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THE NO FAKES ACT: PROTECTING AMERICANS FROM UNAUTHORIZED DIGITAL REPLICAS

HEARING BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ONE HUNDRED EIGHTEENTH CONGRESS

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**THE NO FAKES ACT:
PROTECTING AMERICANS FROM
UNAUTHORIZED DIGITAL REPLICAS**

TUESDAY, APRIL 30, 2024

UNITED STATES SENATE,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in Room 226, Dirksen Senate Office Building, Hon. Christopher A. Coons, Chair of the Subcommittee, presiding.

Present: Senators Coons [presiding], Klobuchar, Blumenthal, Hirono, Welch, Tillis, and Blackburn.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Chair COONS. The Subcommittee of the Senate Judiciary Committee will come to order. I'd like to thank all of our witnesses for participating today; my colleagues for joining me. I'd like to specifically thank Ranking Member Tillis and his staff for working on a consensus basis to put this hearing together and to thank Senator Blackburn and her staff, as well, for partnering with us on this hearing.

About 10 months ago, Senator Tillis and I held a Subcommittee hearing on artificial intelligence and copyright law and their intersection. And I opened that hearing with the debut of a new AI-generated song, AI, AI, a riff on Frank Sinatra's New York, New York, with lyrics created by ChatGPT and voice cloning technology used to mimic Frank Sinatra's voice. The song was fun to create, with permission from the rights holders, of course, but it also highlighted some pressing legal questions that generative AI tools raise. Was my song protected speech? If I hadn't gotten permission, would the song have violated Mr. Sinatra's rights to his voice or his style?

Since that hearing, AI-generated replicas have only grown more pervasive, from deepfake videos of celebrities hawking products, to songs made with voice cloning tools posing as legitimate hits, to scam calls mimicking a panicked grandchild's voice. AI-generated replicas of Tom Hanks and Gayle King were used to advertise medical services, and a fake version of Elon Musk encouraged consumers to invest in a cryptocurrency scam. Drake, Eminem, Ariana Grande, Taylor Swift, Beyoncé are just a few of the musical artists who've seen their voice mimicked by AI clones; and McAfee, a glob-

al leader in online protection, found one in four American adults have experienced an AI voice scam, with three-quarters having lost money. Scammers using AI-generated replicas of a grandchild's voice to trick a grandparent out of money have become so sophisticated, both the FCC and FTC have issued warnings.

Now, these examples all relate to commercial speech, but AI deepfakes don't stop there. You've seen other examples: nonconsensual explicit deepfake images and videos that is addressed in the DEFIANCE Act that Senators Durbin and Graham have introduced; election interference, addressed in the Protect Elections from Deceptive AI Act that Senators Klobuchar, Hawley, Collins, and I have introduced. Bluntly, these issues aren't theoretical. Deepfake pornographic images of Taylor Swift circulated broadly on X, formerly known as Twitter, before they were taken down. A voice clone of President Biden encouraged voters to stay home during the New Hampshire primary. And in Slovakia, a deepfake likely had an impact on the outcome of a national election.

In summary, as AI tools have become increasingly sophisticated, it becomes easier to replicate and distribute fake images of someone—fakes of their voice, fakes of their likeness—without consent. We can't let this challenge go unanswered, and inaction should not be an option. As President Biden cautioned during his State of the Union, we must regulate AI voice impersonation but do so thoughtfully, striking the right balance between defending individual rights and fostering AI innovation and creativity. Both Congress and the administration have been working to strike that balance. A bipartisan group of Senators—Young, Heinrich, Rounds, and Schumer—convened nine AI forums last year, and Senator Schumer has encouraged Committees to work on AI legislation on a bipartisan basis, just as we're doing today.

That's why I was excited to release the NO FAKES Act discussion draft last October with Senators Tillis, Blackburn, and Klobuchar. This bill would protect people from having their images, voices, or likenesses used to create digital replicas that say or do things they never agreed to or would never say. The bill accomplishes this broad goal in two ways: by holding individuals and companies liable if they produce an unauthorized digital replica of an individual's voice, image, or likeness; and by holding platforms liable if they host or distribute an unauthorized digital replica if the platform knows the person depicted did not authorize it.

Unlike current right-of-publicity laws that many States have enacted, which often are focused on celebrities who monetize their likeness and leave ordinary people without a remedy, NO FAKES Act protections would apply to all individuals, regardless of whether they commercialize their voices, images, or likenesses. Our bill tries to be careful to balance these protections against free speech rights. The First Amendment will, of course, apply to this bill, whether we say it does or not, but we made clear, long-recognized carveouts. Like, for example, parody and satire remain available to creators, to continue to foster the artistic and innovative potential of AI.

Over the past 6 months, we have had literally dozens of meetings and received extensive feedback: hundreds, if not thousands, of proposed revisions, tweaks, edits, wholesale changes on the discussion

draft from stakeholders who loved the draft, who hated the draft, everyone in between. That was exactly the point, and I appreciate the many constructive suggestions we received. That's also the point of having a hearing today with folks who support the bill, who question the bill, who oppose the bill, and to have a real dialog.

Let me close. The feedback has centered around five different sort of core technical areas: whether we should include a notice-and-takedown structure, similar to the DMCA; whether we've struck the right balance with First Amendment exclusions; whether a 70-year postmortem term should be adjusted or narrowed; whether our bill should have preemptive impact over similar State laws; whether the bill should create some process by which individuals with limited resources and minimal damages can enforce their rights under the law.

So, I look forward to continuing this work with my colleagues and, immediately following this hearing, to work to promptly formalize the NO FAKES Act for introduction next month. With Senator Blackburn and Senator Tillis, their great cooperation, we have assembled a wonderful panel today with diverse perspectives. I encourage you, as our witnesses, to tell us what you like about the draft, what you dislike about the draft, and be specific about what changes you would like us to consider and why. I'll introduce the witness panel in a moment, but let me next invite Senator Tillis to make his opening remarks.

**OPENING STATEMENT OF HON. THOM TILLIS,
A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA**

Senator TILLIS. Thank you, Chairman Coons. As you were going through the description of the NO FAKES Act, I was thinking about—we've done a lot of—I love this Subcommittee, because we actually do work here, and we actually have a bunch of IP nerds or other interested parties showing up. We have a lot of people interested in this space. But I really think the NO FAKES Act is unique among the other bills that we've carried forward, in terms of intellectual property, because it touches everybody. You know, normally it's about patentholders or creators, and this touches everybody, every socioeconomic strata. It's interesting, but it's also one of the reasons why we've got to get it right.

We've got to make sure that we come up with concrete solutions. We don't want to overreach. There is a need for legislation, so anyone who's in the don't fix it; it ain't broke category, I respectfully disagree, but I'd be fascinated to hear your testimony if we have witnesses that are of that position. But we also don't want to miss the opportunity or we don't want to stifle opportunities for innovation. That's why it's so important to get it right.

We don't even know what AI is going to look like, 10 years from now. Interestingly enough, AI is going to make AI even more sophisticated over a much shorter period of time, so we'll also—that's got to be instructive to our policy formulation. But we've all seen, as Chairman Coons has indicated, replicas, deepfakes, photos, videos, audios. We're going to show you an example, here, shortly. And the number is just growing. So, we have to work on it, and we have to do the fair things. Entertainers, politicians, and the public at

large have been subject to, really, fake media for really much of the last hundred years, but now it's getting serious, and it's producing and multiplying at a rate that requires congressional action.

I think I want to go forward a little bit in my comments, because I think Senator Coons did a good job of describing some of the challenges, some of the things we want to work on with our bill. But I'd like to—I think if staff is prepared, I want to show you a video to give you a recent example. This was interesting. I use AI every morning as a part of my news feed, so I interact with generative AI for about an hour every morning; have for about 2 years, since ChatGPT first released their beta version of OpenAI, ChatGPT.

And it was a week or so ago that I saw the estate of Tupac questioning a recent production. I said, more to come. Let's study this more. And we thought it was probably interesting for maybe folks that aren't following the issue as closely as us, to show the video. Have we got staff ready to cue that up?

[Video is shown.]

Senator TILLIS. So, that entire musical rendition is a product of AI. And, interestingly, that image—one of those, that name, image, and likeness, is something that is the property of Tupac's estate. The other one is a AI-generated image that was obviously done in violation—to the extent it was used for commercial purposes, in violation of copyright. So, it just gives you an example of real—this isn't a hypothetical. This happened beginning a week or so ago, shortly after Drake released that song. So, we've got work to do. And legislation addressing the misuse of digital replicas will have a multi-billion-dollar implication. We've got to get it under control.

Now, there're a lot of questions that have to be asked, and my office, in particular, is guilty of putting drafts out there, knowing that they're drafts. Sometimes we even do it sooner, without the co-operation or involvement of other members, because we put scary stuff out there to give you a Ghost of Christmas Future. In this case, we didn't do that. We tried to work on putting out a discussion draft that makes sense, but we've got a lot of things that we have to work out. You know, the questions that we need answered: Is it wise to mandate that individuals have no right to license out of their digital likeness unless they retain counsel? Should we create an exception for harmless, noncommercial users? Should there be a notice-and-takedown provision? I mean, there's a lot. There's a litany. I'm not going to go through all of them. I hope that you all can come up with other ones. But I'll submit the rest of my written statement for the record.

[The information appears as a submission for the record.]

Senator TILLIS. But we have to act. Hopefully, in this Congress we can act, which means we have to move very, very quickly or, at a minimum, lay down a baseline that we can pick up, when we come back with a new Congress, and get it right. So, I look forward in advance to everybody's active collaboration. I will always give you the same warning I give everyone: The only thing that really makes me mad is when I see somebody trying to, through guerilla warfare, undermine the good faith efforts of this Committee and my colleague. If you're at the table, you can have an influence. If you're not at the table, you're going to be on the table.

So, why don't everybody just recognize our office is open to constructive criticism? Use cases of where the policy doesn't make sense. But if you're in the category of, it ain't broke; don't fix it, you're not up with modern times. And I look forward to a good, productive hearing today, and thank you in advance for your productive collaboration as this legislation moves forward.

Chair COONS. Thank you, Senator Tillis. And thank you for another positive and engaging hearing. It's been a great experience serving on this Committee with you.

Today we welcome six witnesses to testify about the NO FAKES Act. Our first witness is Robert Kyncl, CEO of Warner Music Group, who has a lot of experience. He spent over a decade as YouTube's chief business officer, among a number of other business engagements. Next we have twigs—thank you, twigs, for joining us today—a singer, songwriter, producer, dancer, and actor who has used AI to help her create and also has had personal experience with unauthorized AI deepfakes. It's great to have a voice present from the creative community.

Next we have Duncan Crabtree-Ireland, national executive director and chief negotiator for SAG-AFTRA, the Screen Actors Guild-American Federation of Television and Radio Artists, a labor union representing 160,000 members who work in film, television, music, and more. Also the voice of the creative community. Then we have Ben Sheffner, senior vice president, associate general counsel for law and policy at the Motion Picture Association, where he specializes in copyright and First Amendment law. Thank you, Ben.

We welcome Graham Davies, presidency of the Digital Media Association, an organization that represents principally audio streaming companies, platforms like Spotify and YouTube. Mr. Davies also has a history as a musician and songwriter advocate. Finally, we'll hear from Lisa P. Ramsey, professor of law at the University of San Diego School of Law, where she teaches and writes on the intersection of free speech rights and intellectual property law.

After I swear in the witnesses, each will have 5 minutes to provide a summary of your opening statement. The Senators have your written statements. Then we'll proceed to questioning. Each Senator gets 5 minutes for the first round. We will likely have two or even three rounds of questioning, time and attendance permitting. Witnesses, would you please stand? Raise your right hand to be sworn in.

[Witnesses are sworn in.]

Chair COONS. Thank you all. Let the record reflect the witnesses have been sworn. Mr. Kyncl, you may proceed with your opening statement.

**STATEMENT OF ROBERT KYNCL, CHIEF EXECUTIVE OFFICER,
WARNER MUSIC GROUP, NEW YORK, NEW YORK**

Mr. KYNCL. Chairman Coons, Ranking Member Tillis, and Members of the Subcommittee, I'm Robert Kyncl, chief executive officer of the Warner Music Group. Being here today is something I could not have imagined as a young boy growing up behind the Iron Curtain in communist Czechoslovakia. In 1992, I crossed the Atlantic and attended State University in New York, and there I met an

amazing woman from the Dominican Republic who eventually became my wife, and now we have two amazing American daughters. I'm a proud U.S. citizen, and I have deep appreciation for the freedoms at the heart of this great country, having grown up without them.

For the past 25 years, I've been a tech and media executive. I joined Warner Music last year after 12 years at YouTube and 8 years at Netflix. Warner Music is home to an incredible array of artists and songwriters who are moving culture across the globe. One of those artists, FKA twigs, is here with me today, and she's an extraordinarily gifted singer, songwriter, actor, and performer. I would like to acknowledge and thank Duncan Crabtree-Ireland, who led the recent collective bargaining agreement negotiations between SAG-AFTRA and record labels that addresses concerns regarding AI and defends artists' rights.

Music has so often been the canary in the coal mine for the broader trends in our society. More than any other form of communication or entertainment, music drives culture and innovation, and that's happening again with generative AI. Today, music companies are helping artists, rights holders, and tech companies figure out this new world, which is both exciting and daunting. It's our job to not only help amplify artists' creativity but to protect their rights, their livelihoods, and their identities.

Across the industry, legends from Roberta Flack to the Beatles have embraced AI as a tool to enhance their creativity. At the same time, generative AI is appropriating artists' identities and producing deepfakes that depict people doing, saying, or singing things that have never happened before. My accent is a vestige to my Eastern European upbringing. You can hear my identity in my voice. Through AI, it is very easy for someone to impersonate me and cause all manner of havoc. They could speak to an artist in a way that could destroy our relationship. They could say untrue things about our publicly traded company to the media that would damage our business.

Unfettered deepfake technology has the potential to impact everyone, even all of you. Your identities could be appropriated and used to mislead your constituents. The truth is, everyone is vulnerable: families defrauded by voice clones pretending to be relatives, people placed in pornography without their consent, schoolchildren having their faces inserted into humiliating scenes. Some people have spoken of responsible AI as a threat to freedom of speech, but it's precisely the opposite. AI can put words in your mouth, and AI can make you say things you didn't say or don't believe. That's not freedom of speech.

We appreciate the efforts of this Committee to address this problem, including the NO FAKES Act discussion draft authored by Chairman Coons, Ranking Member Tillis, Senator Blackburn, and Senator Klobuchar. Your leadership kickstarted efforts in this area, and we strongly support the bipartisan No AI FRAUD Act introduced in the House earlier this year by Representatives Salazar and Dean and the recently enacted ELVIS Act in Tennessee.

As the Committee moves forward the introduction of a Senate bill, there are three elements that those should contain, to be effective. One, an enforceable intellectual property right for likeness

and voice. Each person should be allowed to license or deny that right on free-market terms and seek redress for unauthorized uses. Two, respect for an important First Amendment principles, without going any further and providing loopholes that create more victims. And, three, effective deterrents. To incentivize a vibrant and commercial marketplace, we need to maintain consequences for AI model builders and digital platforms that knowingly violate a person's property rights.

I applaud the Committee for its leadership in addressing these challenging and rapidly developing issues with urgency. Congress should pass legislation this year, before the genie is out of the bottle, while we still have a chance to get this right. I look forward to answering your questions. Thank you.

[The prepared statement of Mr. Kyncl appears as a submission for the record.

Chair COONS. Thank you, Mr. Kyncl. Twigs.

**STATEMENT OF TAHLIAH DEBRETT BARNETT ("FKA TWIGS"),
SINGER, SONGWRITER, PRODUCER, DANCER, AND ACTOR,
LONDON, UNITED KINGDOM**

Ms. BARNETT. As artists, we dedicate a lifetime of hard work and sacrifice in the pursuit of excellence, not only in expectation of achieving commercial success and critical acclaim but also in the hope of creating a body of work and reputation that is our legacy. So, why am I here today? I am here because my music, my dancing, my acting, the way my body moves in front of the camera, and the way that my voice resonates for a microphone is not by chance. They are essential reflections of who I am. My art is a canvas on which I paint my identity and the sustaining foundation of my livelihood.

It is the very essence of my being, yet this is under threat. AI cannot replicate the depth of my life journey, yet those who control it hold the power to mimic the likeness of my art, replicate it, and falsely claim my identity and intellectual property. This prospect threatens to rewrite and unravel the fabric of my very existence. We must enact regulation now to safeguard our authenticity and protect against misappropriation of our inalienable rights.

Three decades ago, we did not realize that the internet would embed itself so deeply into the core of our everyday lives. Policies and controls to keep pace with the emergence of the technology were not put in place to protect artists, young people, and those that are vulnerable, and it ran away with us. AI is the biggest leap in technological advancement since the internet. You know the saying, fool me once, shame on you; fool me twice, shame on me? If we make the same mistake with the emergence of AI, it will be shame on us.

Let me be clear. I am not against AI. As a future-facing artist, new technologies are an exciting tool that can be used to express deeper emotions, create fantasy worlds, and touch the hearts of many people. In the past year, I have developed my own deepfake version of myself that is not only trained in my personality but that can also use my exact tone of voice to speak many languages. These and similar emerging technologies are highly valuable tools.

This, however, is all under my control, and I can grant or refuse consent in a way that is meaningful.

What is not acceptable is when my art and my identity can simply be taken by a third party and exploited falsely for their own gain, without my consent, due to the absence of appropriate legislative control and restriction. History has shown us time again that in moments of great technological advancement, those in the arts have been the first to have their work exploited and, in many instances, fraudulently commoditized. Soon after, it follows that the general and more vulnerable public suffer the same types of image- and voice-related exploitation. By protecting artists with legislation at such a momentous time in history, we are protecting a 5-year-old child, in the future, from having their voice, likeness, and identity taken and used as a commodity without prior consent.

I stand before you today because you have it in your power to protect artists and their work from the dangers of exploitation and the theft inherent in this technology if it remains unchecked. I am here on behalf of all creators whose careers depend deeply on the ability to create, safe in the knowledge that they can maintain tight control over their own art, image, voice, and identity. Our careers and our livelihoods are in jeopardy, and so potentially are the wider image-related rights of others in society. You have the power to change this and safeguard our future.

As artists and, more importantly, human beings, we are a facet of our given, learned, and developed identity. Our creativity is a product of this lived experience overlaid with years of dedication to qualification, training, hard work, and—dare I say it—significant financial investment and sacrifice. That the very essence of our being, at its most human level, can be violated by the unscrupulous use of AI to create digital facsimile that purports to be us and our work is inherently wrong. It is therefore vital that, as an industry and as legislators, we work together to ensure we do all we can to protect and create an intellectual rights system as well as protect the very basis of who we are.

We must get this right. You must get this right, before it's too late. Thank you.

[The prepared statement of Ms. Barnett appears as a submission for the record.

Chair COONS. Thank you. Mr. Crabtree-Ireland.

**STATEMENT OF DUNCAN CRABTREE-IRELAND, NATIONAL
EXECUTIVE DIRECTOR AND CHIEF NEGOTIATOR, SCREEN
ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION
AND RADIO ARTS, LOS ANGELES, CALIFORNIA**

Mr. CRABTREE-IRELAND. Thank you very much, Chairman Coons, Ranking Member Tillis, and the Members of the Subcommittee on Intellectual Property. My name is Duncan Crabtree-Ireland. I'm the national executive director of SAG-AFTRA, the country's largest labor union for entertainment and media artists. And I'm here today to testify in support of the NO FAKES Act. Our members believe that AI technology, left unregulated, poses an existential threat to their ability to, one, require consent for the creative use of their digital representation; two, receive fair payment for use of their voice and likeness; and, three, to protect against having to

compete against themselves, their own digital self, in the marketplace.

