Date of Hearing: April 23, 2024

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION
Rebecca Bauer-Kahan, Chair
AB 2602 (Kalra) – As Amended April 15, 2024

AS PROPOSED TO BE AMENDED

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

SYNOPSIS

Owing to transformative advancements in artificial intelligence, digital replicas—computer-generated reproductions of an individual's likeness, voice intonations, and bodily movements—can now be used to create entirely new "performances" in lieu of human actors and musicians. The author argues that performers across the entertainment industry have been inadvertently signing away the rights to their digital selves through clauses buried in contracts that can look like standard copyright or advertising language. Under these agreements, individuals unknowingly authorize studios to use their voice and likeness, in the phrasing of one example, "in any and all media and by all technologies and processes now known or hereafter developed, throughout the universe and in perpetuity." Non-union performers, who may not have an agent negotiating on their behalf, are especially at risk of this exploitative practice.

This bill, which is sponsored by the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) and the California Labor Federation, is intended to ensure performers fully understand the stakes before transferring the rights over their digital likenesses. The bill does so by deeming unenforceable contractual provisions governing digital replicas (1) that do not sufficiently delineate the uses of the digital replica, and (2) for which the performer lacked proper representation. Such representation may be in the form of an attorney or labor union representative.

The bill is supported by a coalition of organizations representing artists, as well as by Oakland Privacy. Chamber of Commerce opposes a prior version of the bill, and Motion Picture Association (MPA) takes an oppose-unless-amended position. Many of MPA's requested amendments are adopted in the proposed Committee amendments.

The bill passed the Labor Committee by a vote of 5-0.

SUMMARY: Deems unenforceable a contractual provision governing new performances involving a digital replica, unless the provision is sufficiently specific as to the uses of the digital replica and the performer was represented during contract negotiations. Specifically, **this bill**:

1) Deems unenforceable a provision in an agreement between an individual and any other person for the performance of personal or professional services as it relates to a new performance by a digital replica if both of the following apply:

    a) The provision does not clearly define and detail all of the proposed uses of the digital replica.

    b) The individual was not represented in either of the following manners:

i) By a legal counsel who negotiated on behalf of the individual licensing the individual's digital replica rights, and the licensing terms existing in a standalone written agreement.

ii) By a labor union representing workers who do the proposed work, and the terms of their collective bargaining agreement expressly covers uses of digital replicas.

2) Provides that an exclusivity provision in an underlying agreement applicable to the creation and use of a digital replica remains in force even if a provision relating to the creation and use of a digital replica is held to be unenforceable under the bill.

3) Defines "digital replica" as a computer-generated, electronic representation of the voice or likeness of an individual that is readily identifiable as that individual and fixed in a sound recording or audiovisual work.

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 whose likeness is used for unauthorized commercial purposes. (Civ. Code § 3344.)

FISCAL EFFECT: As currently in print, this bill is keyed fiscal.

COMMENTS:

1) **Digital replicas and the entertainment industry**. Despite having been dead for 64 years, James Dean was cast in a movie in 2019 using a digital replica: a computer-generated avatar of an individual's likeness—their face, body, voice, movement; indeed, their very identity—that appears authentic and can be manipulated to move in life-like fashion. "In effect, digital replicas enable moviemakers to use existing stills, footage, and data scans of an actor to make it appear as though an actor gave a performance in a movie that the actor never actually gave. In the past, the technology has been used to finish movies when an actor dies before filming is complete. As the technology has advanced, however, it has become capable of creating entirely new performances in movies that actors had no active role in making."[1]

Examples abound. *Star Wars: The Rise of Skywalker* repurposed unused footage of Carrie Fisher from *The Return of Jedi*, with Fisher's daughter serving as the body stand-in for the scene.[2] The

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[1] Alexandra Curren, Note, *Digital Replicas: Harm Caused by Actors' Digital Twins and Hope Provided by the Right of Publicity* (2023) 102 Tex. L. Rev. 155, 159.
[2] Langmann, "How J.J. Abrams Pulled Off Carrie Fisher's CGI Flashback in *Star Wars: The Rise of Skywalker*" (Jan. 8, 2020) *Esquire*, https://www.esquire.com/entertainment/movies/a30429072/was-carrie-fisher-cgi-in-star-wars-the-rise-of-skywalker/.

