



Artificial Intelligence and Digital Replicas

Artificial Intelligence (AI) is opening new pathways for creators to develop their craft, give expression to their ideas, and develop new artistic works and performances. AI tools can help artists enhance their creative experimentation and workflow across all art forms. This includes the use of AI-enhanced special effects and sound mixing in film and music production, as well as AI-enhanced CAD/CAM tools in sculpture, architecture, and applied arts. Writers use AI-enhanced word processing, reference, and drafting aids in the development of new literary expressions. Generative AI tools offer new approaches to leverage data analytics to help spark and enrich the intuitive ideation and critical thinking that lies at the core of human imagination and artistic expression.

However, AI tools can also be misused for the commercial dissemination of unauthorized digital replicas of an artist's name, image, likeness, or voice. This improper activity is particularly detrimental to artists who depend upon their reputation and public recognition for their livelihood.

BSA urges Congress to take steps to protect artists from the spread of such unauthorized AI-generated digital replicas—drawing on the following principles:

1 Create New Rights for Artists

Artists should have the right to prevent the unauthorized commercial dissemination of any digital replica that is so realistic that a reasonable observer would believe it is the actual artist's name, image, likeness, or voice.

2 Deter the Intentional Dissemination of Unauthorized Digital Replicas

Congress should impose liability on those that create and disseminate for commercial purposes a digital replica knowing that the replica wasn't authorized by the artist at issue.

3 Deter Technologies That Are Primarily Designed to Disseminate Unauthorized Replicas

Congress should prohibit commercial trafficking in any algorithm, software, tool, or other technology, service, or device that has the primary purpose of creating or disseminating to the public of a particular, identifiable individual's digital replica, knowing that this act was unauthorized.

4 Knowledge Should Be a Predicate for Liability

Congress should protect third parties that do not have actual knowledge that the digital replicas at issue are not authorized. It would be manifestly unfair to impose liability on those that lack actual knowledge that the digital replicas at issue are unauthorized.

5 Create Incentives to Quickly Remove Unauthorized Replicas Online

To protect artists and remove unauthorized digital replicas as quickly as possible, service providers should be encouraged to remove unauthorized replicas expeditiously, consistent with the requirements of 17 USC § 512. The section 512 provisions should apply without regard to whether the unauthorized production of an artist's name, image, likeness, or voice infringes copyright.

6 Safeguard Constitutionally and Statutorily Protected Uses

Congress should shield from liability a use of a digital replica for statutorily permitted purposes such as criticism, comment, news reporting, teaching, scholarship, or research (in line with 17 USC § 107); any use covered by the First Amendment of the US Constitution; and any use that is de minimis, transient, or incidental.

7 Consider Additional Protections for Writers, Photographers, and Graphic or Applied Artists

Beyond protections for an artist's name, image, likeness, or voice, Congress should consider how to protect the interests of graphic and literary artists from AI-generated forgeries or other digital replicas that are fraudulently passed off as the work of the true artist.

8 Protect Artists From Unfair Practices in Licensing Negotiations

To protect artists from those who might unfairly license away their rights on unfavorable terms, any license or assignment must be in writing, and the artist must be formally notified of his/her right to representation by counsel. We also urge Congress and the Copyright Office to explore the establishment of a system of pro bono or subsidized legal aid services to represent those artists in these licensing negotiations. Artists should also be able to rely on collective bargaining agreements through unions or guilds in which they are entitled to participate.

What Are Technologies With the "Primary Purpose" of Disseminating Unauthorized Digital Replicas?

Consistent with the US Supreme Court holding in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), liability should not arise for AI technologies that are "widely used for legitimate, unobjectionable purposes, or... capable of substantial noninfringing uses" that do not conflict with a person's right to authorize such replication. Congress should pay attention to this framing to avoid unintentionally capturing broader technologies that have other beneficial uses.