

February 28, 2025

The Honorable C.T. Wilson  
Chair  
Economic Matters Committee  
231 Taylor House Office Building  
Annapolis, Maryland 21401

**RE: Concerns with House Bill 1407**

Dear Chair Wilson and Committee Members:

On behalf of the video game industry, the Entertainment Software Association (ESA)<sup>1</sup> writes to share our concerns regarding House Bill 1407 related to rights for the use of voices and visual likenesses. While well-intentioned, the bill in its current form would discourage innovation, limit creativity, and negatively impact the First Amendment rights of video game publishers.

ESA is also concerned with creating a patchwork of new state laws specific to digital replica rights. If there is a desire to enact state right of publicity law to include voice or digital replicas, it makes the most sense to examine existing law and amend from there as opposed to adopting a separate set of requirements for digital replicas. Accordingly, we urge the committee to refrain from passing this legislation until critical issues have been fully vetted and resolved.

**HB 1407 Will Impact Innovation and Artistic Freedom**

Video games are unique and different from many other forms of entertainment content in that players come to video games for the purpose of participating in fictional worlds with digital characters. Even when video games are designed to imitate real-life events (such as football games), those events are presented to players as alternative scenarios created by game developers. Given this unique environment, ESA is concerned that the current definition of digital replica in the legislation might capture the fictional worlds and digital characters presented in video games—whether or not they were generated by artificial intelligence.

ESA is also concerned that House Bill 1407 will unintentionally limit game designers' artistic freedom and player choice by extending the law's protections to all likeness, rather than only those that have established commercial value.

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<sup>1</sup> The Entertainment Software Association (ESA) represents the innovators, creators, publishers, and business leaders that are transforming the video game industry: <https://www.theesa.com/about-esa/>. The industry now has a domestic impact of over \$90 billion, providing high-skilled jobs and other economic benefits across the United States.

This expansive protection, coupled with the broad language used to define “visual likeness” to include any “visually identifiable characteristic of the individual,” will likely force companies to defend themselves against lawsuits from individuals who happen to resemble a video game character.

Specifically, many video game companies use production tools to design and customize characters and may also offer their players the ability to further customize such characters within a video game. Unfortunately, when players use character creation tools to create their own avatars, it is impossible for video game publishers to know if these avatars were based on real individuals who could potentially bring a claim.

### **HB 1407 Will Impact the First Amendment Rights of Video Game Publishers**

We urge careful consideration of HB 1407’s impact on our First Amendment rights. The First Amendment has been fundamental to the growth of the video game industry, with the U.S. Supreme Court confirming that video games are protected expressive works.<sup>2</sup> HB 1407 provides exceptions for some uses of protected speech such as “For purposes of comment, criticism, scholarship, satire, or parody.” However, there is no statutory exception for the use of an image, likeness, or voice as part of an expressive work.

### **Other Concerns with HB 1407**

ESA is also concerned that the inclusion of extensive postmortem rights in the bill could result in the expansion of claims beyond what even the individual rights holder envisioned in their lifetime and impede future creativity. As technology expands the world of creative possibilities, new postmortem rights would require creators to leave the past behind. This is particularly true for historic figures, including athletes and military figures. Additionally, postmortem rights impose limitations on freedom of expression, especially when those restrictions apply to expressive works.

ESA member companies recognize the importance of publicity rights and appreciate the opportunity to provide comments. Please consider ESA as a resource as you navigate this complicated and evolving landscape and reach out to me with any questions at [jgibbons@theesa.com](mailto:jgibbons@theesa.com).

Sincerely,

Jennifer Gibbons  
Vice President, State Government Affairs

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<sup>2</sup> See *Brown v. Entertainment Merchants Assn, et al.*, 564 U.S. 786 (2011).