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HOUSE BILL NO. 581

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for <s> Court</s><em class=new>
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. A person is liable to a civil action if the person publishes, performs, distributes, transmits, or otherwise makes available to the public an individual's voice or likeness, with actual knowledge that the specific use of the voice or likeness was not authorized by the individual or, in the case of a minor, the minor's parent or legal guardian, or in the case of a deceased individual, the executor or administrator, heir, or devisee of such deceased individual.

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. No interactive computer service, as defined under 47 U.S.C. § 230(f)(2), shall be liable for a violation of this chapter unless such service directed the production of the digital replica.

F. 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 biographical manner, including some degree of fictionalization, unless the use creates the false impression that the work is an authentic recording in which the individual participated or the digital replica is embodied in a musical sound recording that is synchronized to accompany a motion picture or other audiovisual work, except to the extent that the use is protected by the First Amendment to the Constitution of the United States;

4. The use is fleeting or incidental;

5. The use is in an advertisement or commercial announcement for a work described in this subsection and is relevant to the subject of such work; or

6. The use is otherwise protected under the Constitution of the United States.

G. No action shall be commenced under this section more than ~~20~~ 100 years after the death of such person.

2. That the provisions of this act shall not become effective unless reenacted by the 2027 Session of the

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