

Clone Wars: The Use (and Misuse) of Digital Replicas in Advertising

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FKKS Tech Law Summit

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Every project begins with ...

... *uncertainty*

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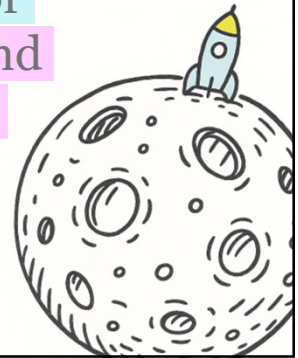
When facing uncertainty,
you hedge your bets ...

... and *ask for the moon*

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A Moonshot

Talent grants to Client the **unlimited** right to use the results and proceeds of Talent's services, as well as Talent's name, likeness, voice, performance and persona," **edited or altered as Client shall determine, in any and all media now known or hereafter devised in perpetuity throughout the universe.**



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Digital replicas have the potential to be the ultimate way to hedge ...

... and give new meaning to "we'll fix it in post"

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But I won't bury the lede ...

... *when it comes to digital replicas the moonshot won't fly*

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Digital Replicas are Different

- Traditional post-production techniques allowed plenty of room for alteration, modification, manipulation ... but *nowhere near* as much as AI
- Talent (and society) concerns include:
 - Criminal uses
 - Deceptive uses
 - Loss of job opportunities
 - Integrity of the portrayal
- The legal landscape is changing *fast*

And
creepy !



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Agenda and Topics



A Digital Replica
by Any Other Name?



Disclosure Obligations
in New York (and
Beyond)



Enforceability of
Contracts to Use
Digital Replicas



Digital Replicas,
Synthetic Performers &
the SAG AFTRA
Commercials Contract

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Disclaimer:
This is all new, new, new

Without precedent, we must apply
our wits and wisdom.



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Part 1

A Digital Replica by any other name?

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Previous Laws

- Right of Publicity
 - “*Likeness*” broadly interpreted to cover lookalikes, soundalikes, and “persona,” regardless of how created
 - Generally, applies to *commercial* uses
 - Some states (e.g., NY, CA, IL, WA, TN) have amended ROP laws to address digital replicas
- Different laws, *different definitions* of digital replica (NY has several different ones in different laws)
- These definitions are *interesting* ...

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Digital Replica Definition (CA)

CA Labor Code § 927; Cal. Civ. Code § 3344.1

“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.”

Not just AI

Animation?
Clearly fake?

Recognizable?

Loss of job

What is
“material”?

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Digital Replica Definition (NY)

N.Y. Gen Oblig. Law § 5-302

“a digital simulation of the voice or likeness of an individual that so closely resembles the individual's voice or likeness that a layperson would not be able to readily distinguish the digital simulation from the individual's authentic voice or likeness.”

Not just AI

Animation?
Clearly fake?

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Digital Replica Definition (NY)

New York Fashion Workers Act

“a significant, computer-generated or artificial intelligence-enhanced representation of a model's likeness, including but not limited to, their face, body, or voice, which substantially replicates or replaces the model's appearance or performance, excluding routine photographic edits such as color correction, minor retouching, or other standard post-production modifications.”

Hmmm

Not just AI

Only models

Hmmm

“or”?

Narrow exception

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Preliminary Question: Choice of Law

- For *living* claimants, which law applies?
 - The law of claimant's *domicile*
 - The law where replica was *created*
 - The law where replica is *exhibited*
- For *dead* claimants, most states look to the place of domicile at the time of death
- Some state laws (e.g., IN) purport to apply regardless of claimant's domicile (which may be unconstitutional)

