House of Representatives Committee of the Judiciary
Subcommittee on Courts, Intellectual Property, Artificial Intelligence, and the Internet
Hearing: "A Mid-Life Crisis? IP and The Internet After 40"

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Thank you for permitting me to speak on "A Mid-Life Crisis? IP and the Internet After 40." My name is Bhamati Viswanathan, and I am a Visiting Assistant Professor at Suffolk University Law School in Boston, MA. I teach various courses in IP, including Copyright, Artificial Intelligence and the Law, Current Issues in IP, and Law and the Visual Arts, as well as Constitutional Law and Contracts Law. I serve on several non-profit boards, including the Copyright Alliance (Academic Advisory Board); News/Media Alliance (Faculty Partner); Copyright Society (Member/former Trustee); Volunteer Lawyers for the Arts (Education Advisor); Institute for Intellectual Property and Social Justice (Advisor); and the American Bar Association (Member/former Chair, Emerging Technologies Section). I speak, write, and advise on a range of matters involving IP, creative economies, and new technologies. I am speaking today on my own behalf, and the views I share here are solely my own.

Framing the issues we face today is a challenge: we are seeing the rapid emergence of innovative new technologies, from the Internet to Artificial Intelligence (AI), that are likely to change our lives in ways that are unimaginably vast. At the same time, we are seeing new pressures being brought to bear on industries that are central to our economic vitality and growth. Among those are creative industries, whose total value was recently estimated at **$3.369 trillion**, or **12.3%** of the entire U.S. economy.[1] By comparison, the technology sector was estimated at **$2.0 trillion**.[2] These two sectors are both pillars of the American economy. But we must recall that both sectors matter: we cannot do without both, or sacrifice the proverbial goose to get the golden eggs.

At the same time, we know that China is developing its technologies at lightning speed. Many argue that China is less "hampered" by regulation, caution, and safety measures than we are. Many argue that we will "lose the arm's race" if we fetter our technological growth. But we can do better than to foreclose important measures that keep all of our sectors strong, our people safe, and our artists creating. We must proceed freely, but not without caution and, where necessary, regulation. Free markets, private ordering solutions, entrepreneurship, and innovation are paramount. But regulation works best when it solves market failures, protects against bad actors, and protects vulnerable populations. After 40 years of digital transformation, we have implemented successful bipartisan regulations, such as the Digital Millennium Copyright Act

[1] International Intellectual Property Alliance (IIPA (2024 report).
[2] Computing Technology Industry Association (CompTIA) (2023 report).

(DMCA). But those regulations have been overtaken by changes in technologies, judicial decisions, and market realities. New course corrections that are responsive to present needs but narrowly tailored are timely and required. I propose three areas for legislative change: judicial site-blocking; clarity surrounding treatment of the ingestion of copyrighted materials to "train" large learning models (LLMs); and regulation of digital replicas.

1. Judicial Site Blocking and Expeditious Removal

The theft of copyrighted works by foreign piracy websites is a well-recognized problem that harms copyright owners and creators, damages creative industries, and constantly threatens to undermine the U.S. economy.[3] There is a solution that over 50 developed countries have adopted and implemented: judicial site blocking. Judicial site blocking is a process through which courts issue an order to stop websites or online services that are primarily designed for the purpose of infringing copyright. The U.S. Copyright Office has recognized the importance of judicial site blocking regimes, and has written a letter to Congress in support of wielding judicial site blocking to reduce large-scale online infringement.[4]

Judicial blocking is a process through which a court issues an order to stop websites or online services that are primarily designed or provided for the purpose of infringing copyright from accessing a market when other enforcement mechanisms are ineffective. It is a no-fault process in which blame is not assigned and damages are not sought. Proposed site-blocking legislation includes numerous safeguards to ensure that the due process rights of intermediaries are fully and effectively protected. And judicial site-blocking is narrowly targeted at websites and online services that have no legitimate noninfringing uses.

In its recent *Sony v. Cox* decision,[5] the U.S. Supreme Court held that a service provider cannot be held liable for infringing acts even if it is aware that those acts are infringing; it has to engage actively in encouraging or promoting the infringement. This standard makes it challenging for copyright owners to successfully pursue intermediaries that exist to foster infringing activities; and the challenge may be compounded by extraterritoriality concerns and jurisdictional constraints. Judicial site blocking offers a reasonable way to balance the interests of copyright owners, service providers, and other stakeholders. It gives copyright holders a swift, effective, and judicious avenue for going after bad actors and shutting down their illicit activities.

[3] Michael D. Smith, *What the Online Piracy Data Tells Us About Copyright Policymaking*, Hudson Institute (April 12, 2023), https://www.hudson.org/intellectual-property/what-online-piracy-data-tells-us-about-copyrightpolicymaking.
[4] Letter from Register of Copyrights to the Senate Subcommittee on Intellectual Property (Oct. 28, 2023).
[5] *Cox Communications, Inc. v. Sony Music Entertainment*, No. 24-171 (U.S. Mar. 25, 2026).

2. Treatment of Ingestion of Copyrighted Materials for "Training" Large-Language Models

Artificial intelligence large-language models (LLMs) ingest vast amounts of copyright-protected works, most often obtained by trawling the Internet. The works are used to build the models' capacity for complex feedback to users. While "training" is the analogy that's typically used to describe the process, it is more accurately reproduction, disambiguation of data, and building pattern recognition that occur. Unlike human training, it is not really "education" – i.e., learning with the purpose of become knowledgeable and developing critical skill – rather, the LLMs' end goal is the accumulation of information and the ability to offer users certain cognitive tools.

