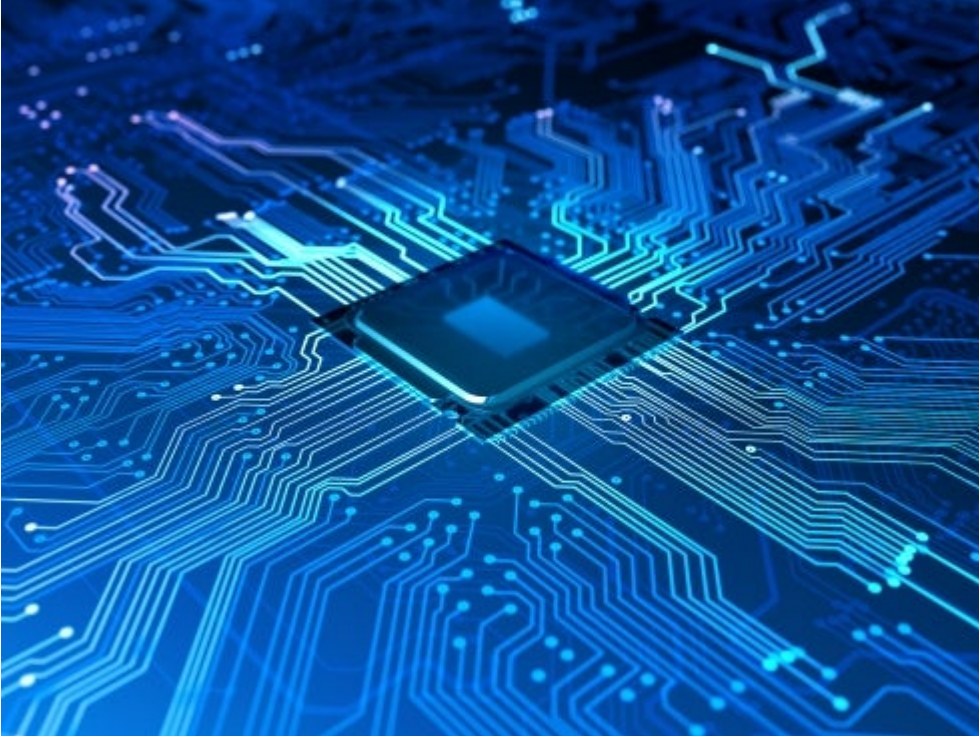


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September 27, 2024

In a Single Day, California Enacts Five Bills Tackling Digital Replicas and Deepfakes



Last week, over the course of a single day, California Governor Gavin Newsom made headlines by signing into law *five* new bills tackling complex issues involving digital replicas and deepfakes. Two of the bills are aimed at “digital replicas,”^[1] and the other three address concerns about deepfakes relating to elections.

Digital Replica Laws

With the passage of these two bills, California is one of only three states that currently have laws specifically regulating digital replicas or deepfakes outside the context of elections or pornography (joining Illinois and Tennessee).

The first of these bills is intended to address concerns raised by SAG-AFTRA and actors and performers in Hollywood that computer-generated digital replicas of performers may be used in place of human performers to replace work that otherwise would have been performed in person. It places certain conditions on the enforceability of provisions in services agreements that allow for such use. The second bill expands the prohibitions on the use of a digital replica of a deceased personality’s voice or likeness.

Assembly Bill 2602 (Kalra, D-San Jose)

Under [AB 2602](#) (to be codified at Cal. Lab. Code §927), a provision in a contract between an individual and any other person for a performance of personal or professional services may be *unenforceable* (as to performances fixed on or after January 1, 2025, by a digital replica of the individual) where *all of the following conditions are met*:

- First, the provision involves 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.

- Second, the provision **does not** include a “reasonably specific description of the intended uses of the digital replica” (except where “the uses are consistent with the terms of the contract for the performance of personal or professional services and the fundamental character of the photography or soundtrack as recorded or performed”).
- Third, the individual **was not** represented by (1) legal counsel negotiating the individual’s digital replica rights, where the commercial terms are stated “clearly and conspicuously in a contract or other writing” signed by the individual; or (2) a labor union where terms of their collective bargaining agreement “expressly” addresses use of digital replicas.

