

HOUSE BILL NO. 2462

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice

on _____)

(Patron Prior to Substitute—Delegate Glass)

A BILL to amend and reenact § 8.01-40 of the Code of Virginia, relating to unauthorized use of name, portrait, voice, likeness, or picture of any person; digital replica; civil liability; statute of limitations.

Be it enacted by the General Assembly of Virginia:**1. That § 8.01-40 of the Code of Virginia is amended and reenacted as follows:****§ 8.01-40. Unauthorized use of name, portrait, voice, likeness, or picture of any person; punitive damages; unauthorized use of digital replica; statute of limitations.**

A. For the purposes of this section, "digital replica" means 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. "Digital replica" does not include the electronic reproduction, use of a sample of one sound recording or audiovisual work into another, remixing, mastering, or digital remastering of a sound recording or audiovisual work authorized by the copyright holder.

B. Any person whose name, portrait, voice, likeness, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of ~~his or her~~ such minor's parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm, or corporation so using such person's name, portrait, voice, likeness, or picture to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use. And if the defendant ~~shall have~~ knowingly used such person's name, portrait, voice, likeness, or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award punitive damages.

~~B.~~ C. Notwithstanding the provisions of subsection B, a person or entity who (i) originates and distributes a digital replica of a person's voice or likeness in an expressive audiovisual work or sound recording without first obtaining the prior written consent required by subsection B or (ii) acts as a platform that hosts or facilitates the creation or distribution of such digital replica by a third party and, after receiving notice from the rights holder that such digital replica is unauthorized, fails to promptly remove or disable access to every instance of such unauthorized digital replica shall be liable to the individual or, if applicable, to the surviving consort and if none, to the next of kin, or if a minor, the written consent of such minor's parent or guardian in an amount equal to the greater of \$1,000 or the actual damages suffered by the person, surviving consort, next of kin, parent, or guardian. For the purposes of clause (i), each unauthorized digital replica that originates and is distributed in violation of this subsection shall be treated as a single instance of use, irrespective of the number of times such unauthorized digital replica is shared, copied, or otherwise disseminated; however, the extent of such dissemination may be considered by the court or jury when determining the amount of actual damages. For the purposes of clause (ii), a platform that fails to promptly remove or disable access to every instance of an unauthorized digital replica upon receiving notice and having a reasonable opportunity to do so shall be liable for \$1,000 for each instance of such unauthorized digital replica that remains accessible.

D. Nothing in this section shall be construed to impose liability on an Internet service provider or its affiliate or subsidiary that solely provides access to or connection from a website or other online content, or a facility, system, or network not under that provider's control, including transmission, downloading, storage, or access, if the provider is not responsible for the creation of the content that constitutes an unauthorized digital replica.

E. A digital replica of a person's voice or likeness in an expressive audiovisual work or sound recording may be used without first obtaining the prior written consent required by subsection B if the use of the digital replica meets any of the following criteria:

1. The use is in connection with a bona fide news, public affairs, or sports broadcast or account, provided that the digital replica is the subject of, or is materially relevant to, the subject of such broadcast or account;

2. The use is consistent with the public interest in bona fide commentary, criticism, scholarship, satire, or parody;

3. The use represents the individual as the individual's self in a documentary or in a historical or

57 *biographical manner, including some degree of fictionalization, unless the use creates the false impression*
58 *that the work is an authentic recording in which the individual participated or the digital replica is embodied*
59 *in a musical sound recording that is synchronized to accompany a motion picture or other audiovisual work,*
60 *except to the extent that the use is protected by the First Amendment to the Constitution of the United States;*
61 *4. The use is fleeting or incidental;*
62 *5. The use is in an advertisement or commercial announcement for a work described in this subsection*
63 *and is relevant to the subject of such work; or*
64 *6. The use is otherwise protected under the Constitution of the United States.*
65 *F. No action shall be commenced under this section more than ~~20~~ 100 years after the death of such*
66 *person.*