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Part 2

Digital Replicas - Contracting Requirements

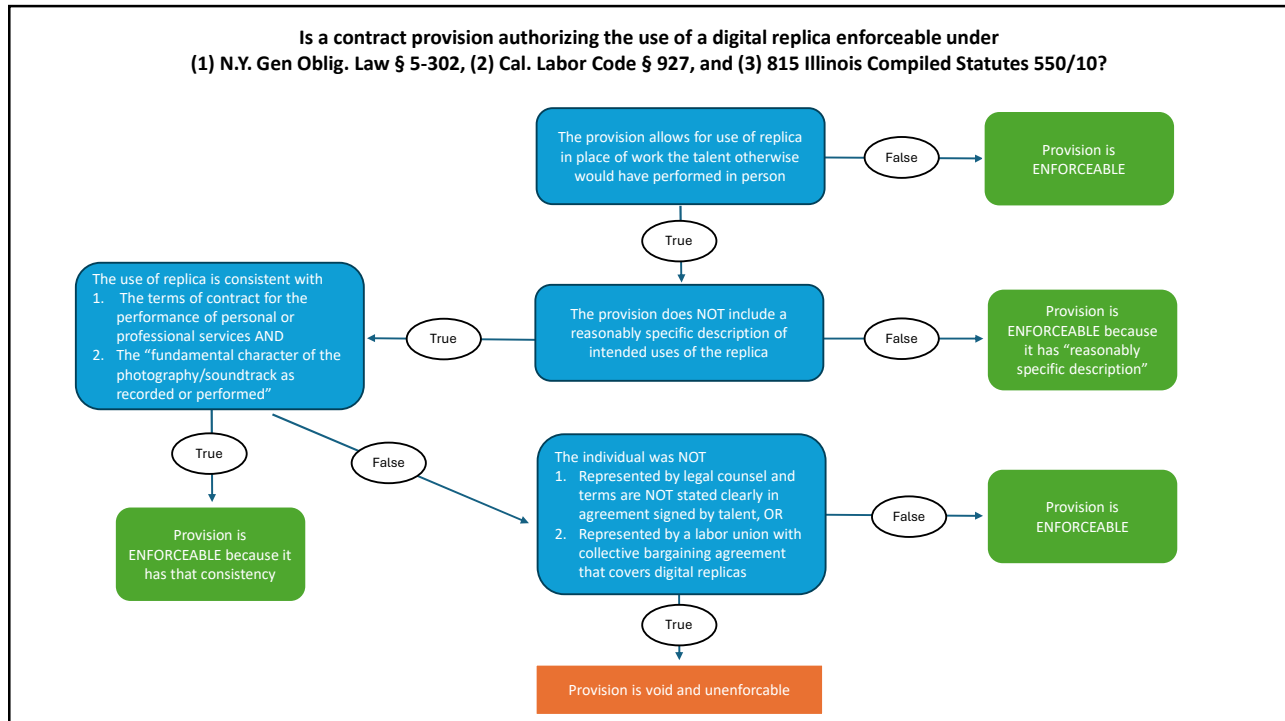
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NY, CA and IL Digital Replica Laws

Contracts for creation/use of digital replicas are *not* enforceable *if all three are true*:

- 1 **Lost Gig:** The provision allows use of digital replica “in place of work the individual would otherwise have performed in person”
- 2 **Specific Description:** The provision does not “include a reasonably specific description of the intended uses of the digital replica” unless the uses are consistent with (1) the terms of the contract for performer’s services and (2) the fundamental character of the photography or soundtrack as recorded or performed.
- 3 **Representation:** Individual not represented by a lawyer (and the commercial terms are stated clearly and conspicuously in a contract) or a union (and the collective bargaining agreement allows digital replicas)