I'm the chief negotiator for the union's contracts, including last year's historic agreement with the major entertainment studios, which was only finalized after the longest entertainment industry strike in over 40 years—a strike that lasted nearly 4 months. The strikes and the public's response to them highlighted that the entertainment industry and the broader public understand that AI poses real threats to them, and they fully support protections against those threats. For an artist, their image and likeness are the foundations of their performance, brand, and identity developed over time through investment and hard work. SAG-AFTRA has long fought for right-of-publicity laws and voice and image protections. The exponential proliferation of artificial intelligence technologies—technologies which allow for rapid and realistic fakes of voices and likenesses in audiovisual works and sound recordings—makes this fight urgent for our members.

Enshrining this protection as a Federal intellectual property right will ensure our members, creative artists, and, frankly, all of us are protected and service providers provide the same protections to individuals' images, likenesses, and voices that they provide now for other intellectual property rights. These rights should be transferable and descendible, just like any other intellectual property or any kind of property someone owns, with durational limitations on transfers during one's lifetime, to ensure that we don't enter into an era of digital indentured servitude, just as actress and SAG-AFTRA member Olivia de Havilland fought to establish the 7-year rule to end long-term abusive contracts in the old studio system.

Some would argue that there should be broad, categorical First Amendment-based exemptions to any legislation protecting these important rights. There are no stronger advocates for the First Amendment than our members. They rely on their First Amendment rights to tell the stories that artists in other countries are often too endangered to tell. However, the Supreme Court has made clear over a half a century ago that the First Amendment does not require that the speech of the press or any other media, for that matter, be privileged over protection of the individual being depicted. To the contrary, the courts apply balancing tests which determine which right will prevail.

These balancing tests are critical, and they are incorporated into the discussion draft of the NO FAKES Act. They ensure that the depicted individual is protected and rewarded for the time and effort put into cultivating their persona while not unduly burdening the right of the press to report on matters of public interest or the entertainment media to tell stories. At the same time, these tests help ensure the depicted individual is not compelled to speak for the benefit of third parties who would misappropriate the value associated with the persona they have carefully crafted. With new AI technologies that can now realistically depict an individual's voice or likeness with just a few seconds of audio or even a single photograph, and with constantly evolving capabilities of these technologies, it is even more important that broad categorical exemptions be avoided and that the courts be empowered to balance the competing interests.

It's also essential that action be taken to address these harms now. Our members, the public, and our society are being impacted right now by the abuse of deepfake technology, and we must take timely action. Just as one of many examples of the abusive deepfake technology, during the ratification campaign for our contract after the strike last year, an unknown party on the internet created an unauthorized deepfake video of me saying false things about our contract and urging members to vote against it. Anathema to me, as someone who devoted my life for more than a year to a contract I deeply believe in.

There was no Federal right to protect me, no takedown right, and tens of thousands of people were misled about something that really mattered to so many of us. It's neither necessary nor appropriate to wait for broader artificial intelligence regulation to be adopted. This narrow and technology-neutral approach can and should proceed expeditiously forward. The companies behind many of these technologies are asking for rules so they better understand the appropriate boundaries on their conduct. The NO FAKES Act will provide them with important guidance, while helping to ensure individuals are protected from exploitation that puts their livelihoods and reputations at risk. Thank you again for this opportunity to speak today, and I look forward to answering your questions.

[The prepared statement of Mr. Crabtree-Ireland appears as a submission for the record.

Chair COONS. Thank you, Mr. Crabtree-Ireland. Mr. Sheffner.

**STATEMENT OF BEN SHEFFNER, SENIOR VICE PRESIDENT
AND ASSOCIATE GENERAL COUNSEL, LAW AND POLICY,
MOTION PICTURE ASSOCIATION, INC.,
LOS ANGELES, CALIFORNIA**

Mr. SHEFFNER. Chair Coons, Ranking Member Tillis, Members of the Subcommittee, thank you for the opportunity to testify today on behalf of the Motion Picture Association and our member studios about legislation to regulate the use of digital replicas. For over a century, the MPA's members have employed innovative new technologies to tell compelling stories to audiences worldwide. From the introduction of recorded sound in the 1920's, color in the 1930's, the dazzling special effects in movies like this year's Dune: Part Two, the MPA's members have long used technology to allow filmmakers to bring their vision to the screen in the most compelling way possible. Artificial intelligence is the latest such innovation impacting our industry.

MPA sees great promise in AI as a way to enhance the filmmaking process and provide an even more compelling experience for audiences, but we also share the concerns of actors and recording artists about how AI can facilitate the unauthorized replication of their likenesses or voices to supplant performances by them, which could potentially undermine their ability to earn a living practicing their craft. The NO FAKES Act is a thoughtful contribution to the debate about how to establish guardrails against abuses of such technology; however, legislating in this area necessarily involves doing something that the First Amendment sharply limits: regulating the content of speech.

It will take very careful drafting to accomplish the bill's goals without inadvertently chilling or even prohibiting legitimate, constitutionally protected uses of technology to enhance storytelling. I want to emphasize, this is technology that has entirely legitimate uses, uses that are fully protected by the First Amendment and do not require the consent of those being depicted.

Take the classic 1994 film, *Forrest Gump*, which depicted the fictional Forrest character, played by Tom Hanks, navigating American life from the 1950's through the 1980's, including by interacting with real people from that era. Famously, the filmmakers, using digital replica technology available at the time, had Forrest interact and even converse with Presidents—or, should I say, former Senators—Kennedy, Johnson, and Nixon. To be clear, those depictions did not require the consent of their heirs. And requiring such consent would effectively grant heirs or their corporate successors the ability to censor portrayals they don't like, which would violate the First Amendment.

In my written testimony, I detail some specific suggestions we have for improving the NO FAKES draft so that it addresses real harms without encroaching on First Amendment rights. Here, I'll highlight just four points. First, getting the statutory exemptions right is crucial. And I want to thank the drafters for getting much of the way there. Those exemptions give filmmakers the clarity and certainty they need to determine whether to move forward with spending tens, even hundreds, of millions of dollars on a movie or TV series. If the statutory exemptions are not adequate, some producers will simply not proceed with their projects, a classic chilling effect that the First Amendment does not allow.

Second, the bill should preempt State laws that regulate the use of digital replicas in expressive works. Simply adding a Federal layer on top of the existing patchwork of State laws would only exacerbate the problems associated with inconsistent laws in this area.

Third, the scope of the right should focus on the replacement of performances by living performers. Going beyond that risks sweeping in wide swaths of First Amendment-protected speech which would make the statute vulnerable to being struck down on overbreadth grounds.

And, fourth, the definition of digital replica must be focused on highly realistic depictions of individuals. It should not encompass, for example, cartoon versions of people you might see on shows like *The Simpsons* or *South Park*.

And, last, before legislating, MPA urges the Subcommittee to first pause and ask whether the harms it seeks to address are already covered by existing law, such as defamation, fraud, the Lanham Act, or State right-of-publicity law. Often, the answer will be yes, indicating that a new law is not necessary. And if there is indeed a gap in the law—for example, regarding pornographic or election-related deepfakes—the best solution is narrow, specific legislation targeting that specific problem. Thank you again for the opportunity to testify today, and I welcome your questions.

[The prepared statement of Mr. Sheffner appears as a submission for the record.]

Chair COONS. Thank you, Mr. Sheffner. Mr. Davies.

**STATEMENT OF GRAHAM DAVIES, PRESIDENT AND CHIEF
EXECUTIVE OFFICER, DIGITAL MEDIA ASSOCIATION,
WASHINGTON, DC**

Mr. DAVIES. Good afternoon, Chairman Coons, Ranking Member Tillis, and thank you to the Committee for giving me the opportunity to speak to you today on this important issue. My name is Graham Davies, and I'm president and CEO of the Digital Media Association, representing the leading music streaming services. We support the Committee's efforts to bring forward legislation at the Federal level, which should preempt existing State laws, to keep pace with new technology. We join you in the objective of ensuring there are appropriate protections for individuals' likenesses. This is an important issue for us all, and DiMA supports efforts to develop a clear and balanced way forward.

Our members benefit from clarity in law and providing fans with great experiences. Indeed, our members have a strong track record of licensing complex rights to deliver music to fans. They work closely with record labels and music publishers, with whom they have long relationships and robust contracts. This is our common objective. But any new or increased rights should be appropriate and targeted. They should not come at the expense of important freedoms of speech or creative expression, nor should they be overly broad to the point of creating confusion or needless litigation, over the true objective of protecting personhood.

The NO FAKES Act proposes to sweep in a broad range of legitimate replicas and downstream activities within its scope. The current draft punishes good and bad actors alike. Any new rights should not undermine the global content supply chains on which the streaming industry depends. We are still in the early stages of the application of AI by the artistic community, but we see that the existing practices for taking down illegal or deceptive content continue to suffice in this new context.

Streaming services are the last point in the supply chain. Only the originator of the content and the label who delivers it to the services have the information necessary to establish whether the content is legitimate or not. Streaming services do not have any way to know the complex chain of rights behind the content they receive from labels and distributors. To address the harms caused when AI technology is used to imitate a musical artist, a celebrity, or other public figure, we believe the Committee's objectives would be best achieved if new legislation was developed from the existing right-of-publicity laws.

This would have a number of advantages. Firstly, there is a body of existing case law on how First Amendment protections can be balanced with the individual's right-of-publicity. Second, liability sits squarely with the bad actors: those who create the deceptive content and first place it into the public sphere. And, thirdly, the focus is on commercial use, with actual damages, which we believe are proven to be a sufficient deterrent.

Establishing a Federal law that preempts the existing patchwork of privacy and publicity laws is both beneficial and necessary. Music streaming is a global industry. We believe that rights pertaining to the person should remain inextricably tied to the individual for the duration of their life. This ensures that each person

is always able to retain control over how their voice is used. The discussion draft released by Chair Coons, Ranking Member Tillis, and Senators Blackburn and Klobuchar has been helpful to foster dialog and encourage all stakeholders to think about these complex issues. I've included more in my written testimony which is intended to support the next stages of the discussion, and DiMA looks forward to continued work with the Committee. Thank you.

[The prepared statement of Mr. Davies appears as a submission for the record.

Chair COONS. Thank you, Mr. Davies. Professor Ramsey.

**STATEMENT OF LISA P. RAMSEY, PROFESSOR OF LAW,
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW,
SAN DIEGO, CALIFORNIA**

Professor RAMSEY. Chair Coons, Ranking Member Tillis, and other Members of the Subcommittee, thank you for the opportunity to testify today about the First Amendment implications of the proposed NO FAKES Act. I'm a professor of law at the University of San Diego School of Law. I teach intellectual property classes at USD, and my scholarship focuses on the potential conflicts between trademark laws and the right to freedom of expression.

The First Amendment of the U.S. Constitution commands that Congress shall make no law that abridges the freedom of speech. Congress generally lacks the power to restrict expression because of its message, ideas, subject matter, or content. This rule is subject to a few limited exceptions for historically unprotected speech, such as fraudulent speech and obscenity, but content-based regulations of speech are generally presumed invalid unless the government can prove the law is constitutional.

The NO FAKES Act imposes restrictions on the content of speech. It targets the harms caused by the unauthorized creation and dissemination of digital replicas or deepfakes of individuals in recordings that are nearly indistinguishable from that person's actual voice, image, or visual likeness. When the Act applies to the use of digital replicas to impersonate people in fraudulent speech or misleading commercial speech, it is consistent with the First Amendment. There's also no conflict with the First Amendment when the Act restricts the use of digital replicas in sexually explicit deepfakes without consent if those images or videos constitute obscene speech or child pornography.

The problem is that the current version of the NO FAKES Act also regulates nonmisleading speech that is protected by the First Amendment. Congress must therefore prove that the Act satisfies constitutional scrutiny. The law must be narrowly tailored to directly and materially further its goals and not harm speech that's protected by the First Amendment more than necessary. Strict scrutiny analysis may be required when the government is regulating the unauthorized use of digital replicas in political messages, news reporting, entertainment, and other types of noncommercial speech that's fully protected by the First Amendment.

As it is currently drafted, I believe the NO FAKES Act is not consistent with the First Amendment because the law is overbroad and vague; however, I think a revised version of the law could satisfy intermediate and strict constitutional scrutiny. There are three

ways that Congress can better protect First Amendment interests in the law. First, it's critical that the law not suppress or chill protected speech more than necessary. The Senate's proposed NO FAKES Act does a better job than the No AI FRAUD Act in setting forth specific exemptions from liability for certain nonconfusing uses of another's image, voice, or likeness. The law can still be improved in certain ways that I discuss in my written testimony.

It is also important that Congress not enact a strict liability rule for online service providers that host expression covered by the NO FAKES Act. Specific and actual knowledge of the direct infringer's use of an unauthorized digital replica should be required for liability. Online service providers should implement a notice-and-takedown system, to make it easier to remove unauthorized deepfakes that violate the law. Accused infringers must also, though, be able to challenge takedown requests by filing a counter-notification with the platform.

My second recommendation is for Congress to create separate causes of action that target the different harms caused by unauthorized uses of digital replicas. This includes, number one, the use of deepfakes to impersonate individuals in a deceptive manner; number two, uses in sexually explicit deepfakes; and, number three, uses that substitute for an individual's performance that they typically would have created in real life, such as a performance in a song or movie. These causes of action should have different requirements and distinct speech-protective exceptions.

My third recommendation is that Congress ensure each provision of the law adequately protects speech interests. Congress can better protect expressive values by allowing the new Federal statute to preempt the inconsistent State laws that protect the right-of-publicity and digital replica laws that restrict the unauthorized use of digital replicas. If licensing of digital replica rights is allowed by the Act, individuals should be able to consent for each different use of their digital replica.

Allowing others to control a person's identity rights through a broad licensing agreement will work at cross purposes with many of the stated goals of this proposed legislation. It could potentially lead to greater AI-generated deception of the public. It can also stifle the right of people to make a living through their performances and result in the use of their image or their voice in sexually explicit material that was authorized by the broad terms of a licensing agreement.

I encourage Congress to continue to protect the interests of both public figures and ordinary people, in the NO FAKES Act, and I also encourage you to continue consulting with stakeholders, academics, and attorneys with expertise in this field of law. I look forward to answering your questions as you continue to improve the Act. Thank you.

[The prepared statement of Professor Ramsey appears as a submission for the record.]

Chair COONS. Thank you. Thank you to all six of our witnesses for your preparation, your engagement. I'm going to start with some questions about exploring how AI replicas are impacting individuals and entertainment businesses and then use a subsequent

round to get into your perspectives on specific potential revisions to the NO FAKES Act.

Mr. Crabtree-Ireland, thank you for sharing your personal experience of an AI-generated deepfake. This was in the context of the ratification fight for the most recent contract. Given your experience, should a digital replica right apply to all individuals, regardless of whether they're commercializing their image, voice, or visual likeness? You primarily represent people who make a living, who commercialize their image, voice, or visual likeness. Why should we have this available to everyone?

Mr. CRABTREE-IRELAND. No, it's a great question, Chairman. I think, yes, we support a right that's available to everyone. Obviously, twigs, myself, others, Mr. Kyncl, have explained the impact that this can have on people who make a living and whose career is based on their image, likeness, or voice, but the impacts are so obvious and so real for so many Americans, outside of the scope of just a commercialized use. And the example I gave, in my mind, is not a commercial use example. This is an example that could apply to anyone, and the impact is so serious. So, yes, we do support this right on a broader basis, and it should be applicable to everyone.

Chair COONS. Twigs, could you help us understand how you're using AI as a creative tool, on the one hand, and then briefly tell us a little bit about your experience with AI deepfakes and what you think the future of your industry looks like if we don't heed your urgent call for us to act?

Ms. BARNETT. Well, over the past year, I've been creating an AI version of myself that can use my tone of voice exactly to speak in multiple languages. I've done this to be able to reach more of my fans and to be able to speak to them in the nuance of their language. So, I've currently explored French, Korean, and Japanese, which is really exciting for me. It means that, even with my upcoming album, I can really explain in depth what it's about, creatively. It also allows me to spend more time making art. Often, being a music artist or any artist in this day and age requires a lot of press and a lot of promo, a lot of one-liners. So, it means if it's something simple that doesn't really require my heart, I can do a one-liner and give it to people, to promote a piece of work, and, you know, it's harmless, but ultimately I can spend more time making something that's really meaningful for my fans. And the next question—oh, you asked how—

Chair COONS. Your own—

Ms. BARNETT [continuing]. Have I been—

Chair COONS [continuing]. Experience with deep—

Ms. BARNETT. Yes. So, there are songs online, collaborations with myself and other artists, that I didn't make. It makes me feel vulnerable, because first of all, as an artist, I think the thing that I love about what I do is that I'm very precise. I take my time with things, and it's really what I'm very—I'm very proud of my work, and I'm very proud of the fact that I think my fans really trust me, because they know that I just put so much deep meaning of my north star into what I do.

So, the fact that somebody could take my voice, change lyrics, change messaging, maybe work with an artist that I didn't want

to work with or maybe work with an artist that I wanted to work with and now the surprise is ruined—it really leaves me very raw and very vulnerable. I think that if legislation isn't put in place to protect artists, not only will we let artists down who really care about what we do, that have spent a long time developing themselves, developing the way that we work, but it also would mean that fans wouldn't be able to trust people that they've spent so many years investing in.

It would affect us spiritually. It would affect us financially. And it makes—honestly, if I'm honest with you, I'm just surprised that we're even having this conversation, because it feels so painfully obvious to me that it's hard to even find the language, if I'm completely honest with you.

Chair COONS. There're a lot of things that are painfully obvious that call out for Congress to act——

[Laughter.]

Chair COONS. So, your surprise is not unusual.

[Laughter.]

Chair COONS. It is broadly spread.

Ms. BARNETT. But ultimately what it boils down to is my spirit, my artist, and my brand is my brand, and I've spent years developing it, and it's mine. It doesn't belong to anybody else, to be used in a commercial sense or cultural sense or even just for a laugh. You know? I am me. I am a human being. And we have to protect that.

Chair COONS. Thank you. Mr. Kyncl, if I might, just briefly—we've seen a steady increase in the quality of deepfakes, with songs on streaming platforms that are virtually indistinguishable from talented artists like twigs. What are the challenges that AI deepfakes are creating, sort of long term, for both the music business and for fans, as well as for performers?

Mr. KYNCL. So, I think twigs addressed one of those, and no one can do that better than what she just did. I think the second one is that, when you have these deepfakes out there, the artists are actually competing with themselves for revenue on streaming platforms, because there's a fixed amount of revenue within each of the streaming platforms, and if somebody's uploading fake songs of twigs and those songs are eating into that revenue pool, there's less left for her authentic songs. So, that's the economic impact of it, long term. And the volume of content that will then flow into the digital service providers will increase exponentially, which will be harder for the artist to be heard and to actually reach lots of fans. So, creativity, over time, will be stifled.

Chair COONS. So, as you both put it, there's both a relationship impact, a spiritual impact, a financial impact, a broader ecosystem of creativity impact. Senator Tillis, I turn to you.