show *Ted Lasso* used a visual effects technology to "[t]o pack three seasons' worth of English soccer stadiums with exasperated or exhilarated crowds."[3] A song created with artificial intelligence to replicate the voices of performers Drake and The Weeknd went viral on social media.[4]

Concerns regarding the use of artificial intelligence in the entertainment industry played a major role in the 2023 strike by writers and performers that brought Hollywood to a standstill. One commenter described the issue as follows:

> The actors' demands include protections against digital replicas, pushing back against indications that production companies do not take their concerns seriously. They worry that their current contracts, as well as the larger legal landscape, are insufficient to protect actors against abuse of digital replicas. Artists are also concerned with the bigger picture; they worry that rapid implementation of artificial intelligence without thoughtful safeguards will not only harm actors but also kill the intangible thing that makes art art.[5]

After months of negotiations with the Alliance of Motion Picture and Television Producers, SAG-AFTRA ratified an agreement that, among other things, "establishes detailed informed consent and compensation guardrails for the use of AI, hair and makeup equity, meaningful protections for the casting process, sexual harassment prevention protections and more."[6] With regard to artificial intelligence, the agreement governs various uses of digital replication and generally requires that the performer's "clear and conspicuous" consent to use the digital replica be contained in a separate writing, along with a "reasonably specific description of the intended use."[7]

2) **Author's statement.** The author writes:

> 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.
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> 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

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[3] Tracy, "Digital Replicas, a Fear of Striking Actors, Already Fill Screens" (Aug. 4, 2023) *New York Times*, https://www.nytimes.com/2023/08/04/arts/television/actors-strike-digital-replicas.html.
[4] Savage, "AI-generated Drake and The Weeknd song goes viral" (Apr. 17, 2023) BBC, https://www.bbc.com/news/entertainment-arts-65298834.
[5] *Digital Replicas*, *supra*, at p. 161.
[6] Lawler, "Hollywood's actors vote to make their new deal official—the strikes are really over" (Dec. 5, 2023) *The Verge*, https://www.theverge.com/2023/12/5/23990186/hollywoods-actors-vote-to-make-their-new-deal-official-the-strikes-are-really-over.
[7] SAG-AFRTRA, "TV/Theatrical Contracts 2023," https://www.sagaftra.org/files/sa_documents/TV-Theatrical_23_Summary_Agreement_Final.pdf.

> performer's informed consent and proper representation in executing a contract for any transfer of rights of that individual's likeness or voice.

3) **Right of Publicity.** The use of a person's name or image without consent for commercial purposes has long been recognized as an actionable invasion of privacy under common law principles. In 1974, California Civil Code section 3344 codified the right to publicity for living personalities, imposing liability on 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 prior consent.[8]

In *Zacchini v. Scripps-Howard Broad, Co*. (1977) 433 U.S. 562, the United States Supreme Court framed the right in terms of economic rather than privacy interests:

> The State's interest in permitting a "right of publicity" is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment. The State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation? "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay. [Citation.]"[9]

4) **Public policy versus private contracts.** The author's office provides the following example of the type of contractual provision that this bill would render unenforceable:

> Player consents to the use of Player's name, voice (actual or simulated), likeness (actual or simulated) and biography, with no additional compensation to Player, in any and all media and by all technologies and processes now known or hereafter developed, throughout the universe and in perpetuity…[10]

Under this bill, such all-encompassing provisions would be deemed unenforceable as to the rights over the digital replica. Additionally, even more specific provisions would be unenforceable unless the performer was represented by counsel or a union representative in the course of negotiations. As such, this bill implicates the constitutional prohibition on impairment of contracts. In 2020, the California Supreme Court summarized the analytical framework for state infringement on private contracts as follows:

> "Both the United States and California Constitutions contain provisions that prohibit the enactment of laws effecting a 'substantial impairment' of contracts, including contracts of employment." This constraint applies to public contracts, as well as those between private parties. As suggested by the reference to a substantial impairment, not every legislative impairment of contractual relations triggers the contract clause. "[T]he prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."

