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AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO

AgencyAnalysis.nmlegis.gov and email to billanalysis@dfa.nm.gov

(Analysis must be uploaded as a PDF)

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 2/4/25 *Check all that apply:*
Bill Number: HB 221 Original Correction
 Amendment Substitute

Sponsor: Rep. Tara L. Lujan **Agency Name and Code** AOC
Short Title: Voice & Visual Likeness Rights Act **Number:** 218
Person Writing Kathleen Sabo
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---------------|------|---------------------------|---------------|
| FY25 | FY26 | | |
| None | None | Rec. | General |
| | | | |

(Parenthesis () indicate expenditure decreases)

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|---------|---------|---------------------------|---------------|
| FY25 | FY26 | FY27 | | |
| Unknown | Unknown | Unknown | Rec. | General |
| | | | | |

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY25 | FY26 | FY27 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|---------|---------|---------|-------------------|---------------------------|---------------|
| Total | Unknown | Unknown | Unknown | Unknown | Rec. | General |

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None.

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 221 enacts the “Voice and Visual Likeness Rights Act,” (VVLRA) declaring that the right to an individual’s voice or visual likeness is a property right exclusive to that individual who may license the use of the individual’s voice or visual likeness with instructions, limitations and conditions provided by a licensing agreement, as often and to as many persons as the individual chooses. The VVLRA provides that the right shall not expire on the death of the individual, regardless of whether the right was commercially exploited by a right holder. **(Section 3(A))** The Act provides that a right holder who is not the individual may authorize the use in a digital replica in accordance with the terms of a licensing agreement. Under the VVLRA, this right is a property right that is licensable by the right holder and a license may survive the individual’s death and be bequeathed by will or pass as personal property by operation of law. **(Section 3 (B))** The law provides that the rights provided in Subsection A are exclusive to the individual and may be transferred during the individual’s lifetime. The law further provides that a right holder may transfer the rights provide in Subsection B during the individual’s lifetime or during the 10-year period after the death of the individual and the right may be terminated by: (1) proof of the non-use of the name, likeness or voice of an individual by a right holder for two years subsequent to the initial 10-year period following the individual’s death; or (2) the death of all executors, transferees, heirs or devisees of the individual.

The VVLRA distinguishes between licenses involving adults and minors. **(Section 4)** A license for a living minor is valid only if the license agreement is in writing and signed by a parent or guardian, includes a reasonably specific description of the intended uses of the digital replica, and is approved by a court in accordance with the laws of the state.

Section 5 of the VVLRA provides that a post-mortem transfer is valid only if the transfer agreement is in writing and signed by the right holder or an authorized representative of the right holder.

Section 7 of the Act provides the following regarding liability, civil action, remedies, limitations of action and exclusions:

- **Subsection A:** provides that a person that produces, publishes, reproduces, displays, distributes or otherwise makes available digital replicas without the written consent of the individual or the right holder is liable for a civil action. Under the law, each display made, copy made, transmission and instance of an unauthorized digital replica made available on an online service is a violation of the VVLRA.
- **Subsection B:** requires that, to incur liability, a person engaged in the violation have actual knowledge of the alleged violation, or shall have willfully avoided having knowledge that the material is an unauthorized digital replica.
- **Subsection C:** provides that, unless the digital replica is used to depict sexually explicit conduct, a violation does not occur under specified circumstances.
- **Subsection D:** provides that a person shall not be secondarily liable for a violation of the provisions of the VVLRA for manufacturing, importing, offering to the public,

- providing or otherwise distributing an unauthorized digital product unless the product or service meets the Acts specified criteria.
- **Subsection E:** provides that an online service shall not be liable for violation the Act if, upon receiving a notification of alleged violation, the online service removes or disables access to the material alleged to be an unauthorized digital replica as soon as is practicable.
 - **Subsection F:** provides that an online service shall not be liable for violating the Act for storing third-party provided material that resides on a system or network controlled or operated by or for the online service if, upon receiving a notification of violation, the online service removes or disables access to all instances of the material claimed to be an unauthorized digital replica as soon as is practicable for the online service and takes reasonable steps to promptly notify the third party that provided the material that the online service has removed or disabled access to the material.
 - **Subsection G:** provides that a civil action for a violation of the Act may be brought by: (1) a right holder; (2) if the individual is a minor, a parent or guardian of the individual; (3) a person that controls, even by virtue of a license, the right to authorize the use of the voice or visual likeness of the individual; (4) a person that owns or controls the right to authorize the use of the voice or visual likeness of a deceased person; or (5) in the case of digital replica involving a sound recording artist, a person that has directly or indirectly entered into: (a) a contract for the exclusive use of the sound recording artist as a sound recording artist; or (b) an exclusive license to distribute or transmit one or more works that capture the audio performance of the sound recording artist.
 - **Subsection H:** provides that a civil action for private enforcement of the Act may be brought within 3 years after the date on which the party bringing the civil action discovered or with due diligence should have discovered the violation.
 - **Subsection I:** provides that it shall not be a defense that the defendant displayed or otherwise communicated to the public a disclaimer stating that the applicable digital replica was unauthorized or disclosing that the digital replica was generated through the use of artificial intelligence or other technology.
 - **Subsection J:** provides that in a civil action brought pursuant to the VVLRA, a person that violates the act is liable to the injured party in an amount equal to the greater of:
 - \$5,000 per work embodying the unauthorized digital replica, in the case of a natural person;
 - \$5,000 per violation, in the case of an online service;
 - \$25,000 per work embodying the unauthorized digital replica, in the case of a person that is not an online service; or
 - Actual damages suffered by the injured party as a result of the activity, plus profits from the unauthorized use attributable to that use and that are not taken into account in computing the actual damages.
 - **Subsection K:** permits the plaintiff to seek injunctive or other equitable relief.
 - **Subsection L:** provides that in the case of willful activity in which the injured party has proven that the defendant acted with malice, fraud, knowledge or willful avoidance of knowledge that the conduct violated the law, the court may award the injured party punitive damages. If the prevailing party is the party bringing the action, the court may award reasonable attorney fees. If the prevailing party is the party defending the action, the court may award reasonable attorney fees if the court determines that the action was not brought in good faith.