Senator TILLIS. Thank you, Chairman Coons. And, again, thank you all for being here. Ms. Ramsey, I'm going to start with you and then have others who may have an opinion on it. You mentioned notice-and-takedown in your comments. This is a strict liability bill, in its current form. Some of us think that maybe we have to weigh into that. You also talked a bit about having, I guess, that—having the individual who's been informed of takedown having some recourse. Can you talk a little bit more about that, briefly?

Professor RAMSEY. Sure. You might have a situation where somebody challenges your own personal use of your identity online, and they're the one that's the bad actor, but they file a complaint with the online service provider, and the online service provider, who wants to avoid liability, automatically takes it down. That's one possibility.

Another would be that the person who is disseminating this image actually has a defense, right? An exception applies to this particular use. It might be news reporting or parody. And so it's critical for the online service provider to be able to put that expression back up, if it actually does not violate the law. Under the copyright laws, my understanding is that once the information's put back up, it stays up unless the copyright owner files a lawsuit.

So, what's great about the takedown-and-notice procedure is that it allows ordinary people to get these unauthorized uses off the internet. And I think that's one real benefit of having a notice-and-takedown procedure and encouraging companies to adopt one. There are some challenges, though, with notice-and-takedown procedures that folks like Eric Goldman and others have talked about, so it's great that you're talking to interested parties when you figure out these issues.

Senator TILLIS. Anybody here have an opinion counter to that? Okay. Mr. KYNCL, can you walk me through what artist, what rights typically are granted to record labels under exclusive sound recording agreement, and are likenesses included in that?

Mr. KYNCL. So, it's a pretty wide range of rights, anywhere from a full copyright right to distribution-only rights, where the copyright remains with the artist. And increasingly so, they include likeness, as well, because we're—as you can imagine, as we work on open platforms with lots of user-generated content, we are the ones who have a staff of people that is working to issue notices, claim the content, take down the content. And, increasingly, we need the name, image, likeness, and voice rights in order to actually act on that, on the artist's behalf, with the platforms.

Senator TILLIS. I think you believe that new digital replica rights need to be fully transferable?

Mr. KYNCL. Yes.

Senator TILLIS. Why isn't a license enough?

Mr. KYNCL. I think it should be at the choice of the artist. The artist should have a choice to either transfer or license.

Senator TILLIS. Okay. Mr. Sheffner, State-level right-of-publicity laws restricting commercial speech have existed for many decades. They've developed their own case law, and they're well understood. The new digital replica right proposed by the NO FAKES Act would affect noncommercial speech beyond what most State laws currently cover. Can you explain how novel this proposed right would be in the context of existing right-of-publicity laws, and how should we consider preempting similar State-level digital replica laws, especially when it's such new territory?

Mr. SHEFFNER. So, thank you for that question, Senator Tillis. And you're absolutely right that most State right-of-publicity laws, which have existed for more than a century, are really limited to commercial uses. That's in advertisements or on merchandise. What Congress is considering doing here is really novel. Although

it's sometimes described as right-of-publicity, we think it's fundamentally different in that it would apply in expressive works like movies, TV shows, songs which are fully protected by the First Amendment.

So, there have developed a robust body of case law in the traditional commercial right-of-publicity context which says, yes, it applies if you put somebody's face on a billboard or use it in an advertisement, on a lunchbox, but it doesn't apply if, for example, you're making a biopic or a docudrama about somebody. You can't use right-of-publicity law to censor those portrayals. Again, this is a novel form of right which is going to be subject to heightened constitutional scrutiny, like Professor Ramsey described.

Because it applies in expressive works, it's really important, up front, to provide some clarity to film producers so that when they're about to embark on a project, they know what's allowed and what's not. And if it's too vague, if it's too uncertain, they're going to shy away from using this technology to engage in those sorts of portrayals. Again, that chills speech, and the First Amendment case law says that a statute is vulnerable to being struck down if it chills constitutionally protected speech.

Senator TILLIS. Yes, which is why we absolutely have to get it right. I think there's general consensus that we have to make progress, but the challenges of all this work being struck down are significant. We have to do the legwork. Thank you. I'll have a second round.

Chair COONS. All right. Thank you, Senator Tillis. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman and Ranking Member Tillis, for bringing this bill before us. And as you say, Mr. Chairman, the bill has gone through a lot of input from a lot of different groups. And if I listened to your testimony accurately, it doesn't sound as though any of you think that we should not do something that will protect—I like the framing of protecting personhood. Any of you think that we don't need to do anything in this area? Okay.

So, looking at this statute, then, why don't we go down the list very quickly? What do you like most about the current bill—and we'll just start with Mr. Kyncl—about the current bill, and what is the most important thing you would want to change, if anything? And if you can just keep your answer really short.

Mr. KYNCL. I'll start with what I believe it needs to contain, which is it needs to contain consent for the use of people's name, likeness, and voice, to train AI models and create outputs. That needs to happen. Second, it needs to contain monetization, which is fair market license that that person can exercise, you know, through that consent. But in order for that to happen, and in order for all of that to be operationalized by the platforms, we need two things: one, which is provenance of the content that generative AI models are trained on and that they're outputting to be retained, which means they should keep sufficiently detailed records on what they trained on, so that later on that provenance can be embedded into watermarks which are recognized by the platforms on which the content is.

Senator HIRONO. I mean, the point is, it sounds like, consent is the critical part of this. Consent of the creator——

Mr. KYNCL. And the provenance——

Senator HIRONO [continuing]. Of the image.

Mr. KYNCL [continuing]. Of the content.

Senator HIRONO. Okay.

Mr. KYNCL. And we are good at tracing provenance on luxury clothing, on cheese, on wine. We should be able to do it on intellectual property, as well.

Senator HIRONO. Going down the line. We're talking about this particular bill. Is there something in this bill that you think is the most critical aspect of the bill, that you support? And is there anything there you would change in the bill?

Ms. BARNETT. I think the most important thing is to put the power in the hands of the artists. I want to be in control of my likeness, my brand, my legacy. I have sacrificed so many years to be good at dancing, at singing; so much financial input, so much time. And I do it in the name of my legacy. I do it so that one day I can look back at my body of work and say, that was me. And that's what I want to be protected in the bill.

Mr. CRABTREE-IRELAND. Thank you, Senator. I think what I like most about this bill is the fact that it is broader than limiting it to commercial use. The fact is the commercial use limitation may have worked 100 years ago. A commercial use limitation does not solve the problems that we face today, especially because of generative AI. And we need the breadth that is reflected in this legislation.

I think in terms of—if there were one thing that I would change in it, I would adopt a durational limitation on transfer or even licenses of these rights during lifetime. I think may not be as necessary after death, but during a lifetime, I think it's essential in order to make sure that someone doesn't improvidently grant a transfer of rights early in their lifetime that turns out to be unfair to them, and I think there's various standards we could look at for an appropriate duration.

Senator HIRONO. So, 70 years is a bit long.

Mr. CRABTREE-IRELAND. Well, I'm sorry, the 70 years, though, is the duration of the right in the bill after death. I'm talking about the duration of a transfer even during life. So, if you had, say, a 21-year-old artist who's granting a transfer of rights in their image, likeness, or voice, there should not be a possibility of licensing that for 50 years or 60 years during their life and not have any ability to renegotiate that transfer. So, I think there should be a shorter, perhaps 7-year, limitation on those transfers.

Senator HIRONO. Makes sense.

Mr. SHEFFNER. Senator, one thing that we do like about the bill is the First Amendment exemptions. We think they are most of the way there to giving our members the clarity and certainty they need. I think they can be improved a little bit, and we have some specific, fairly technical changes that we recommend. One thing that we would recommend changing is there is currently essentially a no-preemption provision. We think it should essentially be the opposite. I was just discussing with Senator Tillis: this novel law with kind of some uncertainties around the First Amendment lim-

its. We think it would be important not to preempt all existing State right-of-publicity law but to preempt State regulation of digital replicas in expressive works like movies, TV shows, songs, that are protected by the First Amendment.

Mr. DAVIES. Thank you for the question. I think——

Senator HIRONO. Do you mind, Mr. Chairman, if we——

Chair COONS. Yes.

Senator HIRONO [continuing]. Just——

Chair COONS. I think this is——

Senator HIRONO [continuing]. Continue with the——

Chair COONS [continuing]. Instructive.

Senator HIRONO [continuing]. Responses? Go ahead.

Mr. DAVIES. Yes. Building on some of the things said, I think the efforts here to protect personhood is something we very much encourage with the draft. The fact it's a discussion draft—I think in terms of the key areas that we want to focus on is where liability sits and that we would encourage it to be focused on the creator and those that are first releasing the content. We would prefer that it was based around right-of-publicity laws, the existing body of law, rather than IP; actual damages rather than statutory damages; and the preemption message.

Senator HIRONO. Professor.

Professor RAMSEY. All right. Thank you for your question. So, what I like most about the bill? I love the specific exclusions from liability, even though there might be some additional revisions that should be made, and the fact that you're protecting personhood, although I'll note that State right-of-publicity laws do sometimes apply to noncommercial uses of a person's identity. The *Zacchini* case involved use of his entire act in a news report, so that's not a commercial use. And in the *Comedy III* case in California, the Supreme Court case, the law was applied to an identical kind of rendition of The Three Stooges in a lithograph, which is also not commercial speech. So, there are some circumstances where current laws do apply to noncommercial uses of a person's identity, and also false endorsement laws can apply to noncommercial uses, but they have to be used in connection with goods and services, so they might be noncommercial use in goods and services.

What should we change? Well, I think there's a tie. You said pick one, but I have to pick two. So, first I think we should have separate causes of action, as I mentioned before, with distinct defenses. So, for example, a disclaimer might make sense if you're targeting deceptive impersonation of someone, right, because it dispels any confusion. But a disclaimer doesn't make sense in a sexually explicit deepfake that's been put out there without consent. You might have different requirements with regard to commercial use, right? If it's just a general, broad Federal right-of-publicity, you might have a commercial use requirement, whereas if you're talking about sexually explicit deepfakes, impersonation, it should apply to both commercial and noncommercial speech.

And then my other part of the tie is the provisions with regard to limits—or no limits on the scope of licensing. My concern is that individuals without significant bargaining power at the early stages of their career might sign a contract, maybe a long contract, where it has a digital rights provision in it, and sign away the

right to their identity for a lengthy period of time and use in any context.

And so I would like to see some way for Congress to encourage or require, you know, those folks who are negotiating these agreements to perhaps have a specific use authorization for a certain movie, right, as opposed to use of your digital identity in any context, right. Or instead of a lengthy period of time—instead of 50, 60 years, I would say maybe 1 to 5 years. And I'm not an expert in the area of what's a good term, but I think it's critical to make that shorter rather than longer, because a lot of these people, even if they have attorneys, they're just not going to have that kind of bargaining power that the big studios, big music companies will have.

Senator HIRONO. Thank you, Mr. Chairman. I think that what the Professor is suggesting, different causes of action—it's very intriguing but complicated, so—

Chair COONS. Perhaps we'll explore—

Senator HIRONO [continuing]. We'll think on it.

Chair COONS [continuing]. Second round.

Senator HIRONO. Thank you very much.

Chair COONS. Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman, and thank you for your good work on the bill. We've spent months working on a discussion draft and moving this forward, so I'm so pleased that today we are to the hearing stage on this. Now, I represent Tennessee, so it doesn't matter if you're on Beale Street or if you're on Music Row or maybe you're working with Naxos or one of the symphony distributors—you know, we distribute more symphonic music out of Nashville, Tennessee than anybody else in the world. We've got gospel, contemporary Christian. We've got church music. We've got bluegrass. We've got the Museum of African American Music. It is all right there. And we are really so protective of our creators.

And in Tennessee we kind of have the good, the bad, the ugly relationship when it comes to AI. All of our people in manufacturing and logistics and health care—they're innovating and going to town with it, but I'm deeply concerned about what is happening to the creative community and working on NO FAKES and making certain that there is a way for artists to protect that name, image, likeness, their voice—that there is a way for them to exercise their constitutional right to protect their intellectual property and to benefit from that property. That is going to be so important.

Mr. Kyncl, I want to come to you. I appreciate the comment you made when we were visiting, preparing for the hearing. You said, we got data wrong, data privacy wrong. We still haven't done data privacy.

Mr. KYNCL. Yes.

Senator BLACKBURN. And we can't afford to get AI wrong. And it's going to require that we take an action. And Tennessee stepped up last month, and they passed the ELVIS Act. This is a great piece of legislation. And, Mr. Chairman, what they did was take much of what we've put in the discussion draft, and they put it in place to protect our innovators and to give them that State right of action. And not all States are following suit on this, of course,

and I think that what we've done is kind of establish that baseline for a Federal action. So, I'd like to hear from you, if you will, sir, about the need for a Federal standard, a Federal preemption on that, for action.

Mr. KYNCL. Yes. Thank you for your efforts on the ELVIS Act. It's truly groundbreaking. We are in a unique moment of time, where we can still act, and we can get it right before it gets out of hand. The genie is not yet out of the bottle, but it will be soon. And, as you mentioned, Senator Blackburn, we got it wrong on privacy. We waited too late. Don't get it wrong on identity. It's simply far too important. And the speed at which this will happen will be afforded by open-sourcing of foundational AI models which are developed. And once that happens, everything accelerates exponentially, and therefore it's imperative that Congress acts this year. Thank you.

Senator BLACKBURN. You know, we've heard—some commentators are talking about, well, you've got existing law, when it comes to privacy or to personal property and intellectual property protections, and so you can rest on that existing law, and that is sufficient to go in and get a takedown order on some of these AI fakes. Talk to me about why that is not sufficient.

Mr. KYNCL. I mean, today, if you think about privacy, how many spam emails do you get every single day in your inbox? Quite a lot. Your personal information is leaking everywhere, whether it's being sold or whether it's just being taken. It's just not safeguarded properly. When that happens with your face and your voice, it's a whole new game. And for you—and this will happen at a volume that is impossible for every single person to try to, like, personally manage, which means it has to be solved with technology. So, it is technology that will unleash it, and it has to be technology that helps manage it, which is why it's important for us to work with the technology platforms to solve this, and we have to have a working bill and working law that can be operationalized by all of us. But the existing framework is simply too whack-a-mole and doesn't work.

Senator BLACKBURN. Let me ask you this. And, Mr. Chairman, if I can get one more question in. Do you think that the platforms should be held responsible for unauthorized AI fakes that they're continuing to allow to be distributed?

Mr. KYNCL. I think we need to develop a set of conditions—

Senator BLACKBURN. Okay.

Mr. KYNCL [continuing]. That they should meet, and then if they don't, then yes. But there has to be an opportunity for them to collaborate and work together with all of us to make it so. And that, I think, is the detail work that needs to happen. But when we achieve that, then it will work, and there will be good actors, and many of them are. So, I think it's through that collaboration that we can wrestle this down.

Senator BLACKBURN. Thank you. Thank you, Mr. Chairman.

Chair COONS. Thank you, Senator Blackburn, and thank you for your cooperation on moving forward this great bill. I have a whole series of questions I want to ask about potential tweaks, so I'm going to try and move relatively quickly, if I might.

Mr. Sheffner, you testified that we have to include First Amendment exceptions for uses and works that have public interest or newsworthy value. Some people say that any work involving a celebrity is newsworthy or in the public interest. And that raises the challenge of how we define First Amendment exceptions to ensure they don't just swallow up the rule and permit all kinds of uses that the bill's, in fact, trying to stop. So, I'd be interested in your views on how we narrow that. And, Professor Ramsey, how would you craft the First Amendment exceptions to make sure that they don't swallow up the whole bill, particularly with regards to what is newsworthy?

Mr. SHEFFNER. Sure. So, Senator Coons, we've talked to your staff, which I have a great relationship with; I've talked to other stakeholders and listened to the concerns that've been raised about, well, maybe these exceptions are overbroad and they could somehow swallow the right itself. We've listened, and we've suggested tweaks to make sure that those types of exceptions do not apply if the use of the digital replica is deceptive. We don't support fraud. Fraud is not protected by the First Amendment. It should not be allowed.

Chair COONS. Does—

Mr. SHEFFNER. One—

Chair COONS. Does it—

Mr. SHEFFNER. One—well, but one other thing I would just say is that these types of statutory exemptions have been routinely included in State right-of-publicity laws over the last 25 years or so, since the late 90s. And one thing that we've seen—or that we haven't seen is this type of abuses of those exceptions. They have worked very well in separating out the uses where you should need to get permission—again, to put somebody's face on a billboard or on a lunchbox—

Chair COONS. Got it.

Mr. SHEFFNER [continuing]. Versus the biopics.

Chair COONS. Got it. Professor. Briefly.

Professor RAMSEY. So, Christine Farley and I just recently wrote a paper about how we can balance trademark and free speech rights when someone uses a trademark in an informational or expressive way, like a news report, entertainment, things like that. And I think our proposal in that context might also work here. So, as you mentioned, right, some of these kinds of uses can actually be bad, right? Impersonation, et cetera.

So, one approach, in addition to listing out these potential defenses, would be to say, if this is an informational expressive use that is a false statement or false representation—so you actually say this is a certain celebrity, when it's not, or a certain teenaged girl, when it's not—that would be actionable, still, even though, you know, there's some argument that it's expressive, or if this use is likely to mislead a reasonable person about the source of the message or the speaker's identity. And so that way, you would be able to at least have courts consider whether it's an information or expressive use but also the safety valve that if it's really causing harm because it's deceptive, then you can still regulate it.

Chair COONS. Understood. Mr. Davies, today you raised concerns the bill lacks a mechanism for showing or demonstrating your

members had knowledge. Should we incorporate a notice-and-takedown structure? If so, should it be the DMCA's notice-and-takedown provisions? Is there another mechanism you'd urge us to consider for knowledge and for constructive—

Mr. DAVIES. Yes. Thank you for the question. In terms of the current situation, our members are handling—they're the leading streaming services, so they're handling the majority of the music streaming consumption, and the processes are working very well. I think the example that you've used and other—you know, the Drake example, which is a common one—there's been no challenge there in taking down the content expeditiously. So, we don't see our members needing any additional burdens or incentives here, but we do understand that the Committee is keen to look at—if there is to be secondary liability, we would very much seek that there be a safe harbor for an effective takedown.

I think the DMCA notice-and-takedown process we don't see as being a good process for here. It was designed for copyright, and we obviously have opposition in terms of seeing this as a different set of rights. That said, our members absolutely can work with the Committee in terms of what we would think would be an effective notice-and-takedown, and building on some of the points the Professor's made there, in terms of, it's really essential that we get specific information on how to identify the offending content so that it can be removed efficiently. We need information on the notifier, in terms of why is the content offending, on what basis, and also that information on the notified, so that if there was an objection to the notification, that can take place.

Chair COONS. Two more questions. I want to talk about preemption briefly, Professor, if I might. Several witnesses have described the existing State right-of-publicity laws as a difficult-to-navigate patchwork. Should our bill broadly preempt State laws or limit preemption to those State laws governing uses of unauthorized digital replicas?

Professor RAMSEY. So, I teach right-of-publicity law and trademark law, intellectual property survey, and every year I teach it, I think, we really need a Federal right-of-publicity law, right. The State laws are so different. And if you go to—Jennifer Rothman has this great blog which talks about all the different laws. And then even within a State, the statutory provisions have different rules than the common law provisions. So—

Chair COONS. I take it your answer is yes?

Professor RAMSEY. Well, yes.

[Laughter.]

