

## **Summary and Analysis of Proposed NO FAKES Act of 2023, Discussion Draft Dated October 11, 2023**

The “Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023” or NO FAKES Act of 2023 (released in discussion draft form) would create a “digital replication right” in both “living” and “dead” “individuals” to “authorize the use of the image, voice or visual likeness of the individual in a digital replica.” In the case of the dead, this right would be held by their “executor, heir, assign, or devisee.”

A “digital replica” is defined as a “newly-created, computer-generated, electronic representation of the image, voice, or visual likeness of an individual that is [nearly indistinguishable] from the actual image, voice, or visual likeness or that individual;” and “is fixed in a sound recording or audiovisual work in which the individual did not actually perform or appear.” I note that the brackets around “nearly indistinguishable” are in the discussion draft. I am not sure whether the brackets indicate that this language is on the chopping block. It is not entirely clear what the provision would mean in the absence of this language.

A “visual likeness” is defined as “the actual visual image or likeness of an individual . . . that is readily identifiable as the visual image or likeness of the individual because of a depiction of the face, image, likeness, or other visually identifiable characteristic of the individual or from information displayed in connection” with those aspects of the person. This provision could be quite broad as likeness is not defined nor is any “visually identifiable characteristic.” It is also not clear what “actual” means in this context, as the subsequent language suggests that it need not be the “actual” image or likeness.

### **Cause of Action**

The legislation would create a civil action for damages “by the individual or rights holder injured” by either the “production of a digital replica without the consent of the applicable individual or rights holder” or the “publication, distribution, or transmission of, or otherwise making available to the public, an unauthorized digital replica.” This provision is very broad, seeming to sweep into liability AI companies, hosts, users, and re-posters, and applying without regard to fault or knowledge and without regard to any confusion as to a person’s actual participation or performance, or their sponsorship.

The action could be brought by the underlying “individual” whose “image, voice, or visual likeness” is used—what I call elsewhere the “identity-holder”—or by anyone else who “owns or controls, including by virtue of an exclusive license the rights to the image, voice, or visual likeness” of the individual, or in the case of a “sound recording artist,” any person who has an “exclusive personal services” contract with that person “as a sound recording artist.” A “sound recording artist” is defined as someone who “creates or performs in sound recordings for economic gain or for the livelihood of the individual.”

As currently drafted, it is unclear what happens when a living performer or a devisee object to a record label’s enforcement. Even if the parties agree, does the performing artist recover damages or only the record label? Or do they split the recovery?

The draft text also suggests that licensees and holders of personal services contracts could sue the individuals themselves, and perhaps the individuals could sue the licensees or record labels for producing computer-generated performances the individuals object to. It's not clear how such conflicts would be resolved in the absence of contracts that govern such disputes.

It also seems that liability could occur even if the computer-generated works are derived with authorization from copyright holders who are producing new derivative works. This sets up a clash with federal copyright law.

### **Property Right**

The created right is designated as a "property right" and as "descendible and licensable in whole or in part, by the individual to whom the right applies." It is unclear whether this language limits postmortem rights only to the first party with whom they vest and precludes further descendibility or licensing.

### **Descendibility**

The descendibility provision tracks language in state publicity laws that do not require any commercial exploitation during a person's lifetime. Although the law is purportedly directed solely at working performers it seems to create a postmortem right in every single person that has ever lived without regard to whether they were performers, had commercial value, or lived as recluses. The provision does not have any registration requirement, nor does it require that the person die after the effective date of the proposed legislation. So, it will create performance rights, if enacted, in every dead person dating back 70 years. The provision is not limited to those who died in the United States so seems to apply to those who died anywhere in the world.

### **Licensing**

Thankfully, the draft does not set up a fully transferable right in a person's image and voice, but, unfortunately, it essentially does almost the same thing. Although the right is stated to be exclusive to the "applicable individual" during their lifetime, the licensing provision is so broad that it could essentially be controlled by others during the person's lifetime in all contexts and for the entirety of their life. The licensing regime has some limits, but they are woefully insufficient. Licenses are "valid only" if in writing and if the party was represented by counsel. But being represented by counsel, while an improvement over not being represented, is woefully inadequate protection when we are considering perpetual, global control over a human being's voice and likeness, and the ability for others to generate performances by that person forever and in unknown contexts as if they are saying or singing words they never said nor agreed to. This poses a broad threat to society by undermining the meaningfulness and trust in authentic communication.

In addition, because the draft allows for unlimited licenses, having an attorney represent people does not undo the possibility that parents will be able to license their children's rights in perpetuity, nor that aspiring actors or singers with few options will sign problematic contracts. The draft also allows licensing *without* legal representation if a collective bargaining agreement governs such licenses. This provision seems likely directed at facilitating an end to the actors' strike, but unions should not be able to decide for individuals when perpetual rights in their performances should be granted to others.

There is no provision in the draft that addresses prior licensing or transfer agreements that involve a person's name, image, likeness, and voice rights setting up significant conflicts with prior contracts.

For the postmortem right, there appears to be no provision for transfers or even licenses beyond the designated "executors, assigns, or devisees of the applicable individual." This could be a good idea (if such a postmortem right is created)—to limit such postmortem rights to a single designated set of

devises, without allowance for any further transfer or licensing. If all of these devisees die before the expiration of the 70-year period, it is unclear whether the right is extinguished.

### **Exclusions**

The legislation has a number of exclusions from liability that seek to soften the potential impact of the work in the context of news, commentary, and expressive works. These exclusions include the use in “news, public affairs, or sports broadcast or report;” uses in “a documentary, docudrama, or historical or biographical work;” “representation[s] of the applicable individual as that individual;” uses for purposes of “comment, criticism, scholarship, satire, or parody;” and advertisements for these excluded uses. There is also an exclusion for “de minimis or incidental” uses. The enumerated exclusions are “regardless of the degree of [dramatization],” with the brackets in the original text. If read broadly, the “representation of the individual as that individual” provision could insulate from liability even the Drake/Weeknd & Hanks’s examples. I think this provision was meant to mirror similar language in a recent New York postmortem digital replica law that clarified that fictional works could use deceased performers to represent themselves. This needs some fine-tuning in the next draft.

Notably, the use of a “disclaimer” is expressly rejected as a basis for a defense, as is the defense that a person “did not participate in the creation, development, distribution, or dissemination of the applicable digital replica.” This suggests that liability may go beyond even strict liability and apply to involuntary acts.

### **Remedies**

No provision for injunctive relief is included. Damages suffered by the injured party are recoverable or statutory damages in the amount of \$5,000 whichever is greater. Willful violations may be subject to punitive damages and prevailing parties may recover attorneys’ fees.

### **Preemption**

The law expressly does not limit or alter any state laws.

### **Retroactivity**

The proposed legislation would only apply to conduct that occurs after its enactment. One would presume that should the legislation proceed that an effective date would be differentiated from an enactment date so as to give time to remove potentially infringing content. It does not, however, address whether the postmortem provision applies to those who died before potential enactment.

For more general comments, concerns, and recommendations about the proposed legislation in its current form, see Jennifer E. Rothman, “Proposed Draft Digital Replica Bill Risks Living Performers’ Rights over AI-Generated Replacements,” at

[https://rightofpublicityroadmap.com/news\\_commentary/draft-digital-replica-bill-risks-living-performers-rights-over-ai-generated-replacements/](https://rightofpublicityroadmap.com/news_commentary/draft-digital-replica-bill-risks-living-performers-rights-over-ai-generated-replacements/)

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For more information contact Professor Jennifer E. Rothman at rothmj@law.upenn.edu