- **Subsection M:** provides that an online service that has an objectively reasonable belief that material claimed to be an unauthorized digital replica does not qualify as a digital replica pursuant to the VVLRA shall not be liable for statutory or actual damages exceeding \$1 million, regardless of whether the material is determined to be an unauthorized digital replica.
- **Subsection N:** provides that in the event that the third party that provided the material that the online service has removed or to which the online service has disabled access files a lawsuit against the sender of a notice of violation claiming that the notice was false or deceptive, the online service may restore the removed material to its network for access by members of the public without monetary liability to either the notice sender or the third party that provided the material that the online service had removed or disabled access.

Section 8 of the Act provides that the VVLRA is a law pertaining to intellectual property for the purposes of the Federal Communications Act of 1934.

Section 9 of the Act contains a severability clause.

The effective date of the Act is July 1, 2025.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions, and appeals from convictions, as well as challenges to the law. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

- 1) In July of 2024, S. 4875, the “Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2024” or the “NO FAKES Act of 2024” was introduced. A companion bill, H.R. 9551, was introduced in September. (<https://www.congress.gov/bill/118th-congress/senate-bill/4875/text> and [https://www.congress.gov/bill/118th-congress/house-bill/9551/text#:~:text=\(1\)%20IN%20GENERAL..individual%20in%20a%20digital%20replica.&text=\(III\)%20licensable%2C%20in%20whole,exclusively%2C%20by%20the%20Right%20holder.](https://www.congress.gov/bill/118th-congress/house-bill/9551/text#:~:text=(1)%20IN%20GENERAL..individual%20in%20a%20digital%20replica.&text=(III)%20licensable%2C%20in%20whole,exclusively%2C%20by%20the%20Right%20holder.)) Both bills are similar to HB 221’s “Voice and Visual Likeness Rights Act”. As described by a nationally-recognized intellectual property law professor,

The bill provides each individual or a different “rights holder” the “right to authorize the use of the voice or visual likeness of the individual in a digital replica.” The right is violated by the “display, copy made, [or] transmission” of the digital replica, or its being made available. Each instance of those acts produce[s] a violation unless an online service has taken reasonable measures to remove or disable access to the digital replica.

See https://rightofpublicityroadmap.com/news_commentary/no-fakes-act-introduced-in-senate/#:~:text=The%20bill%20provides%20each%20individual,access%20to%20the%20digital%20replica.

Additionally, the American Action Forum notes that

The NO FAKES Act aims to preserve individuals' rights in the digital age by recognizing a federal intellectual property right to their own voice and visual likeness, and it extends this protection to their relatives after their death. The legislation would permit individuals to take action against bad actors who intentionally generate, distribute, or profit from unlawful digital copies, thereby protecting personal identification in an increasingly digitally dominated world. The bill would introduce exceptions to unlawful creation and distribution, allowing for relevant digital replicas in documentaries, bona fide news, or broadcasts.

To incur liability, individuals must either willfully avoid knowing or have been notified that the material is a digital replica and that the rights holder did not authorize it. Exceptions to liability would exist for bona fide news, public affairs, and sports broadcasts, as long as the newly created digital material is relevant to the subject of broadcast and used in documentaries and biographies that are not marked as authentic.

See <https://www.americanactionforum.org/insight/the-pros-and-cons-of-the-no-fakes-act/#:~:text=The%20NO%20FAKES%20Act%20aims,are%20not%20marked%20as%20authentic>, and for a listing of potential concerns.

