

Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2024

SECTION-BY-SECTION

Section 2 – Voice and Visual Likeness Rights

- Subsection (a): **Definitions**
 - Defines the following terms and phrases that are used in the bill: (1) digital replica; (2) individual; (3) online service; (4) production; (5) right holder; and (6) sound recording artist.
- Subsection (b): **Digital Replication Right**
 - *Nature of the Right* – Provides individuals with a new federal property right to authorize the use of their voice or visual likeness (a digital replication right). The right is not assignable during the individual’s lifetime but is licensable and does not expire upon the death of the individual.
 - *Post-Mortem Scope* – Explains that upon the death of the individual, the digital replication right is transferable, licensable, and exclusive to the executors, heirs, licensees, or devisees of the individual and the like for 10 years. The 10-year post-mortem term is renewable in 5-year increments so long as the right is actively and publicly used during the last two years of the original or renewed period; however, the post-mortem term is capped at 70 years (and could expire earlier if not renewed).
 - *License Requirements* – Sets forth the requirements for licenses involving adults and minors. For adults, the license duration is no longer than 10 years (it can be renewed), the license must be in writing, and the license agreement must describe intended uses of the digital replica. Includes additional guardrails for minors—the license duration can be no longer than 5 years (it can be renewed) and terminates when the individual turns 18; the license must also be in writing, must describe the intended uses of the digital replica, and must be approved by a court. The license requirements do not apply if the license is governed by a collective bargaining agreement and the license requirements do not affect terms and conditions of other licenses or contracts.
 - *Post-Mortem Transfers* – Establishes that a post-mortem transfer or license must be in writing and signed by the right holder or the right holder’s authorized representative to be valid.
 - *Registration for Post-Mortem Renewal* – Establishes a registration system and directory for renewing the post-mortem term that the U.S. Copyright Office will maintain and make available to the public. The registration will include the name of the deceased individual, a statement under penalty of perjury that that the right holder has engaged in active and public use of the voice or visual likeness, the identity and contact information of the right holder, and any other information that the Register of

Copyrights determines is appropriate. A right holder may also voluntarily register the original post-mortem term with the Copyright Office.

- *Post-Expiration or Termination Utilization of Authorized Uses* – Establishes that a digital replica embodied in a sound recording, image, audio-visual work, or transmission authorized under a license may continue to be used under the terms of that license after the license expires or terminates.

□ Subsection (c): **Liability**

- *General Liability for Prohibited Activities* – Creates liability for a person that engages in certain activities in a manner affecting interstate commerce (or using a means or facility of interstate commerce). The prohibited activities are: (1) producing a digital replica without consent of the applicable right holder; and (2) publishing, reproducing, displaying, distributing, or transmitting, or otherwise making available to the public a digital replica without consent of the applicable right holder.

- *Knowledge Requirement* – Requires actual knowledge, which could be obtained from a notice received from the right holder (or a person authorized to act on behalf of the right holder or an eligible plaintiff), or willful avoidance of actual knowledge that the material is an unauthorized digital replica.

- *Exclusions* – Excludes certain digital replicas from violating the digital replication right based on recognized First Amendment protections. These protections apply when the applicable digital replica is:

1. Produced or used in a bona fide news, public affairs, or sports broadcast or account if the digital replica is the subject of, or materially relevant to the subject of the broadcast or account;
2. A representation of the applicable individual as the individual in a documentary or in a historical or biographical manner, including some degree of fictionalization, unless the production or use is intended to, and does, create the false impression that the work is an authentic work that the individual participated in or the digital replica is embodied in a sound recording that is synchronized to accompany a motion picture or other audiovisual work, except to the extent that the use of the digital replica is protected by the First Amendment;
3. Produced or used consistent with the public interest in bona fide commentary, criticism, scholarship, satire, or parody
4. Used in a fleeting or negligible manner; and
5. Produced or used in an advertisement or commercial announcement for a purpose described in (1)–(4).

The exclusions do not apply when the applicable digital replica is used to depict sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A).

□ Subsection (d): **Safe Harbors**

- *Products and Services Capable of Producing Digital Replicas* – Provides a safe harbor from liability for manufacturing, importing, offering to the public, providing, or otherwise distributing a product or service unless the product or service: (1) is primarily designed to produce one or more unauthorized digital replicas; (2) has only limited commercially significant purpose or use other than to produce an unauthorized digital replica; or (3) is marketed, advertised, or otherwise promoted by that person or another acting in concert with that person with that person’s knowledge for use in producing an unauthorized digital replica.
- *Online Services* – Establishes a notice and takedown framework and safe harbor for online services. An online service that links or refers a user to an unauthorized digital replica and/or stores an unauthorized digital replica is not liable for a violation, as long as the online service removes or disables access to the unauthorized digital replica as soon as technically and practically feasible after receiving notice of a claimed violation and, in the case of an online service that stores material, promptly notifies the user who uploaded the material that the online service has removed or disabled access to the material.
- *Designated Agent* – Explains that to receive the safe harbor, an online service must designate an agent to receive notifications by providing the name, address, phone number, and e-mail address of the agent and other contact information on its website and to the Register of Copyrights. The Register of Copyrights will maintain a directory of agents.
- *Elements of the Notice* – Requires an effective notice to include: (1) the right holder’s (or person authorized to act on the right holder’s behalf or eligible plaintiff’s) signature; (2) identification of the individual whose voice or visual likeness is being used in an unauthorized digital replica; (3) identification of the material containing an unauthorized digital replica and sufficient information to allow the service to locate the replica; (4) the notifying party’s contact information; (5) a statement asserting a good faith belief that the material is an unauthorized use of a digital replica; (6) if not the right holder or eligible plaintiff, a statement that the notifying party is authorized to act on behalf of the right holder; and (7) information sufficient to identify the reference or link to the material or activity claimed to be an unauthorized digital replica and to permit the online service to locate that reference or link.
- *Penalties for a False or Deceptive Notice* – Provides that it is unlawful to knowingly materially misrepresent that the material requested to be removed is an unauthorized digital replica, that a person is authorized to act on behalf of the rights holder, and that the digital replica is unauthorized. A person who sends a false or deceptive notice is liable for the greater of \$5,000 or any actual damages, including the costs and attorney’s fees the alleged violator and any online service injured in relying on that notice to remove or disable access to material or activity.

