sufficient.

9.4. If an objection is not honored, what remedies should be available? Are existing remedies for infringement appropriate or should there be a separate cause of action?

In addition to any remedies that may be available to the copyright owner, in the case of audio or audiovisual works that include voices or likenesses, the individuals whose voices or

[3] LibriTTS is a text to speech dataset derived from the public domain LibriVox corpus (https://research.google/resources/datasets/libri-tts/). While it is purportedly intended for text-to-speech research, it is released under a Creative Commons CC BY 4.0 deed that authorizes sharing and adaptation, including for commercial purposes. *See,* https://creativecommons.org/licenses/by/4.0/.

likenesses are included should also have remedies, particularly to the extent that the works are used to train AI-generated digital replicas of them.

17. Outside of copyright law, are there existing U.S. laws that could require developers of AI models or systems to retain or disclose records about the materials they used for training?

SAG-AFTRA is not aware of any law that would require retention or disclosure of records regarding the materials used for training, except as may be necessary to respond in litigation. A law requiring this would benefit individuals, such as SAG-AFTRA's members, whose voices and likenesses are included in materials used to train the AI models and, also, may be replicated by the models' output.

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?

Yes, particularly in regard to AI-generated audio, visual, and/or audiovisual content that contains human (or human-like) likenesses or voices. Failure to provide this kind of transparency will deceive and manipulate the consumers of that material.

28.3. If a notification or labeling requirement is adopted, what should be the consequences of the failure to label a particular work or the removal of a label?

The consequences should depend on the nature of the work and how it is used. As noted, AI-generated works can be used in deceptive and fraudulent manners which can harm the public. If the work also contains the voices or likenesses of an identifiable individual, it can also harm that individual. It should therefore give rise to a cause of action by the depicted individual or, where a cause of action already exists (such as in the context of right of publicity violations), it should increase the measure of damages. Without individuals having a way to protect themselves, the sheer number of likely violations will overwhelm enforcement agencies.

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?

The law related to name, image, and likeness rights in connection with AI remains muddied. At present, there is no express federal right that is applicable, although Section 43(a) of the Lanham Act[4] might provide recourse with respect to false endorsements or similar false associations involving prominent individuals. At the state level, the right of publicity is the

[4] 15 U.S.C.S. § 1125 (2023). Frequently, when prominent individuals allege violations of their right of publicity, particularly in connection with blatantly commercial uses, they will also include claims under 15 U.S.C. § 1125. Most of the cases referenced in notes 7-12, below, include such claims.

legal right most likely to protect an individual's name, likeness, or vocal likeness in the context of AI. Other speech-based torts, such as false light (where it exists), might also provide some protection. A handful of states also allow civil claims when AI-generated material is sexually explicit in nature.[5]

While nearly every state recognizes some form of the right of publicity, however named, the laws vary state-by-state in their scope (including what aspects of the individual's persona is protected), statutory exemptions, and remedies. New York is one of the only states to expressly address digital replicas in its statutory law, and it only addresses the digital replica of deceased individuals.[6] The existence and scope of the right of publicity post-mortem also varies state-by-state.

As the technology is so new, case law related to AI-generated digital replicas is not yet developed. State-based right of publicity laws likely would extend to AI-generated materials featuring the name, likeness, or vocal likeness of a particular person, just as they have extended to a race car[7], robots[8] and animatronics[9], a slogan[10], video games avatars[11], and soundalike singers.[12] Notably, in the foregoing examples, most of the referenced cases involved California's common law right of publicity, with courts holding that even in connection with soundalike singers, the statutory right did not apply if the individual's voice was not actually

[5] *E.g.*,, Cal. Civ. Code § 1708.86 and N.Y. Civ. Rights Law § 52-c, both of which were championed by SAG-AFTRA, create a statutory prohibition on nonconsensual sexually explicit digital replicas and provide civil remedies.

[6] N.Y. Civ. Rights Law §50-f

[7] *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (holding that a recognizable race car used in an advertisement violated California's common law right of publicity).

[8] In *White v. Samsung Elecs. Am., Inc*., 971 F.2d 1395 (9th Cir. 1992) the Ninth Circuit found that a print ad featuring a robot designed to resemble the "Wheel of Fortune" hostess likely violated her right of publicity under California's common law, but not the statutory right of publicity under Cal. Civ. Code § 3344. Weighing the likelihood of confusion factors, the Ninth Circuit also determined that White would likely prevail on her claim under 15 U.S.C.S. § 1125.

