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PRACTICE BRIEF · ENTERTAINMENT & TALENT

Entertainment Law: Recent Developments 2025-2026 — Digital Replicas, Fair Use, and the Future of AI in Creative Industries

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The entertainment industry entered 2025 in the middle of a generational shift. AI-generated content, digital replicas of performers, and the recalibration of foundational copyright doctrines converged to produce a legal landscape that looks materially different from even two years ago. This annual review examines the four developments that most directly affect talent, studios, production companies, and rights holders heading into the second half of 2026.

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I. AB 2602 and AB 1836: California's AI Digital Replica Laws

In September 2024, Governor Newsom signed two bills that made California the first state to enact comprehensive legislation specifically addressing AI-generated digital replicas of performers. The two statutes operate in tandem but address distinct problems.

A. AB 2602: Contractual Protections for Living Performers

AB 2602 targets the contract formation process. It provides that a provision in a contract for personal or professional services that permits the creation or use of a digital replica of an individual's voice or likeness is **unenforceable** unless two conditions are met: (1) the provision includes a reasonably specific description of the intended uses of the digital replica, and (2) the individual was either represented by legal counsel or by a labor union that negotiated the terms on the individual's behalf.

The statute addresses a core power imbalance. Before AB 2602, performers — particularly those without significant bargaining leverage — were routinely presented with broad AI consent clauses in standard production agreements. A performer auditioning for a day-player role had no practical ability to negotiate the removal of a blanket digital-replica clause. AB 2602 renders those blanket clauses void as a matter of law unless the performer had representation and the clause describes the specific intended uses.

The representation requirement is significant. It does not merely encourage performers to retain counsel; it makes the enforceability of the clause contingent on actual representation. A performer who signed without a lawyer or union representative can later void the digital replica provision — even if the performer read and understood the clause at the time of signing.

B. AB 1836: Postmortem Rights Extended to Digital Replicas

AB 1836 amends California Civil Code section 3344.1 — the postmortem right of publicity statute — to explicitly cover **digital replicas** of deceased personalities. Before the amendment, section 3344.1 protected against unauthorized commercial use of a deceased person's name, voice, signature, photograph, or likeness. AB 1836 adds "digital replica" to that enumeration, defined as a computer-generated, highly realistic electronic representation that is readily identifiable as the deceased individual.

The practical effect is to extend postmortem publicity rights to AI-generated performances of deceased artists. An AI-generated film performance by a deceased actor, or an AI-generated vocal performance replicating a deceased musician's voice, now triggers the same consent-and-compensation requirements that apply to uses of the deceased person's photograph or name. The right endures for 70 years after the personality's death — the same duration established under existing section 3344.1.

C. Interplay with Existing Law and Preemption Questions

Both statutes operate alongside — not in replacement of — California Civil Code section 3344, which protects the right of publicity for living individuals, and common-law misappropriation claims. Section 3344 already prohibited the knowing use of another person's name, voice, signature, photograph, or likeness for commercial purposes without consent. AB 2602 and AB 1836 supplement that framework by addressing two gaps: the contract-formation process (AB 2602) and the postmortem digital-replica question (AB 1836).

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The preemption question remains unresolved. Federal copyright law preempts state law claims that are equivalent to rights under the Copyright Act. 17 U.S.C. § 301(a). A digital replica of a performance in a copyrighted motion picture may involve both a copyright interest (in the underlying audiovisual work) and a publicity-rights interest (in the performer's likeness). Whether a state-law digital replica claim is preempted when the underlying work is a copyrighted performance has not been tested in litigation under the new statutes. The strongest argument against preemption is that publicity rights protect the *identity* of the individual — an interest qualitatively different from the copyright in the work — and that distinction has historically survived preemption analysis in the Ninth Circuit.

> *"These bills represent the nation's most comprehensive effort to address the threat of unauthorized AI replicas. California is sending a clear signal: the right to control your own likeness — in life and after death — is not something that can be signed away in boilerplate."*
> *— Governor Gavin Newsom, signing statement, September 2024*

II. Andy Warhol Foundation v. Goldsmith: Fair Use Reshaped

The Supreme Court's 2023 decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), did not merely resolve a dispute about a silkscreen portrait of Prince. It recalibrated the first factor of the fair use analysis — purpose and character of the use — in ways that continue to reshape licensing practice throughout the entertainment industry.

A. The Doctrinal Shift

For nearly three decades following *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), "transformativeness" had been the dominant inquiry under the first fair use factor. Courts routinely found that a secondary use was transformative if it added new meaning, expression, or message to the original — even when the secondary work served the same commercial market as the original. The practical result was that many derivative uses were insulated from infringement claims by the transformative-use doctrine.

