January 24, 2025

Delegate Jackie Hope Glass
General Assembly Building
201 North 9th Street
Richmond, VA 23219

Re: HB 2462 – "Digital Replication Right Act" (Oppose)

Dear Ms. Glass:

On behalf of the Computer & Communications Industry Association (CCIA), I write to raise several concerns regarding HB 2462. CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms.[1] Proposed regulations on the interstate provision of digital services therefore can have a significant impact on CCIA members. CCIA understands Virginia lawmakers and residents' concerns about "unauthorized digital replicas."

However, HB 2462 as currently drafted raises constitutional concerns and conflicts with existing state and federal law. The legislation is also premature, as these are new technologies; the issues they raise are being considered in many fora, both domestic (at the state and federal level) and internationally; and policymakers need to be careful not to overregulate.[2] We appreciate the opportunity to further expand on concerns associated with the provisions of HB 2462 and respectfully request that the bill be sent to the Virginia Joint Commission on Technology and Science (JCOTS) for study during the 2025 interim.

HB 2462's definition of "digital replica" should be more-narrowly defined.

HB 2462 defines "digital replica" as "a newly created, computer-generated, highly realistic electronic representation that is made for commercial use and is readily identifiable as the voice or visual likeness of an individual" (i) "embodied in a sound recording, image, audiovisual work" (a) in which they either didn't appear or (b) "in which the fundamental character of the performance or appearance has been materially altered" that is (ii) "nearly indistinguishable from the actual voice or visual likeness of that individual such that a reasonable person would believe that the electronic representation is only of that particular, actual individual". Without further specificity under this definition, vague and undefined language like "readily identifiable" and "reasonable person" could apply to a broad swath of use cases and could unnecessarily chill other expressive uses given the bill's enforcement provisions, as discussed below.

[1] For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.

[2] *See generally* CCIA, *Understanding AI: A Guide To Sensible Governance* (June 26, 2023), https://ccianet.org/library/understanding-ai-guide-to-sensible-governance/; *see also* U.S. House of Representatives, *Bipartisan House Task Force Report on Artificial Intelligence* (Dec. 2024), https://www.speaker.gov/wp-content/uploads/2024/12/AI-Task-Force-Report-FINAL.pdf.

Liability under HB 2462 should be limited to those who intentionally deceive or commit otherwise illegal acts.

HB 2462 would establish that any person who "engage[s] in the intentional production of a digital replica" or "engage[s] in the intentional publication, reproduction, display, distribution, transmission, or otherwise making available to the public of an unauthorized digital replica" could be liable for statutory damages, actual damages, punitive damages, and/or injunctive relief, as explained below. Because this liability extends to any person that "distributes," "transmits," or "makes available" digital replicas, there is a risk it could extend to technological or automated tools a user may choose to use to create and disseminate content without authorization from the depicted individual.

Legislation should hold accountable bad actors who knowingly and intentionally exploit a person's likeness without permission, ensuring that liability falls on them rather than intermediaries who lack knowledge or intent. This will ensure that other expressive uses are protected while also holding bad actors accountable for the most high-risk, and likely most harmful, scenarios.

While we understand the importance of ensuring that content generated from computer-generated or automated tools like artificial intelligence (AI) is not used to further nefarious purposes, 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 AI system deployers and cloud storage providers in an untenable position, as they could be held liable if a user utilizes their system to create, distribute, or make unauthorized content featuring another individual — without the service provider's knowledge.

The provision limiting secondary liability for "manufacturing, importing, offering to the public, providing, or otherwise distributing a product or service capable of producing digital replicas unless such person directed the production of the digital replica" is well-intended, but not sufficient.

HB 2462 should make clear that other First Amendment-protected activity would not be prevented by the bill's provisions.

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

We appreciate the exceptions that have been added in § 59.1-611(A)(1)-(5), and would suggest also including: the use is protected by the First Amendment; the claim involving an applicable digital replica is against a service provider (as defined in 17 U.S.C. § 512(k)(1)) and would be subject to the safe harbor provisions of the Digital Millennium Copyright Act, 17 U.S.C. § 512 et al., if it were a copyright infringement claim; and the claim is against the provider of a general purpose tool, such as a generative artificial intelligence service or

application, used to produce the digital replica, but the provider did not direct the production of the digital replica.

A framework should be established that enables online services to remove 'digital replicas' promptly upon being notified of specific instances on their services.