Professor RAMSEY. So, I'm just building it up. So, yes, we need preemption, right. But the challenge, right, is, you know, obviously, Congress—you're doing a great job trying to get this right. And so you get it right, and then you preempt State laws, and it simplifies everything: for litigants, for judges. Instead of having to figure out which law's going to apply in a particular—you know, there's right now forum shopping going on, right. People are going to file suit in whatever State's going to be best for their interests. And so if you have—yes. So, yes, we need—preemption's a great idea.

Chair COONS. The discussion draft has a 70-year postmortem provision. It's modeled after the Copyright Act. Postmortem rights

are important, but we understand 70 years is a long time, especially for individuals who don't commercialize their image, voice, or likeness. I'd be interested—jump ball. Several of you; perhaps Mr. Sheffner first and then others. Should postmortem terms be longer for individuals who commercialize image, voice, and likeness? Should they be limited? Should they be reviewed and re-extended every decade or so? Like, how would you handle postmortem rights? The draft has 70 years postmortem, and some of you have enthusiastically supported that as part of your creative legacy. Others have raised concerns. Mr. Sheffner, you kick us off, and we'll do this one quickly.

Mr. SHEFFNER. Sure. So, we view this, again, through the lens that this is a content-based regulation of speech. And as Professor Ramsey said in her opening statement, a content-based regulation of speech needs to be justified by a compelling government interest that is narrowly tailored to serve that interest. And what we have said is that, as for living professional performers, use of a digital replica without their consent impacts their ability to earn a living. You have a compelling government interest in regulating there, and it would be appropriate for Congress to regulate. Postmortem, that job preservation justification goes away, and I have yet to hear a compelling government interest in protecting digital replicas once somebody is deceased. So, I think there's going to be serious First Amendment problems with extending a right that applies in expressive works postmortem.

Chair COONS. Any other witnesses think preserving the legacy and property rights of an individual is worthy of some protection? Professor Ramsey, and then Mr. Crabtree-Ireland.

Professor RAMSEY. So, this is not going to shock you, but I'm going to say it depends on the goal of the law, right? So, if we're—

Chair COONS. You really do belong as a—

Professor RAMSEY. Right.

Chair COONS [continuing]. Professor.

[Laughter.]

Professor RAMSEY. So—

Chair COONS. Great.

Professor RAMSEY. So, if we're talking about a law that's regulating deceptive uses of someone's identity; if we're talking about a law that's governing sexually explicit deepfakes, it seems to me that it's fine to have a postmortem right, like long—right, long term, possibly, maybe life plus 70. If we're talking, though, just about protection of a broad Federal right-of-publicity, maybe not so much. And I haven't written in this area, but I would recommend looking at the works of people who have: Mark Bartholomew; Jennifer Rothman I think is working on a paper, et cetera.

Chair COONS. All right. Mr. Crabtree-Ireland.

Mr. CRABTREE-IRELAND. Thank you. I mean, to me, it's shocking that anyone would think that this right doesn't deserve to be preserved and protected after death, I mean, for all the reasons that twigs stated about how personal this is. It's an economic right, it's a personal right, and it's something that has real value. And so why that should somehow dissipate upon death and make itself

available to big corporate interests like the ones represented by some folks here—that doesn’t make any sense.

I would argue that there shouldn’t be a 70-year limitation at all. This right should be perpetual, and the reason why this right should be perpetual is that every one of us is unique. There is no other twigs, and there never will be. There is no other you, or you, or any of us. This is not the same thing as copyright. It’s not the same thing as—we’re going to, you know, use this to create more creativity on top of it, later. This is about a person’s legacy. This is about a person’s right to give this to their family and let their family take advantage of the economic benefits they worked their whole life to achieve. So, from my perspective, this is an intellectual property right that deserves protection. It should absolutely be protected after death, and I’m waiting to hear a good reason why it shouldn’t be, to be honest with you.

Chair COONS. In perpetuity; not at all. Mr. Kyncl, see if you can help us bring this home, and then I’m—

Mr. KYNCL. I will make this—

Chair COONS [continuing]. Going to—

Mr. KYNCL [continuing]. Very brief for you. I agree with Mr. Duncan Crabtree-Ireland 100 percent.

Chair COONS. Thank you all for that. Twigs, would you like to make a comment on that? Forgive me.

Ms. BARNETT. I was going to say that I’ve worked so hard, throughout the whole of my career, and when I die, I would like everything that I’ve created to go to my family and my estate, that will have clear instructions of the way I want to preserve my history and all of the art that I’ve created.

Chair COONS. Thank you. Senator Blumenthal.

Senator BLUMENTHAL. Thank you very much, Mr. Chairman. I got off a plane about 20 minutes ago, coming from Connecticut, so I do apologize for missing the bulk of the hearing. As you may have heard, we had no votes yesterday, so today was a partial day off, and I had plans in Connecticut. So I am grateful to all of you for being here, and we are very, very hopeful that you’re in good health and that you’re going to continue creating, and I’m a big fan of your work. So, thank you for being here, particularly.

Thank you, Mr. Chairman, for having this hearing, which focuses on a bill that you’re going to introduce. I’d like to be added at the appropriate time as a co-sponsor. I’m a strong supporter, and I believe that there ought to be a Federal right for people whose image and voice are used without their consent, whether it is an actor or a songwriter or a singer or an athlete. What is shared here is a right in one’s own likeness and creation as a person, an individual right. And I think there ought to be a right to take legal action under that right. A right without a remedy is unavailing, as we know from our first year in law school, which for me was quite a few years ago, but I’ve seen it repeated again and again in real life as a prosecutor, as an advocate, as a litigator.

But I’d also like to focus on a complementary remedy, which could be watermarking or identification, attribution, giving credit, not just the deepfake and the right to recover as a result of use of it without attribution or credit, so to speak, without a watermarking, but also that kind of identification, public crediting

of a work. And I'm asking not only in the abstract, but I head a different Subcommittee of the Judiciary Committee. It's called Privacy, Technology, and the Law.

The Ranking Member of that Subcommittee and I, Senator Josh Hawley of Missouri, have set forth a framework. It's the most comprehensive bipartisan framework right now, and we should do more adopting the kind of measure that Senator Coons and others have proposed. But it would provide a requirement for watermarking, as well as an entity to oversee licensing, mandatory licensing, risk-based, of AI models and other measures like transparency and so forth. It's a more comprehensive approach.

But my question is really focused on watermarking. Maybe you can tell us—let me ask all the witnesses—how watermarking can complement rules requiring permission to use someone's likeness or voice or creation in a deepfake or impersonation or simply using it without permission.

Mr. KYNCL. I'll take it. So, thank you for all of your work on this important issue. I think, you know, without attribution achieved through watermarking, we won't be able to operationalize what we're talking about here today. So, you're focusing on absolutely the right issue. And I think the important part in this is to determine the provenance of content that's being displayed, the degrees of similarity to its original—you know, to the original, and then it is up to the rights holders, whether it's artists, music companies, movie studios, et cetera, to then negotiate commercial relationships with the platforms, separate and aside from the laws and how it all works, using all of those mechanisms.

We've actually done this. When I was at YouTube, this is precisely what we have done with user-generated content. We've just done it in the copyright scheme, where it was the exact content referenced. And so we built a whole framework around that. This is merely that, on steroids, adopted for the AI age with, you know, many more shades of grey and much more speed. But it's really just upgrading that. But the framework exists. It has been developed by companies like YouTube, which is best in class in that. And therefore I'm hopeful that we can take it further and apply that to AI as it relates to voice and degrees of similarity, using watermarks to label content and carry the provenance of it.

Senator BLUMENTHAL. Thank you.

Ms. BARNETT. I mean, I can only really talk from personal experience, that in the last 6 months, I had 85 of my songs leak online, which was basically the whole of my experimentation for my next album. It was really scary, because I thought that it's like having the whole of my note pad, I guess, of all my ideas being put out to the whole world before it was ready.

But on the flip side of that, I felt very secure because I was able to call up my label and say, hey, this has happened, and immediately they could go and take it down, and it just disappeared. And now you can't find it. So, I think that watermarking—it would protect artists, because then we'll have a point of call to go to, to say, this has happened, and immediately whatever's, you know, been leaked online or put online can be taken down.

But one thing I will say is that the thing that's really scary is once something is out in the world, we can't take it back. So, if

someone uses my likeness and says something offensive or says something harmful, people might think that that is me. And we've all seen in the news when someone does something wrong, and the big story is, like, the front page, but then you think, oh, no, they actually didn't do something wrong. It was a mistake. And the rewrite of it is so small, and I think that's the thing that I'm scared about—is even if something does get out in the world that's not me, it's the reputational damage that it will do and the financial and cultural harm that won't be able to be amended after the fact.

Senator BLUMENTHAL. Very good point. If the chairman would give me a little more time, I'd be interested in the others to answer. Thank you.

Mr. CRABTREE-IRELAND. Thank you. I agree with Mr. Kyncl on the value of watermarking and other tools, as well—C2PA: the coalition is working on that—but I also just want to caution, especially in deepfakes, it was mentioned earlier the idea of disclaimers solving problems there, or the ideas of watermarking solving problems there. We also have to make sure that tools that we use to protect against abuses of these technologies are realistic.

And so expecting viewers of content online to read deeply into captions to find disclaimers or things like that—that doesn't really solve this problem. So, I hope as the Committee considers what to do, it's not enticed into thinking that that type of solution actually solves the problem. It needs to be more front facing, so that the message that's delivered is received by all those who view it.

Mr. SHEFFNER. Thank you for the question, Senator Blumenthal. As Mr. Kyncl was talking about in the copyright context, watermarking has proved useful in certain contexts. I think he was referring to YouTube's content ID system, which has been a great help in reducing the presence of pirated material on that platform. I would just say, again, our experience from copyright law, though—it's not a silver bullet. It sometimes can help identify the original source of pirated material, but just because it's out—just because it has a watermark on it, it doesn't stop it from being further disseminated, et cetera. So, there's really no silver bullets in this context.

Mr. DAVIES. Thank you for the question. I'm going to build on things that have already been said. I think Robert talked about the partnerships between the services and the rights holders. These are absolutely essential. This is where the content comes from, for the services. So, we're very reliant on the data, on the metadata that exists. I think it would be true to say that data in the music industry already have significant challenges, so—but these are challenges we work on together.

Senator BLUMENTHAL. Thank you. Professor.

Professor RAMSEY. So, I'll incorporate by reference everything that's been said before but then also say that I think someone using a digital replica to impersonate someone or basically put out a sexually explicit deepfake—they're not going to use this kind of technology, so it's not going to help in certain circumstances.

Senator BLUMENTHAL. Yes. And I meant this—I think I used the word complementary. If not, I meant to say complementary. I didn't mean it as a substitute. So, I take all these comments as very helpful and valid. Thank you, Mr. Chairman.

Senator TILLIS [presiding]. On behalf of the Chair, Senator Klobuchar—char.

Senator KLOBUCHAR. Thank you very much. That was an AI attempt. I know it was.

[Laughter.]

Senator KLOBUCHAR. Kind of failed. Kind of close, not quite.

Senator TILLIS. I never heard—

Senator KLOBUCHAR. Okay. Professor Ramsey, since you ended there, I'll pick up where you were, about some of these, and some of the other witnesses mentioned about this—deepfakes and how some of these things—whether it's sexually explicit images or whether it is the political robocalls or videos or ads. And I wasn't going to start this way, but it makes sense here because of what you just said.

To me, some of this we just have to get off there. They're not going to be able to listen to a major candidate for president for 3 minutes and then look and see a label. And I think that, in other countries, that's what they've done. That's why Senator Hawley and Senator Coons and Collins and a number of other Senators have come together. We're marking up this bill, along with a labeling bill, in the Rules Committee on elections. Could you talk about why that kind of targeted approach to some of these, like, hair-on-fire things is very important, given the timing of all of this?

Professor RAMSEY. Well, as you can expect, I love the fact that you're working on these targeted laws, but again, one of the things we need to do is protect ordinary people from impersonation. Over Thanksgiving, someone called my dad when I was standing right next to him. It sounded just like my brother, and he said he was in jail and he needed money to get out of jail. And my dad was not duped by this, but, you know, some people have been, as the Senators have noted. So, I think it's a great idea, but I think that, you know, we still need the more broad act to deal with these kinds of issues for folks that are not politicians, et cetera.

Senator KLOBUCHAR. Exactly. And my State director's son is in the Marines, and her husband got a call where it was an impersonating. They'd scraped his voice. They didn't know where he was stationed. So, we're going to see all of this deployed against military families, as well, really, all these kinds of scams. So, it's going to be—I see this, you know, heaven of some of the great uses, especially in health care, of AI, but then there's the hell part, and that should be our job to try to put the guardrails in place, which is why I'm so honored to be working with Senator Coons and Tillis and Blackburn on this bill.

So, one of the things that interested me during the testimony—you, Mr. Sheffner, and Mr. Crabtree-Ireland, you kind of got to this, but both the NO FAKES Act and this election bill include exemptions, exceptions for the use of digital replicas, to ensure the bills do not chill speech protected by the First Amendment. Could you talk a little bit more as we look at how we can write these in a way—and I have tried, with exceptions for satire in the elections bill, with Senator Hawley—how we can do this to ensure that common-sense safeguards do not chill protected speech and that this is upheld in a court?

Mr. SHEFFNER. All right. So, Senator Klobuchar, I just want to say, agreeing with Professor Ramsey, that I think your approach of having specific legislation on pornographic deepfakes; other legislation on election-related deepfakes is really the right way to go. When you have a broad bill that essentially says you need permission to use digital replicas and then let courts kind of sort it all out, that's where you get into trouble, and you have an overbroad bill that is going to necessarily end up encompassing protected speech. Makes it vulnerable to being struck down on overbreadth grounds.

So, these kinds of exceptions, I think, are specific to the type of legislation. In the world of movies, our studios, the studios that we represent at the MPA, make a lot of movies that are based on or inspired by real people and events. Went through this morning. The last 5 years of all the Best Picture nominees over the last 5 years—approximately half were based on or inspired by real people and events. Our studios want to make sure that legislation like this doesn't interfere with their ability to do that.

When you're talking about, say, nonconsensual pornographic deepfakes, you don't need those exceptions for biopics and satire and parody. That stuff is bad in almost every circumstance you can think of. And I think this narrow, targeted approach is really the right way to go.

Senator KLOBUCHAR. Okay. So, Mr. Duncan Crabtree-Ireland—you've got, like, the best long name in the world.

Mr. CRABTREE-IRELAND. Thank you.

[Laughter.]

Senator KLOBUCHAR. Could you talk about balancing that right of creators with the right of those whose voice or likeness may be at risk? Sitting next to one of them, right there, with—

Mr. CRABTREE-IRELAND. Absolutely.

Senator KLOBUCHAR [continuing]. Twigs. And how do you believe we should balance that?

Mr. CRABTREE-IRELAND. Absolutely. You know, I think we all agree that obviously the First Amendment has to be protected and that expressive speech is important. I think, you know, the exceptions that are written into this discussion draft now are not that far off, but I think it's important that they not be expanded upon nor that they be broader than necessary, because the fact is, we can't anticipate what this technology is going to do tomorrow. We cannot anticipate every iteration of this. And while there are certain specific uses or concerns that are being addressed by legislation like the legislation you've referenced, there is a broader need for protection. The example I gave in my opening statement is one. Twigs has given examples as they apply to her.

And so we do need to have that proper balance, and I am concerned that we are only looking at one side of the First Amendment consideration here. The other side of the First Amendment consideration is the right that each of us has to our own freedom of speech, to be able to communicate our ideas, to associate ourselves with ideas that we want to associate with and not be associated with ideas we disagree with. And that is being really trampled on right now by this unfettered ability of people, without a Federal

right, to do things like the deepfake I experienced, that she experienced, et cetera.

And so I do feel like the Committee is going to have to work on, you know, defining these exceptions, making sure they are no broader than necessary to keep the legislation viable but also to make sure it doesn't swallow up the rule, like the Chairman said. If we make them so broad that they swallow up the rule, then all of this work will have been for nought, and the reality is, today is not like 10 years ago. It's not like 30 years ago. This technology is fundamentally different, and what it can do with all of our faces and voices calls out—it screams out for a remedy that's actually effective.

Senator KLOBUCHAR. And do you see—and maybe anyone, twigs, any of you—Mr. Kyncl—and again, this need for a national standard, just because Senator Blackburn's worked with us on this bill and is going to be a co-sponsor, and they just did the ELVIS Act. Of course, in Minnesota we have the DYLAN Act and the PRINCE Act. No, I just made that up.

[Laughter.]

Senator KLOBUCHAR. But we do have people, as you know, who are fiercely, fiercely independent and protective of their incredible music in our State, but we have a common law in Minnesota that's helpful. There's like, this State, this State. Talk about—a few of you, if you want to—just this need to have this national standard and why it's so important.

Mr. KYNCL. Maybe if I can—

Senator KLOBUCHAR. Okay. Mr. —

Mr. KYNCL [continuing]. Chime in.

Senator KLOBUCHAR [continuing]. Kyncl.

Mr. KYNCL. I just want to comment on some of the things from before, which is, as someone who grew up without the First Amendment, I value it probably more than those who have, because I do not take it for granted at all. And it seems like it's well and alive in America, because half of the movies who were nominated for Oscars, you know, were based on, you know, existing folks. So, saying that any, you know, AI regulation that is respectful of the existing First Amendment is not reducing it; it's keeping it as it is, and it's alive and well. So, I do think that we need to stay within the limits of First Amendment and not go beyond.

As to national regulation, we work with global platforms. We're talking about global platforms. Not even national. We're talking about global platforms. Doing anything State by State is a very cumbersome process. Twigs's content getting on a platform unauthorized—if we have to fight that on a State-by-State, it's untenable. It just doesn't work.

Senator KLOBUCHAR. Very good. Mr. Davies—he'll be my last one, and then we'll—go ahead.

Mr. DAVIES. Thank you. I just need to reinforce what Robert's just said. You know, absolutely right. You know, music streaming is global. The success of this is having access to twigs's music from the UK or from Tennessee or wherever. So, it's high volume, and anything that adds complexity on a State-by-State level is anathema to this industry. So, we're very strongly in favor of preemption.

Senator KLOBUCHAR. Very good. Just the last thing, kind of along those lines, is—don't laugh. I heard you, Coons. Just—it'll be very fast, and you can put it in writing—of you, Mr. Davies: In January we heard testimony that generative AI has been used to create unauthorized digital replicas of news anchors making comments, and we have a number of things going on in the journalism area.

I have a vested interest. My dad was a journalist for the Minneapolis Star Tribune, but also, Senator Kennedy and I have the bill to push for negotiation of the content and to get them reimbursed, mainly from Google and Facebook, for the use of this content, something that's going on in Australia and Canada, and I will not go on. But what steps can streaming services take to ensure that unauthorized digital replicas of journalists are not posted on the streaming platform?

Mr. DAVIES. Senator, if I could follow up with you after? I'm—
Senator KLOBUCHAR. Okay.

Mr. DAVIES [continuing]. Not briefed on that.

Senator KLOBUCHAR. Okay. Excellent. Thank you.

Chair COONS [presiding]. Thank you, Senator Klobuchar. Back to Senator Tillis for his second—

Senator KLOBUCHAR. She had—

Chair COONS [continuing]. Round.

Senator KLOBUCHAR [continuing]. One thing.

Chair COONS. Twigs, if you'd like to—

Senator TILLIS. Go ahead, twigs.

Senator KLOBUCHAR. Yes.

