

SB1025 No Fakes Act.pdf

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Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity

Updated January 29, 2024

Recent uses of artificial intelligence (AI) to create realistic images, videos, replicas, or voice simulations of real people have prompted some Members of Congress to [call for federal legislation](#) to protect the “right of publicity” (or ROP, for short). The ROP is [often defined](#) as the right to prevent unauthorized commercial uses of one’s name, image, or likeness (NIL) or other aspects of one’s identity (such as one’s voice). The ROP is not comprehensively protected by current federal laws.

This Legal Sidebar surveys existing state-level legal protections for the ROP, explains how they intersect with federal laws regarding intellectual property (IP), describes potential ROP concerns raised by AI, and presents constitutional and other legal considerations for Congress. Another [Legal Sidebar](#) discusses questions AI raises for copyright law, while a separate [Legal Sidebar](#) and a [CRS report](#) discuss the ability of college student-athletes to receive compensation for uses of their NIL.

State Right of Publicity Laws

The ROP is protected in some form by the laws of most U.S. states, and the number of states that recognize this right has [expanded](#) over the past several decades. One [study](#) found that 35 states recognized the ROP as of 2020. ROP laws generally create a private right of action for the unauthorized commercial use of another person’s NIL. For example, if a manufacturer uses a famous athlete’s name or face in a TV commercial without her permission, the athlete could sue the manufacturer for violating her ROP, and a court could order the manufacturer to pay damages and stop showing the commercial.

What constitutes an unauthorized commercial use of NIL can vary from state to state. Some states’ ROP laws [may apply only to advertising](#), while others [more broadly apply](#) to any use that commercially benefits the user, such as video game or comic book characters based on real people.

Other notable differences between the ROP laws of various states concern questions such as:

- **Is the ROP protected by statute, common law, or both?** [Twenty-five](#) states have enacted statutes protecting the ROP. In some of these states, including [California](#), the ROP is protected by both statutes and common law (law derived from court opinions). In

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other states, including [Delaware](#), the ROP is protected by common law only, sometimes as an application of a common law “right of privacy.”

- **What parts of a person’s identity does the ROP protect?** The ROP often only [protects](#) a person’s NIL, voice, and signature. In some states, the ROP also includes someone’s “[distinctive appearance, gestures, or mannerisms](#).” Courts have construed certain states’ ROP laws to protect more abstract aspects of personal identity, finding defendants liable for using an image of a famous driver’s [race car](#), a [blonde robot](#) performing Vanna White’s role on a game show, or the catch phrase “[here’s Johnny](#).”
- **Do all individuals enjoy the ROP?** State laws vary as to whether all persons or only those with “[commercially valuable](#)” NIL (such as celebrities) may assert ROP claims.
- **Does the ROP survive a person’s death?** In some states, the ROP is [descendible](#), meaning it can be asserted by one’s heirs after a person dies. States that recognize a descendible (or postmortem) ROP differ as to their duration, with postmortem rights [lasting](#) 20 years in Virginia, 70 years in California, and 100 years in Oklahoma, for instance. Under [Tennessee](#) law, postmortem ROP may last indefinitely. In other states, the ROP is [not descendible](#), or else courts [have not resolved](#) the issue.

Often, the law of the state in which a person is [domiciled](#)—or, where they were domiciled when they died—[governs](#) their ROP. [Indiana’s ROP statute](#), however, allows suit “regardless of a personality’s domicile” for infringing materials “disseminated within Indiana.” This law [may allow](#) non-Indiana plaintiffs to sue for infringing materials that are made available in Indiana via television or the internet.

Intersection of Right of Publicity and Federal IP Laws

Although the ROP is distinct from the forms of IP already protected by federal law, it is related in some ways to trademarks and copyrights. If Congress chooses to regulate the ROP via federal law, it may consider how best to harmonize the ROP with existing trademark and copyright laws.

Trademarks

While the ROP generally protects commercial uses of a person’s identity, [trademarks](#) protect commercial uses of words, names, and other symbols that distinguish one person’s goods from others. The ROP may overlap with trademarks in cases where aspects of a person’s NIL can be trademarked. A person’s name, for instance, may be trademarked if it acquires a distinctive meaning and is used commercially to identify goods or services (e.g., McDonald’s). The ROP may be seen as serving a [similar function to trademarks](#), although some scholars have criticized the [theoretical foundations](#) and [expansion](#) of the ROP.

Trademark infringement occurs when someone without authorization uses a trademark in a way that creates a likelihood of confusion for consumers. [The Lanham Act](#)—the federal trademark law—also establishes a cause of action for “false endorsement,” which provides additional protection that overlaps with the ROP. False endorsement occurs when a person’s identity is used in a way that is likely to confuse consumers into believing that the person recommends a product. In 2023, for instance, actor Tom Hanks [alerted fans](#) that an AI-generated replica of him was being used to advertise a dental plan without his permission; such scenarios might give rise to both state ROP and Lanham Act false endorsement claims. State ROP laws can provide broader protection than the Lanham Act, however, as they often prohibit unauthorized commercial uses of NIL regardless of whether they imply any sponsorship or confuse consumers. In addition, some courts have held only individuals with “[recognizability](#)” (such as Hanks) may sue for false endorsement, whereas many state laws allow all individuals to sue for ROP violations.

Copyrights

Copyrights protect original works of authorship that are “fixed” (i.e., recorded) in a “**tangible medium**,” including books, paintings, music recordings, and films. The Copyright Act gives copyright owners the “**exclusive right**” to reproduce (copy), perform, display, and distribute copyrighted works and to make derivative works (adaptations) from them. Generally, a work’s author **automatically owns** the copyright but may sell or license it to others. In short, whereas ROP laws prohibit unauthorized uses of another person’s identity, copyright law prohibits unauthorized uses of another’s creative works. As one illustration, in January 2024, the estate of comedian George Carlin filed a **lawsuit** based on an unauthorized comedy program delivered in an AI-generated imitation of Carlin’s voice. The complaint claims defendants **infringed their copyrights** by making copies of Carlin’s works to train the AI model—similar to other AI-related copyright lawsuits noted in a separate **Legal Sidebar**—and that defendants **violated Carlin’s ROP** under California law by using his NIL to promote the comedy program and other media.

