

# Protecting the Living and the Dead from AI: New Legislation and Its Future Impact

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New artificial intelligence (AI) capabilities seem to emerge daily, and these capabilities can affect the way we live. But now, there is growing concern about how AI can impact the deceased, and the entertainment industry. Many performers fear they will lose jobs if studios can freely reanimate and use dead actors or generate new synthetic actors cheaply. So, what is being done to protect performer's livelihoods from being consumed by the ever-growing advancements of generative AI?

The development of AI technologies is posing fundamental challenges to the current approach to intellectual property rights.<sup>1</sup> While it may seem like these new AI tools can create new material from out of thin air, that is not the case.<sup>2</sup> Generative AI platforms are trained on large data sets that are constructed by processing huge archives of images and text.<sup>3</sup> When responding to a prompt, these AI platforms identify patterns and relationships, which they then use to create rules, and then make judgments and predictions.<sup>4</sup> Because AI is trained on pre-existing materials, there is a risk that its outputs will infringe on copyright law. Even though the content maybe new, the information that it is based on is not.

AI has played a role in the entertainment industry for years, but as developments increase, so do fears. AI has received a lot of attention because of its potential effects on Hollywood and the entertainment industry as a whole.<sup>5</sup> There are obvious concerns because generative AI can create the types of content that the entertainment industry relies on—scripts, marketing campaigns, and moving static images.<sup>6</sup> With economic pressures to produce more content at a lower cost, AI offers studios a tempting solution. Given that a high percentage of current entertainment is a derivative of past content, it is well suited for generative technologies, which are trained on data from past content.<sup>7</sup>

AI is already affecting the industry is through digital replicas, voice synthesis, and AI generated scripts. For example, even though actor James Dean died in a car crash in 1955, he is being digitally resurrected to appear in a new film, *Back to Eden*.<sup>8</sup> A digital replica of the actor

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<sup>1</sup> Cathy Li & Minos Bantourakis, *6 ways AI could disrupt the entertainment industry* (2023), WORLD ECON. F. (Aug. 2, 2023), <https://www.weforum.org/agenda/2023/08/hollywood-strike-synthetic-voice-digital-avatar-ai-entertainment/>.

<sup>2</sup> Gil Appel, Juliana Neelbauer & David A. Schweidel, *Generative AI Has an Intellectual Property Problem*, HARV. BUS. REV. (Apr. 07, 2023), <https://hbr.org/2023/04/generative-ai-has-an-intellectual-property-problem> [perma.cc/U3J3-7UGE].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Thomas H. Davenport & Randy Bean, *The Impact of Generative AI on Hollywood and Entertainment*, MIT SLOAN MGMT. REV. (June 2023), <https://sloanreview.mit.edu/article/the-impact-of-generative-ai-on-hollywood-and-entertainment/> [perma.cc/7ZBZ-FXEF].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Supra*, note 1; *see generally* S.J. Velasquez, *How AI is bringing film stars back from the dead*, BBC NEWS (July 18, 2023), <https://www.bbc.com/future/article/20230718-how-ai-is-bringing-film-stars-back-from-the-dead> [perma.cc/PL2M-LWQE] (discussing the use of AI to bring back dead actors including James Dean).

will walk, talk and interact with other actors in the film, using AI technology similar to that which is used to create deepfakes.<sup>9</sup> This isn't the time Dean has been digitally cloned and casted to appear in a film.<sup>10</sup> In 2019, it was announced that he would be resurrected in CGI for a film called *Finding Jack*, but that project was later cancelled.<sup>11</sup> There have been additional posthumous replicas of actors and performers. For example, rapper Tupac Shakur's hologram performed at the Coachella Valley Music & Arts Festival in 2012, sixteen years after his murder. These digital resurrections have raised concerns among performers and their respective unions about how their careers might be exploited and their legacies tarnished.<sup>12</sup>

In mid-September, California Governor Gavin Newsom signed two bills into law aimed at protecting performers from unauthorized AI replication, including those who are deceased.<sup>13</sup> This legislation is meant to ensure that AI and other technology in entertainment is used responsibly by giving workers stronger protections from entertainment companies. The first bill, Assembly Bill 2602 (AB 2602), requires contracts to specify the use of AI-generated digital replicas of a performer's voice or likeness.<sup>14</sup> It also requires that the performer be professionally represented, either by legal counsel or a labor union, during contract negotiations.<sup>15</sup> This bill is critical in providing safeguards for performer's careers, ensuring that their voice or likeness are not replicated without their consent.<sup>16</sup> Just because digital innovation in the entertainment industry continues to boom doesn't mean performer's rights should diminish. These protections safeguard what makes them so valuable—their image (or voice)—from being taken right from under them.