Ms. BARNETT. Oh, thank you. I'd actually like to go back to Mr. Sheffner's point about the desire to make very big and financially successful films about artists without consent. I think the problem is if you're able to use an artist's voice and likeness without consent about their life story, you're giving the impression that it's, I guess, the equivalent of an autobiography rather than a biography, you know. And that's the confusion, if you're able to use my voice and my exact face, you're saying, this is what happened from my point of view, and it's not. It's what happened from a team of writers in Hollywood that want to overdramatize things and maybe make it more tragic or, you know, more fantastical.

And I think that's what makes me really nervous and feel uncomfortable and very vulnerable. I don't think it's fair that, even after an artist is deceased that somebody would be able to make a film about their life, using them. You know, we can watch a film about a star from the past, and if it's an actor, we know to take it with a pinch of salt. If it is the person themselves, then it just feels too unclear and not fair and actually not in—what am I trying to say? Not the best intention of the artist's legacy.

Senator KLOBUCHAR. Thank you.

Chair COONS. Thank you. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. I'm going to be brief. I did have a question for you, Mr. Crabtree-Ireland. The current draft legislation—individuals only have a right to license out their digital likenesses if they hire an attorney or they're a member of a labor organization. We've gotten some feedback, I think, that your organization in particular—that this is a giveaway. Can you give me other examples in law, give away or really giving—vectoring every-

body either into legal counsel or to your union? Can you give me examples, other areas in law where this is the case, where you have to engage an attorney or a labor interest to move forward?

Mr. CRABTREE-IRELAND. Sure. And I guess I would just say I don't think it's just our union. It would be, you know, any collective bargaining representative. But there are a number of examples that occur in labor law, labor and employment law, where there are defined worker protections that then can be deviated from through a collective bargaining arrangement but not through individual contracts. In this case, the proposal, I think, is a little broader, a little more open because of the option of securing individual representation by an attorney as an alternative. That's not normally present in those kinds of statutes. But I'm sure I could provide—I can't give you a laundry list—

Senator TILLIS. Yes, if you could—

Mr. CRABTREE-IRELAND [continuing]. Right now, but I could provide some—

Senator TILLIS [continuing]. For the record. We're going to be submitting questions for the record, for all of your—provide an opportunity for additional information.

Senator TILLIS. Mr. Chair, I just think it's remarkable, if you take a look at the attendance in the audience and the engagement from the Members, you're hard pressed to see—I mean, on certain subjects, but on technical subjects like this, to have Members go twice their allotted time demonstrates the interest. So, twigs, I'm going to end my questions with you. I do believe that Congress needs to act, but you need to understand that this is—it's tough to get virtually anything done, even what appears to be common sense, for the reasons that we've talked about. We're going to have constitutional questions we have to address. We have to get to a number of matters.

And hopefully we do get it done this year, but in your opening statement you were emotional or appeared to be emotional on one or two points, and I'm just trying—I think that people need to understand—I think—excuse me—one of the reasons you maybe got emotional is because this is an existential threat to creators. And I'm trying to figure out how we educate people on the difference between an original creation from a human being and something that was either created or augmented from a machine. And this is more of a societal thing that we have to sort out. At what point is society just prepared to say, boy, this sounds as good. I know it comes from a machine.

You mentioned something about the investment of your fans, that they've made in you. How do you invest in a relationship with a machine? I mean, we're at an interesting point in time in history, where we could have billions of people think the inauthentic creation of a machine is somehow as good as the hard work of a human being. So, I wonder at what point—and when we lose all the creators—this is a philosophical question—at what point can those machines never possibly match the creative genius of an individual?

Ms. BARNETT. Thank you.

Senator TILLIS. That's okay. Red means on, which makes no sense to me, but—

[Laughter.]

Ms. BARNETT. I think that there's two things here. I feel incredibly lucky to have spent the whole of my teenage years without a smartphone. So, I straddle a generation where I memorized all my friends' numbers. I would walk to my friend's house. If we said we're going to meet at 1:00 o'clock, I just would have to be there. You know, there was no texting and saying that I was going to be late. I loved my brain, back then. I loved how simple it was. I loved what truth was, back then. I loved that I was able to think for myself.

Even where we're at with the internet now, it's so confusing. You know, even if you just want to find a simple news story, we can't. Even if you want to find the truth about, you know, whether a food even is good for you or bad, we can't. You know. It's just a stream of nonsense. I look at a lot of my friends that have children that are teenagers, and their mental health is really struggling. We're looking at young people that have anxiety, that have depression because they're overwhelmed with information and lack of truth and lack of stability.

And the thing that scares me is the—my fans look to me for a north star, a message, a sense of being. My work is something that they can find themselves in. And if you change the narrative of my work, we're just messing with their brains. You know, like, the solid essence of my work that I've spent 10 years developing—if someone can just take it and make up something completely different, I'd feel so bad, because I'm harming people then, and there would be nothing that I can do about it.

I think the way that we can prevent this from happening is putting the power in the hands of the artists and also putting the power in the hands of people that are there to protect the artists, whether that's third parties like record labels or agents or lawyers. You know, that's up to the artist to understand and to, you know, sign a contract if we want to. You know.

But I think that the way that I've been experimenting with deepfake is going to help my fans. It's going to help them understand the nuance of my language across all parts of the world. Like, the way that I want to use it is not harmful because I think inherently artists just want to express their emotions, be there for people, and say things that you can't say for yourself. So, if you're putting words in our mouths, it's going to be devastating.

Senator TILLIS. Well, I also agree. I'm very glad there weren't cell phones back when I was a young person, but—

[Laughter.]

Senator TILLIS [continuing]. Maybe for other reasons—and that Polaroids fade, but—

[Laughter.]

Senator TILLIS. But, no, I do think that—you know, I'm glad that we're taking up this bill. I do feel strongly that we should do everything we can to try and move it in this Congress. If not, then we just have to lean into it and get it done in the near future. But when we have these discussions, it points to all the other societal challenge, challenges of creators that we need to get right.

This technology—I love it; I interact with generative AI for about an hour every day, as part of my own study of it—and study that

began back in the 1980's into artificial intelligence, for me personally—but we've got a lot of work to do, and Congress has a role to play, but we've got to be very, very careful not to overstep, not to trample the rights of others. And we're going to need your help and your continued engagement, to get it right. So, thank you all for being here today.

Chair COONS. Senator Tillis, thank you. Thank you for, again, being a great partner. I have even more questions, but we have come to the end of our time. And you and Senator Blackburn have been terrific to work with. I am grateful to all of our witnesses for the way that you've brought your skills, your value, your background, your creativity, your voice to this hearing today. And we've engaged in a lot of different challenging questions about how we could refine this, how we could narrow it.

There've been a lot of members who've participated. For those who did not participate or those who still have other questions, the record will be open for questions for the record for the witnesses. They are due 1 week from today by 5 p.m. on May 7—although, twigs, in your case, 2 weeks before we wrap this up with cellophane and move forward.

Chair COONS. If I could, today's hearing was important to show that when we regulate the use of AI, we have to balance individual privacy rights and First Amendment rights in a way that doesn't stifle creativity and innovation with these rapidly developing AI tools. It reinforces what we've heard today, why we need a clear policy to protect image, voice, and likeness of all individuals from unauthorized AI replicas. And the feedback we heard and that our staff has received over the last 6 months is critical.

I look forward to working with my colleagues and co-sponsors and the witnesses and the others who attended today, to refine this in the next week or two and get to the point where we can introduce it next month, so we move from discussion draft to reality. I think we need to seize the moment and move forward. Thank you for your partnership. Thank you for your testimony. And with that, this hearing is adjourned.

[Whereupon, at 4:28 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

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**Prepared Opening Remarks
Senator Thom Tillis (R-N.C.)
Ranking Member
Senate Judiciary Committee
Subcommittee on Intellectual Property
For a hearing entitled
The NO FAKES Act: Protecting Americans
from Unauthorized Digital Replicas
April 30, 2024**

Thank you, Chairman Coons.

While you and I have worked closely on countless IP issues, I think the issues addressed by the NO FAKES Act are unique as they have major implications for every person in this room and everyone in this country.

When the Senate addresses AI policy, especially from an IP perspective, it is important that we identify real, concrete problems that exist today and craft direct solutions that aren't overly broad and don't stifle innovation.

We can't be certain of what AI will look like in decades to come, but we can and should identify and fix today's problems. The NO FAKES Act does just this by tackling the improper use of unauthorized digital replicas.

We have all seen unauthorized digital replicas, or “deep fakes.” Someone shares a photo, video, or audio of someone you recognize doing or saying something odd. Then it comes out that it was a fake. It is taken down, but only after millions of people viewed, shared, and commented on it.

Faked or altered media has been around for over a century now. It is nothing new.

Entertainers, politicians, and the public at large have been subjected to fake media since at least the 19th century and the first photographs. Generative AI has thrown gasoline on this problem. With just a few clicks of a mouse users can generate deep fakes almost instantly.

AI-generated deep fakes are running rampant across the Internet. I've read countless examples of young women being targeted with sexually explicit deep fakes.

And the same goes for celebrities.

Consumers now have a hard time identifying the source of commercial material. The song “Heart on My Sleeve,” was created with AI-generated replicas of the voices of pop stars Drake and The Weeknd. The song accumulated hundreds of thousands of listens on streaming sites before it was removed.

Just last week it was reported, Tupac Shakur's estate sent a cease-and-desist letter to Drake over use of an AI-generated imitation of Tupac's voice.

I could go on and on with countless other examples. The reality is that the improper use of deep fakes must have consequences.

That is why we are here to discuss the NO FAKES Act – a bill that creates civil penalties and a private right of action for unauthorized deep fakes and gives every American a property right for digital replicas of their own voice, image, and appearance.

Legislation addressing the misuse of digital replicas will have multi-billion dollar implications in the entertainment industry and priceless implications as it relates to personal privacy.

But there still are questions to be answered about this draft legislation.

- Is it wise to mandate that individuals have no right to license out their digital likeness unless they retain counsel?
- Should we create an exception for “harmless” non-commercial uses?
- Should there be a notice and take down provision?

I look forward to continuing to develop the NO FAKES Act and have it pass into law, where it will become a strong defense against deep fakes.

Thank you again Mr. Chairman for holding this hearing today. I am committed to work closely with you, your staff, and our various stakeholders to move the NO FAKES Act through the Senate together.

I now look forward to hearing from our
witnesses.

FKA twigs
Statement for US Senate Judiciary Subcommittee on Intellectual Property
April 30, 2024

Thank you Chairman Coons, Ranking Member Tillis, and members of the Subcommittee.

I have spent my entire life immersed in the arts. My mother was a dancer, and my stepfather – a retired company director – is a devoted jazz fanatic and theatre buff. They sacrificed so much so that I could take ballet lessons, singing and acting classes, and enjoy all that the arts have to offer. From the age of sixteen, I began to explore both dance and music as a career, and that interest in multiple disciplines has defined my life for the past two decades both personally and professionally.

It has been an incredible journey. My music has been critically acclaimed and Grammy-nominated. I am currently a Creative Partner at On Running as well as having been the face of a number of prestigious global brands. Earlier this month, I made my solo debut with the Martha Graham Dance Company in New York and am co-starring in an adaptation of *The Crow*, which premieres in August. I am a Cannes Lions nominee and AIFC winner as a commercials director whilst being a winner of multiple prestigious music industry awards.

So why am I here today?

I am here because my music, my dancing, my acting, the way that my body moves in front of a camera and the way that my voice resonates through a microphone is not by chance; they are essential reflections of who I am. My art is the canvas on which I paint my identity and the sustaining foundation of my livelihood. It is the essence of my being. Yet this is under threat. AI cannot replicate the depth of my life journey, yet those who control it hold the power to mimic the likeness of my art, to replicate it and falsely claim my identity and intellectual property. This prospect threatens to rewrite and unravel the fabric of my very existence. We must enact regulation now to safeguard our authenticity and protect against misappropriation of our inalienable rights.

Three decades ago, we did not realise that the internet would embed itself so deeply into the core of our everyday lives. Policies and controls to keep pace with the emergence of the technology were not put in place to protect artists, young people, those who are vulnerable, and it ran away with us. AI is the biggest leap in technological advancement since the internet. You know the saying "Fool me once, shame on you... Fool me twice, shame on me". If we make the same mistakes with the emergence of AI, it will be "shame on us".

Throughout my career I have always embraced and experimented with new technologies, I have even directed award-winning commercials for companies such as Google and Meta, some of which have been placed as part of permanent collections within art institutions such as The BFI and MOMA archives.

As a future-facing artist, new technologies are an exciting tool that can be used to express deeper emotions, create fantasy worlds, and touch the hearts of many people. In the past year, I have developed my own deepfake version of myself that is not only trained in my personality but also can use my exact tone of voice to speak many languages. I will be engaging my AI twigs later this year to extend my reach and handle my online social media interactions, whilst I continue to focus on my art from the comfort and solace of my studio. These and similar emerging technologies are highly valuable tools both artistically and commercially when under the control of the artist. What is not acceptable is when my art and my identity can simply be taken by a third party and exploited falsely for their own gain without my consent due to the absence of appropriate legislative control.

History has shown us time again that in moments of great technological advancement, those in the arts have always been the first to have their work exploited and, in many instances, fraudulently commoditised. Soon after it often follows that the general and more vulnerable public suffer the same types of image- and voice-related exploitation. By protecting artists with legislation at such a momentous moment in our history we are protecting a five-year-old child in the future from having their voice, likeness and identity taken and used as a commodity without prior consent, attribution or compensation.

I stand before you today because you have it in your power to help protect artists and their work from the dangers of exploitation and theft inherent in this technology if it remains unchecked. I am here on behalf of all creators whose careers depend on their ability to create, safe in the knowledge that they can maintain tight control over their own art, image, voice, and identity. Our careers and livelihoods are in jeopardy, and so potentially are the wider image-related rights of others in society. You have the power to change this and safeguard the future.

As artists and, more importantly, human beings, we are a facet of our given, learned, and developed identity. Our creativity is the product of this lived experience overlaid with years of dedication to qualification, training, hard work and, dare I say it, significant financial investment and sacrifice. That the very essence of our being at its most human level can be violated by the unscrupulous use of AI to create a digital facsimile that purports to be us, and our work, is inherently wrong. It is therefore vital that as an industry and as legislators we work together to ensure we do all we can to protect our creative and intellectual rights as well as the very basis of who we are.

We must get this right ... you must get this right ... now ... before it is too late.

Thank you.

Written Testimony of Duncan Crabtree-Ireland

Before the

United States Senate

Committee on the Judiciary

Subcommittee on Intellectual Property

April 30, 2024

Thank you, Chairman Coons, Ranking Member Tillis, and Members of the Subcommittee on Intellectual Property. This hearing on the NO FAKES Act is of existential importance to the livelihood of our members and we appreciate the opportunity to testify on their behalf.

My name is Duncan Crabtree-Ireland. I am the National Executive Director of SAG-AFTRA, the country's largest union for entertainment and media artists. SAG-AFTRA's membership includes over 160,000 actors, news and entertainment broadcasters, recording artists and other entertainment professionals (collectively "artists"). Hundreds of thousands of individuals have work under our contracts, including many who have served in the Senate, the House, and even the White House.

I am here today to provide testimony regarding the NO FAKES Act and the importance of protecting performers, and all individuals, from non-consensual replication and use of their voice and likeness. AI technology, left unregulated, poses an existential threat not only to SAG-AFTRA's members, but to civil discourse, student health & welfare, democracy and national security.

I am the chief negotiator for the union's contracts, including last year's historic agreement with the major entertainment studios which was only finalized after the longest entertainment industry strike in over forty years, a strike that lasted nearly four months. That negotiation

resulted, among other things, in the introduction of the first comprehensive terms governing the use of artificial intelligence (AI) in filmed entertainment projects. The strikes – and the public's response to them – highlighted the importance of AI, both to the entertainment industry and the broader public. Subsequent to that negotiation, we successfully concluded similar negotiations with the major record labels, negotiations which again resulted in the first comprehensive terms related to A.I. in the music industry.

Without a federal property right over their voice and likeness, our members cannot control what others do with AI generated digital replicas of them and cannot successfully demand compensation for that use. For an artist, their voice and likeness are the foundation of their performance, brand, and identity, developed over time, through investment and hard work. Taking that voice and likeness is a form of theft. It is definitely unethical and must be made illegal.

While SAG-AFTRA's core responsibility is to negotiate, administer, and enforce the collective bargaining agreements under which our members work, the union is also charged with advocating on behalf of our members for legislation that directly impacts their work and their careers. SAG-AFTRA has long fought for right-of-publicity laws and voice and likeness protections throughout the United States. The exponential proliferation of artificial intelligence technologies, technologies which allow for rapid and realistic fakes of voices and likenesses in audiovisual works and sound recordings, makes this fight urgent for our members.

While I am here to speak primarily about artists, we mustn't ignore all the ways in which we are all now threatened. I urge this body to take seriously the warnings being sounded by AI experts in all industries, across the political spectrum, and around the world. Current AI voice

simulation software is able to create a convincing replica of any person's voice from a four second sample, enabling them to impersonate anybody. Imagine a scenario where somebody receives a call from the AI-generated voice of a family member who states that harm will come to them if a ransom is not immediately digitally transferred. Or a scenario where one of our artists loses a job to a digital replica of their own voice or image. These aren't far-fetched science fiction; they are already happening. That's why swift consideration and passage of the NO FAKES Act is essential.

Like all Americans, SAG-AFTRA members need the ability to give or withhold consent, exercise control, and receive compensation for the use of their voice and likeness. NO FAKES would enshrine the core principles of Informed Consent and Compensation into federal law and demonstrate to the rest of the world that the United States is leading on protecting the identity and livelihood of individuals in the age of generative AI.

I speak from experience when it comes to the risks and the harm from nonconsensual replication of voice and likeness. During the ratification campaign for SAG-AFTRA's contract with the major studios, a contract focused on AI protections, a deepfake of me was created by an unknown party. This deceptively impressive looking, and sounding, deepfake Duncan made false statements about the contract and urged members to vote NO on it, a contract that I negotiated and I strongly supported. Despite a disclaimer in the fine print of the caption that it was a deepfake, many members never saw or read that disclaimer. I was contacted by many members asking me why I opposed the very contract I had worked so hard to negotiate. But beyond that, there is something uniquely dehumanizing in having your own voice and image turned against you, turning any conception of freedom of speech on its head. To have your own voice used to speak the opposite of what you believe - and have no way to stop it - is the

ultimate violation of everyone's right to freedom of expression and association.

While myriad state laws offer individuals protection against misappropriation of their names, images, voices, and likenesses, there is no corresponding federal law. This patchwork of state laws has, to a degree, served its purpose over the years. However, with the rapid proliferation of generative AI technologies, overarching federal protections are critical. And these protections must address the novel concept of realistic digital clones. Despite rights of publicity being widely recognized as intellectual property rights, courts have split on whether they fall within the scope of the immunity conferred on internet service providers under Section 230. This judicial schism has mitigated enforcement of the right, even in some of the most egregious examples. Service providers are simply not quick to respond, and an artist cannot unring the bell once a digital clone has been propagated. At best, it becomes a game of whack-a-mole that places the burden on the individual whose image has been exploited.

Enshrining this important protection as a federal intellectual property right will ensure individuals are protected and service providers are incentivized to act. Importantly, a comprehensive federal statute will also deter nefarious behavior before it manifests itself. It is true that the nature of damages will differ between individuals and professionals or personalities whose voice and likeness form the very basis for their careers. This difference should not impact liability but, consistent with Supreme Court precedent, should be taken into consideration in how damages are calculated.