If an online service promptly removes a digital replica once notified, or reasonably believes that the content qualifies for an exception or otherwise does not meet the definition of digital replica, it should not be liable for hosting that content. Allowing digital services to make good faith determinations about whether content meets the statutory definition will help limit the misuse of the takedown mechanism to silence legitimate First Amendment-protected speech.

An online service provider should only be held liable for hosting or publicly sharing a digital replica if it obtains actual knowledge of a specific instance of an allegedly unauthorized digital replica and fails to take appropriate action expeditiously. To obtain the requisite knowledge, a court order or a compliant notice from the individual depicted in the digital replica or their authorized representative, with the specific URL or location of the alleged infringement, should be required. Under the current bill, there is currently no obligation for a right holder to notify an online service of allegedly unauthorized digital replica, which makes compliance impossible.

While appreciated, the safe harbors as currently drafted are unbalanced and insufficient. The proposed safe harbor in § 59.1-611(D) for "referring or linking a user" only applies if a service "removes or disables access to the material that is claimed to be an unauthorized digital replica as soon as is reasonable." As with the rest of the bill, "reasonable" is ambiguous and not defined, and it is still not clear how they are expected to know to do so. Even more concerning is the proposed safe harbor for "storing or distributing," which would not only require "takedown" but effectively require "staydown" — still without any notice.

The current proposed safe harbor in § 59.1-611(E) for "storing or distributing third-party-provided material that resides on a system or network controlled or operated by or for the online service" — which likely encompasses a wide range of digital services without knowledge like cloud service providers — requires that a service both "removes, or disables access to, all instances of the material or an activity using the material that is claimed to be an unauthorized digital replica as soon as is reasonable" 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." The requirement to respond to "all instances of" a material or "activity using it" effectively functions as an untenable filtering mandate. This safe harbor also would require the service to take "reasonable steps to promptly notify the third party that provided the material that the online service has removed or disabled access to the material," but still doesn't require a right holder to notify the service.

Additionally, as the bill currently requires that an online service "promptly notify the third party that provided the material that the online service has removed or disabled access to the material," it should also include a counter-notice and appeal system to deter the abuse of takedown requests. The individual or entity whose content is subject to a takedown notice should have the right to provide a counter-notice if they believe that the content is not subject

to the takedown mechanism and thereby appeal its removal. However, they would have no legal recourse against an online service that removes their content in compliance with a valid takedown notice under federal law. Similarly, there should also be recourse for fraudulent misrepresentations, as in 17 U.S.C. § 512(f).

A more robust framework would offer individuals who have been harmed an efficient avenue to seek the removal of digital replicas without resorting to costly litigation. Additionally, it would allow for the recovery of actual damages and profit disgorgement for those harmed by individuals who knowingly violate the statute.

The private right of action would result in the proliferation of frivolous lawsuits and questionable claims.

HB 2462 permits users to bring legal action against companies that have been accused of violating new regulations. By creating a new private right of action, the measure would open the doors of Virginia's courthouses to plaintiffs advancing frivolous claims with little evidence of actual injury. As lawsuits prove extremely costly and time-intensive, it is foreseeable that these costs would be passed on to individual users and advertisers in Virginia, disproportionately impacting smaller businesses and startups across the Commonwealth.[3]

The bill would enable statutory damages of the greater of either $5,000 per "work embodying the applicable unauthorized digital replica," or "any actual damages" (which may be read to suggest harm is unlikely), with the opportunity to seek injunctive or other equitable relief, punitive damages if willful ("with malice, fraud, or knowledge"), and reasonable attorney fees. Damages are capped at $1,000,000 only if there's a "reasonable belief" that material does not qualify as a digital replica. Additionally, "each display, copy, transmission, and instance of the unauthorized digital replica made available on an online service" would be considered its own violation, "unless the online service has taken reasonable steps to remove or disable access to the unauthorized digital replica as soon as is reasonable." As with the rest of the bill, "reasonable" is never defined, which invites costly litigation over ambiguity, or may lead to unnecessary user takedowns.

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CCIA acknowledges the significance of this policy issue and understands the potential for misuse across various sectors. We welcome the opportunity to collaborate on refining the language of this proposal to establish a framework that our members can adhere to while ensuring strong protections are in place.

We appreciate your consideration of these comments and stand ready to provide additional information.

Respectfully submitted,

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[3] Trevor Wagener, *State Regulation of Content Moderation Would Create Enormous Legal Costs for Platforms*, Broadband Breakfast (Mar. 23, 2021), https://broadbandbreakfast.com/2021/03/trevor-wagener-state-regulation-of-contentmoderation-would-create-enormous-legal-costs-for-platforms.

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