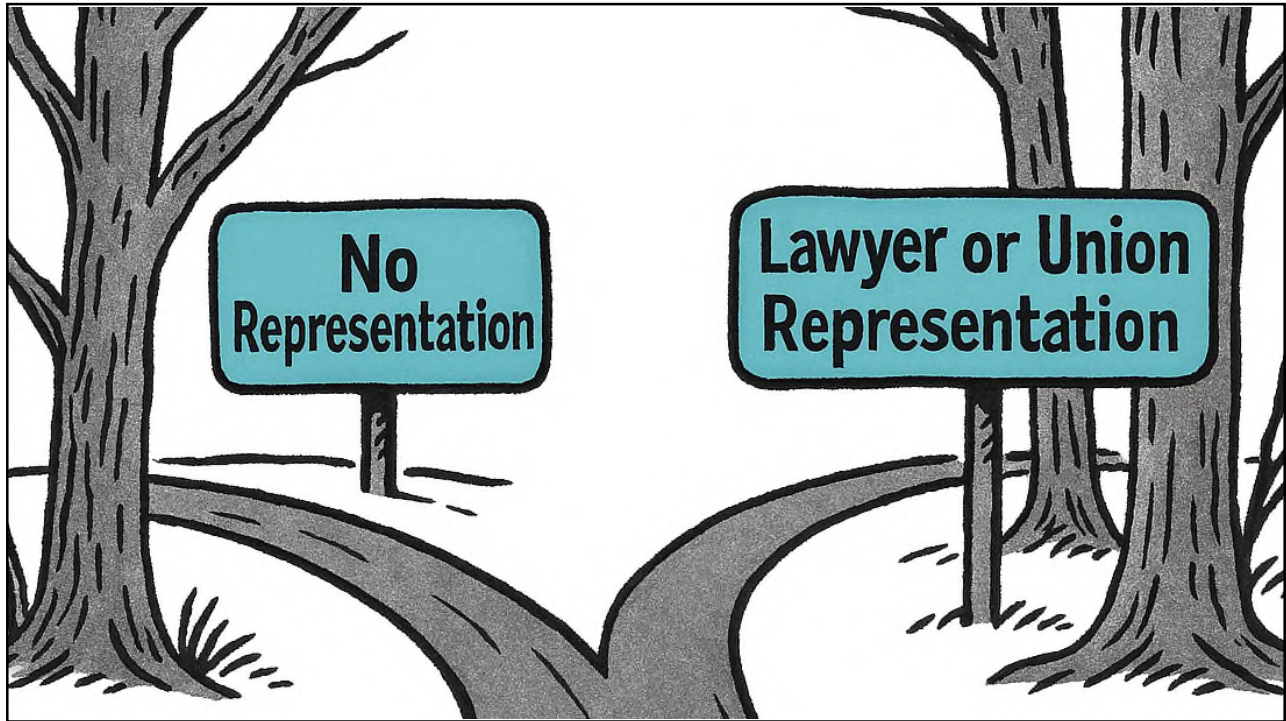
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Two roads diverge ...

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No Representation: “Reasonably Specific”

- Replica can be used to portray brand’s mascot riding a giant toothbrush through space, shouting ‘Minty fresh for light-years!’ while dodging asteroids shaped like cavities
- Replica can be used to portray the brand’s mascot in commercials riding a toothbrush in space
- Replica can be used to portray the brand’s mascot flying or floating in various fictional settings
- Replica can be used to portray the brand’s mascot in various fictional settings



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“Reasonably Specific” Description



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Consider the *policies* and *players* behind the law

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SAG-AFTRA and Specificity Under the Law

- SAG-AFTRA lobbied *hard* for these laws
- The SAG-AFTRA Commercials Contract also requires you to provide a “*reasonable specific description of the intended use*” of the digital replica, and it includes examples
- Might a court look to *industry custom* – including the SAG-AFTRA Commercials Contract – for guidance regarding what “reasonably specific” means?

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No Representation: Specificity “Exception”

- Lack of specificity ok if “the uses are [1] consistent with the terms of the contract for the performance of personal or professional services, and [2] consistent with the fundamental character of the photography or soundtrack as recorded or performed.”
- Exception narrow
- Is portrayal using replica:
 - Consistent with the type of work talent agreed to perform
 - Consistent with usage in contract
 - Consistent with photos/footage captured IRL (e.g., the tone, style, and purpose)

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And if there *is* a lawyer involved ... then what?