The second bill, Assembly Bill 1836 (AB 1836) prohibits commercial use of digital replicas of deceased performers in films, TV shows, video games, audiobooks, sound recordings and more, without first obtaining the consent of those performers' estates.<sup>17</sup> This bill is designed to prevent unauthorized digital replicas of a deceased performer, including their works. We have reached a point where deceased performers can be seen and heard in new music, movies, and other performances. All without the consent of their estate. For example, earlier this year during a highly publicized "rap beef" between prominent artists Drake and Kendrick Lamar, Tupac Shukar's estate threaten to sue Drake over a diss track using what appears to be late rapper's AI-generated voice in the song "Taylor Made Freestyle."<sup>18</sup> Drake later removed the song from all platforms, after a

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<sup>9</sup> S.J. Velasquez, *How AI is bringing film stars back from the dead*, BBC NEWS (July 18, 2023), <https://www.bbc.com/future/article/20230718-how-ai-is-bringing-film-stars-back-from-the-dead> [perma.cc/PL2M-LWQE].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Greg Rosalsky, *It was a classic rap beef. then Drake revived Tupac with AI and Congress got involved*, NPR (May 14, 2024 12:10 PM), <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> [perma.cc/EQK2-PNTS].

<sup>13</sup> *Governor Newsom signs bills to protect digital likeness of performers*, GOVERNOR OF CAL. (Sept. 17, 2024), <https://www.gov.ca.gov/2024/09/17/governor-newsom-signs-bills-to-protect-digital-likeness-of-performers/> [perma.cc/GG3M-7S5Q].

<sup>14</sup> *Id.*

<sup>15</sup> AB 2602, 2024 Leg. Sess. (Cal. 2024).

<sup>16</sup> *Supra*, note 12.

<sup>17</sup> *Id.*

<sup>18</sup> Angela Yang & Diana Dasrath, *Tupac's estate threatens to sue Drake over diss track using what appears to be late rapper's AI-generated voice*, NBC NEWS (Apr. 24, 2024 6:33 PM), <https://www.nbcnews.com/pop-culture/pop-culture-news/tupac-shakur-estate-threatens-to-sue-drake-ai-use-dis-track-rcna149242> [perma.cc/ND7L-E74V].

cease-and-desist letter was sent by the attorney for Shakur's estate. The letter warned that Drake's nonconsensual use of Shakur's likeness violates Shakur's intellectual property rights.<sup>19</sup> The letter also noted that the song is "a blatant abuse of the legacy of one of the greatest hip-hop artists of all time," and that the estate would not have given approval for such use.<sup>20</sup>

At the federal level, Congress has yet to address this issue. Currently, there are few or no federal laws that explicitly prohibit people from using generative AI to produce replicas of people without their consent, leading to laws that vary state by state.<sup>21</sup> Some states protect your visual likeness but not your voice, others only protect the living but not the dead.<sup>22</sup> Earlier this year, Tennessee made history by becoming the first U.S. state to sign legislation to protect musicians from unauthorized AI impersonation.<sup>23</sup> A move likely influenced by the state's prominence in the country music industry, and its many historic artist and songwriters.

Although there isn't much on the books for this issue federally, it appears change may be on the way. Senators Chris Coons, Marsha Blackburn, Amy Klobuchar, and Thom Tillis have co-sponsored a draft legislation known as "The No Fakes Act."<sup>24</sup> The No Fakes Act would grant Americans a federal "digital replication right," giving individuals the power to authorize the use of their image, voice, or likeness in a digital replica.<sup>25</sup> It would hold individuals liable if they used a digital replica of someone without consent.<sup>26</sup> Modeled after current copyright law, it would protect living individuals as well as the heirs, assigns, and estate of those individuals for the life of the individual plus 70 years after their death.<sup>27</sup>

While we don't know exactly what the future holds for AI in entertainment, it's clear that states like California and Tennessee are leading the way in protecting performers' rights. These new laws are essential steps in preventing unauthorized AI use of both living and deceased individuals. As AI technology continues to evolve, the entertainment industry must strike a balance between innovation and protecting the creative and personal rights of performers, ensuring that no one's likeness is used without their permission, whether they're alive or long gone.

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Supra*, note 12.

<sup>22</sup> *Id.*

<sup>23</sup> Rebecca Rosman, *Tennessee becomes the first state to protect musicians and other artists against AI*, NPR (Mar. 22, 2024 5:50 AM), [https://www.npr.org/2024/03/22/1240114159/tennessee-protect-musicians-artists-ai?utm\\_source=npr\\_newsletter&utm\\_medium=email&utm\\_content=20240510&utm\\_term=9453544&utm\\_campaign=money&utm\\_id=22281377&orgid=141&utm\\_att1=\[perma.cc/LX83-BXGY\]](https://www.npr.org/2024/03/22/1240114159/tennessee-protect-musicians-artists-ai?utm_source=npr_newsletter&utm_medium=email&utm_content=20240510&utm_term=9453544&utm_campaign=money&utm_id=22281377&orgid=141&utm_att1=[perma.cc/LX83-BXGY]).

<sup>24</sup> *Supra*, note 12.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*