The ROP intersects with copyright law inasmuch as both fictional and nonfictional copyrighted works often include the NIL of real people, including descriptions, portrayals, recordings, or performances of those people. For example, people depicted in photographs often **do not hold the copyright**, since the photographer is usually considered the author, but they may have ROP interests implicated by how those photos are used. These rights may come into conflict, such as when a copyright owner displays photographs in a way that commercially exploits the NIL of people shown in the photographs.

Section 301 of the Copyright Act provides that the Copyright Act preempts (supersedes) any state law rights that are “equivalent to” a copyright holder’s exclusive rights. Some commentators **argue** courts have inconsistently applied Section 301 in cases where copyrights conflict with the ROP. Some courts have dismissed lawsuits that allege copyright holders violated the ROP by exercising their exclusive rights under the Copyright Act. For instance, in 2017, one court held that Section 301 preempted a suit claiming the sale of **photographs of NCAA athletes** violated the athletes’ ROP. **Other courts have held** that Section 301 does not preempt ROP claims based on advertising. For example, one court held that a **sports announcer’s ROP claim** was not preempted where an excerpt of his voice from a copyrighted broadcast was used in a commercial for a video game. Congress could clarify the scope of copyright preemption of ROP claims by amending Section 301. In addition, if Congress enacts any new protections for ROP at the federal level, it may specify under what circumstances copyright would preempt such protections.

ROP laws can protect commercial interests in live performances, which cannot be copyrighted unless they are “fixed” (e.g., filmed). In **the Supreme Court’s only ROP case** to date, for instance, a performer sued a television company for broadcasting his “human cannonball” act, undermining ticket sales for the act. The Supreme Court held that the First Amendment did not prevent the performer from asserting a ROP claim against the company. As an exception to the rule that live performances have no copyright protection, in 1994 Congress provided **criminal** and **civil** liability for recording and distributing live music performances without permission, although some courts have **questioned** these laws’ constitutionality.

Right of Publicity Concerns Regarding AI

Recent advances in **generative AI** systems, which are trained on large volumes of data to generate new content that may mimic likenesses, voices, or other aspects of real people’s identities, have stimulated **congressional interest**. Like the above-noted uses of AI to imitate Tom Hanks and George Carlin, the examples below illustrate that some AI uses raise concerns under both ROP laws and myriad other laws.

One example of AI’s capability to imitate voices was an AI-generated song called “**Heart on My Sleeve**,” which sounded like it was sung by the artist Drake and was heard by millions of listeners in 2023. Simulating an artist’s voice in this manner could make one liable under ROP laws, although these laws

differ as to whether they cover [voice imitations](#) or vocal styles as opposed to the artist's actual voice. Voice imitations are not, however, prohibited by [copyright laws](#). For example, the alleged copyright violation that caused YouTube to remove "Heart on My Sleeve"—namely, that it [sampled another recording](#) without permission—was unrelated to the Drake voice imitation. In August 2023, Google and Universal Music were in discussions to [license artists' melodies and voices](#) for AI-generated songs.

The potential for AI to replicate both voices and likenesses was also a [point of contention](#) in last year's negotiations for a collective bargaining agreement between the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA)—a union that represents movie, television, and radio actors—and television and movie studios, including streaming services. SAG-AFTRA expressed concern that AI could be used to alter or replace actors' performances without their permission, such as by [using real film recordings to train AI](#) to create "digital replicas" of actors and voice actors. The [Memorandum of Agreement](#) between SAG-AFTRA and studios [approved](#) in December 2023 requires studios to obtain "clear and conspicuous" consent from an actor or background actor to create or use a digital replica of the actor or to digitally alter the actor's performance, with certain exceptions. It also requires that the actor's consent for use of a digital replica or digital alterations be based on a "reasonably specific description" of the intended use or alteration. The agreement provides that consent continues after the actor's death unless "explicitly limited," while consent for additional postmortem uses must be obtained from the actor's authorized representative or—if a representative cannot be identified or located—from the union. In January 2024, SAG-AFTRA [announced](#) it had also reached an agreement with a voice technology company regarding voice replicas for video games, while a [negotiation](#) to update SAG-AFTRA's agreement with video game publishers is reportedly ongoing.

Commentators have also raised concern with deceptive AI-generated or AI-altered content known as "deepfakes," including some videos with sexually explicit content and others meant to denigrate public officials. To the extent this content includes real people's NIL and is used commercially, ROP laws might provide a remedy. Where deepfakes are used to promote products or services—such as the [AI replica of Tom Hanks](#) used in a dental plan ad—they may also constitute false endorsement under the Lanham Act. In addition to these laws, some states have enacted laws prohibiting sexually explicit deepfakes, with [California](#) and [New York](#) giving victims a civil claim and [Georgia](#) and [Virginia](#) imposing criminal liability. In addition, [Section 1309](#) of the federal Violence Against Women Act Reauthorization Act of 2022 (VAWA 2022) provides a civil claim for nonconsensual disclosure of "intimate visual depictions," which might be interpreted to prohibit intimate deepfakes—as might some states' "revenge porn" [laws](#). A bill introduced in the House of Representatives in May 2023, the Preventing Deepfakes of Intimate Images Act, [H.R. 3106](#), would amend VAWA 2022 by creating a separate civil claim for disclosing certain "intimate digital depictions" without the written consent of the depicted individual, as well as providing criminal liability for certain actual or threatened disclosures. Deepfakes may also give rise to liability under state defamation laws where a party uses them to communicate reputation-damaging falsehoods about a person with a [requisite degree](#) of fault.