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[8] Ch. 1595, Stats. 1971.
[9] *Id.* at p. 573.
[10] Scheiber and Koblin, "Will a Chatbot Write the Next 'Succession'?" (Apr. 29, 2023) New York Times, https://www.nytimes.com/2023/04/29/business/media/writers-guild-hollywood-ai-chatgpt.html.

> [. . .] As a threshold question, the court must determine "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' [Citations.] The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." In making this determination, "the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights."
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> If the state law is found to create a "substantial" impairment, "the inquiry turns to the means and ends of the legislation." To justify the legislation, the state "must have a significant and legitimate public purpose behind the regulation, [citation], such as the remedying of a broad and general social or economic problem. [Citation.] … The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." If the legislation survives that scrutiny, "the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'"[11]

Arguably, the bill does not operate as a substantial impairment of a contractual relationship. It leaves intact existing contracts except for narrow circumstances involving the use of digital replicas in which the intended uses were not clearly delineated and the performer lacked representation. Depending on the specifics of the contract, it is likely that in many such cases the parties did not reasonably expect that a generic clause relating to the use of a person's "simulated" likeness could soon render the performer obsolete.

Even if it is assumed that the bill substantially impairs vested rights, the bill is likely to withstand the lenient "legitimate public purpose" test set forth above. As Professor Erwin Chemerinsky writes, "virtually all laws have been found to meet this deferential scrutiny."[12] Here, it can be argued that the bill serves a legitimate public purpose by resetting bargaining rights that have been upended by a sudden, dramatic transformation in technology. This targeted adjustment of rights and responsibilities, where the performer was unlikely to have understood the professionally devastating consequences of signing away the licensing rights to their digital self in perpetuity, appears to be appropriate to the bill's public purpose of ensuring that performers make fully informed decisions regarding the use of their likeness.

Summing this issue up, Oakland Privacy, writing in support, states:

> It makes sense to us to protect people's literal physical attributes for a while longer until we all have a better understanding of what we are selling and for what purposes. While creative work like songs are deeply personal and not easily replaced if stolen from their creator, our physical likenesses are even more intimate and less replaceable, so it makes sense to be cautious and assist people who had little to no understanding of what they signed on to. Assembly Bill 2602 provides the opportunity for the re-negotiation of contracts with the appropriate guidance to protect each party's rights, which may not have been present when the original contract was signed.

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[11] *Alameda County Deputy Sheriff's Assn. v. Alameda County Employee's Retirement Assn.* (2020) 9 Cal.5th 1032, 1074-1075, italics in original.
[12] Chemerinsky, "Constitutional Law: Principles and Policies" (7th ed.), p. 704.

5) **Amendments respond to opposition concerns.** Chamber of Commerce opposes the bill; however, their letter focuses on the express retroactivity provisions in the prior iteration of the bill. These provisions created confusion over whether the bill affects performances that occur before its effective date. In view of such concerns, the author recently amended the bill to apply to "new" performances. As reflected below, the author has agreed to further clarify this by adding phrase "on or after January 1, 2025."

Taking an oppose-unless-amended position, MPA claims "AB 2602 is an effort to legislate a subject of collective bargaining and to override the recently concluded collective bargaining agreement." They request a number of clarifications, most of which are reflected in the amendments below. Some of these changes reflect the wording of the collective bargaining agreement, such as the requirement that the performer's "clear and conspicuous" consent to use the digital replica be contained in a separate writing, as well as the requirement that the agreement must contain a "reasonably specific description of the intended use" of the digital replica. MPA also requests that the definition of "digital replica" match that of AB 1836 (Bauer-Kahan), which this Committee recently passed. The amendments are as follows:

927. (a) 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***, on or after January 1, 2025,*** by a digital replica of the individual if the provision meets all of the following conditions:

(1) 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.

(2) The provision does not ~~*clearly define and detail all of the proposed*~~ ***include a reasonably specific description of the intended*** uses of the digital replica.