Lawyer or Union Representation

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Represented by Lawyer

- Digital Replica uses must be “*stated clearly and conspicuously*” in writing signed by talent
- Difference in language suggests that talent represented by lawyer can agree to allow the use of a Digital Replica more broadly without as specific description of the uses
- *But wait ...*

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New York Fashion Workers Act

(NY Labor Law § 1030)

- Applies to models providing “**modeling services**”:
 - “the appearance by a model in photographic sessions or the engagement of a **model** in live runway, live, filmed, or taped performances, including on social media platforms, requiring the model to pose, provide an example or standard of artistic expression or to be a representation to show the construction or appearance of some thing or place **for purposes of display or advertising**, including the provisions of castings, fittings, photoshoots, showroom, parts or fit modeling services”
- The Act has “*Fashion*” in the title ... a clue?

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New York Fashion Workers Act

(NY Labor Law § 1030)

- NYFWA does not distinguish between talent represented by lawyers/union and those that are not
- Clients hiring models must “obtain *clear and conspicuous prior written consent* from the model for any creation or use of a model's Digital Replica, detailing the *scope, purpose, rate of pay, and duration of such use.*”
- The NYFWA does not “diminish the rights, privileges, wages, working conditions or remedies of any employee under any applicable collective bargaining agreement”

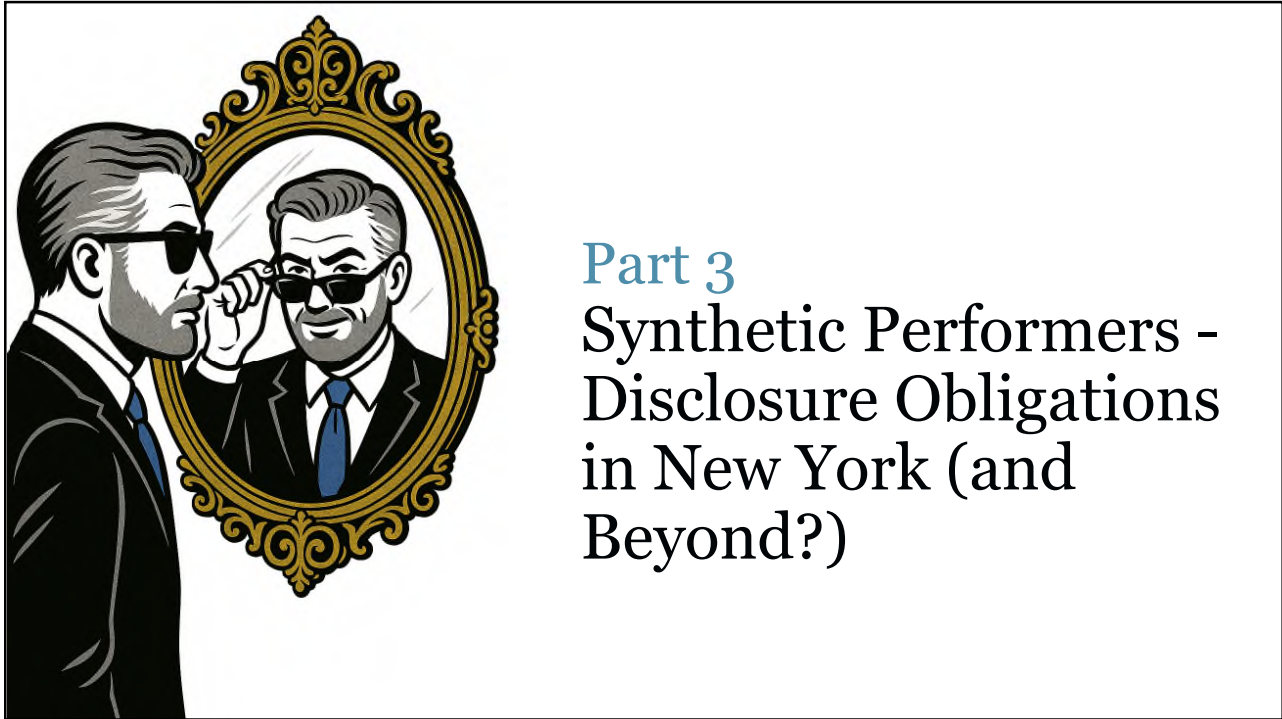
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Checklist

- ✓ Include clear right to create replicas with AI (*and future tech*)
- ✓ Be as *specific* as possible regarding uses – consider an exhibit that includes the kitchen sink of potential uses
- ✓ If talent is not repped by lawyer, consider encouraging them to hire one (and maybe even pay), if the situation warrants
- ✓ Make AI provision **CLEAR AND CONSPICUOUS**
- ✓ Have talent initial the provision or sign a separate addendum
- ✓ Structure so payments staggered
- ✓ Termination rights if enforceability issues arise
- ✓ Hope for the best



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Part 3

Synthetic Performers - Disclosure Obligations in New York (and Beyond?)