Regarding the use of AI in political advertisements, some [proposed legislation](#) would prohibit deepfakes or require disclaimers for them in federal campaigns, although such proposals may raise [First Amendment concerns](#). The Protect Elections from Deceptive AI Act, [S. 2770](#) (118th Cong.), for instance, would [ban](#) the use of AI to generate materially deceptive content falsely depicting federal candidates in political ads to influence federal elections, while excluding news, commentary, satires, and parodies from liability. Google [announced](#) that, as of mid-November 2023, verified election advertisers on its platform "must prominently disclose when their ads contain synthetic content that inauthentically depicts real or realistic-looking people or events."

Another concern some commentators raise is that AI-generated material might be falsely [attributed to real persons](#) without their permission. One writer who focuses on the publishing industry, for instance, [found](#) that books apparently generated by AI were being sold under her name on Amazon. Although the

company ultimately removed these titles, the writer claimed that her “[initial infringement claim with Amazon went nowhere](#),” since her name was not trademarked and the books did not infringe existing copyrights. As she [noted](#), however, this scenario might give rise to claims under state ROP laws as well as the Lanham Act. In addition, the [Federal Trade Commission \(FTC\)](#) states that “books sold as if authored by humans but in fact reflecting the output of [AI]” violate the FTC Act and may result in civil fines.

It is unclear how [Section 230 of the Communications Act of 1934](#) might apply when ROP-infringing content from a third party, including content made with AI, is disseminated through social media and other interactive computer services. Although the law generally bars any lawsuits that would hold online service providers and users liable for third party content, there is an exception allowing lawsuits under “any law pertaining to intellectual property.” Courts differ as to whether state ROP laws and the Lanham Act’s prohibition on false endorsement are laws “pertaining to” IP within the meaning of Section 230. Another [Legal Sidebar](#) discusses the application of Section 230 to generative AI more broadly.

Considerations for Congress

Some commentators have called for [federal ROP legislation](#) to provide more uniform and predictable protection for the ROP in the United States. Others have argued that Congress should leave ROP protection to the states on [federalism](#) grounds. If Congress decides to craft federal ROP legislation, it might consider the scope of the ROP protections it seeks to enact, the effect of those enactments on state ROP laws, and constitutional authorities and limitations on Congress’s power to enact ROP protections. As noted below, some Members have proposed legislation that would prohibit certain unauthorized uses of digital replicas or depictions of individuals while leaving state ROP laws in place.

Scope and Preemptive Effect of Federal ROP Legislation

Congress has many options to determine how broadly to protect the ROP via possible federal legislation. Federal ROP legislation might specify, for instance, which aspects of a person’s identity are protected, whether individuals without a commercially valuable identity may assert the ROP, and how long—if at all—the ROP survives a person’s death. Legislation might also specify whether a federal ROP applies broadly to all uses of NIL or only to specific uses. For example, a discussion draft circulated in October 2023 by [four Senators](#), the [NO FAKES Act of 2023](#), would create a civil action for producing, publishing, distributing, or transmitting a “digital replica” of a real person’s image, voice, or likeness without consent, with some exceptions. A bill introduced in the [House of Representatives](#) in January 2024, the No AI FRAUD Act, [H.R. 6943](#), would create a civil action for certain conduct involving “digital depictions,” “personalized cloning services,” and “digital voice replicas” of real people without their consent. These proposals differ as to how long postmortem rights may last, among other differences.

Additionally, Congress may consider whether federal ROP legislation should preempt or leave in place existing state ROP laws. Existing federal IP laws provide examples of both approaches, as the Patent Act and Copyright Act largely [preempt](#) state laws while the [Lanham Act](#) and [Defend Trade Secrets Act](#) do not. [Some commentators](#) argue Congress should preempt state ROP laws to promote greater uniformity and predictability. Alternatively, Congress could create [a minimum level of ROP protection](#) under federal law, letting individual states provide greater ROP protections if they wish. The NO FAKES Act of 2023 and No AI FRAUD Act, for instance, state that they do not preempt other ROP protections.

Constitutional Authority and Limitations for Federal ROP Legislation

While Congress has [express constitutional authority](#) to enact patent and copyright laws, its power to protect other IP, such as trademarks and [trade secrets](#), derives from its authority to regulate interstate commerce. Some have [argued](#) the [Commerce Clause](#) of the Constitution gives Congress the power to

establish a federal ROP and preempt state ROP laws. ROP laws would likely fall within Congress's commerce authority so long as they regulate uses of NIL [in or substantially affecting](#) interstate commerce.

ROP laws create civil liability for certain NIL-containing speech—potentially including media such as books, films, and [video games](#)—and therefore raise questions about defendants' First Amendment rights. Some scholars [argue](#) that courts apply inconsistent tests to resolve clashes between the ROP and First Amendment protections. The Ninth Circuit, for example, held that the First Amendment did not shield the use of [football players' avatars in a video game](#) from a ROP lawsuit, since the avatars were not a “transformative use” of the players' identity under a test first articulated by the [Supreme Court of California](#). The Ninth Circuit reached a [different result](#) in a Lanham Act false endorsement case involving another football player's avatar, holding that the use of the plaintiff's NIL was “artistically relevant” to the video game and therefore protected under a test developed by the [Second Circuit](#). In a third case, the Ninth Circuit held that the [film portrayal of an army veteran](#) was not subject to the transformative use test because, unlike the football players, the veteran had not built up “a marketable performance or identity.” The court therefore applied [strict scrutiny](#), a standard requiring that a law be narrowly tailored to serve a compelling governmental interest. The court held that application of California's ROP statute would violate the First Amendment because the plaintiff could not demonstrate a “compelling state interest,” given his lack of a marketable identity.

Congress might have [more latitude](#) to enact ROP laws aimed at [commercial speech](#), such as advertising, which merely proposes a commercial transaction or relates solely to the speaker's and the audience's economic interests. Courts typically subject commercial speech regulations to [intermediate scrutiny](#), a less stringent standard than strict scrutiny that requires the government to show that its regulation directly advances a substantial government interest and is not broader than necessary to serve that interest.