Current case law in this area was created prior to the advent of the Internet and generative AI, and accordingly, is woefully inadequate to address the current proliferation of fake images. In the only Supreme Court case to address these rights, the plaintiff was a human cannonball performer whose short act was broadcast in its entirety by a television news broadcast. In that

case, the Court held that the right of publicity provides "an economic incentive for him to make the investment required to produce a performance of interest to the public."¹ The Court analogized the right of publicity to copyright and patent and acknowledged that the time devoted to "creative activities deserve[s] rewards commensurate with the services rendered."² Despite the *Zacchini* case involving the plaintiff's entire act, the Court never made that a requirement and subsequent courts have routinely followed *Zacchini*'s holding and reasoning.

Some will argue that there should be broad, categorical First Amendment-based exemptions to any legislation protecting these important rights; however, nothing in the First Amendment requires this. The Supreme Court made this clear over half a century ago – the First Amendment does not *require* that the speech of the press, or any other media, be privileged over protection of the individual being depicted.³ To the contrary, most courts apply balancing tests to determine which right will prevail.

The most prominent balancing test, the transformative use test, was derived from the Copyright Act's fair use factors. It protects the use when the depiction of the individual has been "transformed" into new expression, such as where the individual is being depicted as a futuristic space reporter with hot pink hair or a half-man, half-worm character.⁴ On the other end of the spectrum, if the individual is being depicted doing what they are known for and for what they would normally be compensated for, the right of publicity prevails over the First Amendment.⁵

¹ *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 576 (1977).

² *Id.*

³ *Zacchini*, 433 U.S. 562

⁴ See *Kirby v. Sega of America, Inc.*, 144 Cal.App.4th 47, 55-57, 50 Cal.Rptr.3d 607 (2006); *Winter v. DC Comics*, 30 Cal. 4th 881, 69 P.3d 473, 134 Cal. Rptr. 2d 634 (2003).

⁵ See, e.g., *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013) (In the game at issue, the digital version of the athlete did what the real one did, "he plays college football, in digital

Another common balancing test explores whether the depiction is something that is in the public interest. This is the test typically used in connection with news reporting, docudramas, or similar fact-based works, even when they are fictionalized.

These balancing tests are critical, and they are incorporated into the NO FAKES Act. They ensure that the depicted individual is protected and rewarded for the time and effort put into cultivating their persona, while not unduly burdening the right of the press to report on matters of public interest or the entertainment media to tell stories. At the same time, these tests help ensure the depicted individual is not *compelled* to speak for the benefit of third parties who would misappropriate the value associated with the persona they have carefully crafted, and perhaps associate them with a message that they don't believe in, or which may be anathema to them. With new AI technologies that can now realistically depict an individual's voice or likeness with just a few seconds of audio or a single photograph, it is all the more important that broad categorical exemptions be avoided and that the courts be empowered to balance the competing interests.

There have been multiple hearings on AI technologies during this term. The companies behind many of these technologies have asked for legislation so they better understand the appropriate boundaries on their conduct. The NO FAKES Act will provide them with important guidance while helping to ensure individuals are protected from exploitation that puts their livelihoods and reputations at risk.

recreations of college football stadiums, filled with all the trappings of a college football game"); *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018, 1036 (2011) (Defendant violated the band members' right of publicity by using their names, images, and likenesses beyond the authorized scope). *See, also, Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013).

Thank you again for this opportunity to speak today. I look forward to answering your questions.

**Statement of Graham Davies
President and Chief Executive Officer
Digital Media Association (DiMA)**

**Before the Senate Judiciary Committee
Subcommittee on Intellectual Property**

**Hearing on: “The NO FAKES Act: Protecting
Americans from Unauthorized Digital Replicas.”**

April 30, 2024

Chairman Coons, Ranking Member Tillis, and Members of the Committee, thank you for the opportunity to testify before you today at this important hearing examining the NO FAKES Act and issues related to unauthorized digital replicas. My name is Graham Davies, and I am the President and CEO of the Digital Media Association, or DiMA. DiMA represents the world’s leading audio streaming companies, whose innovations are the engine that has revitalized the music industry.

We appreciate this Committee’s work to explore issues related to digital replicas in the rapidly evolving AI landscape, in a measured way that takes into account the views of all stakeholders.

I. The importance of safeguarding the music streaming success story

DiMA and its members – Amazon, Apple Music, Feed.fm, Pandora, Spotify, and YouTube – advocate for policies that ensure the continued success of the music streaming economy, where music fans have legal access to music anytime, anywhere they want it, and artists and songwriters can connect with existing fans and make new ones around the world.

DiMA’s members have ushered the music industry into the modern era, empowering creators and returning the record industry to year over year growth after years of decline. In 2023, music streaming generated \$14.4 billion in the U.S. alone – representing 84% of recorded music revenues.¹ Music streaming services contribute enormously to the creator economy. In addition to the substantial royalties they pay – approximately two-thirds of their revenue flows to music rights holders – streaming services are critical to moving consumers from illegally accessing music to using legal, affordable and innovative services. These services also provide fans with new ways to connect with artists as well as each other – creating a powerful community focused on music. The services we represent have invested personnel and resources throughout the world to support music creators, working with up-and-coming and established artists alike, and creating opportunities for

¹ See RIAA, Year-End 2023 RIAA Statistics, *available at* <https://www.riaa.com/wp-content/uploads/2024/03/2023-Year-End-Revenue-Statistics.pdf>

visibility and engagement. Often, emerging artists get their first big break on streaming services, connecting with audiences and developing fans that would have been unreachable in the record store era.

Streaming services are central to the music ecosystem and their success is built on a foundation of strong working relationships with rights owners, intermediaries and partners. The industry operates on global supply chains and agreements that enable the distribution of tens of millions of recordings to listeners around the world. This is a complex process that involves precise technical specifications and business practices governing staggering volumes of data: including recordings, album art and other visual information, lyrics, the metadata that accompanies those recordings, and the usage reports provided by the services to a wide variety of rights owners in a wide variety of formats. Relevant to today's hearing, rights owners and services have established robust processes to address and potentially remove content that violates the rights of third parties or is otherwise harmful in the context of this complex, finely-tuned supply chain. A well-functioning digital music supply chain is critical to the success of the music industry as a whole. For this success story to continue, it is imperative that the work of streaming services is bolstered for the benefit of music rights owners, music creators, and music fans.

II. Responding appropriately to the risks and opportunities of Artificial Intelligence

The use and impact of artificial intelligence and how AI intersects with existing law are important areas of focus for all music industry stakeholders, including DiMA and our member companies. AI has been used as a tool in the music industry for many years, and as the technology continues to rapidly evolve, it has the ability to assist creators and artists, including musicians, producers, and songwriters, and improve the way music is created, distributed, discovered, and consumed.

A healthy music ecosystem is one where consumers have legal access to the best content creators can devise. Creativity is based on the relentless pursuit of ideas and has always incorporated the latest that technology can offer. As we address the impacts of AI technology, we must ensure that freedom of expression and creativity can be fostered, while protecting against deliberate harmful acts.

DiMA members understand that AI technology, particularly generative AI, can raise questions around the integrity of an individual's likeness and voice that have particular resonance in the music industry. Digital service providers have nothing to gain from deceptive music in their supply chain. Those who would falsely capitalize on the creative identity and expression of the artists their customers love should be held accountable. We therefore believe there should be appropriate safeguards to protect an individual's personhood (name, image, likeness, voice) in this context. However, it is vital that any new law sets clear, appropriate bounds for all parties involved, in order to support innovation,

and adapt to future changes in technology while ensuring individuals can protect their personhood.

Notably, we are not seeing an epidemic of AI-generated voice clones climbing the charts. To the contrary, the most famous example of an AI generated voice cloned track is still the song “Heart on my Sleeve” – a purported collaboration between Drake and The Weeknd. The so-called ‘Fake Drake’ track was released more than a year ago and, since that time, there hasn’t been a successor that has achieved nearly that level of attention. Critically, as a result of the close working relationships between digital music services and rights holders, the track was quickly taken down off streaming services. It is important to recognize that the removal of this content was done in a timely and effective way under the current legal regime and existing business relationships.

I do not intend to suggest that the potential harm of voice cloning is not a real concern. It certainly is, and I have no doubt that you will hear many examples today. However, the responses to the development of AI technology should be proportional to the scale of the issue, and not inhibit future legitimate uses, such as parody or satire. AI generated content is not having a negative impact on the revenue streams generated from streaming services, nor is it interfering with the continued growth of the industry, and it is imperative to ensure any new reforms don’t disrupt the successful streaming economy.

III. DiMA principles for new legislation

DiMA supports appropriate safeguards to protect an individual’s personhood and is committed to working toward federal solutions that afford such protections in the age of AI. But it is critical to ensure that any such protections do not have a chilling effect on creative freedoms or interfere with or disrupt the thriving digital music supply chain. It is also critical that any new legislation clarifies and simplifies the law, instead of adding to the current morass of conflicting and overlapping state regulations in this area. While any successful legislation must reflect input from across the industry, DiMA believes it must satisfy the following criteria:

First: Legislation should be based on existing rights of privacy and publicity.

Any new legislation should be narrowly tailored to address the particular risks that are at issue. Specifically, legislation should be designed to protect the elements of personhood and right of performance while not encroaching on accepted and legitimate uses of technology. As other stakeholders have noted, there are a wide array of legitimate and constitutionally-protected uses of digital replicas, and any new protection should be designed to steer clear of those protected uses. Importantly, intellectual property law – including, in particular, copyright law – is not the best foundation for fashioning any new protections. Intellectual property laws provide economic incentives to create new works and devise new innovations. This construct does not readily translate to the realm of protecting personhood and right of performance, where a voice or visage already exists without any such inducement, and the goal is to protect those elements from

misappropriation. Instead, any legislation aimed at protecting individuals from unauthorized digital replicas should be grounded in existing rights of privacy and publicity, which *have* developed over time to protect an individual's identity against misappropriation.

Second: Legislation should not disrupt important existing commercial relationships.

Any legislation in this area must recognize and take account of the fact that there are already extensive, long-standing commercial relationships between rights owners and music streaming services. The supply chain from rights owners to streaming services is complex, having developed over the course of the digital age to support the massive scale at the heart of streaming's economic success. Rights holders and streaming services alike have made significant investments in infrastructure and industry standards to enable the automated, real-time delivery of music to distributors, the ingestion of that music into the disparate technological systems services deploy, and the nearly instantaneous availability of that music and all the important information that goes with it to listeners around the world. With over 100 million songs available on major music streaming services and millions added each month, the function and efficiency of the music supply chain cannot be taken for granted and can be easily disrupted by new requirements. Importantly, as business partners, digital music services and rights holders may have processes already in place for identifying content that may be infringing (or otherwise unlawful or inappropriate) and assessing whether the content should be removed. Any new law should tread carefully to avoid disruption to this crucial supply chain.

Third: Legislation should focus liability on the original content creator.

The primary targets of any future claims brought under a new federal right should be the individuals or organizations that create the violative content. That is both the most fair approach – liability should rest with the person who intended to cause the harm – and the best way to ensure that only illegitimate content is targeted and removed, because the originator will be in the best position to defend the replica.

By the same token, it is imperative that downstream distributors of potentially violative content do not face liability for making it available in the ordinary course of business, except in the most extreme circumstances. If legitimate digital music services faced the same risk of liability from misappropriated personhood as the original creator of the content, they would have a substantial incentive to remove all content on the slightest sign of a dispute or question over verity, even if the content were constitutionally protected or otherwise lawful. Limiting the liability of service providers safeguards against the risk of chilling effects on freedom of expression and First Amendment rights – principles that have been essential to cultivating the rich heritage of American music today.

Fourth: Legislation should be designed to cover all types of content, not just sound recordings and motion pictures.

Any digital replica legislation should deal with image and likeness protection comprehensively: including audio works, audio-visual works, and purely visual works. This means the legislation should reflect input from all stakeholders involved in the creation of any type of content. This is important to ensure the continuation of a well-functioning market, and realize the policy goals of the legislation, as well as to make the law more likely to withstand the strict scrutiny that content-based restrictions on speech must undergo.

Fifth: Legislation must preempt the patchwork of state laws.

Current rights of publicity are subject to an inconsistent and confusing patchwork of state laws, instead of a set of uniform national rules. This problem has only been exacerbated in the age of AI, as industry groups are actively pursuing new legislation in states throughout the country at a rapid pace, and often without careful deliberation of unintended consequences. This began with the introduction and prompt adoption of the ELVIS Act in Tennessee and is being pursued in one state after another. The music industry does not operate on a state-by-state basis. The advances that music streaming has brought in developing a truly global industry means that these are not local issues; rather AI is a global phenomenon and the rights at issue affect global companies. If Congress acts, it should create a single, uniform, national rule – consistent with the principles articulated above – instead of permitting the proliferation of varying and sometimes conflicting state laws. The success of any legislation in this area will be measured by the extent to which it establishes a comprehensive and effective framework to which others around the world will look for guidance and model.

IV. Specific issues with the NO FAKES Act discussion draft

We appreciate the Committee's work towards a solution to address these novel and challenging issues. The discussion draft of the NO FAKES Act represents an important effort. As the authors of that legislation noted, the draft was meant to foster further conversation among stakeholders. We appreciate the opportunity to have this discussion, and the recognition that these are complicated issues that warrant careful consideration. But as invested stakeholders in this process, DiMA's members believe that the NO FAKES Act, as currently contemplated, strays from the principles we set forth above. Specifically, I want to draw attention to three main issues:

1. The draft is not narrowly tailored to the risks presented

The draft legislation is not narrowly tailored to the problem sought to be addressed – namely, the challenge of preventing harmful misuse of a person's likeness or voice in the age of generative AI. Rather than precisely targeting the kind of conduct that has caused understandable concern, it attempts to create an entirely new species of intellectual property right, out of whole cloth.

As I previously mentioned, we do not believe that intellectual property is the right framework for this kind of legislation. And the NO FAKES Act would create a “right” that goes far beyond any other IP right that has previously been recognized. Intellectual property rights, such as copyrights and patents, are specific (and limited) exclusive rights intended to stimulate investment in the creation of new works and inventions, ultimately to promote the public interest. Those works pass into the public domain and enrich our collective cultural heritage.

Name, image, likeness, and voice rights have an entirely different origin and purpose, grounded in personal privacy rights. Most obviously, there is no need to create economic incentives for the creation of a person’s identity. Nor should a person’s immutable characteristics – indeed their very personhood – be considered a commodity to be marketed, bought, sold, divested in bankruptcy, or seized by creditors. Indeed, if the goal of the legislation is to protect an individual’s interest in preventing inappropriate uses of their likeness or voice, treating personhood as transferable intellectual property will be counterproductive. Once a person has sold off their name, image, likeness, or voice rights, they lose the right to object to what may be ‘authorized’ uses by the owner of those rights, even if they find them objectionable. In other words, we are concerned that the “intellectual property” approach taken by the NO FAKES Act is likely to make offensive uses of name, image, likeness, and voice by those who have acquired broad rights to them more common, not less.

2. The scope of liability in NO FAKES is too broad

The NO FAKES Act improperly expands the scope of liability in a manner that runs headlong into First Amendment concerns. The NO FAKES Act, like all right-of-publicity laws, is a content-based restriction on speech. The First Amendment protects freedom of speech and where State laws exist, they have been narrowly tailored to serve compelling state interests while protecting free speech.

State right of publicity laws are traditionally aimed at instances of commercial exploitation, consumer confusion, or unfair competition—in other words, economic harms. Those state laws, in addition, typically carve out specific categories of protected content, further narrowing their scope. The NO FAKES Act, however, is not so limited. In fact, it makes unlawful *any* knowing creation or transmission of an unauthorized digital replica, regardless of economic harm. The exceptions of protected conduct it includes alone do not make the prohibition “narrowly tailored” (as is constitutionally required) to the legitimate purpose of protecting an individual’s identity – and the exceptions would not cover all potentially protected uses.

Moreover, the damages provision of the NO FAKES Act is unprecedented in nature and scope. While state laws permit recovery of the actual economic injury suffered by the individual, the NO FAKES Act entirely does away with the requirement to show injury, instead authorizing statutory damages of \$5,000 per violation. There is no basis for

creating a statutory damages regime for unauthorized digital replicas; as with right of publicity and defamation torts under state law, actual damages and injunctive relief are sufficient to prevent unlawful activity. Additionally, the statute is ambiguous as to whether that provision is meant to apply per transmission or per unauthorized digital replica. If the former, it could expose a company to potentially ruinous liability based merely on the posting of a single digital replica that gets viewed many times. Such an unbounded damages regime is hardly “narrowly tailored” to serve compelling state interests.

Similarly, the NO FAKES Act appears to sweep in a broad range of downstream activities within its scope. As I explained before, liability for unauthorized digital replicas should be directly assigned to the creator of the violative content, not to parties downstream in the chain of commerce who unknowingly transmit that content. But the NO FAKES Act would not merely render unlawful the “production” of digital replicas; it would broadly sweep in secondary actors that merely “transmit” a digital replica, subjecting them to the full range of remedies that can be levied against the *actual* bad actors. As currently drafted, NO FAKES seeks to punish good and bad actors alike.

There is little precedent for this approach in the law. Unlike in copyright law, there is no well-developed or widely recognized regime for secondary liability based on violations of rights of publicity. The NO FAKES Act attempts to craft such a regime out of whole cloth, but, as drafted, it is not workable. Most critically, while the bill purports to limit secondary liability to those services that distribute or make content available with “knowledge” that the content is an unauthorized digital replica, that is still an amorphous standard that is likely to invite significant litigation and attendant business uncertainty. For example, in the context of the music industry, profound and pervasive metadata challenges make it difficult for services to know who owns what content; in fact, much of the music industry’s infrastructure is organized around the fact that rightsowners often don’t know what they own or control. This problem is even more acute with respect to digital replicas; there is no practical way for services to know what was created using generative AI, much less whether those works were created with requisite consent, fall into an enumerated exception, or are otherwise permissible.

Moreover, music streaming services do not need an additional incentive to remove illegal content. We have seen that parties throughout the supply chain have been quick to act, in the context of existing commercial terms and relationships, to address the issues that have arisen to date.

By placing a significant risk of liability on downstream services that have no involvement in the creation of the offending content, the bill as currently drafted would incentivize services to overly restrict or remove constitutionally protected and otherwise lawful content. Faced with unbounded liability under uncertain legal conditions, there is a serious risk that services will significantly over-screen or censor content – threatening free speech, creative freedom (and revenue for legitimate work), and consumer choice.

Accordingly, if the Committee intends to adopt a secondary liability regime for improper uses of individuals' appearance or voice, it must put in place appropriate safeguards to ensure that any regime is targeted at truly objectionable conduct. For instance, any such liability should be premised on a refusal to remove or disable violative content once the service has actual knowledge of the specific violation. And "actual knowledge" must be carefully defined: notices identifying infringing content are often incorrect (as a matter of fact and/or law) even where they purport to contain all of the necessary information. Even where a notice is correct and complete on the facts, a distributor may have good reason to think that a First Amendment exception applies, or consent has been obtained. Merely receiving a notice alleging a violation does not, and must not as a matter of law, establish actual knowledge of an unauthorized digital replica.²

Finally, while a take-down notice identifying content cannot be sufficient, in and of itself, to establish such knowledge for purposes of liability, there should be a clear and straightforward safe harbor against liability where the service responds promptly to a specific take-down notice regarding the content. Likewise, service providers should be immune to liability for the replacement of content, where a proper counter-notice procedure is followed.