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Disclosure of Synthetic Performers

N.Y. Gen. Bus. Law § 396-b

- Effective: June 9, 2026
- Advertisers must:
 - “*Conspicuously* disclose” use of AI-generated “*synthetic performers*” in ads
 - Where they have “actual knowledge”
- Law does not define “conspicuously” or provide any guidelines regarding wording, placement or manner of disclosure
- Applies to all ads (unlike states that require disclosure of deepfakes in in political ads, such as AL, KY, MI, WA)
- \$1K civil penalty for 1st violation, \$5K per subsequent

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Synthetic Performer

“Synthetic performer” means a digitally created asset created, reproduced, or modified by computer, using generative artificial intelligence or a software algorithm, that is intended to create the impression that the asset is engaging in an audiovisual and/or visual performance of a human performer who is not recognizable as any identifiable natural performer.”

Modified?

AI is defined broadly ... does “or a software algorithm” add anything?

Intent matters.

i.e., *not* a digital replica

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Exceptions

N.Y. Gen. Bus. Law § 396-b

- Expressive works (movies, TV, video games, docs) if use is consistent with the underlying work
- *Audio-only ads*
- *Language translation* of a real human performer
- Publishers/platforms (TV networks, streaming services, newspapers) are not liable for advertiser non-compliance

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Policies

N.Y. Gen. Bus. Law § 396-b

1. *Deception*: Consumers cannot easily distinguish between real people deep fakes
2. *Transparency*: Provide accountability and trust in advertising by forcing disclosure when AI, rather than human actors, is used

“In New York State, we are setting a clear standard that keeps pace with technology, while protecting artists and consumers long after the credits roll.”

Gov. Kathy Hochul

“If you are being sold to by a machine you will know it.”

SAG-AFTRA

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Deception & Accountability

- Sure, synths – without disclosure – *might* be misleading in *certain* contexts
 - *Product Demos*: consumers might think this is an actual demonstration of product performance
 - *Endorsements*: consumers might believe this a real human endorsing the product
- But laws on books already address these issues



With these lashes, I'm ready to join the cast of *The Real Housewives of Salt Lake City*!

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Fake Endorsement Crackdown: AGs v. Meta

- A coalition of about 35 attorneys general called on Meta to take action on deceptive weight loss ads appearing on Meta's platforms ^(12/25)
- “Advertisers are misleadingly using AI-generated fictitious spokespersons and falsified before-and-after sequences”
- “Other ads feature testimonials from trusted sources – such as law enforcement, nurses, pharmacists, and military personnel – to bolster their claims. The problem: none of these people are real”



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Policies

N.Y. Gen. Bus. Law § 396-b

1. *Deception*: Consumers cannot easily distinguish between real people deep fakes
2. *Transparency*: Provide accountability and trust in advertising by forcing disclosure when AI, rather than human actors, is used
3. *Protecting Human Talent*: Minimize loss of work by human actors

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Additional Observations

N.Y. Gen. Bus. Law § 396-b

- Doesn't distinguish between principal performers and extras
- On its face, law applies to *advertiser* – does it also apply to agencies, production companies and others involved in ad creation?
- Should you contractually require everyone in the chain-of-creation to disclose use of synthetic performers?

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Use Cases

N.Y. Gen. Bus. Law § 396-b

- Must you disclose a digital simulation of a body part (like a hand) to demo a product?
- Must you disclose a digitally created crowd of synths used in the background (i.e., as “extras”)?
- If pre-existing materials (e.g., website creative) include synths, must you retroactively label now?
- Must you disclose a synth VO in an audiovisual commercial?