The *Warhol* majority, in an opinion by Justice Sotomayor, narrowed the inquiry. The Court held that the degree of transformation, standing alone, is not dispositive. When the original work and the secondary work share the **same commercial purpose** — in that case, both served as magazine illustrations of Prince — the first factor weighs against fair use, regardless of the aesthetic changes the secondary work introduces. The relevant question under the first factor is not merely whether the new work is *different* from the original, but whether it has a **distinct purpose or character** that justifies using the original without authorization.

B. Downstream Effects on Entertainment Licensing

The practical consequences for the entertainment industry have been significant and are still developing:

- **Music sampling.** Post-*Warhol*, the argument that a sample is "transformed" by its incorporation into a new song carries less weight when the new song serves the same

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commercial market as the sampled work. Sampling clearance rates have increased, and the cost of sample licenses has risen as rights holders leverage the decision in negotiations.

- **Visual art appropriation.** Artists who incorporate copyrighted photographs, film stills, or other visual works into new compositions now face heightened scrutiny if the new composition serves a commercial purpose similar to the original. The argument that artistic recontextualization alone makes a use transformative is no longer reliable.
- **AI training data.** Perhaps the most consequential downstream application is in AI copyright litigation. Generative AI companies have relied on transformative-use arguments to defend the ingestion of copyrighted works as training data. *Warhol* weakens that defense to the extent the AI-generated output competes in the same market as the works used for training. If an AI model trained on copyrighted photographs generates images that compete with those photographs commercially, the first-factor analysis after *Warhol* is substantially less favorable to the AI developer.

The decision has not eliminated the transformative-use doctrine — it has recalibrated it. Uses that serve a genuinely different purpose (criticism, commentary, education, parody) remain protected. But uses that serve the same commercial function as the original must clear a higher bar, and the mere addition of new expression is no longer a reliable shield.

III. Section 203 Copyright Termination: First Wave Now Actionable

A provision of the Copyright Act that received relatively little attention for decades is now producing significant consequences for the entertainment industry. Section 203 of the Copyright Act, 17 U.S.C. § 203, grants authors (and their statutory heirs) the right to **terminate** transfers of copyright — effectively reclaiming ownership of works they assigned to publishers, labels, or studios — after a waiting period of 35 years from the date of the grant.

A. The Termination Window

The termination right may be exercised during a five-year window beginning at the end of the 35th year after the grant was executed (or, for grants covering publication rights, 35 years from publication or 40 years from execution, whichever is earlier). 17 U.S.C. § 203(a)(3). Critically, the author must serve advance written notice on the grantee not less than **two** and not more than **ten** years before the intended termination date. § 203(a)(4)(A).

Works granted in 1990 and 1991 are now squarely within the termination window. For a copyright assigned in 1990, the five-year termination window opened in 2025 and closes in 2030. The notice window for an effective termination date in 2026 required service no later than 2024. For works assigned in 1991, the termination window opens in 2026, with the earliest effective dates requiring notices served in 2024 or 2025.

B. Why This Matters Now

The works entering the termination window include commercially significant music catalogs from the late 1980s and early 1990s, film and television scripts optioned or assigned during the same period, and book publishing agreements for works that became the source material for later

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adaptations. This timing coincides with a period of unprecedented catalog acquisition activity — investment funds, private equity firms, and major labels have spent billions acquiring music publishing rights and master recordings. Catalog buyers who acquired rights from the original grantees face the prospect of those rights reverting to the original authors.

The termination right is **inalienable**. Section 203(a)(5) provides that termination may be effected "notwithstanding any agreement to the contrary." An author who assigned all rights in perpetuity cannot be held to that assignment beyond the 35-year period. Even a contract clause explicitly waiving the termination right is void and unenforceable.

C. Procedural Requirements

The procedural requirements for exercising the termination right are exacting. The notice must identify the work, the grant being terminated, the effective date of termination, and must be served on the grantee (or the grantee's successor in interest) by certified mail or personal service. The notice must also be recorded in the Copyright Office before the effective date. Failure to comply with the statutory notice requirements can forfeit the termination right for the current window.

For jointly authored works, a majority of the authors who executed the grant must join in the termination notice. For deceased authors, the termination interest passes to statutory heirs — surviving spouse, children, and grandchildren — in proportions specified by statute, not by will. An author's testamentary beneficiary does not necessarily hold the termination interest.