3. The draft does not solve the "patchwork" approach to rights of publicity

Finally, the discussion draft does not address the problem of the patchwork of state laws. To the contrary, the discussion draft does the opposite, by explicitly *declining* to preempt any law that "provides protection against the unauthorized use of the image, voice, or visual likeness of the individual." That is a step in the wrong direction and will only encourage further fragmentation and confusion among the various state and federal laws, rather than reflect the careful policy-making that Congress is well positioned to undertake. This is a national challenge and calls for leadership to devise a national solution.

* * *

DiMA and its members thank the Subcommittee for its time and focus on this important issue. DiMA supports the effort to create stronger protections against misappropriation of personhood in the age of AI and is encouraged by the process to date. We look forward to working with policymakers and industry stakeholders to advance solutions that protect creators' personhood, the ability of streaming services and the broader music industry to innovate, and every American's creative speech and First Amendment rights.

² Among other things, any notice-and-takedown system is open to the risk of abusive and improper notices. Simply receiving a notice cannot be enough to establish knowledge of a potential violation.



Written Remarks for the Record
US Senate Judiciary Subcommittee on Intellectual Property
Hearing on “The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas”
Washington, DC, April 30, 2024

Chairman Coons, Ranking Member Tillis, and members of the Subcommittee,

I am Robert Kyncl, Chief Executive Officer of Warner Music Group (WMG). It’s an honor to be here to discuss the promise of generative artificial intelligence (AI) and the perils of deep fakes with you.

Being here today is something I couldn’t have imagined as a young boy growing up behind the Iron Curtain in communist Czechoslovakia. In 1992, I crossed the Atlantic to attend a state university in New York. There, I met an amazing woman from the Dominican Republic, who eventually became my wife, and we now have two American daughters. I’m a proud U.S. citizen, and I have a deep appreciation for the freedoms at the heart of this great country, having grown up without them.

Headquartered in New York City, Warner Music Group is home to an extraordinary roster of artists and songwriters who are moving culture across the globe, including legends such as Led Zeppelin, Ray Charles, Aretha Franklin, Prince, and Fleetwood Mac, iconic stars such as Ed Sheeran, Cardi B, Janelle Monae, Bruno Mars, Coldplay, Green Day, and Dua Lipa, and songwriters including Quincy Jones, Liz Rose, Justin Tranter, and Gamble & Huff. Our 2,400 US-based employees work passionately every day to find and develop some of the world’s greatest artists and songwriters, and to deliver incredible music and experiences that enrich, inspire, and uplift millions of lives around the world.

I am honored to be testifying today next to Warner recording artist FKA Twigs, who has worked tirelessly to develop and hone her artistry, as both a groundbreaking musician and a talented actress.

I am well-positioned to speak to issues regarding the intersection of technology and music. For the past 25 years, I’ve been a tech and media executive. I joined Warner Music Group as CEO in January 2023 after 12 years at YouTube and eight years at Netflix.

WMG has always embraced innovative ways to bring technology and music together to offer fans new opportunities to engage with the music they love. Today, our society is on the verge of another potential technological breakthrough – generative artificial intelligence that ingests, copies, and analyzes extraordinary volumes of information and that is developing the ability to answer difficult questions, solve complex problems, and create new text, sounds and images.

For AI to be part of a thriving economy, these models must be developed within a reasonable legislative regime that respects human identity. **We must ensure a robust free-market licensing system to allow the use of copyright-protected materials for training AI models and strong legal protection for name, likeness and voice rights.**

Our fundamental position on AI is simple. Everyone should have the right to decide how their own name, likeness, and voice is used. These characteristics are the very foundations of our individuality – they are

not simply data to be taken and used by others. Each person's identity must not be used in ways that they would never condone or wish to participate in.

Specifically, in the music industry, this means any artist who chooses to lean into AI should have the right to do so in a free market — giving them control over whether and on what terms their name, likeness and voice can be used. If they prefer not to engage with AI, that should be their right, too.

In order to achieve an environment where human beings' identities are respected and protected, we need four these things:

1. **Consent:** The use of people's name, likeness and voice rights to train AI models and create output from them requires consent.
2. **Monetization:** The grant of name, likeness and voice rights must be subject to free-market licenses.

In order to operationalize Consent and Monetization at scale, we need:

3. **Attribution:** AI developers must identify outputs through labels and watermarks, which in turn must be recognized by all distribution platforms.
4. **Provenance:** AI developers must be required to keep sufficiently detailed, publicly available records of the material used to train their models to enable the enforcement of rights.

We've already begun working in this space. We are eager to partner with AI developers, pursuing groundbreaking applications based on artist and songwriter consent and free-market compensation.

We are partnering with companies like YouTube, Endel and LifeScore on experiments featuring artists such as Sia, Charlie Puth, and Roberta Flack who have agreed to explore the possibilities of AI. And we are using AI to help recreate legendary lost voices like those of French chanteuse, Edith Piaf, and Costa Rican singer-songwriter, José Capmany, in collaboration with their estates.

AI will also have many less prominent but equally valuable uses across our industry, from studio production to tour planning, from marketing efficiencies to creative "assists" for musicians.

At the same time, the ability of generative AI models to create deep fake videos and audio recordings depicting people doing, saying or singing things that are utterly fictional creates extraordinary risks. Artists face significant commercial and reputational harm from phony videos and recordings, but that is only the tip of the iceberg. The truth is everyone is vulnerable. These tools are already being used today to create non-consensual pornography, to impersonate politicians and world leaders, and to supercharge frauds and scams.

Like every other business, AI model builders must act lawfully and responsibly. Critical to creating this environment is a strong Federal law establishing an intellectual property right in a person's name, likeness and voice. And, in the music industry specifically, we need to ensure we are able to protect the distinctive names, likenesses and voices of our artists, whose livelihoods are based on their unique talents that they've spent years honing. The current legal framework consists of an insufficient patchwork of inconsistent State laws that will be no match for what's ahead of us.

So, how can you help? We appreciate the process that Members of this Committee have initiated to address this problem, including the *NO FAKES Act* discussion draft authored by Chairman Coons, Senator Tillis, Senator Blackburn, and Senator Klobuchar and which kick-started legislative efforts in this area. We strongly support the bipartisan *No AI FRAUD Act* that was introduced in the House earlier this year and the recently enacted *ELVIS Act* in Tennessee.

As the Committee moves toward the introduction and movement of a Senate bill soon after this hearing, I would like to highlight several elements that we believe any effective bill on deep fakes and voice clones must have to be meaningful:

- **An Enforceable Intellectual Property Right** – Legislation must give each person an enforceable intellectual property right to their own individual name, likeness and voice which will allow them to license or authorize use of that property right on free-market terms, deny use of that property right and seek redress in cases of unauthorized use. As this would be an intellectual property right, creators of unauthorized deep fakes should not be shielded by Section 230 of the Communications Decency Act.
- **A Proper Role for the First Amendment** – Legislation must acknowledge and respect important First Amendment principles without going further than what the First Amendment protects. The harsh reality is that AI can put words in your mouth. AI can make you say things you didn't say, don't believe, and would never want to be associated with you. That's not freedom of speech.
- **Effective Deterrence** – In order to incentivize a vibrant and responsible commercial marketplace which is remunerative for all participants in the value chain, legislation must include meaningful consequences for AI model builders and digital platforms that knowingly facilitate the violation of a person's property rights.

On behalf of the creative community, I applaud the Committee for its leadership on these challenging, rapidly developing issues. The development of AI technology is moving very quickly, and Congress should act now to establish reasonable guardrails which ensure that AI models, digital platforms, artists, songwriters, and other intellectual property owners can prosper together. I urge you to work to move a Bill this session and look forward to answering your questions.

**Testimony before the U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property**

**Hearing on The NO FAKES Act:
Protecting Americans from Unauthorized Digital Replicas**

April 30, 2024

**Lisa P. Ramsey
Professor of Law
University of San Diego School of Law**

Chair Coons, Ranking Member Tillis, and other Members of the Subcommittee: Thank you for the opportunity to testify about the First Amendment implications of the U.S. Senate's NO FAKES Act discussion draft and the U.S. House of Representatives' No AI FRAUD Act bill.¹ As there was some discussion of whether Congress should adopt a federal right of publicity law at the Subcommittee's July 12, 2023 hearing on Artificial Intelligence and Intellectual Property,² I will also address whether there are any free speech limits on laws that protect people from the misappropriation and misuse of their name, image, voice, or likeness (NIVL) in various commercial and noncommercial contexts.

I am a Professor of Law at the University of San Diego School of Law, where I teach and write in the intellectual property and international intellectual property law area. My scholarship primarily focuses on potential and actual conflicts between trademark law and the right to freedom of expression.³ I have also written about how to balance trademark and free speech rights when someone is impersonating a company, organization, or individual in a fake website or social media account.⁴

¹ Nurture Originals, Foster Art, and Keep Entertainment Safe Act of 2023 ("No FAKES Act") (discussion draft available at https://www.coons.senate.gov/imo/media/doc/no_fakes_act_draft_text.pdf) (circulated in the Senate on Oct. 11, 2023); No Artificial Intelligence Fake Replicas And Unauthorized Duplications Act of 2024, H.R. 6943, 118th Cong. (2024) ("No AI FRAUD Act") (introduced in the House on Jan. 10, 2024).

² *Artificial Intelligence and Intellectual Property – Part II: Copyright and Artificial Intelligence Before the Subcomm. on Intellectual Property of the S. Committee on the Judiciary*, 118th Cong. (July 12, 2023).

³ See, e.g., Christine Haight Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 1225 (2023); Lisa P. Ramsey, *Using Failure to Function Doctrine to Protect Free Speech and Competition in Trademark Law*, 104 IOWA L. REV. ONLINE 70 (2020); Lisa P. Ramsey, *Free Speech Challenges to Trademark Law after Matal v. Tam*, 56 HOUS. L. REV. 401 (2018); Lisa P. Ramsey, *A Free Speech Right to Trademark Protection?* 106 TRADEMARK REP. 797 (2016); Lisa P. Ramsey, *Free Speech and International Obligations to Protect Trademarks*, 35 YALE J. INT'L L. 405 (2010); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008); Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095 (2003).

⁴ See, e.g., Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851 (2010) (providing examples of impersonation on Facebook and Twitter).

Recently bad actors have impersonated people using unauthorized “digital replicas” of them that are nearly indistinguishable from the actual voice, image, or visual likeness of that person.⁵ The identities of famous musicians, politicians, comics, actors, and other celebrities are increasingly used in new songs, sound recordings, images, videos, and advertisements that are generated by artificially intelligent (AI) computer programs at the request of a human user of that AI technology. AI-generated digital replicas and other sound or audiovisual recordings that are digitally altered in ways that convincingly replace one person’s voice or likeness with that of another are commonly referred to as “deepfakes”. One example is the unauthorized AI-generated song “Heart on my Sleeve,” which contained a performance that closely imitated the voices of musicians Drake and The Weeknd.

There are many other examples. A simulated version of President Joe Biden’s voice was used in a robocall that spread election disinformation. The estate of George Carlin filed a lawsuit when a deepfake version of the deceased comic was featured in a comedy special. An AI-generated version of the actor Tom Hanks was used without his consent in an advertisement for a dental plan. Taylor Swift and other female celebrities have been targets of unauthorized sexually explicit deepfake images. Unfortunately ordinary people can also be the victims of nefarious use of AI technology. Teenage students have created deepfake nude images of female classmates and shared these doctored images with others online.

The federal Lanham Act’s false endorsement law and state right of publicity laws can often provide a remedy in such disputes involving digital replicas.⁶ Still, I commend Congress for considering whether these laws—and other federal or state laws—are sufficient to stop and punish the creation and dissemination of unauthorized sexually explicit deepfakes and the deceptive impersonation of public figures and regular people. The U.S. Supreme Court’s First Amendment jurisprudence allows the government to ban and otherwise regulate the use of another individual’s NIVL without consent in obscene speech, child pornography, fraudulent speech, and misleading commercial speech. These categories of speech are outside the scope of the constitution’s protections. The proposed No FAKES Act and No AI FRAUD Act apply to such unprotected speech, but—like state right of publicity laws—these bills protecting a digital replica right also regulate noncommercial and commercial speech that is protected by the First Amendment. As these laws regulate the content of speech, Congress must prove that any law protecting a federal digital replica right or right of publicity satisfies at least intermediate constitutional scrutiny. Regulations of noncommercial speech are subject to strict scrutiny analysis, which often results in a finding of a First Amendment violation.

⁵ The discussion draft of the No FAKES Act provides that: “The term ‘digital replica means a newly-created, computer generated, electronic representation of the image, voice, or visual likeness of an individual that—(A) is [nearly indistinguishable] from the actual image, voice, or visual likeness of that individual; and (B) is fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear.” (brackets in original).

⁶ 15 U.S.C. § 1125(a)(1); *see, e.g.*, CAL. CIV. CODE §§ 3344, 3344.1; *Comedy III Prods., Inc. v. Saderup* 21 P.3d 797 (Cal. 2001) (California’s common law right of publicity). Note the false endorsement law only applies when another’s identity is used without consent in connection with goods or services in a manner likely to cause confusion, so it may not apply in disputes involving sexually explicit deepfakes.

In my testimony today, I will discuss three ways that Congress can better protect First Amendment interests in the No FAKES Act or a broader federal right of publicity law. First, the federal statute should include specific exceptions to liability for expression protected by the First Amendment and categorical safe harbors for online service providers. These rules will increase clarity and predictability as to what uses of another's NIVL are allowed and prohibited.

Second, due to the distinct harms caused by different uses of a digital replica, Congress should revise the proposed bill into separate causes of action with different requirements and distinct speech-protective defensive doctrines. This should include a law targeting uses that impersonate individuals in deceptive ways, and could also include different provisions aimed at protecting a performer's right to make a living or preventing the use of digital replicas in unauthorized sexually explicit deepfakes regardless of any actual confusion. The U.S. Supreme Court's First Amendment jurisprudence requires the government to identify the purpose of each provision in a law, and ensure that law is narrowly drawn to further a compelling or substantial government interest without harming protected expression too much. As it is currently drafted, the single overbroad cause of action in Section 2(c) of the No FAKES Act does not satisfy constitutional scrutiny.

Third, the First Amendment requires consideration of whether each provision in a law regulating speech chills expression no more than necessary and is narrowly tailored to further its goals. Congress can better protect expressive values by ensuring that the federal statute preempts similar state laws. This will harmonize the law and simplify lawsuits, which can reduce the chilling effect on speech that may be caused by the cost of litigation and uncertainty about the scope of these laws. Congress should also impose limits on the transferability of digital replica and NIVL rights, and the scope of licensing agreements relating to such rights. This approach will help ensure that individuals retain control over their own identity and is consistent with the U.S. Constitution's requirements of freedom of speech, freedom of association, and of liberty. Allowing companies or organizations to control a person's identity rights either via transfer or a broad licensing agreement will work at cross-purposes with many of the stated goals of this proposed legislation. It could potentially lead to greater AI-generated deception of the public and exacerbate the circulation of sexually explicit images (authorized by these owners/licensors).

I. Freedom of expression is better protected if a law has clear and predictable rules

First, any law regulating the content of speech is more likely to be found consistent with the First Amendment if the law's defensive doctrines are clear and allow the litigants to predict what uses of expression are allowed and prohibited. Including specific exemptions from liability in the statute will make it easier for judges to grant motions to dismiss frivolous speech-harmful claims, and for online service providers to determine whether a user complaint alleging a violation of the digital replica right or the right of publicity is frivolous or legitimate.

Vague laws are inconsistent with the free speech right because they can have a chilling effect on speech. Thus, I commend the Senators who included specific exclusions from liability for constitutionally protected speech in the No FAKES Act. Congress should also adopt a safe harbor provision for online service providers willing to implement a notice and takedown system.

A. Specific exceptions to liability

Section 2(c)(3) of the proposed No FAKES Act contains a list of specific exclusions for the applicable digital replica's

- (A) use as part of a news, public affairs, or sports broadcast or report;
- (B) use in documentaries, docudramas, or historical or biographical works that depict the applicable individual as that individual;
- (C) use for purposes of comment, criticism, scholarship, satire, or parody;
- (D) use in an advertisement or commercial announcement for the purposes described in (A), (B), or (C); or
- (E) use in ways that are de minimus or incidental.

As the No FAKES Act currently regulates speech that is not misleading and not commercial, these types of speech-protective rules—which apply regardless of the degree of dramatization or fictionalization—are essential in a democratic society and contribute to the marketplace of ideas and information. Congress should consider making some additional revisions to this list of exclusions to better protect speech interests.⁷ One revision is adding “teaching” to Section 2(c)(3)(C) or otherwise allowing certain educational uses of digital replicas by teachers, professors, librarians, and similar types of educators who want to provide their students with information about AI-generated digital replicas or lawsuits involving them.

Another suggestion is to add a “catch-all” provision at the end of the list of exclusions which explicitly allows courts to limit application of the statute in other ways to protect freedom of expression and other public interests, such as fair competition. Congress could add a fair use defense here similar to the copyright fair use defense in Section 107 of the Copyright Act. This exclusion would allow decision-makers to consider whether the use is transformative and/or commercial, and the effect of the use upon the potential market for or value of the person's image, voice, or likeness. Legislators who want to protect a performer's right to perform or otherwise make a living will want courts to consider whether the digital replica could substitute for the actual person's performance. Copyright law contains several specific limitations on

⁷ If Congress decides to enact a federal right of publicity statute that covers nonconfusing uses of NIVL rather than one targeted at digital replicas, other state right of publicity laws may provide ideas of additional exclusions from liability. For example, California's current right of publicity statute regulating certain unauthorized uses of the “name, voice, signature, photograph, or likeness” of deceased personalities, CAL. CIV. CODE § 3344.1(a)(1) (covering uses “in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services”), excludes the following types of expression from its application: “For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.” CAL. CIV. CODE § 3344.1(a)(2). For living individuals, California's right of publicity statute exempts “a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.” CAL. CIV. CODE § 3344(d), along with other limitations on the statute's scope. CAL. CIV. CODE § 3344(e)–(f). See also Indiana's Right of Publicity statute, INDIANA CODE § 32-36-1-1c.

exclusive rights in addition to the flexible four-part fair use defense in Section 107, so this approach has precedent.⁸

The proposed No FAKES Act does a better job than the No AI FRAUD Act in setting forth specific exemptions for certain nonconfusing uses of another's image, voice, or likeness.⁹ Section 3(d) of The No AI FRAUD Act includes a general statement that provides "First Amendment protections shall constitute a defense to an alleged violation of subsection (c). In evaluating any such defense, the public interest in access to the use shall be balanced against the intellectual property interest in the voice or likeness."¹⁰ This statement is vague and insufficiently speech-protective because it is impossible to predict what uses are permitted by the law until a court rules on this issue. Some parties may settle because they cannot afford to litigate, so this type of unclear rule could have a chilling effect on speech.

Importantly, some of the speech-protective exclusions in Section 2(c)(3) of the No FAKES Act should arguably not apply when an AI-generated digital replica is used to impersonate individuals in a deceptive manner or used in sexually explicit deepfakes. The exclusion relating to use for purposes of comment, criticism, scholarship, satire, or parody is an example. An accused infringer should not be able to claim a satire or parody defense if this use would mislead a reasonable person as to the identity of the actual person that is heard in a sound recording or depicted in a video recording. As explained later, this is just one reason why Congress should create separate causes of action to address the different harms caused by digital replicas.