If Congress enacts federal protections for the ROP, it may seek to mitigate the need for judicial resolution of conflicts between the ROP and the First Amendment, or it may try to give wider latitude to free speech than courts might hold is constitutionally required. To limit the reach of ROP claims, Congress could consider enacting statutory exceptions to ROP liability, possibly similar to the “[fair use](#)” defenses in the [Copyright Act](#) and the [Lanham Act](#). Congress could also consider limiting federal ROP protections to commercial speech.

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MD SB 1025 No FAKES Act (oppose).pdf

Uploaded by: Aden Hizkias

Position: UNF



March 7, 2025

The Honorable Pamela Beidle
Chair
Senate Committee on Finance
Room 3, East Wing, Miller Senate Office Building
11 Bladen Street
Annapolis, MD 21401-1991

Re: Opposition to SB 1025

Dear Chair Beidle:

On behalf of the undersigned public interest organizations and trade associations, we respectfully **urge you to oppose SB 1025.**

Noting that SB 1025 is virtually identical to the federal NO FAKES Act as introduced in the last Congress, we oppose SB 1025 for three principal reasons. Specifically, we believe the bill as written would:

- Contravene the fundamentals of federal copyright law by unconstitutionally protecting facts, as courts consistently have held voices and likenesses to be. Its savings clause also may fail to permit conduct protected under the Copyright Act's fair use exception (17 USC §107). The bill is thus likely to be fully preempted;
- Subject online service providers to liability from which federal law now productively shields them, and
- Unconstitutionally interfere with all citizens' rights to free speech. Thus, as a broad restraint on speech, the bill is unlikely to survive the strict scrutiny test mandated by the Supreme Court for assessing such legislation, having not been narrowly tailored to its objectives.

Finally, we also respectfully note that adopting SB 1025 may be unnecessary. We understand that while Maryland law contains no statutory right of publicity, its courts recognize the common law appropriation invasion of privacy tort and follow Section 652C of the Restatement (Second) of Torts (1977). It states that an individual who appropriates another's name or likeness for personal benefit is liable for an invasion of privacy (*Lawrence v. A.S. Abell Co.*, 475 A.2d 448, 450-51 (Md. 1984)). Codifying this doctrine would appear to achieve the objectives of SB 1025.

For these reasons, we **respectfully urge you to reject SB 1025.**

Sincerely,

Chamber of Progress
Electronic Frontier Foundation
Engine
Public Knowledge
Software Information Industry Association

ESA Concerns MD SB 1025_030625.pdf

Uploaded by: Jennifer Gibbons

Position: UNF

March 6, 2025

The Honorable Pamela Beidle
Chair
Senate Finance Committee
3 East Miller Senate Office Building
Annapolis, Maryland 21401

RE: Concerns with Senate Bill 1025

Dear Chair Beidle and Committee Members:

On behalf of the video game industry, the Entertainment Software Association (ESA)¹ writes to share our concerns regarding Senate Bill 1025 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.

Senate Bill 1025 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 Senate Bill 1025 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.

¹ 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.

SB 1025 Will Impact the First Amendment Rights of Video Game Publishers

We urge careful consideration of SB 1025’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.² SB 1025 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 SB 1025

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.

Sincerely,

Jennifer Gibbons
Vice President, State Government Affairs

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

[MD] SB 1025_No Fakes_TechNet.pdf

Uploaded by: margaret durkin

Position: UNF



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March 7, 2025

The Honorable Pam Beidle
Chair
Senate Finance Committee
Maryland Senate
3 East Miller Senate Office Building
11 Bladen Street, Annapolis, MD 21401

RE: SB 1025 (Mautz) – NO FAKES Act – Unfavorable

Dear Chair Beidle and Members of the Committee,

On behalf of TechNet, I'm writing to share our concerns on SB 1025.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.5 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance. TechNet has offices in Austin, Boston, Chicago, Denver, Harrisburg, Olympia, Sacramento, Silicon Valley, Tallahassee, and Washington, D.C.

We support protecting an individual's personhood and are committed to working with legislators to address any gaps in the law for legitimate protections. Our primary concern is with the assignment of liability, which must attach to the bad actor that seeks to profit from a person's likeness without their permission, not to an intermediary that is simply making available the technology that can recreate a person's photo or voice. We believe that the legislation needs to better clarify this distinction. Liability should also be attached to commercial exploitation.

The bill seeks to prevent the exploitation of an individual's identity, and it must include vigorous protections for the First Amendment rights of creators, producers, and distributors of expressive works that include the names, likenesses, and other attributes of real-life people in motion pictures, television programs, books, magazines, music, video games and works of art. Importantly, these works enjoy full constitutional protection, whether they are sold, rented, loaned or given away, and whether they are intended to entertain or to inform. The bill also creates new state property rights. We are concerned that this could interfere with federal

intellectual property rights. We also believe that such property rights should expire at death, and not 10 years after death.

We have reservations about provisions in this bill related to the removing and disabling of material that is "claimed". If an online service removes content, they could be subject to First Amendment free speech violations. Further, the standard of "promptly notify" is subjective and open to different interpretations by different companies. This bill could be improved by adding a safe harbor which allows online services to take down infringing digital replicas when on actual notice of specific violative conduct.

Should the committee decide to advance this legislation, we believe that SB 1025 could be improved to address liability concerns by clarifying the definition of a "Digital Replica" to a representation that is "indistinguishable from" the voice or visual likeness of an individual, and by making clear that primary liability rests solely with the bad actor, and not the tool or provider such bad actor may have used for the digital replica. Also, the bill could be improved by further clarifying that secondary liability does not attach to intermediaries or service providers that are making or distributing technology tools.

Finally, SB 1025 contains a private right of action (PRA), which TechNet is opposed to. We believe that PRAs lead to frivolous lawsuits that don't bring significant benefits to consumers in relation to the alleged violation.

Below you will find suggested comments on the bill as drafted. Thank you for your consideration of our concerns and please let me know if you have any questions.

Sincerely,



Margaret Durkin
TechNet Executive Director, Pennsylvania & the Mid-Atlantic

11-1701.