The American Action Forum further notes that

[T]he bill would create a safe harbor if platforms remove or disable access to the replica as soon as technically and practically feasible. This safe harbor would require a platform to establish a designated agent who would receive the takedown notifications and mandate the availability of the agent's name, address, telephone number, and electronic mail address. As such, the legislation would shield media platforms from responsibility when they proactively remove infringing information after detection.

While there is no requirement within HB 221 that a platform establish a designated agent, HB 221 would shield media platforms from responsibility when they proactively remove infringing information after detection.

Under both the federal S. 4875/H.R. 9951 and HB 221, if platforms do not take down reported content within a feasible timeline, they open themselves up to civil action and could be liable for actual damages in addition to profits made from the unauthorized use or an amount of \$5,000 per work for individual, \$5,000 per violation for an online entity, or \$25,000 per work for an entity that is not an online service, whichever is higher. An online service with an objectively reasonable belief that the unauthorized material does not qualify as a digital replica is not liable for statutory or actual damages exceeding \$1 million.

2) The American Action Forum also notes, regarding the federal S. 4875/H.R. 9551

The bill raises significant concerns regarding free speech and content moderation, however, because potential liability for platforms could lead to the over-removal of content. These liability concerns, paired with the bill's vague wording, could significantly limit speech online. Congress should carefully consider the bill's potential erosion of speech protections and potential for general legal confusion as it works its way through the legislative process.

These concerns apply to HB 221's proposed VVLR, as well.

- 3) Given the use of vague terms such as “bona fide news” within the VVLRA, there could be uncertainty about when First Amendment freedom of speech protections apply, leading to legal disputes and confusion.

Also, as described by the American Action Forum

by allowing individuals to hold platforms liable for hosting digital replicas, the bill could incentivize false claims and the over-removal of content. If, for example, an individual creates a parody of a popular figure that would normally be considered fair use if analyzed under existing copyright law, and in practice wouldn't violate the NO FAKES Act, a claim from the individual depicted could result in a platform simply erring on the side of caution and taking that content down. Without clear guidelines, platforms may become overly cautious, stifling user-generated content and free speech to avoid litigation.

See <https://www.americanactionforum.org/insight/the-pros-and-cons-of-the-no-fakes-act/#:~:text=The%20NO%20FAKES%20Act%20aims,are%20not%20marked%20as%20authentic>

- 4) Just yesterday, February 3, 2025, the American Bar Association (ABA) House of Delegates addressed the increased use of artificial intelligence to replicate people's voices or appearances without their permission. At the meeting, Beth Whittenbury, a special advisor to the Commission on Women in the Profession, noted that the unauthorized use of digital replicas disproportionately harms women. “With the recent *Dobbs* decision and the exclusion of the Equal Rights Amendment from the U.S. Constitution, it is clear that women's rights are under attack, and we need to turn that tide,” Whittenbury said. “Resolution 501 allows us to begin to do that.”

The ABA House overwhelmingly adopted Resolution 501, which calls for federal legislation to prevent the unauthorized use of an individual's voice, visual likeness or image through technological means. The resolution recommends that legislation include safeguards to protect First Amendment rights and address right of publicity and privacy laws and other related issues.

- 5) The National Conference of State Legislatures reports that states have begun to prohibit the distribution of deceptive audio or visual media with the intent to injure a candidate's reputation or to deceive a voter into voting for or against a candidate, and that at least 40 states have pending legislation in the 2024 legislative session and that at least 50 bills have been enacted. These include in Tennessee, where the Personal Rights Protection Act was replaced with the Ensuring Likeness, Voice and Image Security Act of 2024, to provide that every individual has a property right in the use of that individual's name, photograph, voice or likeness in any medium in any manner. See *Deceptive Audio or Visual Media ('Deepfakes') 2024 Legislation*, November 2024, <https://www.ncsl.org/technology-and-communication/deceptive-audio-or-visual-media-deepfakes-2024-legislation>

6) Section 7(E) of the VVLRA provides that an online service shall not be liable for violation of the Act if, upon receiving a notification of alleged violation, the online service removes or disables access to the material alleged to be an unauthorized digital replica *as soon as is practicable*. (emphasis added) Subsection F provides that an online service shall not be liable for violating the Act for storing third-party provided material that resides on a system or network controlled or operated by or for the online service if, upon receiving a notification of violation, the online service removes or disables access to all instances of the material claimed to be an unauthorized digital replica *as soon as is practicable* for the online service and takes reasonable

steps to promptly notify the third party that provided the material that the online service has removed or disabled access to the material. (emphasis added)

It is curious that in an Act seeking to protect an individual's property rights, that immediate removal or disabling is not required, rather than removal or disabling "as soon as is practicable". Perhaps this is an attempt to balance the rights of an individual with the potential chilling effect the law could have on a platform's fair use of material. (See Significant Issue #3, above.)

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

See "Fiscal Implications," above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS