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Client Alert
Commentary

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The ELVIS Act: Tennessee Shakes Up Its Right of Publicity Law and Takes On Generative AI

A new Tennessee law seeks to impose liability on generative AI companies and internet platforms related to unauthorized use of a person's voice or likeness.

On March 21, 2024, Tennessee enacted the Ensuring Likeness, Voice, and Image Security (ELVIS) Act of 2024, expanding the state's statutory right of publicity (ROP) in a manner that may pose new risk of liability for artificial intelligence services, internet platforms, and other technology companies that use artists' voices and likenesses. The law goes into effect on July 1, 2024.

Publicized as "first-of-its-kind legislation," the ELVIS Act arrives at the forefront of similar state and federal proposed ROP legislation, as well as regulatory action targeting AI-generated deepfakes and soundalikes.

Expanded and New Liability

The ELVIS Act amends Tennessee's Personal Rights Protection Act of 1984 in two core respects.

First, it expands existing law (section 47-25-1105) to prohibit unauthorized commercial use of an individual's voice, in addition to the existing restrictions on use of an individual's name, photograph, and likeness. The Act defines "voice" to include "a sound in a medium that is readily identifiable and attributable to a particular individual, regardless of whether the sound contains the actual voice or a simulation of the voice of the individual." This broad definition raises the specter that liability under the ELVIS Act may extend not only to use of an existing sound recording of someone's voice, and not only to digitally generated recordings or audiovisual content that approximates individual voices, but also to humans who can imitate other artists (i.e., soundalike artists).

Second, the ELVIS Act effectively creates a novel form of secondary liability for persons other than those who have engaged in the actual unauthorized use of an individual's voice or likeness. Specifically, the law introduces two new forms of civil liability where a person or company:

- "Publishes, performs, distributes, transmits, or otherwise makes available to the public an individual's voice or likeness, with knowledge that use of the voice or likeness was not authorized by the individual"; or

- "Distributes, transmits, or otherwise makes available an algorithm, software, tool, or other technology, service, or device, the primary purpose or function of which is the production of an individual's photograph, voice, or likeness without authorization from the individual."

The first provision could be broadly construed to implicate platforms like social media sites and streaming services, given the potential availability of soundalikes and other replicas on both types of services.

The second provision seems to take more direct aim at technology companies, including generative AI developers, purporting to impose liability where a person provides software, tools, and other technologies "the primary purpose or function of which is the production of an individual's photograph, voice, or likeness without authorization from the individual." It is not clear what "primary purpose or function" means in this context or how that language will be construed. Nevertheless, AI companies should consider how the law may impact technical capabilities, marketing, and innovation going forward.

These new causes of action depart from the existing prohibition on unauthorized use in an important respect. The existing provision makes it unlawful to "knowingly use … in any medium" a person's name, image, likeness (and now voice) "for purposes of advertising … or for purposes of fund raising, solicitation of donations, purchases of products, merchandise, goods, or services." Neither of the new causes of action explicitly include such a commercial-use requirement, creating the possibility that a platform or generative AI company might be held liable for a wider range of unauthorized uses of an individual's voice or likeness. Indeed, the new provisions seemingly overlap with the existing prohibitions in a manner that could effectively eliminate the commercial-use requirement in many cases.

One important issue that will arise with the ELVIS Act and other similar state developments is the interaction between those state laws and federal copyright law, which expressly preempts state laws that attempt to create rights that are equivalent to any exclusive rights within the general scope of copyright. In addition, both federal and state efforts will be subject to First Amendment scrutiny, given the potentially significant impacts on free speech interests.

Remedies and Third-Party Enforcement

The remedies available under the ELVIS Act are largely the same as those under the existing law. A claimant can seek injunctive relief to prevent or restrain the unauthorized use of their name, photograph, voice, or likeness. They may also seek the impounding or destruction of all materials made or used in violation of their publicity rights. And they may recover actual damages and any additional profits attributable to that infringement.

The one material procedural change from the existing law with respect to enforcement is that the ELVIS Act broadens the scope of enforcement by allowing record companies to bring an action on behalf of their recording artist. The new law clarifies that where an individual has entered into an exclusive contract as a recording artist, or granted an exclusive license to distribute sound recordings featuring the individual's voice, either the individual *or* the other contracting party may enforce the relevant publicity rights.

Narrowed Exemptions

The ELVIS Act subtly narrows the liability exemptions provided under the current law ([section 47-25-1107](#)), potentially expanding liability for a broad range of media companies.