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Disclosure Over the Rainbow

- Some other states have AI disclosure laws that apply specifically to political advertising
- Will we soon see industry “best practices” or guidance on this from regulators, NAD ... ?
- Media outlets/platforms already have (and may add more) requirements ...

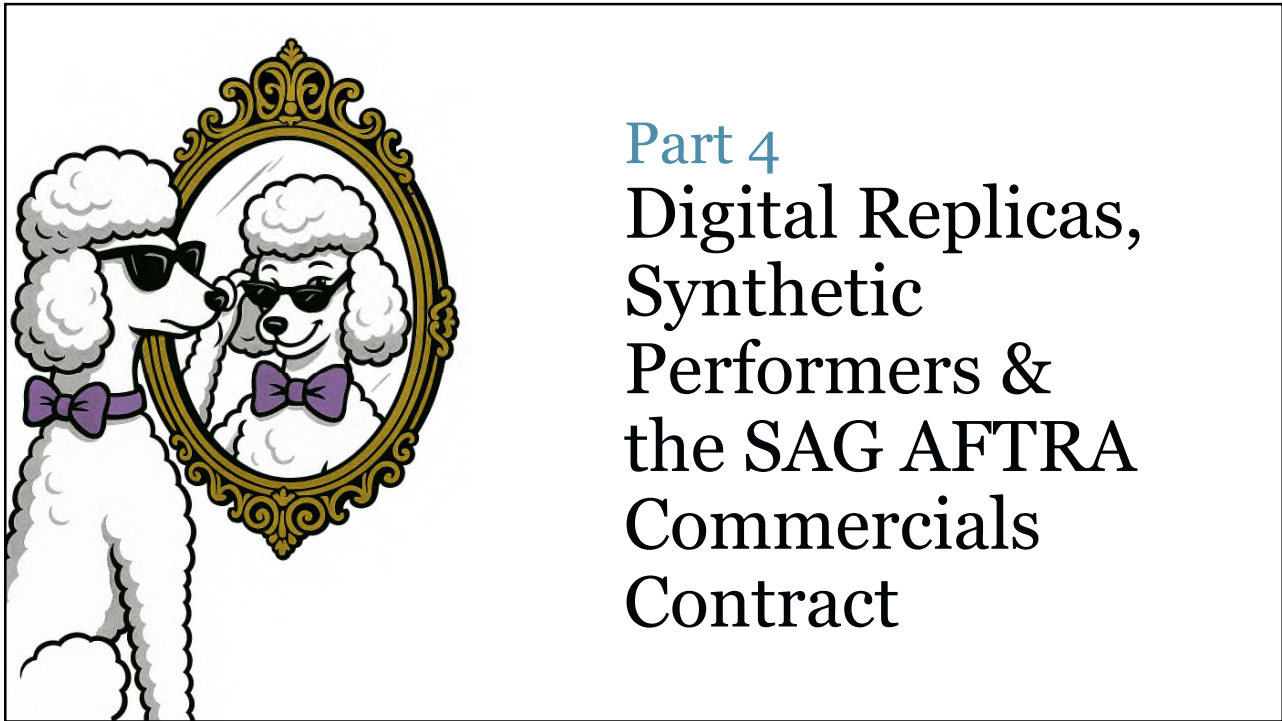
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Platform Disclosure Policies

YouTube	Disclosure required when content is meaningfully altered or when synthetic content seems realistic, but not for unrealistic content or for minor changes
X	Synthetic content should not be used in a manner that will deceive or cause harm
TikTok	Disclosures required when AI used to show realistic-appearing scenes or people
Meta	Disclosures required for AI-generated video and audio of people, but not typically for still images
LinkedIn	Disclosures required when showing person doing/saying something they didn't do/say and for synthetic content that misrepresents or distorts real-life events

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Part 4
Digital Replicas,
Synthetic
Performers &
the SAG AFTRA
Commercials
Contract