Moreover, unlike human training, the technology companies building LLMs do not access copyrighted materials by buying, borrowing, licensing, or otherwise licitly obtaining them. Rather, they simply take the works by scraping them off the Internet. No purchase prices, licensing fees, or royalties exchange hands. No copyright creators are compensated. Not even permission is sought or obtained.

For copyright owners, this is catastrophic: it means that they don't get paid for their hard work and for the risk they took in undertaking the work in the first place. For creative ecosystems, it is likewise a disaster: it completely undermines the business model on which creative industries are predicated. For the copyright system as a whole, it entirely subverts the incentive to create that is the heart of the Intellectual Property Clause in the U.S. Constitution.[6]

AI companies argue that this is "fair use," meaning that while they are engaged in wholesale infringement, the purpose of their use is so transformative and so socially beneficial, that the end justifies the means. They also argue that their practices do not undermine the "actual or potential" markets for copyright owners. Both elements must be true for a fair use defense to stand; but neither are established in practice or at law. The purpose may be "transformative" – they change the works they use into data in their models – but it is not clearly a transformation in the legal sense as intended by the Copyright Act – a "change of expressive use for a new and different meaning."[7] Further, the practice *does* undermine copyright owners' actual and/or potential markets in licensing their works for training use.[8] Copyright owners are usually eager to license their works, but they are precluded from doing so when their works have been appropriated and they are left without a choice.

Technology companies and their advocates argue that it is too costly to license materials for training, due to the sheer volume of works required for ingestion. Yet creative content companies that engage in large, complex media productions regularly engage in cross-licensing works, irrespective of expense: the production of movies, for instance, often entails clearing rights and paying royalties for embedding songs, clips, quotes, and other works. The fact that the scale is

[6] *See* U.S. Constitution, Art. 1, Section 8, clause 8.
[7] See, for e.g., *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 528-30 (2023).
[8] In fact, several copyright industry companies have begun to enter licensing agreements for training – which shows that there are markets to be had.

different does not mean that the process should be put aside. It means that licensing arrangements will have to be made more creatively and equitably. Moreover, "it's too expensive" is not a defense that works when regular people want to access or use a copyrighted work. We all pay to consume content, and we understand that paying the toll is necessary to make sure that the people who create the works we use will continue to do so as professional creators. The AI industry should not be an exception to the rule.

AI companies claim that the market will create rights-clearing processes. Thus far, the market has not acted, and copyright industries continue to lose value daily. Absent action or regulation, multiple court cases brought by copyright owners and intermediaries who are seeing their businesses eviscerated by AI proliferate. Legislation by litigation is expensive and cumbersome, and often results in a patchwork of results that are themselves suboptimal. A preferable solution would be a light hand of regulation: incentivizing licensing, and ensuring that markets in copyrighted material can continue to operate effectively and to optimize value.

Copyright industries have been a robust and reliable engine of economic growth. Do we want to see them undermined to the point of no return? That is the threat that AI poses. The ideal solution is private solutions: reform driven by AI companies and content owners coming together at the negotiating table and devising large-scale licensing arrangements. We see glimpses of that already: in the music industry, licensing deals are being struck,[9] and in the entertainment industry, stakeholders are striking new arrangements for AI use and compensation.[10] We need to spur such arrangements across all sectors so that the rising AI tide will lift *all* boats.

3. Regulation of Digital Replicas

Digital replicas are real, they are proliferating, and they are becoming increasingly sophisticated, to the point of being indistinguishable from real images and real people. Legislation of digital replicas would serve an important and pressing purpose: it would preserve a longstanding right in one's identity against a radically new technological threat. It is analogous to a right of publicity property right – the major difference is that rights of publicity have typically been protected at the state level, whereas federal protection would be helpful both in standardizing protection and in ensuring that such protection is robust and enduring. Some critics have raised First Amendment concerns regarding potential hampering of free speech on the Internet. Those concerns, however, would be allayed by prohibiting only realistic digital substitution. Legitimate uses of digital replicas would not be affected.

One concern is ensuring that the transferability of the right is narrowly tailored to protect rights but not hamper licit use. The property right in one's own images, after all, inheres in personal autonomy. It rightfully belongs to the person being replicated digitally. But should that right be

[9] *See, for e.g.*, https://www.theverge.com/news/829189/warner-music-group-suno-ai-licensing-deal.
[10] *See, for e.g.*, https://www.hollywoodreporter.com/business/business-news/sag-aftra-four-year-deal-studios-new-ai-protections-1236590891/.

transferable? Why can, or should, it be assigned, licensed, inherited, and/or controlled by one's estate? This question needs to be considered and dealt with thoughtfully.

There are arguments on both sides of the debate. On the one hand, digital replicas can outlast the span of human lives; and one would not want to see a replica used posthumously in ways that do not respect the subject of the image. On the other hand, an endlessly long span of protection seems to risk overpropertization and to incentivize perennial rent-seeking by third-party actors. Just as copyright, patent rights, and rights of publicity have limited terms of duration; so perhaps should digital replica rights be limited in term. Moreover, such rights should be tightly tied to actual consent of the holder. These are important considerations, but they can and will be worked out by well-crafted litigation that both protects personal rights and encourages the licit use of digital replicas.