IV. AI Content Ownership: The Federal Policy Vacuum

The question of whether AI-generated content can be protected by copyright remains unresolved at the federal level, and the absence of clear policy is creating practical problems for every segment of the entertainment industry.

A. The Human Authorship Requirement

The Copyright Office's position, articulated in a series of guidance documents beginning in February 2023, is that copyright protection requires **human authorship**. In *Thaler v. Perlmutter*, No. 22-1564 (D.D.C. Aug. 18, 2023), the U.S. District Court for the District of Columbia upheld the Copyright Office's refusal to register a visual artwork generated entirely by an AI system without human creative input. The court held that the Copyright Act's use of the term "author" requires a human being, and that a work generated autonomously by a machine is not eligible for copyright registration.

B. The Zarya of the Dawn Precedent

The Copyright Office's February 2023 decision on the graphic novel *Zarya of the Dawn* established a more nuanced framework. The Office granted registration to the text and the selection and arrangement of images — elements authored by the human applicant — while denying registration to the individual AI-generated images themselves. The decision established the principle that a work containing AI-generated elements may be partially registrable, but only to the extent of the human-authored contributions.

This creates a spectrum. At one end, a work generated entirely by an AI system with no meaningful human creative input is not copyrightable. At the other end, a work in which a human author uses AI as a tool — making creative decisions about prompting, selection, arrangement, and modification — may contain copyrightable elements. The Copyright Office has indicated that the inquiry turns on whether the human exercised sufficient **creative control** over the expressive elements of the work, but has not issued a bright-line rule.

C. The Registration Problem

As of mid-2026, the Copyright Office requires applicants to disclose the use of AI in generating any portion of a work submitted for registration. Applicants must identify which elements were AI-generated and which were human-authored. This disclosure requirement creates a dilemma for producers of AI-assisted content: full disclosure may result in partial or denied registration, while failure to disclose AI involvement in a work risks cancellation of the registration if the AI involvement is later discovered.

The practical consequence is that entertainment companies using AI tools in production — whether for visual effects, script development, music composition, or marketing materials — face genuine uncertainty about the copyright status of their output. A film that incorporates AI-generated visual effects may have full copyright protection in the live-action footage, partial protection in elements where human artists directed and modified AI output, and no protection in elements generated autonomously by AI systems.

D. Congressional Inaction

Despite multiple hearings and several proposed bills, Congress has not enacted legislation addressing AI and copyright. The result is a policy vacuum filled by Copyright Office guidance and a single district court decision — neither of which provides the certainty that the entertainment industry requires for long-term investment and licensing decisions. The absence of federal legislation also leaves open the question of whether state-law protections like AB 2602 and AB 1836 will face preemption challenges if and when Congress acts.

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PRACTICAL TAKEAWAYS FOR ENTERTAINMENT INDUSTRY CLIENTS

- **Audit digital replica clauses now.** AB 2602 renders unenforceable any digital replica contract provision that lacks a reasonably specific description of intended uses or was signed without legal or union representation. Performers should review existing agreements; studios should update standard contract language to comply.
- **Reassess fair use assumptions post-Warhol.** The transformative-use defense is narrower than it was before 2023. Any use of copyrighted material that serves the same commercial purpose as the original requires a license or a fair use analysis that accounts for the new framework — particularly sampling, appropriation art, and AI-generated content that competes with training data sources.
- **Calendar Section 203 termination deadlines.** Authors and their heirs who assigned copyrights in works from the late 1980s and early 1990s should evaluate whether the termination window is open and serve compliant notices before the window closes. The procedural requirements are strict, and missed deadlines are not recoverable.
- **Document human authorship in AI-assisted workflows.** Productions using AI tools should maintain detailed records of human creative decisions — prompting, selection, editing, arrangement — to support copyright registration of AI-assisted works. The Copyright Office's disclosure requirements make documentation essential.
- **Protect deceased performers' estates.** AB 1836 extends digital replica protections for 70 years postmortem. Estates should proactively monitor for unauthorized AI-generated performances and be prepared to enforce under the amended statute.
- **Monitor federal legislative activity.** Congressional action on AI and copyright, if it comes, could preempt state protections or create new federal frameworks. Entertainment industry stakeholders should track proposed legislation and participate in the comment process.

The 2025-2026 period marks a transition from abstract policy debates about AI and creative rights to concrete legal obligations and enforceable statutory protections. California has moved first on digital replicas. The Supreme Court has tightened fair use. The copyright termination clock is running. And the federal government has yet to provide a comprehensive answer to the most fundamental question: who owns what AI creates. Entertainment industry participants who understand these developments — and plan accordingly — will be better positioned than those who wait for the law to settle.

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