First, the Act narrows the existing "fair use" exemption, which provides that "if the use of a name, photograph, or likeness is in connection with any news, public affairs, or sports broadcast or account,"

it does not violate the law. The ELVIS Act newly provides that this exemption only applies "[t]o the extent such use is protected by the First Amendment to the United States Constitution," which potentially raises the burden on companies that wish to invoke this defense.

Second, the ELVIS Act narrows the existing advertising exemption under section 47-25-1107(c). Previously, that exemption provided that owners or employers of any medium used for advertising, such as newspapers, magazines, and radio stations, will not be held liable for publishing or disseminating any advertisement in violation of the Act *unless* those entities had explicit knowledge of the unauthorized use. The new law takes this provision one step further by excluding from the exemption any company that has "knowledge or reasonably should have known of the unauthorized use."

Broader Context and Impact

The ELVIS Act is a key development in a broader landscape of legislative efforts around ROP issues.

State Legislation

States that seek to similarly impose liability on use of another's "likeness" (broadly defined) related to music, entertainment, and politics include:

- **Kentucky:** The state proposed a new law "relating to commercial rights to the use of names, voices, and likenesses" (SB 317) in March. The language of the bill, similar to that of the ELVIS Act, could implicate streaming services and technology companies that make available certain unauthorized uses of a person's voice or likeness. Kentucky's bill also incorporates a statutory damages scheme and a four-year statute of limitations.

- **Illinois:** The state introduced legislation (SB 3325) that amends the state's Right of Publicity Act in March. Among other things, the proposed legislation defines "artificial intelligence" and "generative artificial intelligence," and expands the definition of "identity" to include "a simulation of the attribute of an individual, or is created through the use of artificial intelligence." The proposed law — which is similar to the ELVIS Act — also expands third-party enforcement of an artist's publicity rights to record companies.

- **California:** The state introduced a bill (AB 1836) in January that would make anyone who uses the digitally simulated likeness or voice of a deceased celebrity liable for damages. Although more limited in its application, AB 1836 is yet another example of legislation designed to target deepfakes. The bill defines "digital replica" as a "simulation of the voice or likeness of an individual that is readily identifiable as the individual and is created using digital technology."

- **Louisiana:** The state introduced a bill (SB 217) in March that focuses on political candidates, and defines "deepfake" as "the use of manipulated images or audio or visual depictions of a candidate for office with the intent to deceive members of the public as being a genuine representation of the candidate." The legislation requires any AI-generated content or deepfakes to be identified as such in the context of the state's election rules.

Federal Legislation

In addition to a proposed federal ROP law, other relevant federal legislation concerning use of likeness and voice includes:

- The Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2023, which was announced late last year in the Senate. As drafted, the Act would hold people, companies, and platforms liable for producing or distributing an unauthorized AI-generated replica of an individual in an audiovisual work or sound recording. The current draft includes exemptions for works protected by the First Amendment, such as sports broadcasts, documentaries, biographical works, or for purposes of comment, criticism, or parody, among others.

- The No Artificial Intelligence Fake Replicas and Unauthorized Duplications Act (No AI FRAUD Act), which was introduced by a group of lawmakers hours after the ELVIS Act was introduced in January. A complement to the NO FAKES Act, the proposed legislation attempts to impose liability against those who "facilitate, create, and spread AI frauds without [an individual's] permission" while "[b]alancing the rights against First Amendment protections to safeguard speech and innovation."

- The AI Labeling Act of 2023, which was announced as a bill designed to ensure that people know when they are viewing AI-made content or interacting with an AI chatbot by requiring clear labels and disclosures. As with similar pending federal legislation, the AI Labeling Act was introduced to curb the prevalence of deepfakes, particularly as they relate to deepfakes of minors.

Regulatory Landscape

The regulatory landscape is rife with efforts that take aim at lookalike and soundalike content:

- On February 15, 2024, the FTC issued a Supplemental Notice of Proposed Rulemaking seeking comment on a proposal that, if implemented, would prohibit the impersonation of any individual and prohibit companies from supplying technology that they know or reasonably should have known would facilitate such impersonation. The proposed rules, which are still subject to public comment, could go into effect as soon as this spring and would substantially increase the FTC's enforcement powers over AI. For more information and commentary, see our Client Alert.

- Over a year ago, the US Copyright Office launched a comprehensive initiative to examine the impact of generative AI on copyright law and policy. As part of this initiative, the Office will issue a report this spring that analyzes the impact of AI on copyright and makes recommendations with respect to legislative and regulatory action. The first section of this report will address use of AI to digitally replicate artists' appearances, voices, or other aspects of their identities.

Latham & Watkins will continue to report on developments related to the intersection of ROP, copyright, and AI.

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