We're requesting the addition of a "Commercial Use" definition:

- **"COMMERCIAL USE" MEANS THE USE OF THE NAME, VOICE, OR LIKENESS OF AN INDIVIDUAL ON OR IN ANY PRODUCT, MERCHANDISE OR GOOD OR WITH THE INTENT OF ADVERTISING, MARKETING, SELLING OR SOLICITING THE PURCHASE OF ANY PRODUCT, MERCHANDISE, GOOD OR SERVICE**

For the definition of "Digital Replica", we're requesting that the phrase **MADE FOR COMMERCIAL USE AND IS** be added to the definition before **"readily"** on page 2, line 6. Also, we'd like to add the following language as new (1):

- (1) **IS 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; AND**

We'd like to add **DESCRIBED IN SUBPARAGRAPH (1)** after **"individual"** on page 2, line 11, and again on line 14 after **"individual"**.

"Online Service" – We're requesting the following language for "Online Service":

- **MEANS A SERVICE THAT ELECTS TO PROVIDE A DESIGNATED AGENT UNDER SECTION 11-1706(D) AND IS:**
- A PUBLIC-FACING WEBSITE, **AN ONLINE SERVICE**, AN ONLINE APPLICATION, A MOBILEAPPLICATION, OR A VIRTUAL REALITY ENVIRONMENT, **OR CLOUD SERVICE PROVIDER** THAT PREDOMINANTLY PROVIDES A COMMUNITY FORUM FOR USER-GENERATED CONTENT, SUCH AS SHARING VIDEOS, IMAGES, GAMES, AUDIO FILES, OR OTHER MATERIAL; OR (II) A **SERVICE ENGAGED IN THE TRANSMISSIONS OF A DIGITAL-AUDIO TRANSMISSIONS MUSIC PROVIDER, AS DEFINED IN 114(J)(5) OF TITLE 17, UNITED STATES CODE.**~~17 U.S.C. §115(E);~~
- Exclusion. An Online Service shall not include a provider of broadband internet access service (as described in section 8.1(b) of title 47, Code of Federal Regulations, or successor regulation).

On page 3, line 14, strike **"the"** and replace it with **"such"**.

11-1702.

On page 3, line 25, strike **"individual or"**.

On page 3, line 29, after **"individual"** add **"to whom the right applies"**.

On page 4, line 1, add **DESCENDIBLE AND** before **"Licensable"**.

On page 4, line 3, after “**individual**” add “**to whom the right applies**”, and add the phrase to page 4, line 6 after “**individual**”. And again on line 17 after “**individual**”.

On page 4, line 23, add the phrase **IN INTERSTATE OR FOREIGN COMMERCE** after “**individual**”, and at line 30 on page 4 after “**individual**”.

On page 5, line 8, please add **THAT IS THE EARLIER OF 20** after “**date**”. At line 9 after section, please add **OR THE DATE UPON WHICH THE EXISTING COMMON LAW RIGHT OF PUBLICITY TO THE EXTENT RECOGNIZED BY MARYLAND COURTS WOULD TERMINATE.**

11-1703.

On page 5, please strike lines 13-15, and lines 21-29 on page 5, and lines 1-5 on page 6.

On page 6, at line 6, please strike “**AND (B)**” and add an “**s**” to Sections.

11-1705.

We suggest the following language on page 7, starting at line 22:

(A) A PERSON SHALL BE LIABLE IN AN ACTION BROUGHT UNDER § 11-1707 OF THIS SUBTITLE **FOR ANY ACTUAL DAMAGES SUSTAINED BY THE RIGHTS HOLDER INJURED AS A RESULT OF THAT ACTIVITY** IF THE PERSON, IN A MANNER AFFECTING INTERSTATE OR FOREIGN COMMERCE (OR USING ANY MEANS OR FACILITY OF INTERSTATE OR FOREIGN COMMERCE):

On page 7, strike lines 24-25. At line 26 on page 7, insert “**intentionally**” before “**publishes**”, strike “**reproduce**”, and strike “**transmits**”.

On page 8, line 3, please add after “**section**” **MUST HAVE ACTUAL KNOWLEDGE OF EACH PROSCRIBED ACT, THAT**, and strike “**have willfully acted in a manner to avoid any knowledge that**”. At line 5, strike “**and**”. On line 7, please add after “**holder**” **AND (III) SUCH PERSON IS ENGAGED IN AN ACTIVITY DESCRIBED IN SUBSECTION (A)(1).**

At line 8, add **(B)** before **(1)**. At line 12 after “**if**”, add **REGARDLESS OF THE DEGREE OF FICTIONALIZATION.** At line 14, strike “**bona fide**”. At line 15, add “**applicable**” before “**digital replica**”. At line 16, strike “**materially**”. At line 18, add “**docudrama**” after “**documentary**”. At lines 19-20, please strike **INCLUDING SOME DEGREE OF FICTIONALIZATION, UNLESS:**, and strike lines 21-29 on page 8. On line 31, strike **CONSISTENT WITH THE PUBLIC INTEREST** and **BONA FIDE**

On page 9, line 2, strike “or”. At line 7 on page 9, add an “or” after “announced;” Then add:

(6) THE USE IS OTHERWISE PROTECTED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On page 9, line 3, add “intentionally” before **used**.

11-1706.