In all other circumstances (*i.e.*, where **any** of the above conditions are not present), the plain language of the statute dictates that the provision remains enforceable. This means that if the provision **does** include a reasonably specific description of the intended uses **OR** if the individual **was** represented, either by legal counsel (and the terms were clearly and conspicuously stated in the agreement) or by a labor union (under a collective bargaining agreement that addressed digital replicas, which currently only includes the recently re-negotiated SAG-AFTRA TV/Theatrics Contract), then the provision would be enforceable. We note that statements by [SAG-AFTRA](#) and [Rep. Ash Kalra](#) (who are sponsors of the bill), as well as descriptions of the legislation on Governor Newsom’s website and [in a number of media](#) accounts have suggested that **both** a reasonably specific description of the intended uses of the digital replica **and** representation by either a lawyer or a labor union (as specified in the new law) are required for such a provision to be enforceable. However, as explained above, this is contrary to what the plain language of AB 2602 appears to require.

Notably, AB 2602 states that to the extent a provision is deemed unenforceable, the remaining provisions of the agreement are unaffected, and it does not “impact, abrogate, or otherwise affect any exclusivity grants contained in, or related to, a provision subject to the law.”

Assembly Bill 1836 (Bauer-Kahan, D-Orinda)

Also enacted last week was [AB 1836](#), which amends California’s Civil Code to prohibit the use of a digital replica of a deceased personality’s voice or likeness in an expressive audiovisual work or sound recording without prior consent from the deceased personality’s estate or from surviving family members (with the right to consent to such uses). The bill makes any person who produces, distributes, or makes available the digital replica of a deceased personality’s voice or likeness in an expressive audiovisual work or sound recording without specified prior consent liable in an amount equal to the greater of \$10,000 or the actual damages suffered by a person controlling the rights to the deceased personality’s likeness.

AB 1836 eliminates the broad “expressive works” exemption under prior law that excluded use in any “play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works.” Instead, more limited exceptions apply for uses in connection with (1) news, public affairs, or sports broadcasts; (2) comment, criticism, scholarship, satire, or parody; (3) representation of the individual as themselves in a documentary or in a historical or biographical manner, including some degree of fictionalization (except where the document is **intended to create** and **does create** the false impression that the work is an authentic recording in which the individual participated); (4) a fleeting or incidental use; or (5) advertisements or commercial announcements for any of the above.

Election Deepfake Laws

Governor Newsom also signed three bills into law aimed at addressing the use of artificial intelligence (AI) to create deepfakes and other altered content in political communications. As AI technology has advanced, it has increasingly been used to mimic political candidates and create deceptive political communications. In this

election cycle, AI-powered tools have been employed to produce fake robocalls, fraudulent celebrity endorsements, and deepfakes imitating candidates' voices, including [one notable instance using the voice of President Joe Biden on the eve of the New Hampshire primary](#).

Existing California law prohibits the distribution of materially deceptive audio or visual media of a candidate within 60 days of an election unless the media includes a disclosure that it has been manipulated. Cal. Elec. Code § 20010. However, California legislators have become increasingly concerned about AI's growing role in political campaigns. In response, California has enacted three bills into law relating to AI and elections: Assembly Bill 2839, Assembly Bill 2655, and Assembly Bill 2355. These laws impose new requirements regarding the use, dissemination, and labeling of AI-generated content in election communications, and the laws' breadth covers candidates, committees, and large online platforms (predominately social media platforms). A summary of each law is provided below.

Assembly Bill 2655 (Berman, D-Palo Alto)

Titled the "[Defending Democracy from Deepfake Deception Act of 2024](#)," AB 2655 requires that large online platforms (*i.e.*, those with at least one million California users during the preceding 12 months) develop and implement "state of the art techniques" to identify certain digitally created or modified content that would falsely appear to a reasonable person to be an authentic record of the content depicted in the media and then to either label or remove such content (depending on various factors, such as the nature of the content). The law applies only within certain time periods prior to (and, in some cases, after) an election. The law also requires large online platforms to provide an easily accessible way for California residents to report content to be removed or labeled and stipulates that such labeling or removal must occur within 72 hours after receiving a report. The law empowers political candidates, election officials, the attorney general, and district attorneys or city attorneys to take action against platforms that do not comply, including seeking injunctive relief to compel the removal of the content if the platform fails to act. The requirements of this bill do not apply to materially deceptive content that is satire or parody, even if it does not include a disclaimer. This law takes effect January 1, 2025.

