

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE
First Reader

Senate Bill 1025
Finance

(Senator Mautz)

**Commercial Law - Voice and Visual Likeness - Digital Replication Rights
(Nurture Originals, Foster Art, and Keep Entertainment Safe Act - NO FAKES
Act)**

This bill establishes standards and requirements related to the use of a “digital replica” of an individual. Specifically, the bill establishes that each individual or right holder must have the right to authorize the use of the voice or visual likeness of the individual in a digital replica. The right does not expire on the death of the individual and is transferrable or licensable, as specified. The right terminates after a certain period of time, subject to renewal procedures authorized by the bill. The bill also establishes provisions related to civil liability for engaging in conduct in violation of the bill. The Secretary of State (SOS) must maintain directories containing specified information related to (1) the renewal of postmortem rights and (2) designated agents. The right established by the bill must apply to an individual regardless of whether an individual dies before or after the effective date of the bill. However, the bill’s requirements may not be applied or interpreted to establish liability for conduct occurring, or a license or contract executed, before the bill’s effective date. The bill also contains a severability provision.

Fiscal Summary

State Effect: General fund revenues and expenditures increase, potentially minimally, for SOS to create and maintain directories required under the bill. The bill is not otherwise anticipated to materially affect State finances or operations.

Local Effect: The bill is not anticipated to materially affect local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Definitions

“Digital replica” means a newly created, computer-generated, highly realistic representation that is readily identifiable as the voice or visual likeness of an individual that:

- is embodied in a sound recording, an image, an audiovisual work, including an audiovisual work that does not have any accompanying sounds, or a transmission (1) in which the actual individual did not actually perform or appear or (2) that is a version of a sound recording, an image, an audiovisual work, or a transmission in which the actual individual did perform or appear, but the fundamental character of the performance or appearance has been materially altered; and
- does not include, when authorized by the copyright holder (1) the electronic reproduction of a sound recording or an audiovisual work; (2) the use of a sample of one sound recording or audiovisual work within another sound recording or audiovisual work; or (3) the remixing, mastering, or digital remastering of a sound recording or an audiovisual work.

“Individual” means a human being, living or dead.

“Right holder” means the individual whose voice or visual likeness is at issue with respect to a digital replica or any person who has acquired, through a license, inheritance, or otherwise, the right to authorize the use of the voice or visual likeness in a digital replica.

Right to Authorize the Use of the Voice or Visual Likeness

Generally, each individual or right holder must have the right to authorize the use of the voice or visual likeness of the individual in a digital replica. The right is (1) a property right; (2) not assignable during the life of the individual; and (3) licensable, in whole or in part, exclusively or nonexclusively, by the right holder. The right does not expire on the death of the individual regardless of whether the right is commercially exploited by the individual during the individual’s lifetime.

On the death of an individual:

- the right may be transferred and licensed, in whole or in part, by the executors, heirs, assigns, licensees, or devisees of the individual; and

- ownership of the right may be: (1) transferred, in whole or in part, by any means of conveyance or by operation of law; or (2) bequeathed by will or pass as personal property by the applicable laws of intestate succession.

The right provided by the bill is exclusive to:

- the individual (subject to the licensing of the right during the lifetime of the individual, as authorized by the bill);
- the right holder: (1) for a period of 10 years after the death of the individual; and (2) if the right holder demonstrates active and authorized public use of the voice or visual likeness of the individual during the 2-year period immediately preceding the expiration of the 10-year period, for an additional 5-year period (subject to specified requirements).

Specifically, the right holder may continue to renew the right for additional 5-year increments if the right holder can demonstrate authorized public use of the voice or visual likeness of the individual during the 2-year period immediately preceding the expiration date of each additional 5-year period.

The right provided under the bill must terminate on the date that is the earlier of:

- the date on which the 10-year period (or additional 5-year period, as described above) terminates without renewal; or
- the date that is 70 years after the death of the individual.

