

Is NO FAKES the Answer to Avoid Fake Out?

The impersonation of celebrity voices is nothing new. Almost 40 years ago, Bette Midler successfully sued Ford Motor Company when it used an impersonation of her voice in a car commercial.ⁱⁱⁱ Singer Tom Waits also won a similar case against Frito-Lay, Inc. and Tracy-Locke, Inc. for impersonating his voice in a commercial.^{iv} In both of those cases, the companies had found soundalike voice actors to copy the sound of the well-known artists.

Both the Bette Midler and Tom Waits cases were brought in California under that state's tort law, which recognizes a tort where a "distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product."^v Tort law differs in all 50 states and not all states recognize a property interest in one's voice. Even under California law, not every imitation of a voice to advertise merchandise is an actionable tort: only "distinctive . . . widely known" voices are protected. This distinction means many individuals have no recourse if their voices are used without their consent in commercial products or endorsements.

With the dawn of widely available artificial intelligence-based technology, it is much easier and cheaper to mimic the voice of others. There is no need for soundalike actors when the technology can be fed prior samples of a well-known artist's own recordings to create something new. Is the current legal framework sufficient to address this new world? With Tupac showing up in current rap beefs and OpenAI releasing a product sounding similar to Scarlett Johansson, the answer is maybe not.

Some U.S. Senators are taking action to fill the void in legislation. Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis have co-sponsored a bill to address the limitations of current tort law to provide wider protection for Americans from what it calls "unauthorized digital replicas."^{vi} The bill is known as the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023 or the "NO FAKES Act" for short. The Subcommittee on Intellectual Property held a hearing on the proposed bill on April 30, 2024.^{vii}

The draft version of the NO FAKES Act makes any person who produces a "digital replica" without the consent of the individual or rights holder, or publishes or distributes a "digital replica," liable to the individual or rights holder for damages. A "digital replica" is 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” and is “fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear.” A violator is liable for statutory damages of \$5,000 per violation or “any damages suffered by the injured party as a result of the violation.” The proposed statute also provides that punitive damages are available for a “willful violation” and that “reasonable attorneys’ fees” may be awarded to the prevailing party.

In its current form, the NO FAKES Act would not apply to a claim such as the one recently made by Scarlett Johansson against ChatGPT. Ms. Johansson accused OpenAI of copying her voice for its Sky AI voice but the company maintains that it hired a sound recording artist. If it is true that the voice was not “computer-generated,” the NO FAKES Act would not apply and Ms. Johansson’s claim may only be viable in certain jurisdictions—such as California—that specifically recognize the right to exclude others from imitating your voice, at least if you are a professional singer with a distinctive voice.

The current version of the NO FAKES act contain some other significant carve-outs that threaten its ability to be an effective deterrent. For instance, there is no liability under the proposed act when the “digital replica” is used (1) “as part of a news, public affairs, or sports broadcast or report;” (2) is used as “part of a documentary, docudrama, or historical or biographical work” and “uses a representation of the applicable individual as that individual;” (3) is used “for purposes of comment, criticism, scholarship, satire, or parody;” (4) is used to advertise one of the above uses; or (5) the use is “de minimis or incidental.”

These ambiguous carve-outs may prevent the NO FAKES Act from accomplishing its goal of protecting the public from being faked out by fake voices and images. Some of the excluded categories appear to be borrowed from copyright law (i.e. “purposes of comment, criticism, scholarship, satire or parody”) but without considering whether it is logical to apply the same exceptions for a “digital replica” of an individual that you would apply to a copy of a work created by an individual. For example, in criticizing or parodying a work, it is logical that you would need to include a copy of an image, written work, or other copyrighted work in the criticism or parody (such as displaying a copy of a painting in an article critiquing it). Such use of the copy furthers progress because it provides the necessary context for the critique or parody. But that same need does not apply to uses of a simulation of another’s voice or image (the “digital replica”). It’s hard to imagine a scenario where it would serve the purpose of progress to allow and encourage the critiquing or parody of another individual’s voice or image. Because the underlying purpose of Copyright law is different from the purpose of the NO FAKES Act, the Senate should use caution when contemplating borrowing exceptions from the Copyright Act.

Instead of borrowing from copyright law, the NO Fakes Act should look to what types of (likely narrower) exclusions they would provide for other property interests, such as real property. One's voice and likeness are unique and should be as protectable from misuse by others as their real property would be. Looking through that lens, the exclusions for liability should be narrowly crafted and well-defined so that an individual can tightly control the use of his or her voice or likeness.

i The Nuture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023.

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iii Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988).

iv Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1096 (9th Cir. 1992), abrogated by Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

v Midler v. Ford Motor Co., 849 F.2d 460, 463–64 (9th Cir. 1988).

vi The Nuture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023

vii It was a classic rap beef. Then Drake revived Tupac with AI and Congress got involved, updated May 14, 2024,

<https://www.npr.org/sections/money/2024/05/14/1250578295/it-was-a-classic-rap-beef-then-drake-revived-tupac-with-ai-and-congress-got-invo>.