



June 10, 2024

Senate Judiciary Committee
1021 O Street, Room 3240
Sacramento, CA 95814

**RE: AB 1836 – “Intellectual property: use of likeness: digital replica”
(Oppose)**

Dear Chair Umberg and Members of the Senate Judiciary Committee:

The above three cosigned organizations understand California lawmakers' and residents' rightful concerns about how a "digital replica" might be used in violation of an individual's intellectual property rights. We recognize the potential for misuse in various sectors, including entertainment, media, and personal data, and are committed to advocating for robust legal protections and frameworks that balance innovation with the safeguarding of personal and intellectual property rights. However, AB 1836 represents a significant departure from California's long-established right of publicity statute under §3344.1, which could likely infringe upon First Amendment protected expressive uses. We believe that these concerns, among others, can and should be addressed through collaborative efforts and thoughtful legislation.

We appreciate the opportunity to further expand on our concerns and propose revisions to AB 1836's current language.

AB 1836's definition of “digital replica” should be more-narrowly defined.

AB 1836 defines “digital replica” as “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”. Without further specificity under this definition, “readily distinguish” could apply to a broad swath of use cases and could unnecessarily chill other expressive uses given the bill’s enforcement provisions. We suggest narrowing this definition in § 3411.2 (a)(2)(A):

For purposes of this paragraph: (ii) “Digital replica” means a highly realistic digital simulation of the voice or likeness of an individual that so closely resembles ~~the~~ that particular 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.

Liability under AB 1836 should be limited to those who intentionally deceive or commit otherwise illegal acts.

Due to the many applications in which automated tools like artificial intelligence (AI) can be used, it is important to limit liability to instances that cause harm. It is also important to consider the different entities involved in a given AI-driven model, including the developer that builds an AI system, the deployer who applies the model to a given task and the user who ultimately utilizes the system. Each of these entities could bear responsibility for outcomes arising from the use of the AI system, depending on the circumstances, but those circumstances are important to consider.

As currently written, AB 1836 would establish that any person who “produces, distributes, or makes available the digital replica of a deceased personality’s voice or likeness in an expressive audiovisual work or sound recording without specified prior consent” liable for up to \$10,000 or actual damages suffered by the depicted person or the person controlling the rights. Because this liability extends to any person that “produces”, “distributes” or “makes available” such a digital replica, it is unclear if the deployers of AI systems more broadly could be held liable if a user chooses to use such a system to create and disseminate content without authorization from the depicted individual.

The cosigned organizations certainly understand the importance of ensuring that content generated from AI systems is not used to further nefarious purposes, however, it is impossible for the developers or deployers of such systems to predict how each and every individual may use generated audio or visual media. This places deployers of such technologies in the untenable and impossible scenario of having to predict each and every use of their product and risks chilling innovation.

We recommend that liability be targeted to a person or entity who committed intentionally or *knowingly* deceptive acts using a digital replica, rather than tying liability to the product that allowed the media to be generated or served as a means for the digital replica to be shared. This division of responsibility will ensure that liability lies in the most appropriate place — with the actor most capable of minimizing harm and most responsible for any harm that ensues. It

will also ensure that other expressive uses are protected while holding bad actors accountable for the most high-risk and, likely most harmful, scenarios.

To further clarify this division of responsibility, we recommend providing a knowledge standard so businesses have a proper roadmap in order to comply. We suggest amending the language to read:

(ii), a person who knowingly produces, distributes, or makes available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording ~~without prior consent from a~~ with the knowledge that the applicable person specified in subdivision (c) did not consent shall be liable to ~~any~~ the injured party in an amount equal to the greater of ten thousand dollars (\$10,000) or the actual damages suffered by ~~a~~ the person controlling the rights to the deceased personality's likeness.

Additionally, our coalition suggests adding a standard definition to the word "knowledge" to further clarify where the division of responsibility lies:

(iii) "knowledge" means actual knowledge or, if the person does not have actual knowledge, constructive knowledge but only if the person has received notice in accordance with 17 U.S.C. 512(c)(3) and has not acted expeditiously to remove, or disable access to, the digital replica where the person has the right and ability to do so.

Our organizations suggest ensuring that the bill's provisions do not impede any activities protected by the First Amendment.

There is an array of uses in which digital replicas appear, and we suggest that the legislation expressly makes it clear that those uses do not constitute a violation of the proposed law. We also suggest including language to allow for other First Amendment covered expressive uses associated with digital replicas to be exempted from liability. This will help ensure that the current California right of publicity law extends to digital replicas without risking violations of the First Amendment.

To that end, our suggestion includes language to exclude the following uses of an applicable digital replica:

- (ii) For purposes of this section, a digital replica may be used ~~without consent to the extent the use is protected by the First Amendment to the United States Constitution,~~ if the use of the digital replica meets any of the following criteria:
- (I) The use is in connection with any news, public affairs, or sports broadcast or account.

- (II) The use is for purposes of comment, criticism, scholarship, satire, or parody.
- (III) The use is a representation of the individual as the individual's self in an audiovisual work, unless the audiovisual work containing the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated.
- (IV) The use is fleeting or incidental.
- (V) The use is of the type otherwise protected by the First Amendment to the United States Constitution.

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We have included a full version of our amendments within the bill text for your convenience following the end of this letter. We appreciate your consideration of these comments and stand ready to provide additional information.

Respectfully submitted,



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On behalf of:
Ronak Daylami, California Chamber of Commerce (CalChamber)
Dylan Hoffman, TechNet

Introduced by Assembly Member Bauer-Kahan**January 16, 2024**

An act to amend Section 3344.1 of the Civil Code, relating to intellectual property.

LEGISLATIVE COUNSEL'S DIGEST

AB 1836, as amended, Bauer-Kahan. Use of likeness: digital replica.