(3) The individual was not represented in either of the following manners:

(A) By legal counsel who negotiated on behalf of the individual licensing the individual's digital replica rights, and the licensing terms ***are stated clearly and conspicuously in an employment contract that is separately signed or initialed by the individual or in a separate writing that is signed by the individual*** ~~*exist in a standalone written agreement*~~.

(B) By a labor union representing workers who do the proposed work, and the terms of their collective bargaining agreement expressly covers uses of digital replicas.

(b) ~~*An exclusivity provision in an underlying agreement applicable to the creation and use of a digital replica shall remain in force even if a provision relating to the creation and use of a digital replica is held to be unenforceable under this section.*~~ ***This section does not affect provisions of a contract other than a provision that falls under subdivision (a).***

(c) ~~*As used in this section, "digital replica" means a computer-generated, electronic representation of the voice or likeness of an individual that is readily identifiable as that individual and fixed in a sound recording or audiovisual work.*~~ ***"Digital replica" means 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.***

5) **Related legislation.** AB 1836 (Bauer-Kahan, 2024) grants a specific cause of action to beneficiaries of deceased "personalities"—individuals whose likeness has commercial value at the time of their death— for unauthorized use of a digital replica of the celebrity in audiovisual works or sound recordings. The bill is pending in the Assembly Judiciary Committee.

AB 3050 (Low, 2024) would provide that an AI-generating entity or individual that creates a deepfake using a person's name, voice, signature, photograph, or likeness, in any manner, without permission from the person being depicted in the deepfake, is liable for the actual damages suffered by the person or persons as a result of the unauthorized use. The bill is pending in this Committee.

AB 459 (Kalra, 2023) was gut-and-amended at the end of last session to be substantially similar to this bill. The bill is pending in Senate Rules.

SB 970 (Ashby, 2024) would provide that, for purposes of Civil Code Section 3344, a synthetic voice or likeness that a reasonable person would believe to be a genuine voice or likeness, is deemed to be the voice or likeness of the person depicted. The bill is pending in the Senate Public Safety Committee.

ARGUMENTS IN SUPPORT

The California Labor Federation, a co-sponsor of the bill, writes:

> Current law prohibits the use of an individual's name or likeness for commercial purposes without the individual's consent. However, in contracts with major studios, artists have unintentionally signed agreements authorizing the on-going use of their voice and likeness through digital replication without additional compensation or proper consent. These contract clauses, signed well before the capabilities of AI technology were ever imagined, would have been disguised as standard copyright or advertising language, but now serve as the studio's right to digitally own a performer's image. The lack of explicit legal protections means that artists will continue to unknowingly have their own voices and likenesses used without proper compensation or control over the most personal of possessions—their image.
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> Artists, especially those new to the industry who do not have access to legal or union representation, are vulnerable to signing away their livelihoods to get a big break. Artists only have one voice and one image, an irreplaceable good. By stripping the likeness or voice from a performer without a fair agreement, studios can essentially "own" the rights of a performer and produce content for the studio's benefit alone.
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> This phenomenon affects all performers, from up-and-coming talent to established artists. Studios and content producers currently have the unfettered ability to buy and sell the images of performers without having to pay wages, benefits, or any other compensation.
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> AB 2602 addresses these challenges by requiring performers to have union or legal representation before signing contracts that transfer the likeness or voice of a performer to another person or employer. This bill will address the use of AI in the entertainment industry, but the concept can be applied to other industries where technology exploits human skills and products to the benefit of employers, not workers.

It is critical that workers and their unions have a voice in the development and use of AI and other technologies in the workplace. Otherwise, technology will rapidly worsen the exploitation of workers and the elimination of jobs. California performers are some of the best in the world and should have the protections they deserve in the digital age. AB 2602 ensures this right is enshrined in state law.

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation, Afl-cio (co-sponsor)
SAG-AFTRA (co-sponsor)
Artists Rights Alliance (ARA)
Black Music Action Coalition
Music Artists Coalition (MAC)
Oakland Privacy
Songwriters of North America

Opposition

CalChamber

Oppose Unless Amended

Motion Picture Association

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