

Advertising + Marketing

California Passes New Legislation Prohibiting Unauthorized AI Replicas

The Bottom Line

- California recently passed two important new laws that aim to protect against the misuse of digital replicas which go into effect on January 1, 2025.
- AB 2602 aims to protect performers against unconscionable contracts that would unfairly grant broad digital replica rights without the performer's informed consent.
- AB 1836 expands the state's powerful right of publicity statute to prohibit the use of AI technology to create digital replicas of deceased individuals.
- Other states have adopted legislation of their own to combat the harms posed to individuals by the unauthorized use of digital replicas, and federal action may be on the horizon.

California's 2024 legislative session has resulted in some major new protections against the harmful use of artificial intelligence technologies. While California has no doubt embraced AI technology - launching several AI programs and initiatives to explore how AI can best serve the community, and proudly serving as headquarters for several industry-leading AI tech companies - California is also home to Hollywood, and to thousands of performers who have had serious concerns about the threat that AI poses to their jobs and the entertainment industry. Acknowledging such concerns, California lawmakers have continued to make AI-generated digital replicas a main focus. On September 17th, 2024 at the headquarters of SAG-AFTRA, the union representing over 160,000 performers, Governor Gavin Newsom signed into law two bills, **AB 2602** and **AB 1836**, which aim to protect performers - both living and dead - against the unauthorized use of AI-generated digital replicas.

What is a "Digital Replica"?

As defined in both AB 2602 and AB 1836, 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.” It has been well reported that digital replicas have been used to create deceptive advertisements to fool the public into thinking that various celebrities have endorsed products, services and brands that they have no relationship with; where such celebrities never granted rights to use their likeness to, nor were engaged to perform services for, the companies promoting the products and services.

Of note, traditional uses of non-generative AI technology to finish and refine sound recordings and audiovisual content (including that which contains the likeness of a performer) are not prohibited by AB 2602 and AB 1836. Both laws clearly exclude from the definition of digital replica “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 copyright holder.”

AB 2602: Protecting Against Unfair Contractual Terms

AB 2602 amends Section 927 of the California Labor Code to protect individuals (including performers) against vague, unfair, and unethical contractual terms that may, deceptively and without the performer’s full awareness, permit the unregulated production, use and distribution of digital replicas of their likeness. Specifically, this new law makes such contractual provisions unenforceable, if:

- The provision permits the use of a digital replica of the individual as a substitution for work that the individual would have otherwise performed, in person.
- The provision fails to state, with specificity, a description of the intended uses of the digital replica - unless the intended uses are “consistent with the terms of the contract” for the performer’s services and “the fundamental character of the photography or soundtrack as recorded or performed.”
- The individual was not represented by either legal counsel or an applicable labor union (provided the applicable union agreement specifically addresses digital replicas).

The foregoing elements of AB 2602 speak to chief concerns of the performing arts community - namely, the use of digital replicas to produce the same performances that a live performer would otherwise produce, thereby reducing employment opportunities for performers and a lack of transparency and control by performers over the use of their likenesses.

This law will take effect beginning on January 1, 2025.

AB 1836: Prohibiting Digital Replicas of Deceased Personalities

AB 1836 amends California's Post-Mortem Right of Publicity statute in Section 3344.1 of the California Civil Code, to protect against the unauthorized exploitation of digital replicas of deceased personalities. Once this amendment takes effect on January 1, 2025, it will be illegal to produce, distribute, or otherwise make available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without prior consent. Some exceptions will be made if the use is fleeting or is in connection with certain entertainment or commentary work (e.g., documentaries, news, criticism, satire, parodies).

Under the new law, if an advertiser like Pepsi wanted to run a throwback version of their Pepsi Generation campaign utilizing a digital replica to create a new performance of Michael Jackson, permission would be required from his estate not only to use his likeness in general, which was already covered by the statute, but to actually create a digital replica of his likeness, and then use that digital replica to create a new performance.

Violation of this law carries a penalty of the greater of \$10,000 or the actual damages suffered by a person controlling the rights to the deceased personality's likeness.

More Implications of AI in the Industry

As AI increasingly becomes a central component of life and work, it is also becoming increasingly clear that this technology can present danger when used by malicious or irresponsible parties. In addition to the new laws referenced above, California also passed two bills on September 19, 2024 that, in turn, criminalize the creation and distribution of sexually explicit digital replicas intended to cause emotional distress (SB 926), and require social media platforms to enact reporting and take-down mechanisms for victims of this type of harmful content (SB 981). Another bill newly signed into law by Governor Newsom (SB 942) requires AI providers to incorporate digital, invisible watermarks in AI-generated content for better transparency and accountability.

California is not alone in its efforts to implement legal protections to guard against the misuse of digital replicas. Earlier this year, Tennessee's ELVIS Act went into effect, which expanded the state's existing right of publicity law to prohibit the use of AI to mimic a person's photograph, voice or likeness without permission. In addition, over a dozen states have passed laws this year restricting the creation and use of digital replicas in the context of political advertising.

At the federal level, the U.S. Copyright Office released a report in July 2024 calling for the creation of a new federal law to address the potential harms of digital replicas, and U.S. Congress has been considering a bill known as the NO FAKES Act addressing this issue as well. Additional laws addressing the use of AI to generate digital replicas are likely to proliferate as this technology continues to mature.

For More Information

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