

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2602 (Kalra)
Version: June 10, 2024
Hearing Date: July 2, 2024
Fiscal: Yes
Urgency: No
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SUBJECT

Contracts against public policy: personal or professional services: digital replicas

DIGEST

This bill provides that a provision in an agreement for the performance of personal or professional services that contains a provision allowing for the use of a digital replica of an individual's voice or likeness is unenforceable if it does not include a reasonably specific description of the intended uses and the individual is not represented by legal counsel or by a labor union, as specified.

EXECUTIVE SUMMARY

Artificial intelligence (AI) is often described as computers or machines that are capable of simulating human intelligence and problem-solving capabilities. At the center of last year's historic writers' and actors' strikes was the growing use of AI in the industry. Given the transformative capabilities of generative artificial intelligence to produce realistic digital replicas of these personalities, concerns have grown that the industry will increasingly rely on these digital replicas, rather than on human performances. More startlingly is the issue of actors signing away the rights to use these digital replicas without fully appreciating the terms or consequences.

This bill makes unenforceable provisions in a contract that allow 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 if the intended uses of the digital replica are not properly described and where the individual was not represented by legal counsel or a labor union representative.

The bill is sponsored by SAG-AFTRA. It is supported by various organizations, including the Recording Industry Association of America and Oakland Privacy. No timely opposition was received by the Committee. It passed out of the Senate Labor, Public Employment and Retirement Committee on a vote of 5 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that a promise between any employee and prospective employer related to joining or not joining a union is contrary to public policy and unenforceable. (Lab. Code § 922.)
- 2) Prohibits, with regard to claims arising in California, employers from requiring employees who primarily reside and work in California to adjudicate claims outside of California or forgo the substantive protections of California laws, unless the employee was represented by legal counsel in contracting away such rights. (Lab. Code § 925.)
- 3) Provides a cause of action for individuals against any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, except as provided. (Civ. Code § 3344.)

This bill:

- 1) Provides that a provision in an agreement between an individual and any other person for the performance of personal or professional services is unenforceable only as it relates to a new performance, fixed on or after January 1, 2025, by a digital replica of the individual if the provision meets all of the following conditions:
 - a) 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.
 - b) The provision does not include a reasonably specific description of the intended uses of the digital replica. However, failure to include this does not render the provision unenforceable if the uses are consistent with the terms of the contract and the fundamental character of the photography or soundtrack as recorded or performed.
 - c) The individual was not represented in any of the following manners:
 - i. By legal counsel who negotiated on behalf of the individual licensing the individual's digital replica rights, and the commercial terms are stated clearly and conspicuously in a contract or other writing signed or initialed by the individual.
 - ii. By a labor union representing workers who do the proposed work, and the terms of their collective bargaining agreement expressly addresses uses of digital replicas.

- 2) Clarifies that it does not affect provisions of a contract other than a provision identified above and does not impact, abrogate, or otherwise affect any exclusivity grants contained in, or related to, such a provision.
- 3) Defines “digital replica” as a digital simulation of the voice or likeness of an individual that so closely resembles the individual’s voice or likeness that a layperson would not be able to readily distinguish the digital simulation from the individual’s authentic voice or likeness.

COMMENTS

1. Updating the law to address “digital replicas”

This bill seeks to address the use of “digital replicas,” which it defines as a digital simulation of the voice or likeness of an individual that so closely resembles the individual’s voice or likeness that a layperson would not be able to readily distinguish the digital simulation from the individual’s authentic voice or likeness.

Digital replicas, in some form, have been around for a while but the technology has been rapidly advancing:

Such scenarios can sound like science fiction, but “performances” by the past selves of aged or even deceased actors have helped carry movies like 2016’s “Rogue One: A Star Wars Story.” Aided by motion capture recorded on a different actor, Peter Cushing, who died in 1994, reprised his role as Grand Moff Tarkin from the original 1977 “Star Wars” film. (His estate gave permission.)

“Digital humans have been part of the visual effects process for quite a while now – about 20 years,” said Paul Franklin, a visual effects supervisor at DNEG.¹

The concern from the artistic community is that the terms of using such digital replicas need to be fairly negotiated:

Innovations in digital technology and artificial intelligence have transformed the increasingly sophisticated world of visual effects, which can ever more convincingly draw from, replicate and morph flesh-and-blood performers into virtual avatars. Those advancements have thrust

¹ Marc Tracy, *Digital Replicas, a Fear of Striking Actors, Already Fill Screens* (August 4, 2023) The New York Times, <https://www.nytimes.com/2023/08/04/arts/television/actors-strike-digital-replicas.html>. All internet citations are current as of June 27, 2024.

the issue toward the top of the grievances cited in the weekslong strike by the actors' union.

SAG-AFTRA, the union representing more than 150,000 television and movie actors, fears that a proposal from Hollywood studios calling for performers to consent to use of their digital replicas at "initial employment" could result in its members' voice intonations, likenesses and bodily movements being scanned and used in different contexts without extra compensation.²

This bill, building off the negotiated settlement of the strikes discussed above, targets provisions for the performance of services that allow for the use of digital replicas in place of in-person performances. The bill makes such provisions unenforceable when the individual subject to the contract has not be adequately represented by either legal counsel or a labor representative and the relevant provision fails to include a reasonably specific description of the intended uses of the digital replica, except as provided. The bill makes clear that this only affects the offending provision.

2. Stakeholder positions

According to the author:

Last year, SAG-AFTRA took part in a historic strike, bargaining with major studios on critical topics including the impact of artificial intelligence on the future of workers in the entertainment industry. Artificial intelligence has shown to be capable of reproducing or creating content based on a performer's work, without their permission or compensation. Some contracts in the entertainment industry have included clauses that grant full use of a performer's voice and likeness forever. While the industry explores new opportunities using artificial intelligence, performers must not be exploited or coerced into relinquishing their digital rights.

AB 2602 strikes a balance that allows the industry to adapt to technological advancements while also protecting performer's rights to their digital self. This bill will require a performer's informed consent and proper representation in executing a contract for any transfer of rights of that individual's likeness or voice.

² *Ibid.*

Writing in support, SAG-AFTRA, the sponsor of the bill, states:

Protection of a performer’s digital voice and likeness is a critical issue for SAG-AFTRA. It is crucial that performers—and all individuals—control whether and how their digital self is exploited. If they enter into an agreement, it must be with informed consent. This is critical to ensure they can continue to make a living.

SUPPORT

SAG-AFTRA (sponsor)
Concept Art Association
Los Angeles County Democratic Party
Oakland Privacy
Recording Industry Association of America

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

SB 970 (Ashby, 2024) ensures, among other things, that media manipulated or generated by artificial intelligence technology is incorporated into the right of publicity law and criminal false impersonation statutes. SB 970 was held in the Senate Appropriations Committee.

AB 1836 (Bauer-Kahan, 2024) prohibits a person from producing, distributing, or making available the digital replica of a deceased personality’s voice or likeness in an expressive audiovisual work or sound recording without prior consent, except as provided. AB 1836 is currently in this Committee.

Prior Legislation: None known.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 5, Noes 0)
Assembly Floor (Ayes 62, Noes 0)
Assembly Appropriations Committee (Ayes 11, Noes 1)
Assembly Privacy and Consumer Protection Committee (Ayes 9, Noes 0)
Assembly Labor and Employment Committee (Ayes 5, Noes 0)