On page 9, line 13, strike “secondarily”. At line 15 after “service” add **UNLESS THE PERSON DIRECTED THE PRODUCTION OF THE DIGITAL REPLICA.**

Strike the rest of the sentence. Please strike lines 17-24 on page 9. At line 25, please see this suggested language:

(B) SUBJECT TO SUBSECTION (D) OF THIS SECTION, AN ONLINE SERVICE MAY NOT BE HELD LIABLE FOR A VIOLATION UNDER THIS SUBTITLE FOR REFERRING OR LINKING A USER TO AN UNAUTHORIZED DIGITAL REPLICA, OR BY CARRYING OUT AN ACTIVITY DESCRIBED IN SUBSECTION (F) OF THIS SECTION, **(1) IF, UPON RECEIVING A NOTIFICATION AS PROVIDED IN SUBSECTION (F) OF THIS SECTION,** THE ONLINE SERVICE **EXPEDITIOUSLY** ~~REMOVES OR DISABLES ACCESS TO THE MATERIAL THAT IS SET FORTH IN THE NOTICE DESCRIBED IN SUBSECTION (F) AND THAT IS CLAIMED TO BE AN UNAUTHORIZED DIGITAL REPLICA AS SOON AS IS TECHNICALLY AND PRACTICALLY FEASIBLE FOR THE ONLINE SERVICE,~~ **OR (2) THE ONLINE SERVICE DOES NOT HAVE THE RIGHT OR ABILITY TO REMOVE OR DISABLE ACCESS TO THE MATERIAL THAT IS SET FORTH IN THE NOTICE DESCRIBED IN SECTION (F) AND THAT IS CLAIMED TO BE AN UNAUTHORIZED DIGITAL REPLICA, AND THE ONLINE SERVICE EXPEDITIOUSLY NOTIFIES THE PROVIDER OF SUCH MATERIAL OF THE RECEIPT AND CONTENTS OF SUCH NOTIFICATION.**

At line 32 on page 9, please see the following language:

(C) SUBJECT TO SUBSECTION (D) OF THIS SECTION, AN ONLINE SERVICE MAY NOT BE HELD LIABLE FOR A VIOLATION UNDER THIS SUBTITLE FOR **ENGAGING IN AN ACTIVITY DESCRIBED IN SUBSECTIONS 11-1705(A)(1) WITH RESPECT TO** ~~STORING~~ THIRD-PARTY-PROVIDED MATERIAL THAT RESIDES ON A SYSTEM OR NETWORK CONTROLLED OR OPERATED BY OR FOR THE ONLINE SERVICE ~~IF, AFTER RECEIVING A NOTIFICATION THAT SATISFIES SUBSECTION (F) OF THIS SECTION,~~ THE ONLINE SERVICE:

(1) IF, UPON RECEIVING A NOTIFICATION THAT SATISFIES SUBSECTION (F), THE ONLINE SERVICE

On page 10 at line 4, see the following language:

(A) **EXPEDITIOUSLY** ~~REMOVES OR DISABLES ACCESS TO ALL INSTANCES OF THE MATERIAL, OR AN ACTIVITY USING THE MATERIAL, THAT IS SET~~

FORTH IN THE NOTICE DESCRIBED IN SUBSECTION (F) AND THAT IS CLAIMED TO BE AN UNAUTHORIZED DIGITAL REPLICA AS SOON AS IS TECHNICALLY AND PRACTICALLY FEASIBLE FOR THE ONLINE SERVICE; AND

On page 10, line 10, add:

OR (2) IF THE ONLINE SERVICE DOES NOT HAVE THE RIGHT OR ABILITY TO REMOVE OR DISABLE ACCESS TO THE MATERIAL THAT IS SET FORTH IN THE NOTICE DESCRIBED IN SUBSECTION (F) AND THAT IS CLAIMED TO BE AN UNAUTHORIZED DIGITAL REPLICA, AND THE ONLINE SERVICE EXPEDITIOUSLY NOTIFIES THE PROVIDER OF SUCH MATERIAL OF THE RECEIPT AND CONTENTS OF THE NOTIFICATION.

On page 11, lines 6-7, strike **OR AN ELIGIBLE PLAINTIFF UNDER § 11-1707(B) OF THIS SUBTITLE**; Please strike lines 17-18 on page 11.

Add new VI:

(VI) IF NOT THE RIGHT HOLDER, A STATEMENT THAT THE NOTIFYING PARTY HAS THE AUTHORITY TO ACT ON BEHALF OF THE RIGHT HOLDER; AND

On page 11 at line 13 after "replica" add **that resides on a system or network controlled or operated by or for the online service.**

On page 11 at line 25, strike **OR TO WHICH ACCESS IS TO BE DISABLED**

On page 11 at line 29, **strike "and materially".**

On page 12 at lines 9-11, strike **CAUSED BY THE RELIANCE OF THE ONLINE SERVICE ON THE MISREPRESENTATION IN REMOVING OR DISABLING ACCESS TO THE MATERIAL OR ACTIVITY CLAIMED TO BE AN UNAUTHORIZED DIGITAL REPLICA**

At line 12, add **"incurred by the alleged violator"** after **"fees"**.

11-1707.

On page 12, strike lines 14-20. At line 22, add **"exclusive"** before **"right"**. At line 23, add **"described in subparagraph (1)"** after **"individual"**.

After line 24, add:

(3) ANY OTHER PERSON THAT EXCLUSIVELY CONTROLS, INCLUDING BY VIRTUE OF A LICENSE, THE RIGHT TO AUTHORIZE THE USE OF THE VOICE OR VISUAL LIKENESS OF THE INDIVIDUAL DESCRIBED IN SUBPARAGRAPH (1);

At line 29, strike **"directly or indirectly"**.

On page 13, line 2, add **"as a sound recording artist"** after **"artist"**. At lines 3-4, strike **"one or more"**.

Add after line 5:

PROVIDED THAT THE SOUND RECORDING ARTIST IS AN INDIVIDUAL AND HAS GIVEN SAID PERSON EXPRESS WRITTEN AUTHORIZATION TO COMMENCE SUCH A CIVIL ACTION ON THEIR BEHALF.

Strike lines 10-16 and lines 22-28.

At line 30, add **"violation"** after **"the"** and strike **ACTIVITY, PLUS ANY PROFITS FROM THE UNAUTHORIZED USE THAT ARE ATTRIBUTABLE TO THE USE AND NOT TAKEN INTO ACCOUNT IN COMPUTING THE ACTUAL DAMAGES**

On page 14, starting at line 3, suggested language:

(2) IN THE CASE OF A WILLFUL VIOLATION ~~ACTIVITY~~ IN WHICH THE INJURED PARTY HAS PROVEN THAT THE DEFENDANT ACTED WITH MALICE, FRAUD, KNOWLEDGE, OR ~~RECKLESS-DISREGARD-OF~~ WITH KNOWLEDGE THAT THE CONDUCT VIOLATED THE LAW, THE COURT MAY AWARD TO THE INJURED PARTY PUNITIVE DAMAGES; AND

Strike lines 20-32 on page 14 and lines 1-2 on page 15.