[9] Much like the robot resembling Vanna White, the Ninth Circuit held that actors George Wendt and John Ratzenberger raised triable issues of fact with regard to whether animatronic robots based on their "Cheers" characters violated their rights of publicity and the Lanham Act. *Wendt v. Host International, Inc.*, 197 F.3d 1284 (9th Cir. 1997).

[10] *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983)

[11] *See, e.g., No Doubt v. Activision Publishing*, 192 Cal. App. 4th 1018 (2011); *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.),* 724 F.3d 1268 (9th Cir. 2013) ; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir 2013).

[12] *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (use of a soundalike after the singer refused to do an advertisement violated Midler's California common law right of publicity, but not her statutory right); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (upholding a jury verdict in favor of the singer under California's common law right of publicity and the Lanham Act for use of a soundalike in an advertisement).

used. While the statutory right of publicity is likely to extend to a digital replica created using a model trained on recordings or images of a specific individual, this remains an open 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?

Yes. SAG-AFTRA strongly supports urgent passage of federal legislation that would protect images and likenesses, such as the NO FAKES Act, which was recently released in the Senate as a discussion draft. SAG-AFTRA also strongly supports the Preventing Deepfakes of Intimate Images Act in the House, which would amend the Violence Against Women Act to add civil remedies and criminal penalties for non-consensual sexually explicit AI-generated content.

Any federal law must clearly define the individual's right in their image and voices as an intellectual property right, a principle that is generally recognized by commentators and case law. The NO FAKES Act includes this acknowledgment. Anything short of this would create a massive loophole allowing websites that act as a "marketplace" for digital replicas — those who have the most control over their creation, dissemination, and exploitation — to escape liability under the safe harbor in Section 230(c) of the Communications Decency Act ("Section 230").[13] Notably, some of these websites play a much more direct role in the creation and dissemination of digital replicas rather than acting as a mere passive conduit.

There is currently a circuit split as to whether the right of publicity falls within Section 230's exception for intellectual property rights. Despite the statute's admonition that it should not "be construed to limit or expand any law pertaining to intellectual property," it has been read to provide nearly blanket immunity against right of publicity claims, most notably by the Ninth Circuit, which is home to the largest concentration of SAG-AFTRA members.[14] More recently, the Third Circuit took the opposite position, which hews more closely to the statutory text.[15]

Additionally, any federal law must provide meaningful remedies and recourse to depicted individuals, including monetary and injunctive relief. Monetary relief under the law must be

[13] 47 U.S.C.S. § 230(c), provides, in pertinent part, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

[14] *See*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007)

[15] *See, e.g.,* Coutney Kim, *Analyzing The Circuit Split Over CDA Section 230(E)(2): Whether State Protections For The Right Of Publicity Should Be Barred*, 96 S. Cal. L. Rev. 449 (2022) *available at* https://southerncalifornialawreview.com/2023/05/27/analyzing-the-circuit-split-over-cda-section-230e2-whether-state-protections-for-the-right-of-publicity-should-be-barred/. Kim argues that the Third Circuit's holding in *Hepp v Facebook*, 4 F.4th 204 (3d Cir. 2021), which allowed a broadcaster's right of publicity claim against an online platform, more closely follows the plain language of Section 230 than the Ninth Circuit's prior holding.

reasonably calculated to remedy the harm caused to the individual which, in the case of professional performers like SAG-AFTRA's members, might include lost wages and reputational damage. Injunctive relief must also be available, particularly in the context of AI-generated content that might impact one's reputation (such as AI-generated voice or likeness used to sell shoddy merchandise or questionable services).

Given the breadth of the right of publicity, a federal right ***should not*** preempt state right of publicity laws unless it provides individuals greater protections over their name, image, voice, or likeness than existing state law. Further, it is ***critical*** that any federal law relating to AI-generated image and/or voice not supersede, whether intentional or inadvertent, existing state law relating to sexually explicit digital replicas.

Essentially, any federal law should set a floor for state law protections, allowing states to provide greater protection to individuals residing in their state, particularly with respect to commercial exploitation of their voice and/or likeness, reputation-damaging uses (such as using a digital replica to cast an individual in a false light or to defame a third party), fraudulent or criminal activity (such as using a AI-generated voice of an individual to commit fraud or gain unauthorized access to an individual's accounts), or in unauthorized sexually explicit content.

32. Are there or should there be protections against an AI system generating outputs that imitate the artistic style of a human creator (such as an AI system producing visual works "in the style of" a specific artist)? Who should be eligible for such protection? What form should it take?

