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California Enacts Generative AI Law Addressing "Digital Replicas" of Performers

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On September 17, 2024, Governor Gavin Newsom signed AB 2602 into California law (to be codified at Cal. Lab. Code §927). The law addresses the use of "digital replicas" of performers. As defined in the law, a digital replica is:

*a computer-generated, highly realistic electronic representation that is readily identifiable as the voice or visual likeness of an individual that is embodied in a sound recording, image, audiovisual work, or transmission in which the actual individual either did not actually perform or appear, or the actual individual did perform or appear, but the fundamental character of the performance or appearance has been materially altered.**[1]***

The law requires a party to undertake certain contractual protocols regarding an agreement for the performance of personal or professional services if the agreement provides for the creation or use of the performer's "digital replica" in a performance fixed on or after January 1, 2025.

As we wrote about in a prior post, generative AI has greatly expanded the possibilities of content creation – both for innovative and unauthorized purposes –spurring litigation over unauthorized uses of individuals' voices and likenesses. This law, intended to address some of those concerns, was influenced by last year's resolution of the SAG-AFTRA strike that included provisions concerning the use of AI.

AB 2602 states that a provision in a contract between an individual and any other person for a performance of services is unenforceable as to new performances, fixed on or after January 1, 2025, by a digital replica of the individual if the provision meets certain conditions:

- The provision allows for the creation and use of a digital replica of the individual's voice or likeness in place of work the individual would otherwise have performed in person;

- The provision does not include a “reasonably specific description of the intended uses of the digital replica.” The law considers this factor met if “the uses are consistent with the terms of the contract for the performance of personal or professional services and the fundamental character of the photography or soundtrack as recorded or performed”; and
- The individual was not represented by: (a) legal counsel negotiating the individual’s digital replica rights and where the commercial terms are not stated “clearly and conspicuously in a contract or other writing” signed by the individual; or (b) a labor union where terms of their collective bargaining agreement “expressly” addresses use of digital replicas.

While the definition of a “digital replica” was drafted with generative AI in mind, it is actually broader, and could be read to cover other technologies that render digital representations of the voice or likeness of a performer. Thus, in certain circumstances, this new law could be argued to impact contracts for “digital replicas” across a variety of applications such as videogames, movies and television, sound recordings, audio or video advertisements, AI text-to-speech services, web-based properties and other similar applications.

Businesses with existing California-law based contracts with performers that address digital replicas or generative AI rights should evaluate the enforceability of those agreements under this law. Of course, future contracting for those rights should also be done with these considerations in mind.

It should also be noted that this past week, Governor Newsom signed additional AI-related bills into law, including: AB 1836, which adds protections for the use of a digital replica of a deceased personality’s voice or likeness in an expressive audiovisual work or sound recording without appropriate consent. This law uses the same broad definition of “digital replica.”

Governor Newsom also signed into law a number of AI-related transparency measures to combat deepfake election content (e.g., AB 2655, which, among other things, imposes certain obligations on large online platforms regarding the labelling or blocking of materially deceptive and digitally altered (or created) deepfake California election content posted during specified periods).

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[1] “Digital replica” does not include the electronic reproduction, use of a sample of one sound recording or audiovisual work into another, remixing, mastering, or digital remastering of a sound recording or audiovisual work authorized by the copyrightholder.

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