Licensing of Voice or Visual Likeness

As noted above, under the bill, an individual has a right to license the use of their voice or visual likeness in a digital replica. Such a license is valid:

- while the individual is living and only to the extent that the license duration does not exceed 10 years; and
- only if the license agreement (1) is in writing and signed by the individual or an authorized representative and (2) includes a reasonably specific description of the intended uses of the applicable digital replica.

Similar requirements apply to a living minor; however, a license duration may not exceed five years in such cases and a license terminates when the individual reaches 18 years of age.

The requirements above may not be construed to (1) apply if a license is governed by a collective bargaining agreement that addresses digital replicas; (2) affect the terms and conditions of a license or related contract other than those described under the applicable section of the bill; or (3) affect a future interest in a license or related contract after the license has expired.

A postmortem transfer or license must be valid only if the transfer agreement or license agreement is in writing and signed by the right holder or an authorized representative. A digital replica may continue to be utilized in a manner consistent with the terms of a license after the expiration or termination of the license if specified requirements are met.

Renewal of a Postmortem Right

The renewal of a postmortem right must be effective if, during the applicable two-year renewal period, the right holder files a notice with SOS that complies with the requirements regarding form and filing procedures as SOS may prescribe by regulation and that contains certain information (*e.g.*, the name of the deceased individual, identity and contact information for the right holder, etc.).

SOS (1) must maintain an up-to-date directory of postmortem digital replication rights registered under the bill; (2) must make the directory available to the public for inspection online; and (3) may charge a reasonable filing fee to a right holder who files in accordance with the provisions noted above. The filing fee charged by SOS must be based on the costs of maintaining the directory.

Liability Provisions

A person must be liable in an action brought under the bill if the person (1) produces a digital replica without consent of the applicable right holder or (2) publishes, reproduces, displays, distributes, transmits, or otherwise makes available to the public a digital replica without consent of the applicable right holder. Subject to limited exception, to incur liability, a person must have actual knowledge or have willfully acted in a manner to avoid any knowledge that (1) the applicable material is a digital replica and (2) the digital replica was not authorized by the applicable right holder.

The bill specifies certain situations that do not incur liability. For example, it is not a violation if the digital replica is produced or used in a *bona fide* news, public affairs, or sports broadcast or account; if the digital replica is a representation of the individual as the individual in a documentary or in a historical or biographical manner, including some degree of fictionalization (unless as otherwise specified); or the use of the digital replica is fleeting or negligible. However, these exceptions do not apply if the applicable digital

replica is used to depict sexually explicit conduct, as defined in specified provisions of federal law.

The bill establishes numerous provisions related to secondary liability. The limitations on secondary liability established by the bill apply to an online service only if the online service (1) has designated an agent to receive notifications through a directory maintained by SOS and (2) provides to SOS and makes available specified information. SOS must maintain a current directory of designated agents, similar to the database noted above related to postmortem rights.

A notification to an online service alleging a violation must be a written communication provided to the designated agent that includes specified information, including contact information.

In a notification to a designated agent, a person may not knowingly and materially misrepresent that (1) the material requested to be removed is an unauthorized digital replica; (2) a person has the authority to act on behalf of the right holder; or (3) a digital replica is not authorized by the right holder or by other law. A person that violates these requirements must be liable for damages in an amount equal to the greater of (1) \$5,000 *or* (2) actual damages, including harm to an online service caused by the reliance of the online service on the misrepresentation in removing or disabling access to the material or activity claimed to be an unauthorized digital replica, and costs and attorney's fees.

Actions for a Violation

An action for a violation may be brought by a right holder and other specified persons. An action may not be brought unless the action is commenced within three years after the date on which the party seeking to bring the action discovered – or (with due diligence) should have discovered – the applicable violation. It is not a defense in an action that the defendant displayed or otherwise communicated to the public a disclaimer (1) stating the applicable digital replica was unauthorized or (2) disclosing that the digital replica was generated through the use of artificial intelligence (AI) or other technology.