□ Subsection (e): **Civil Action**

- *Eligible Plaintiffs* – Establishes the following as individuals that can bring a civil action for a violation: (1) a right holder; (2) the individual’s parent or guardian if the individual is younger than 18; (3) any other person that controls, including through a license, right to authorize the right holder’s voice or visual likeness; (4) any other person that owns or controls the right to authorize the use of the voice or visual likeness of a deceased right holder; or (5) in the case of a digital replica involving a sound recording artist, any person that has entered into a contract for the exclusive personal services of the sound recording artist as a sound recording artist or any person that has entered into an exclusive license to distribute or transmit one or more works that capture the sound recording artist’s audio performance.
- *Limitations Period* – Establishes a 3-year statute of limitations that runs from the date the plaintiff discovered, or with due diligence should have discovered, the violation.
- *Defense Not Permitted* – Explains that a defendant may not claim as a defense that it (1) displayed or publicly communicated a disclaimer stating that the digital replica was unauthorized or (2) disclosed that the digital replica was generated through artificial intelligence or other technology.
- *Remedies* – Provides that: (1) an individual who engages in a prohibited activity is liable for the greater of \$5,000 per work embodying the unauthorized digital replica or actual damages; (2) an online services that engages in a prohibited activity is liable for the greater of \$5,000 per violation or actual damages; (3) an entity that is not an online service that engages in a prohibited activity is liable for the greater of \$25,000 per work embodying the unauthorized digital replica or actual damages; (4) a plaintiff may seek injunctive relief; (5) a court may award punitive damages for a willful violation; (6) the court shall award reasonable attorney’s fees to a prevailing plaintiff; and (7) the court may award reasonable attorney’s fees to a prevailing defendant if the action was brought in bad faith.
- *Violation Defined* – Establishes that a violation means each display, copy made, transmission, and each instance of the unauthorized digital replica otherwise being made available on the online service, unless the online service has taken reasonable steps to remove or disable access to the unauthorized digital replica as soon as is technically and practically feasible for the online service after acquiring actual knowledge that the material is an unauthorized digital replica.
- *Objectively Reasonable Belief* – Caps damages at \$1,000,000 for an online service that has an objectively reasonable belief that material claimed to be an unauthorized digital replica does not actually qualify as a digital replica, regardless of whether the material is ultimately determined to be an unauthorized digital replica.
- *Replacement of Removed Material* – Allows an online service to restore material that it has removed or disabled access to without liability to the notice sender or the user who provided the material to the online service if the user who uploaded the material files a lawsuit against the notice sender claiming that the notice was false or deceptive no later

than 14 days after the user receives notice that material has been removed or disabled.

- Subsection (f): **Preemption** – Preempts causes of action under State law for the protection of an individual’s voice and visual likeness rights in connection with a digital replica, as defined in the NO FAKES Act, in an expressive work.
Notwithstanding that preemption, nothing in the NO FAKES Act preempts:
(1) causes of action under State statutes or common law in existence as of January 2, 2025, regarding a digital replica as defined in the Act; (2) causes of action under State statutes specifically regulating a digital replica depicting sexually explicit conduct as defined in 18 U.S.C. § 2256(2)(A) or an election-related digital replica; or (3) causes of action under State statutes or common law for the manufacturing, importing, offering to the public, providing, making available, or otherwise distributing a product or service capable of producing digital replicas.
- Subsection (g): **Rule of Construction** – Establishes that the NO FAKES Act is considered a law pertaining to intellectual property for purposes of 47 U.S.C. § 230(e)(2).
- Subsection (h): **Severability** – Explains that if any provision of the NO FAKES Act, or the application of any provision of the Act, is held invalid, then the remainder of the Act is not affected by that holding.
- Subsection (i): **Retroactive Effect** – Establishes that the liabilities under the NO FAKES Act apply only to conduct occurring, or licenses or contracts executed, after the Act’s enactment date and that the digital replication right applies to any individual, regardless of whether that individual dies before or after the Act’s enactment date. If a right holder has died before the date of enactment, the right vests in the right holder’s executors, heirs, assigns, or devisees.
- Subsection (j): **Effective Date** – Establishes an effective date that is 180 days after enactment.