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SAG &
Digital Replicas

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Notice

- Must use *48 (reducible to 24) hours notice* to performer
- Notice applies:
 - When you hire talent for a shoot to create the Digital Replica
 - When you create a Digital Replica based on prior performances you captured
 - When you use a Digital Replica created by someone else
 - When you create Digital Replica based on performances captured by someone else
 - When you create a Digital Replica based on performances not created under the SAG Commercials Contract
- Notice is supposed to be given *prior to session, creation, or use (as applicable)* of the Digital Replica
- Most (but not all) of the notice provisions say “commercially reasonable efforts”

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Valid Consent

- Must get “*clear and conspicuous*” consent through rider/separate agreement
- Producer must provide Performer with a *reasonably specific description* of the intended use of the Digital Replica in order to obtain valid consent
- If you want to use the Digital Replica in a commercial “in a manner that goes *beyond the reasonably specific description* initially provided to Performer, Producer must obtain additional consent and provide a new reasonably specific description of the intended use”

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Extra Consent

- Without *additional* consent, you *cannot* use Digital Replica to modify/create a new performance that:
 - Changes the performer's "physical traits" (excluding, for example, adding a voice echo or sweetening)
 - Causes the performer to appear nude (including pasties and genital socks) or partially nude (e.g., shirtless or pantless, only wearing a bathing suit or underwear, sheer or transparent clothing), or
 - Could be offensive to a reasonable person



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Historical Digital Technologies

- MOA: Producers may continue to use historic digital technologies (that may include AI components) to "replicate or alter" performers' voices, likenesses, and performances, consistent with historical practices
- FAQ: "There is a difference between creating a Digital Replica of a specific performer to generate a performance and using editing technologies that may incorporate AI components but that are not generating new performances or modifying a performer's physical traits (e.g., eye color, language, skin color, etc.)" How far will this take us?

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Payments – Digital Replica

- 1 session fee if performing services specifically to create a Digital Replica (e.g., reading a specific script to aid in creation of Digital Replica)
- 1.5 session fee per spot (with 1 session fee applicable against use fees) (a “Replica session fee”), triggered on use of the commercial
 - NOTE: If same spot includes live performance and Digital Replica performance, you can only apply **1 (not 2)** session fees against use
- Scale use and holding fees (principal performers)
- P&H contributions on all of the above

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SAG & Synthetic Performers

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Synthetic Performers

- A “Synthetic Performer” is a digitally-created asset that:
 - is intended to and does create, the clear impression that the asset is a human performer that Producer knows or should know *is not recognizable as an identifiable human performer*,
 - is not voiced by a human performer, and
 - Is *not a Digital Replica*

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Payments – Synthetic Performer

- If spot includes at least 1 (human) principal performer:
 - 1.5 session fee per spot
 - P&H contributions on session fee and, if Synthetic Performer = a principal performer, also on use and holding fees
- If spot includes no humans: negotiate with union

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Crowd Scene and Synthetic Extras

“If you are using synthetic extra performers in a crowd scene and you have already paid the 45 human extras, then no contribution to the Plans is due, just like no payments are due when you use other technologies to replicate background performers after paying 45 human extra performers. If, however, there is not a human on-camera principal performer, SAG-AFTRA (in consultation with the JPC) shall negotiate in good faith the amount payable to the Plans.”

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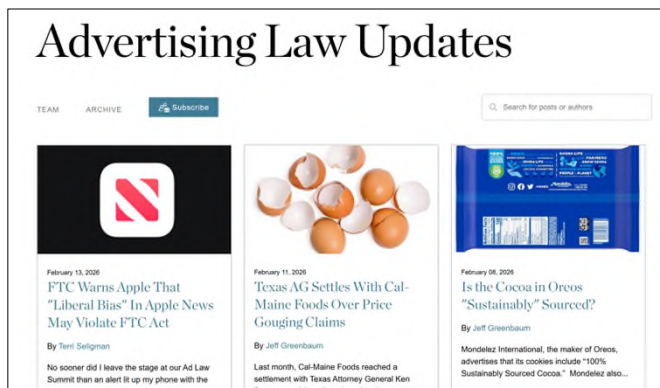
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