Existing law provides that the author of any original work of authorship that is not fixed in any tangible medium of expression has an exclusive ownership in the representation or expression of that work as against all persons except one who originally and independently creates the same or similar work. Existing law also provides that the inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership in the invention or design, and in the representation or expression thereof, which continues so long as the invention or design and those representations or expressions remain in the inventor's or proprietor's possession.

This bill would state the intent of the Legislature to enact legislation to ensure that all intellectual property is sufficiently protected from exploitation.

Existing law also establishes a cause of action for damages on behalf of specified injured parties for the unauthorized use of a deceased personality's name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services within 70 years of the personality's death, except as specified.

Existing law specifies that for the above-described provision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

This bill would make a person who produces, distributes, or makes available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording without specified prior consent liable to any injured party in an amount

equal to the greater of \$10,000 or the actual damages suffered by a person controlling the rights to the deceased personality's likeness, except as prescribed. The bill would define "digital replica" to mean 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.

DIGEST KEY

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

It is the intent of the Legislature to enact legislation to ensure that all intellectual property is sufficiently protected from exploitation.

SEC. 2.

Section 3344.1 of the Civil Code is amended to read:

3344.1.

(a) (1) (A) Subject to subparagraph (B), a person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use, and the person who violated the section shall prove the person's deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorney's fees and costs.

(B) (i) Except as provided in clause (ii), a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

(ii) If a work described in clause (i) includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under this subparagraph, notwithstanding the unprotected use's inclusion in a work otherwise exempt under this subparagraph, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the

deceased personality without prior consent from the person or persons specified in subdivision (c).

(2) (A) (i) Notwithstanding paragraph (1) and subject to clause (ii), a person who knowingly produces, distributes, or makes available the digital replica of a deceased personality's voice or likeness in an expressive audiovisual work or sound recording ~~without prior consent from~~ awith the knowledge that the applicable person specified in subdivision (c) did not consent shall be liable to ~~any~~the injured party in an amount equal to the greater of ten thousand dollars (\$10,000) or the actual damages suffered by ~~at~~the person controlling the rights to the deceased personality's likeness.

(ii) For purposes of this section, a digital replica may be used ~~without consent to the extent the use is protected by the First Amendment to the United States Constitution~~, if the use of the digital replica meets any of the following criteria:

(I) The use is in connection with any news, public affairs, or sports broadcast or account.

(II) The use is for purposes of comment, criticism, scholarship, satire, or parody.

(III) The use is a representation of the individual as the individual's self in an audiovisual work, unless the audiovisual work containing the use is intended to create, and does create, the false impression that the work is an authentic recording in which the individual participated.

(IV) The use is fleeting or incidental.

(V) The use is of the type otherwise protected by the First Amendment to the United States Constitution.

(VI) The use is in an advertisement or commercial announcement for a work described in subclauses (I) to (IV), inclusive.

(B) For purposes of this paragraph:

(i) "Audiovisual work" means a work that consists of a series of related images that are intrinsically intended to be shown by the use of machines or devices, including projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, including films or tapes, in which the works are embodied.

(ii) "Digital replica" means a highly realistic digital simulation of the voice or likeness of an individual that so closely resembles ~~the~~that particular 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.

(iii) "knowledge" means actual knowledge or, if the person does not have actual knowledge, constructive knowledge but only if the person has received notice in accordance with 17 U.S.C. 512(c)(3) and has not acted expeditiously to remove, or disable access to, the digital replica where the person has the right and ability to do so.

(b) The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985. The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subdivision (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of their death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in the deceased personality's name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's

assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased personality during the deceased personality's lifetime by which the deceased personality assigned the rights, in whole or in part, to use the deceased personality's name, voice, signature, photograph, or likeness, regardless of whether the contract was entered into before or after January 1, 1985.

(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent, or portion thereof, has been transferred in accordance with subdivision (b), or if no transfer has occurred, then by the person or persons to whom the right of consent, or portion thereof, has passed in accordance with subdivision (d).

(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

(1) The entire interest in those rights belongs to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belongs to the surviving spouse.

(2) The entire interest in those rights belongs to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belongs to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented. The share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer the deceased personality's rights under this section by contract, or by means of a trust or testamentary instrument, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f) (1) A successor in interest to the rights of a deceased personality under this section or a licensee thereof shall not recover damages for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights under paragraph (2).

(2) Any person claiming to be a successor in interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee as set forth in subdivision (d) of Section 12195 of the Government Code. The form shall be verified and

shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed.

(3) Upon receipt and after filing of any document under this section, the Secretary of State shall post the document along with the entire registry of persons claiming to be a successor in interest to the rights of a deceased personality or a registered licensee under this section upon the Secretary of State's internet website. The Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The microfilm or other reproduction of any document under this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State 70 years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(g) An action shall not be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of that person's death, or because of that person's death, whether or not during the lifetime of that natural person the person used the person's name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. A "deceased personality" shall include, without limitation, any such natural person who has died within 70 years prior to January 1, 1985.

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph if one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

(j) For purposes of this section, the use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing the use is commercially sponsored or contains paid advertising. Rather, it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(l) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit advertisements, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that the owners or employees had knowledge of the unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness as prohibited by this section.

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state. For purposes of this section, acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section.

(o) Notwithstanding any provision of this section to the contrary, if an action was taken prior to May 1, 2007, to exercise rights recognized under this section relating to a deceased personality who died prior to January 1, 1985, by a person described in subdivision (d), other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person described in subdivision (b), that exercise shall not be affected by subdivision (b). In that case, the rights that would otherwise vest in one or more persons described in subdivision (b) shall vest solely in the person or persons described in subdivision (d), other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes.

(p) The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died prior to January 1, 1985.