Assembly Bill 2839 (Pellerin, D- Santa Cruz)

[AB 2839](#) expands prior law regarding the distribution of deceptive content about a candidate to prohibit any person, committee, or entity from knowingly, and with malice, distributing an advertisement or other election communication containing certain types of "materially deceptive content" within certain periods of time around an election. It applies to digitally created or modified content that would falsely appear to a reasonable person to be an authentic record of the content depicted in the media and that is about (1) a candidate portrayed as doing or saying something that they did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of the candidate; (2) an elections official portrayed as doing or saying something in connection with an election that the elections official did not do or say if the content is reasonably likely to falsely undermine confidence in the outcome of an election contest; (3) an elected official portrayed as doing or saying something in connection with an election that the elected official did not do or say if the content is reasonably likely to harm the reputation or electoral prospects of a candidate or is reasonably likely to falsely undermine confidence in the outcome of one or more election contests; or (4) a voting machine, ballot, voting site, or other property or equipment related to an election portrayed in a materially false way if the content is reasonably likely to falsely undermine confidence in the outcome of one or more election contests.

The new law also extends the applicable time period to 120 days before (and, in some cases, 60 days after) any election in California. In addition, it broadens the scope of current law by empowering recipients of materially deceptive content distributed in violation of AB 2839, as well as candidates or committees participating in the election and elections officials, to file a civil action to enjoin the distribution of this content and seek damages and by providing for an award of attorneys' fees and costs. The law has a safe-harbor provision for satire or

parody, so long as it includes a specified disclosure identifying the communications as satire or a parody. It also does not apply to a candidate portraying themselves as doing or saying something that the candidate did not do or say if the content includes a specified disclosure. The law took effect immediately upon Governor Newsom's signature on September 17, 2024.

Assembly Bill 2355 (Carillo, D- Los Angeles)

[AB 2355](#) requires that political advertisements created or originally published or distributed by a "committee" that contain any images, audio, or video generated or substantially altered using AI to disclose the following (in a clear and conspicuous manner): "Ad generated or substantially altered using artificial intelligence." A "committee" is defined as any person or group of persons who receive contributions totaling \$2,000 or more in a calendar year, make independent expenditures totaling \$1,000 or more, or contribute \$10,000 or more in a calendar year to candidates or other committees.

Under this bill, the Fair Political Practices Commission can enforce violations with the disclosure requirement and enforce the bill via injunctive relief and other remedies. Notably, the law provides that it does not alter or negate any rights, obligations, or immunities of an interactive service provider under Section 230 and expressly does not apply to (1) radio or television broadcasting stations that broadcast political advertisements containing any image, audio, or video that is generated in whole or in part using AI (a "qualified political ad") (a) as part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of bona fide news events, if the broadcast acknowledges through content or a disclosure that the qualified political ad may have been generated in whole or in part using AI, or (b) when it is paid to broadcast a qualified political ad; (2) internet websites or regularly published newspapers, magazines, or other periodicals of general circulation if the publication clearly states that the qualified political ad may have been generated in whole or in part using AI; and (3) qualified political ads that constitute satire or parody. The law takes effect January 1, 2025.

Legal Challenges Ahead

Opponents of these laws have raised concerns regarding the laws' implementation and effectiveness, as well as their possible violation of the First Amendment. For instance, civil rights groups have stated that notwithstanding AB 2655's limitation on targeting "materially deceptive" ads, with no sure means of determining what is "materially deceptive," the platforms may err on the side of blocking content, thus burdening more speech than is necessary.

One opponent of the new California legislation has already initiated a legal challenge. On the same day the bills were signed, Christopher Kohls filed a lawsuit in the U.S. District Court for the Eastern District of California. [Kohls v. Bonta et al., Case No. 2:24CV02527 \(E.D. Cal Sep. 17, 2024\)](#). The complaint challenges Assembly Bill 2839 and Assembly Bill 2655 on free speech grounds and brings claims under the First and Fourteenth Amendments. Kohls has already filed a temporary restraining order seeking to preliminarily enjoin AB 2839's implementation.

If you have questions about the applicability of these laws or need guidance on compliance, consult experienced legal counsel.

Endnote

[1] Both laws define a "digital replica" as: "a computer-generated, highly realistic electronic representation that is readily identifiable as the voice or visual likeness of an individual that is embodied in a sound recording, image, audiovisual work, or transmission in which the actual individual either did not actually perform or appear, or the actual individual did perform or appear, but the fundamental character of the performance or appearance has been materially altered.

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