Please add the following:

(E) REPLACEMENT OF REMOVED ~~OR-DISABLED~~ MATERIAL AND LIMITATION ON OTHER LIABILITY.

(1) NO LIABILITY FOR TAKING DOWN GENERALLY—SUBJECT TO PARAGRAPH (2), AN ONLINE SERVICE WILL NOT BE LIABLE TO ANY PERSON FOR ANY CLAIM BASED ON THE ONLINE SERVICE'S GOOD FAITH DISABLING OF ACCESS TO, OR REMOVAL OF, MATERIAL OR ACTIVITY IN CLAIMED VIOLATION OF THE RIGHT DESCRIBED IN SECTION 11-1702(A) OR BASED ON FACTS OR CIRCUMSTANCES FROM WHICH SUCH ACTIVITY IS APPARENT, REGARDLESS OF WHETHER THE MATERIAL OR ACTIVITY IS ULTIMATELY DETERMINED TO BE IN VIOLATION.

(2) EXCEPTION. PARAGRAPH (1) WILL NOT APPLY WITH RESPECT TO MATERIAL RESIDING AT THE DIRECTION OF A USER OF THE ONLINE SERVICE OR NETWORK CONTROLLED OR OPERATED BY OR FOR THE ONLINE SERVICE THAT IS REMOVED, ~~OR-TO-WHICH-ACCESS-IS-DISABLED~~ BY THE ONLINE SERVICE, PURSUANT TO A NOTICE PROVIDED UNDER SECTION 11-1706(F), UNLESS THE ONLINE SERVICE—

(i) TAKES REASONABLE STEPS PROMPTLY TO NOTIFY THE USER THAT IT

~~HAS REMOVED OR DISABLED ACCESS TO THE MATERIAL;~~
(ii) UPON RECEIPT OF A COUNTER NOTIFICATION DESCRIBED IN PARAGRAPH (E)(c), PROMPTLY PROVIDES THE PERSON WHO PROVIDED THE NOTIFICATION UNDER SECTION 11-1706(F), WITH A COPY OF THE COUNTER NOTIFICATION, AND INFORMS THE PERSON THAT IT WILL REPLACE THE REMOVED MATERIAL OR CEASE DISABLING ACCESS TO IT IN 10 BUSINESS DAYS; AND
(iii) REPLACES THE REMOVED MATERIAL AND CEASES DISABLING ACCESS TO IT NOT LESS THAN 10, NOR MORE THAN 14, BUSINESS DAYS FOLLOWING RECEIPT OF THE COUNTER NOTICE, UNLESS ITS DESIGNATED AGENT FIRST RECEIVES NOTICE FROM THE PERSON WHO SUBMITTED THE NOTIFICATION UNDER SECTION 11-1706(F) THAT SUCH PERSON HAS FILED AN ACTION SEEKING A COURT ORDER TO RESTRAIN THE USER FROM ENGAGING IN THE CLAIMED VIOLATION RELATING TO THE MATERIAL ON THE ONLINE SERVICE'S SYSTEM OR NETWORK.
(3) CONTENTS OF COUNTER NOTIFICATION. TO BE EFFECTIVE UNDER THIS SUBSECTION, A COUNTER NOTIFICATION MUST BE A WRITTEN COMMUNICATION PROVIDED TO THE ONLINE SERVICE'S DESIGNATED AGENT THAT INCLUDES SUBSTANTIALLY THE FOLLOWING:
(i) A PHYSICAL OR ELECTRONIC SIGNATURE OF THE USER.
(ii) IDENTIFICATION OF THE MATERIAL THAT HAS BEEN ~~REMOVED OR TO WHICH ACCESS HAS BEEN DISABLED~~ AND THE LOCATION AT WHICH THE MATERIAL APPEARED BEFORE IT WAS REMOVED ~~OR ACCESS TO IT WAS DISABLED~~.
(iii) A STATEMENT UNDER PENALTY OF PERJURY THAT THE USER HAS A GOOD FAITH BELIEF THAT THE MATERIAL WAS REMOVED ~~OR DISABLED~~ AS A RESULT OF MISTAKE OR MISIDENTIFICATION OF THE MATERIAL TO BE REMOVED ~~OR DISABLED~~.
(iv) THE USER'S NAME, ADDRESS, AND TELEPHONE NUMBER, AND A STATEMENT THAT THE USER CONSENTS TO THE JURISDICTION OF FEDERAL DISTRICT COURT FOR THE JUDICIAL DISTRICT IN WHICH THE ADDRESS IS LOCATED, OR IF THE USER'S ADDRESS IS OUTSIDE THE UNITED STATES, FOR ANY JUDICIAL DISTRICT IN WHICH THE ONLINE SERVICE MAY BE FOUND, AND THAT THE USER WILL ACCEPT SERVICE OF PROCESS FROM THE PERSON WHO PROVIDED NOTIFICATION UNDER SECTION 11-1706(F) OR AN AGENT OF SUCH PERSON.
(4) LIMITATION ON OTHER LIABILITY. AN ONLINE SERVICE'S COMPLIANCE WITH PARAGRAPH (2) OF THIS SUBSECTION WILL NOT SUBJECT THE ONLINE SERVICE TO LIABILITY FOR A CLAIMED VIOLATION WITH RESPECT TO THE MATERIAL IDENTIFIED IN THE NOTICE PROVIDED UNDER SECTION 11-1706(F).

On page 15 at line 6, add the following language and change the "but" to an "and".

