INSIGHTS

Media & Entertainment

Lights, Camera, Legislation: Are Your Entertainment Contracts AI Ready?

Synthetic performances using digital replicas generated by AI require specific provisions

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With artificial intelligence becoming increasingly commonplace in the

entertainment industry, lawmakers are enacting legislation regulating the use of AI as well as state privacy laws that regulate the use of personal and biometric information for training, deploying, and engaging AI models. For the performers, talent representatives, studio executives, and lawyers who negotiate, draft, and enter into agreements every day, it is imperative to understand these laws, and when necessary, modify templates to ensure the agreements are enforceable.

Drafting Contracts Permitting the Use of Digital Replicas

In 2023, the new collective bargaining agreement between film and television studios and the Screen Actors Guild introduced provisions governing the use of "digital replicas," including the form of consent required from SAG actors. In this context, a digital replica is a synthetic performance using an actor's image, voice, or likeness generated by AI. In 2024, California and New York expanded these concepts to cover all types of performances created or materially altered by AI.

In California, AB 2602, which was signed into law last September and became effective January 1, 2025, requires a performer's contractual consent and proper representation before using a digital replica. Specifically, this law modifies California's Labor Code to require that any contract that permits the creation or use of a digital replica in lieu of work the individual would have otherwise performed must include a reasonably specific description of the intended uses of the digital replica unless:

- the individual was represented by legal counsel, who negotiated on behalf of the individual resulting in an agreement where the commercial terms are clear and conspicuous and

signed or initialed by the individual, or

- the individual was represented by a labor union representing workers who perform the proposed work, with their collective bargaining agreement expressly addressing uses of digital replicas (such as the SAG-AFTRA Agreement).

See Cal. Labor Code §§ 927(a)(2) and (3). Under this law, contracts governing the creation and use of digital replicas are enforceable only if the contract specifically lays out the intended uses of digital replicas, or one of the representation provisions above is met.

In December 2024, New York enacted Senate Bill 7676B, which is substantially identical to California's law. *See* N.Y. Gen. Ob. L. § 5-302.

Since their passage, the new laws have raised several questions implicating novel legal issues that the entertainment industry must now confront. For example:

What Constitutes a Digital Replica?

Digital replicas, sometimes referred to as deepfakes, have different definitions depending on the state. In California, digital replicas are defined as computer-generated, highly realistic electronic representations that are readily identifiable as the voice or visual likeness of an individual in a work that the performer did not actually perform or appear, or a work in which the performer did perform or appear, but the fundamental character of the performance has been materially altered. In New York, a digital replica is 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.

It is important to understand whether a synthetic performance qualifies as a digital replica, and therefore would fall within the reach of these new laws. Replicas that are obviously unrealistic—for example, using a performer's image or likeness altered to be part of an animation—would likely not qualify as a "digital replica," but using AI to place that same performer in a live-action film where they appear as themselves would likely qualify.

What Contracts are Implicated by the New Laws in California and New York?

Although California's AB 2602 only applies to "new performances, fixed on or after January 1, 2025," the law applies to existing contracts negotiated before that date if the contract authorizes the creation of the performer's digital replicas after January 1, 2025. By comparison, a contract executed in 2024 (or before) that allowed for the creation of a new performance by a digital replica *before* January 1, 2025, would not be affected by the law.

New York Senate Bill 7676B, meanwhile, only applies to contracts entered into or modified on or after January 1, 2025, regardless of when the digital replica is deployed.

What Is a "Reasonably Specific Description of the Intended Use" of a Digital Replica?

While this language has not been clarified due to both laws' recent passage, during negotiations, AB 2602's author provided an example of the type of contractual provision that the new California law 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...

As a result, contracting parties must review their existing agreements to determine whether they satisfy the legislations' requirements for a reasonably specific description of the intended uses and also should re-write their template agreements to ensure that existing and anticipated uses of AI are specifically addressed and described in the contract, unless negotiated by counsel or a labor union.

Can Contracting Parties "Opt Out" of the Legal Representation Requirement?

This too has not been decided. For example, in California, the legislative history of the statute and other California labor law provisions suggest that having performers waive their legal right to counsel provided for in AB 2602 is not permitted, so a waiver would not likely make the contract enforceable.

These are but a few of the many novel questions that have emerged following the passage of AB 2602 and SB 7676B, and many of these questions may take years to be definitively resolved.

Privacy Considerations

These two statutes are not the only legislation that could impact the enforceability of entertainment contracts or a company's potential liability for the creation of digital replicas. The California Consumer Privacy Act ("CCPA") requires businesses to provide notice, adopt

policies, and respect privacy rights granted to state residents regarding the use of one's personal and biometric information, which can include facial characteristics and voice prints, when creating and deploying digital replicas. Entertainment companies also should be aware of consent requirements and limitations on collection, storage, use, and disclosure under various state biometric laws. For example, Texas and Illinois law both require consent for the collection of biometric information without exception. Additionally, Texas law prohibits disclosure of biometric information subject to several narrow exceptions; both Texas and Illinois laws prohibit the sale or lease of biometric information; and Illinois law more broadly prohibits profiting from biometric information. Contracts therefore should inform performers that their personal and biometric information will be collected and used for specific intended use cases, and establish the performer's consent to collection, storage, use, and disclosure of their biometric information for the specified purposes regardless of legal or union representation. Changes to contract language are advisable to comply with these provisions even if the existing language meets the requirements of the 2023 SAG Agreement or the new California and New York digital replicas laws. Studios and production companies also will need to adopt and implement privacy policies and enter into data processing agreements with business partners that comply with the CCPA (and other state-level privacy statutes, including biometric laws, if applicable).

DWT's AI Team has been at the forefront of addressing these issues for its clients, including counseling industry professionals on statutory compliance and suggesting new language for template agreements that satisfy AB 2602, SB 7676B, and the CCPA. If you have questions about AB 2602, SB 7676B, their interplay with the CCPA and state biometric laws, or other legal issues relating to digital replicas, please

contact the authors of this article.