September 3, 2024

Office of the Honorable Gavin Newsom
Attn: Chief of Staff, Dana Williamson
State Capitol, Suite 1173
1303 - 10th Street
Sacramento, CA 95814

RE: AB 1836 - "Use of likeness: digital replica." (Veto Request)

Dear Governor Newsom:

On behalf of the above three cosigned organizations, we write to respectfully request a veto on AB 1836.

Our organizations recognize the legitimate concerns of California lawmakers and residents regarding the potential misuse of 'digital replicas' that could infringe on individual 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. We regret to say that despite our diligent and collaborative efforts throughout the session, these and other concerns remain unresolved.

Below are the proposed amendments we have suggested throughout the session[1] so that our members can comply with the bill. We appreciate the opportunity to further elaborate on our concerns that remain unaddressed.

AB 1836's definition of "digital replica" should be more narrowly defined.

AB 1836 defines "digital replica" as "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." We suggested narrowing this definition to:

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 that

[1] https://ccianet.org/library/joint-opposition-letter-for-ca-ab-1836-june/

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.

The purpose behind this clarification was to ensure that content where someone may look or sound similar to another individual is not necessarily considered a "digital replica." For instance, it helps prevent individuals who resemble or sound similar to a famous person from exploiting the protections provided under this bill.

Liability under AB 1836 should be limited to those who intentionally violate an individual's intellectual property rights.

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 prior consent from a person" is liable for up to $10,000 or damages suffered by a person controlling the rights to the deceased personality's likeness. 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.

As such, 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 would ensure that liability lies in the most appropriate place — with the actor most capable of mitigating harm and 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 suggested 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, we suggested 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.

We believe this language change is crucial because not all digital services have knowledge of every nuance of specific pieces of content hosted on their platforms. For instance, if a news publisher posts an article using an illegal digital replica on their website or app, a device manufacturer wouldn't recognize that the content is an illegal replica. Even if they did, they lack the means to remove it. However, under the current language, a device manufacturer could still be held liable. Establishing a knowledge standard here addresses this issue effectively. *Although we previously considered imposing an obligation to inquire for such knowledge, many digital service providers wouldn't know to ask (because they are unaware of the content on their platform or device) and in some instances, wouldn't be able to remove it even if they did recognize it as an illegal replica.*

* * * * *

To emphasize, we recognize the importance of this policy issue and agree with much of the language in the bill. The three cosigned organizations have collaborated in good faith with the author and committee members throughout the session, offering language to address our concerns. Additionally, we reviewed our suggested edits with a diverse group of stakeholders, including those outside the tech industry, to ensure we were considerate of all perspectives.

Unfortunately, we have not reached a consensus with the author on our concerns. Therefore, we respectfully request that you veto this bill in its current form, allowing for an opportunity to refine it in the next session.

Respectfully submitted,

Khara Boender, Computer & Communications Industry Association (CCIA)
(kboender@ccianet.org; 203-918-6491)

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