- (3) In the case of a right holder who has died before the date of enactment of this article, shall vest in the executors, heirs, assigns, or devisees of the right holder; but**

Exemptions

SB 1025 could also be improved by making it clear that liability rests solely with the bad actor, and not the tool or provider such bad actor may have used for the digital replica. Suggested language is below:

- **“No Internet service provider, or its affiliates or subsidiaries, search engine, or cloud service provider shall be held to have violated the provisions of this section solely for providing access or connection to or from a website or other information or content on the Internet or a facility, system, or network not under the control of the provider, including transmission, downloading, intermediate storage, or access software.”**

CCIA Comments MD SB 1025.pdf

Uploaded by: Megan Stokes

Position: UNF



March 7, 2025

Senate Finance Committee
Maryland General Assembly
90 State Circle
Annapolis, MD 21401

Re: SB 1025 – “NO FAKES Act” (Oppose)

Dear Chair Beidle and Members of the Senate Finance Committee:

On behalf of the Computer & Communications Industry Association (CCIA), I write to raise several concerns regarding SB 1025 in advance of the Senate Finance Committee hearing on March 11, 2025. 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.

SB 1025, the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act, is well-intended but raises serious concerns about free expression and conflicts with federal law, as CCIA has explained about the identical version of this bill proposed by the U.S. Congress.² Legal experts have also detailed the constitutional concerns it poses.³

Responsible businesses understand the potential for misuse of ‘digital replicas’ and are committed to advocating for robust legal protections and frameworks that balance innovation with the safeguarding of personal rights. Unfortunately, this bill does not provide the right approach. As these comments explain, the bill’s proposed text is extremely unbalanced and flawed, including its scope, knowledge standard, notice framework, and private right of action.

Liability should be limited to those who *knowingly* violate an individual’s intellectual property rights.

Liability should be targeted to the individual(s) who committed intentionally or knowingly deceptive acts using a ‘digital replica’, rather than tying liability to a product or service 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 ensure that other expressive uses — like those protected by the First Amendment — are protected while also holding bad actors accountable for the most high-risk, and likely most harmful, scenarios. For example, the bill’s definition of “production” as the creation of a digital replica places AI model developers or system deployers in an untenable position, as they could

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 CCIA, *Tech Industry Objects to NO FAKES Act* (July 31, 2014), <https://ccianet.org/news/2024/07/tech-industry-objects-to-no-fakes-act/>.

³ Re:Create, *Constitutional Concerns with NO FAKES and Similar Acts* (Aug 20, 2024), <https://www.recreatecoalition.org/constitutional-concerns-with-no-fakes-and-similar-acts/>.

be held liable if a user utilizes their tool to create, distribute, or make unauthorized content featuring another individual—often without the service provider’s knowledge.

This language is crucial because digital services do not know every nuance of every piece of content users post on their services. Legislation should hold accountable bad actors who exploit a person’s likeness without permission, ensuring that liability falls on them rather than intermediaries who lack knowledge or intent, especially when certain digital services may find it difficult or impossible to remove such harmful content. For instance, because an app store provider cannot remove a single video from an app available on its platform, it would have to remove the entire app in order to achieve compliance under this proposal. The responsibility and liability for removing allegedly offending content should lie with the party that knowingly posted the content. As explained below, establishing an actual knowledge standard here would address this issue effectively.

An effective notice and takedown framework should enable online services to remove digital replicas promptly upon being notified of specific instances on their services. The proposed framework is flawed and would stifle free expression.

The proposed statutory regime is not a balanced notice-and-takedown process, but effectively a notice-and-*staydown* process. Under the bill, an online service only has a safe harbor if it “removes or disables access to all instances of the material, or an activity using the material” is effectively a requirement to monitor and filter. This would likely result in many services erring on the side of removing legitimate user content to try to avoid overbroad liability. Additionally, the bill’s proposed knowledge standard is too broad; it not only includes a willfulness standard in addition to actual knowledge, it also would further undermine the notice framework to establish that actual knowledge can be obtained through not only a compliant notice.

An online service should only be liable for hosting or publicly sharing a digital replica if it has *actual knowledge* of a specific instance of a specific digital replica. To obtain such knowledge, a court order or a compliant notice from the individual depicted in the digital replica or their authorized representative should be required. Under such a framework, if an online service promptly removes the digital replica identified in the notice or reasonably believes that the content qualifies for an exception or otherwise does not meet the definition of digital replica, it will not be liable for hosting that content. Allowing online 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.

We also recommend establishing 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. The proposed provision on misrepresentation with statutory damages is appreciated but insufficient.



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

SB 1025 permits users to bring legal action against persons that have been accused of violating new regulations. By creating a new private right of action, the measure would open the doors of Maryland'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 individuals in Maryland, disproportionately impacting smaller businesses and startups across the state.⁴

The bill would enable statutory damages of the greater of either \$5,000 per “work embodying the applicable unauthorized digital replica” for a “natural person” or “online service,” \$25,000 per work for “a person that is not an online service,” actual damages plus profits, the opportunity to seek injunctive or other equitable relief, punitive damages if willful (“with malice, fraud, knowledge or willful avoidance of knowledge that the conduct violated the law”), and reasonable attorney fees. Further, because “[e]ach display made, copy made, transmission and instance of an unauthorized digital replica made available on an online service is a violation,” and damages are capped at \$1,000,000 only if an online service “has an objectively reasonable belief” that material does not qualify as a digital replica, this provision creates potentially immense liability for good-faith errors. As with the rest of the bill, “reasonable” is never defined, which invites costly litigation over ambiguity and, as stated above, may lead to unnecessary suppression of users’ free expression.

* * * * *

CCIA acknowledges the significance of this policy issue and agrees that there is 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.

Respectfully submitted,

Megan Stokes
State Policy Director
Computer & Communications Industry Association

⁴ Trevor Wagener, *State Regulation of Content Moderation Would Create Enormous Legal Costs for Platforms*, Broadband Breakfast (Mar. 23, 2021), <https://broadbandbreakfast.com/trevor-wagener-state-regulation-of-content-moderation-would-create-enormous-legal-costs-for-platforms/>.