A person that engages in prohibited activity related to the use of digital replicas without consent must be liable to the injured party in an amount equal to the greater of:

- (1) in the case of an individual, \$5,000 per work embodying the applicable unauthorized digital replica; (2) for an online service, \$5,000 per violation; or (3) in the case of an entity that is not an online service, \$25,000 per work embodying the applicable unauthorized digital replica; or

- any actual damages suffered by the injured party as a result of the activity, plus any profits from the unauthorized use that are attributable to the use and not taken into account in computing the actual damages.

The bill specifies numerous other rules and procedures for actions brought under the bill. For example, a plaintiff may seek injunctive relief. In addition, notably, if a third party that provided the material that is removed by the online service (or to which the online service has disabled access) files a lawsuit against the sender of a notification alleging a violation claiming that the notification was false or deceptive, as specified, the online service may restore the removed material to its network for access by members of the public without monetary liability to either (1) the notice sender or (2) the third party that provided the material that the online service had removed or disabled access to. The removed material may only be restored if a third party files the lawsuit within 14 days after the third party receives notice that the online service has removed the material.

Current Law: The Commercial Law Article generally does not regulate the use of digital replicas, as defined by the bill. However, certain provisions of State law regulate the use of AI, which may be used to create such replicas.

Artificial Intelligence – Definition

Under § 3.5-801 of the State Finance and Procurement Article, “Artificial Intelligence” means a machine-based system that (1) can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments; (2) uses machine and human-based inputs to perceive real and virtual environments and abstracts those perceptions into models through analysis in an automated manner; and (3) uses model inference to formulate options for information or action.

Artificial Intelligence – State Agencies

Chapter 496 of 2024 expanded the responsibilities of the Secretary of Information Technology as they relate to the procurement and use of AI by State agencies and codified the Governor’s AI Subcabinet that was established by [Executive Order 01.01.2024.02](#). Broadly, among other things, the Act:

- requires the Department of Information Technology (DoIT) to adopt policies and procedures, in consultation with the Governor’s AI Subcabinet, concerning the development, procurement, deployment, use, and ongoing assessment of systems that employ high-risk AI by a unit of State government;
- prohibits units of State government from procuring or deploying a new system that employs AI unless the system complies with the policies and procedures adopted by DoIT;

- requires each unit of State government to conduct a data inventory to identify data that meets criteria established by the Chief Data Officer and that is (1) necessary for the operations of the unit or otherwise required to be collected as a condition to receive federal funds or by federal or State law and (2) in a form prescribed by the Chief Data Officer, including when the data is used in AI; and
- requires each unit of State government to conduct an inventory of systems that employ high-risk AI.

State Fiscal Effect: As the bill requires SOS to create and maintain directories related to postmortem rights and other designated agents, there is an operational and potential fiscal impact on the agency. SOS notes that it is unclear how many participants may engage with the required directories. As a result, the exact amount of the filing fee that may be charged to cover the agency's costs cannot be determined without experience under the bill. To the extent SOS is unable to create the directories with existing resources (or if demand is higher than expected), the fee can be increased commensurately to match the agency's costs.

Small Business Effect: Any small businesses that engage in the activities regulated by the bill (*e.g.*, the use of digital replicas) are subject to the bill's standards and requirements and must comply in order to avoid liability. In addition, small businesses may be subject to a filing fee with SOS (*i.e.*, if it is necessary for the agency to establish a fee due to the volume of filers).

Additional Information

Recent Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 1407 (Delegates Amprey and Boafu) - Economic Matters.

Information Source(s): Department of Information Technology; Office of the Attorney General; Secretary of State; Judiciary (Administrative Office of the Courts); Department of Legislative Services

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Analysis by: Eric F. Pierce

Direct Inquiries to:
(410) 946-5510
(301) 970-5510