Artists, such as those represented by SAG-AFTRA, invest their entire lives, and often considerable money, in building their professional brand and identity. To the extent an AI system is based on, or derives value from, the artist's brand or identity, that artist should have legal recourse. Laws such as the right of publicity or Lanham Act that protect an individual's persona may be implicated, including when an AI program generates output by using the name of a specific artist as a prompt. As noted, the current state of the law is inconsistent. The type of federal law we have discussed throughout, such as the NO FAKES Act would address this concern and provide consistent and appropriate protection.

34. Please identify any issues not mentioned above that the Copyright Office should consider in conducting this study.

As noted in connection with question 31, the risks posed by generative AI technology that can clone voices, in particular, but also individuals' likenesses goes far beyond copyright. This is an existential threat for hundreds of thousands of American workers, particularly in the entertainment industry, but also beyond. We wanted to provide one final example to illustrate the disregard with which some companies hold the creative industries.

FakeYou is a website that offers a "deepfake technology to generate audio or videos of your favorite characters saying anything you want."[16] Like most websites that accept user-generated content, the site's "Terms and Conditions of Use" include a representation by the user that they have adequate permission to submit their content and that they do not violate the right of privacy or publicity of any third party.[17] The terms state the website is a "is a research technology for fun" and that the company will take down unauthorized voices on request.[18] Among the voices available on the website are President Joe Biden, former Presidents Barack Obama and Donald Trump, and former candidates like Hillary Clinton and Senator Bernie Sanders, any of which could be used to sow disinformation or worse.[19]

And while it may be true that sites like this are intended for fun and while they might be willing to remove unauthorized voices, its very model is designed to encourage the uploading of voices, with or without consent. The website gamifies the creation of nonconsensual text-to-speech ("TTS") voice models, hosting a "leaderboard" that lists the usernames of their "most frequent contributors" together with the number of TTS models each user has uploaded.[20] On its upload page, it states, "[y]ou'll get credited for everything you contribute. You'll also get queue priority, be eligible to win prizes, and help us become a Hollywood-killing deepfake tooling, streaming, and filmmaking powerhouse."[21]

The current models put an unfair burden on the individual to police the entirety of the internet for violations of their rights, sometimes in heinous ways.[22] A comprehensive legislative solution that recognizes the individual's rights in their digital self, including the right to control how, when, and even whether digital replicas are used, is necessary to stem the rampant abuse generative AI technology has enabled. In the meantime, SAG-AFTRA would encourage the

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[16] https://fakeyou.com/ (last visited Oct. 29, 2023).

[17] https://fakeyou.com/terms (last visited Oct. 29, 2023).

[18] Despite this, SAG-AFTRA has made efforts to reach out to the company on behalf of its members, to no avail.

[19] https://fakeyou.com/tts (last visited Oct. 29, 2023)

[20] https://fakeyou.com/leaderboard (last visited Oct. 29, 2023). The current "leader" has uploaded over 500 TTS models with the next nearest user having uploaded under 400.

[21] https://fakeyou.com/contribute (last visited Oct. 29, 2023).

[22] For example, ElevenLabs' TTS tool was used to generate celebrity AI voices that uttered hate speech. James Vincent, *4chan users embrace AI voice clone tool to generate celebrity hatespeech*, The Verge, (Jan. 31, 2023), *available at* https://www.theverge.com/2023/1/31/23579289/ai-voice-clone-deepfake-abuse-4chan-elevenlabs. SAG-AFTRA has had numerous conversations with ElevenLabs and they have since put safeguards in place against this abuse. *See, generally* Rashi Shrivastava, *'Keep Your Paws Off My Voice': Voice Actors Worry Generative AI Will Steal Their Livelihoods*, Forbes, (Oct. 9, 2023), *available at* https://www.forbes.com/sites/rashishrivastava/2023/10/09/keep-your-paws-off-my-voice-voice-actors-worry-generative-ai-will-steal-their-livelihoods.

USCO to continue denying protection to wholly AI works, particularly when they utilize AI-generated voices and likenesses created without the authorization of the depicted individual.

Thank you again for your attention to and the opportunity to weigh in on this important topic. For all its positive applications, AI also has the potential to cause considerable harm, particularly to creative professionals like SAG-AFTRA's members. Hundreds of thousands of people are at risk of losing control over their digital selves, and may even find they become their greatest competition. Adequate and effective protections against this exploitation are critical.

If you have any questions, please contact me or Danielle S. Van Lier, Senior Assistant General Counsel, Contracts and Compliance at danielle.vanlier@sagaftra.org.

Sincerely,

JEFFREY P. BENNETT
General Counsel