B. Safe harbors for online service providers

Secondary liability is permitted under Section 2(c) of the proposed No FAKES Act. Once an individual files a complaint with an online service provider alleging that a certain video, image, song, or message violates this law, that platform will likely automatically take down that expression to avoid being held liable for infringement regardless of whether that speech is protected by the First Amendment.

It is critical that Congress not enact a strict liability rule for companies that host commercial and noncommercial expression. Instead, the federal legislature should require or encourage online service providers to adopt and implement a notice and takedown system similar to the system created by Section 512 of the Digital Millennium Copyright Act. Accused infringers should also have the ability to challenge take-down requests by filing a counternotification with the platform. This is essential for two reasons. First, bad actors may falsely claim they are the person who owns an individual's digital replica or NIVL right when they file a frivolous complaint with the

⁸ 17 U.S.C. §§ 107-122. Some state right of publicity laws include a defense which focuses on whether the use is transformative. *See, e.g., Comedy III Prods. v. Saderup* 21 P.3d 797 (Cal. 2001).

⁹ For criticism about the broad scope and lack of specific exceptions for protected speech in the No AI FRAUD Act, see Jennifer E. Rothman, *House Draft AI Bill Risks Loss of Control over Our Own Voices and Likenesses*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Jan. 23, 2024), https://rightofpublicityroadmap.com/news_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/.

¹⁰ The provision then lists three factors that may be considered, some of which are similar to the copyright fair use factors.

online service provider. Second, the statute may allow the accused infringer to use the image, voice, or likeness under one of the exclusions (such as news reporting or parody). Congress should discourage—rather than encourage—private censorship and self-censorship of expression protected by the First Amendment in any new anti-impersonation or right of publicity law.

II. The First Amendment analysis of the proposed statutory provisions will differ depending on the distinct harms targeted by Congress

The proposed No FAKES Act contains a single cause of action that broadly seeks to remedy several different harms, and the provisions are not narrowly tailored to further the goals of the law. Overbroad laws are more likely to violate the First Amendment than narrowly drawn laws. Congress should use separate causes of action with different requirements and speech-protective defensive doctrines to address the distinct harms caused by the misuse of digital replicas. My understanding is that some members of Congress are interested in stopping the use of digital replicas to impersonate others in a deceptive manner, preventing unauthorized sexually explicit deepfakes, protecting the rights of performers to make a living, and ensuring that everyone can control and get compensated for use of their NIVL through a federal right of publicity law.

A. The Supreme Court’s First Amendment Jurisprudence

The U.S. Supreme Court has held that fraudulent speech, misleading commercial speech, obscenity, and child pornography are included in the list of categories of speech that the government can generally prohibit, punish, and otherwise regulate without violating the First Amendment.¹¹ A federal statute that narrowly targets these types of unprotected expression will likely be found constitutional unless the law discriminates based on the viewpoint of the speaker or message.¹² If the law also applies to expression not categorically excluded from the First

¹¹ *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (discussing the historic and traditional categories of speech that can be restricted without violating the First Amendment, including obscenity and fraud) (citing *Roth v. United States*, 354 U.S. 476, 483 (1975) and *Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)); *United States v. Williams*, 553 U.S. 285 (2008) (holding that the PROTECT Act of 2003’s criminalization of child pornography, sexually explicit visual portrayals that feature children, was not overbroad under the First Amendment); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 565–66 (1980) (discussing misleading commercial speech as not protected by the First Amendment). *See also* *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring) (“Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition.”); *id.* at 252 (“It is well settled . . . that to the extent a trademark is confusing or misleading the law can protect consumers and trademark owners”) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011)). While a plurality of Justices refused to recognize a “categorical rule. . . that false statements receive no First Amendment protection,” *United States v. Alvarez*, 567 U.S. 709, 719, 729–30 (2012) (Kennedy, J.) (plurality opinion), other Justices are willing to allow the government to regulate false factual statements, *see id.* at 746 (Alito, J., dissenting) (“Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value.”).

¹² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–92 (1992) (suggesting that viewpoint-discriminatory laws are presumptively unconstitutional and subject to strict constitutional scrutiny even if the law regulates expression that is historically or traditionally outside the scope of the First Amendment’s protections). Intellectual property laws that discriminate based on viewpoint are likely to be found inconsistent with the First Amendment. *See, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 582 U.S. 218 (2017).

Amendment's protections and regulates the content of the speech,¹³ then the Court's current free speech jurisprudence requires the government to prove the statutory provisions protecting an individual's image, voice, or likeness satisfy intermediate scrutiny analysis (for nonmisleading commercial speech) or strict scrutiny analysis (for noncommercial speech).¹⁴

The Court has defined commercial speech as "speech which does no more than propose a commercial transaction," such as an advertisement for pharmaceuticals or insurance services, and held such expression is protected by the First Amendment.¹⁵ Commercial messages are currently subject to a lesser degree of protection than noncommercial messages, but government regulations of commercial speech must still satisfy *Central Hudson's* intermediate scrutiny test.¹⁶ If the speech is not misleading and concerns a lawful activity, regulations of commercial expression are constitutional under this analysis only if the government can show the law directly and materially advances a substantial government interest and is narrowly drawn so as to not endanger free speech more than necessary to serve that goal.¹⁷

¹³ A content-based regulation is a law that "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). As explained by Justice Kennedy in his concurring opinion in *Matal v. Tam*, "The First Amendment guards against laws 'targeted at specific subject matter,' a form of speech suppression known as content based discrimination. . . . This category includes a subtype of laws that go further, aimed at the suppression of 'particular views . . . on a subject.' . . . A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Tam*, 582 U.S. at 248 (Kennedy, J., concurring) (citations omitted). For example, a law banning expression about a certain war in a foreign country is a content-based regulation, while a viewpoint-based regulation would be a law that targeted only speakers or messages that oppose that war.

¹⁴ *Reed*, 576 U.S. at 163 (strict scrutiny analysis for content-based regulations of speech); *Central Hudson*, 447 U.S. at 564 (intermediate scrutiny analysis for commercial speech regulations). See generally Ramsey, *Free Speech Challenges*, *supra* note 3, at 423–55 (applying the Court's traditional First Amendment tests to trademark law).

¹⁵ *Va. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

¹⁶ *Central Hudson*, 447 U.S. at 565–66 (1980).

¹⁷ *Edenfield v. Fane*, 507 U.S. 761, 767–71 (1993) (discussing and applying the intermediate scrutiny test for commercial speech regulations first set forth in *Central Hudson*, 447 U.S. at 565–66). Justice Alito (writing for a plurality of four Justices) applied the *Central Hudson* test to a Lanham Act provision in *Matal v. Tam*, 582 U.S. 218, 245–47 (2017) (Alito, J.) (plurality opinion) (explaining that the challenged federal trademark law banning registration of matter that may disparage others, 15 U.S.C. § 1052(a), could not even satisfy the intermediate scrutiny test for evaluating the constitutionality of regulations of commercial speech that are not misleading), but the Supreme Court did not hold in that opinion that intermediate or strict scrutiny analysis should be applied in trademark disputes. After the oral argument in *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), *cert granted sub nom. Vidal v. Elster*, 143 S. Ct. 2579 (2023), it is still unclear whether the Justices believe the Court's traditional constitutional scrutiny tests should be applied in trademark disputes implicating the First Amendment.

In the copyright law context, the U.S. Supreme Court declined to apply heightened scrutiny analysis to content-based laws regulating noncommercial expression when a First Amendment challenge was raised to two different revisions to the U.S. Copyright Act. See *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (holding that "further First Amendment scrutiny is unnecessary" when "Congress has not altered the traditional contours of copyright protection"); *Golan v. Holder*, 565 U.S. 302, 327–30 (2012) (explaining that the idea/expression dichotomy and broad fair use defense were sufficient to protect expressive values in copyright law, and that copyright law itself is the "engine of free expression") (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)). See generally Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697, 713–18 (2003) (discussing the "copyright exception" in the Court's First Amendment jurisprudence). However, those cases are unique due to the narrow scope of copyright protection only for original expression (and not ideas or facts), copyright law's broad fair use defense, and the fact that copyright

Importantly, movies, television and radio programs, plays, musicals, video games, books, magazines, comic books, news reporting, and other forms of entertainment or journalism that communicate ideas or information are—like political speech—fully protected by the First Amendment regardless of whether they are sold for profit.¹⁸ Laws regulating such noncommercial expression based on the content of the message are presumptively unconstitutional and must usually satisfy strict scrutiny analysis.¹⁹ Under this rigorous test, the government must “prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”²⁰ “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”²¹ The No FAKES Act applies to commercial and noncommercial speech, so some of the provisions will be subject to strict scrutiny analysis unless Congress exempts noncommercial uses of the digital replica or NIVL from application of the law or that part of the law regulates expression that is not protected by the First Amendment.

B. Applying the Court’s First Amendment Jurisprudence to the No FAKES Act

The First Amendment analysis of provisions in the proposed No FAKES Act that regulate constitutionally protected speech will vary depending on the goals of the law, the type of speech at issue, and whether that content-based law is narrowly tailored to further those purposes without harming protected expression too much under the applicable test. Congress should strongly consider setting forth the intent of the various statutory provisions within the text of the No FAKES Act, similar to what it did in Section 45 of the Lanham Act.²² Professors Robert Post and Jennifer Rothman have identified four distinct “rights of publicity” that are protected by right of publicity laws: (1) the right of performance, (2) the right of commercial value, (3) the right of control, and (4) the right of dignity.²³ These rights—along with other rights—may be invoked to justify laws that ban the use of a digital replica in deceptive speech and in sexually

law itself is the “engine of free expression,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985), and is specifically mentioned in the Intellectual Property clause of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 8.

¹⁸ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790–98 (2011) (video games); *Smith v. California*, 361 U.S. 147, 150 (1959) (books); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952) (motion pictures).

¹⁹ *Reed*, 576 U.S. at 163 (2015).

²⁰ *Id.* at 171 (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)).

²¹ *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

²² 15 U.S.C. § 1127 (setting forth the intent of the Lanham Act). If Congress wants courts to apply this federal law in an extraterritorial manner to conduct outside the borders of the United States, it should say this in a clear and affirmative statement and clarify whether there are any limits on the statute’s foreign application. *See Abitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023). Other international law issues that Congress should consider are whether non-U.S. citizens living in foreign countries whose digital replica or NIVL are used by others without consent in the United States, or by U.S. citizens anywhere in the world, should have standing to file a claim under this new federal law.

²³ Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020). *See also* Jennifer E. Rothman, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* (2018).

explicit deepfakes, or other laws which protect an individual's right of publicity. The No FAKES Act does not currently include a provision giving courts discretion to issue an injunction that enjoins unauthorized uses of an individual's image, voice, or likeness. Congress should consider revising this part of the law since injunctive relief is a common remedy in state right of publicity statutes, trademark and copyright laws, and other intellectual property laws.

Preventing deceptive impersonation of people to protect their dignity and other rights of publicity, and reduce consumer confusion in the marketplace and community. One intent of the No FAKES Act may be to target the use of digital replicas to impersonate individuals in a deceptive manner and thereby cause confusion about the identity of the speaker. These uses of the digital replica can mislead reasonable persons about the source of a message. A digital replica right that bans the unauthorized creation of a digital replica and inclusion of it in a song, movie, television program, advertisement, or other sound or audiovisual recording disseminated to others will target some fraudulent speech and misleading commercial speech, which are both categorically outside the scope of the First Amendment's protections. The problem with the current version of the Act—which regulates commercial and noncommercial speech—is that it does not *require* proof this use of the digital replica is false, misleading, or otherwise confusing for liability. The government interest in preventing the use of digital replicas to impersonate others is arguably compelling, but the Act is not narrowly tailored to only address this harm. It is an overbroad law.

Congress should consider revising the No FAKES Act to create a separate cause of action that targets the deceptive impersonation of politicians, musicians, actors, comics, models, artists, filmmakers, professional athletes, students, and other public figures and ordinary people. I believe such a law could satisfy strict scrutiny analysis even if some of the regulated speech is not categorically excluded from the First Amendment's protections. In the trademark law area, the U.S. Supreme Court recently cited a Second Circuit case with approval that permitted application of federal trademark infringement law to a political organization's confusing use of a competitor's "United We Stand America" mark "as a source identifier" to falsely identify the source of its own political messages.²⁴ The No FAKES Act is more likely to be deemed constitutionally valid if it is applied when confused members of the public wrongly believe the digital replica is an authentic recording in which the individual participated and rely to their detriment on this false or misleading expression.

Preventing sexually explicit deepfakes to protect human dignity. Some legislators have expressed concern about unauthorized sexually explicit deepfakes. Uses of digital replicas in these circumstances would likely be covered by the statutory language in the No FAKES Act. If the deepfake is deemed to be obscene speech or child pornography, this expression is outside the First Amendment's scope, but not all deepfakes fit into these categories of speech. If the images or videos are nearly identical to the real person portrayed in the deepfake, the Supreme Court

²⁴ *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 89–90, 92–93 (2d Cir. 1997) (applying the infringement statute to defendant's confusing use of the mark "United We Stand America" to associate itself with the political movement that sponsored Ross Perot's presidential campaign and to solicit, collect, and otherwise raise money in support of his presidential candidacy, and holding that infringement laws are not limited to profit-seeking uses of trademarks), *quoted in* *Jack Daniel's Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 155 (2023).

may find there is a compelling government interest in banning such expression even when it is noncommercial or nonconfusing because of the harm to the depicted person's human dignity and reputation. The humiliation and distress that occurs when a fake nude image looks just like you (except for the lack of clothing) makes such a law different than a law regulating sexually explicit materials that do not contain visual images of actual children.²⁵

Yet even if preventing the creation and dissemination of these types of pornographic images or videos is a compelling government interest, the language in the No FAKES Act is very broad and does not specifically mention unauthorized sexually explicit deepfakes. The proposed Act provides no guidance on what speech would be permitted or banned under a rule focused on this type of harm. This is another reason the Act is not narrowly tailored to achieve the goals of legislators and is not the least restrictive means of regulating this expression.

Section 2(d)(3)(A) of the No FAKES Act provides a good example of why Congress should use separate causes of action to target the different harms caused by digital replicas. That provision says that simply including a disclaimer stating that the digital replica was unauthorized should not excuse liability under the law. This provision makes sense when the individual's image, voice, or visual likeness is used in sexually explicit material. On the other hand, this rule relating to disclaimers may not be sufficiently speech-protective for a law targeting deceptive impersonation, as a disclaimer may dispel any confusion about the speaker's identity or the source of the message.

Protecting the right of performance, or a person's right to make a living. In *Zacchini*, the U.S. Supreme Court rejected a First Amendment defense to application of Ohio's misappropriation law when a television station broadcast the "entire act" of a human cannonball entertainer at an Ohio county fair without his consent.²⁶ Zacchini alleged this broadcast infringed his "right to the publicity value of his performance" and the Court described this as a "right of publicity" claim.²⁷ Some members of Congress may intend for the No FAKES Act to protect a "right of performance" of musicians, actors, comics, and other individuals, or their right to use certain aspects of their identity to make a living. Such a goal would likely be deemed a substantial (and possibly a compelling) government interest depending on the legislator or judge. Again, the problem here is that the Act is not narrowly tailored at protecting this particular right.

Congress could enact a separate cause of action aimed at protecting a performer's right to make a living. Such a law would likely be constitutional under *Zacchini*. AI-generated digital replicas can be nearly indistinguishable from the actual image, voice, or visual likeness of a real person. They might be used to replace performances by living individuals and harm the performer's

²⁵ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding the Child Pornography Prevention Act of 1996 was overbroad and unconstitutional because it banned fake child pornography that was not obscene nor produced by the exploitation of real children; it applied to speech that creates no victims by its production or dissemination).

²⁶ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 564, 575 (1977).

²⁷ *Id.* at 565, 573-75. Commentators have noted the constitutional approach in this case may be limited to disputes involving the unlawful appropriation of an "entire act" or similar circumstances where the government wants to protect an individual's "right of performance" in furtherance of the copyright-like goal of incentivizing the creation of new performances. Post & Rothman, *supra* note 23, at 99-102.

ability to get compensated for singing, acting, or telling jokes. Thus, the U.S. Supreme Court will likely conclude the law is consistent with the First Amendment if the No FAKES Act is revised to ban the creation or dissemination of a digital replica that substitutes for a human who is still alive and who normally provides that performance in a creative or informational work (such as a movie or news program). As deceased people cannot perform or work, a narrowly tailored law that protects expressive values would likely state that this right ends at the death of the living person.²⁸ In other words, there would be no post mortem right under this cause of action.

Protecting the property right to control and be compensated for use of your NIVL.

Congress may want to enact a broader federal right of publicity law that protects the property or quasi-property rights of individuals (or their heirs or assignees) to decide whether or not their NIVL is used on commercial products like labels of beer or laxatives; or used on the front of T-shirts or other expressive merchandise; in the title or content of movies, television series, videogames, artwork, books, news reporting, and other artistic or literary expression; or in advertising for these types of goods or services.²⁹ For the law to satisfy First Amendment analysis, the government would have to establish this goal was a compelling government interest when the law is regulating noncommercial speech (e.g., movies), and a substantial government interest for uses of the NIVL in commercial speech (e.g., commercial advertising). The language of the No FAKES Act is not limited to commercial uses of another's image, voice, or likeness.

As of this writing, the U.S. Supreme Court has not provided sufficient guidance on how to balance free speech rights against an individual's rights of publicity and privacy when uses of their NIVL are not fraudulent, deceptive, or misleading. The Court may discuss right of publicity law when it issues its decision before the end of June 2024 in *Vidal v. Elster*.³⁰ The *Elster* case involved a First Amendment challenge to the application of a trademark registration law that protects the rights of publicity and privacy of living individuals and deceased presidents when someone tries to register a mark comprising their name, signature, or image without consent. During oral argument in *Elster* some Justices asked questions in such a manner that suggested they think people have a property right in their name. Perhaps the Court will conclude that there

²⁸ On the other hand, if the goal of the right of publicity statute is to protect property rights in a person's NIVL, Congress may want to consider including a limited post mortem right in the law. See Mark Bartholomew, *A Right to Be Left Dead*, CALIF. L. REV. (forthcoming 2024), <https://ssrn.com/abstract=4610679> (last revised March 5, 2024).

²⁹ See, e.g., CAL. CIV. CODE §§ 3344–3344.1 (covering uses “in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services”); *Comedy III Prods. v. Saderup*, 21 P.3d 797 (Cal. 2001). The California common law claim requires proof: (1) the defendant used the plaintiff's identity; (2) the appropriation was for defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342 (Ct. App. 1983); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

³⁰ *In re Elster*, 26 F.4th 1328 (Fed. Cir. 2022), cert. granted sub nom. *Vidal v. Elster*, 143 S. Ct. 2579 (2023); see Lisa P. Ramsey, Guest Blog Post, *Evaluating the Constitutionality of Viewpoint-Neutral Trademark Registration Laws That Do Not Restrict Speech--Vidal v. Elster*, TECH. & MKTG. L. BLOG (Nov. 27, 2023), <https://blog.ericgoldman.org/archives/2023/11/evaluating-the-constitutionality-of-viewpoint-neutral-trademark-registration-laws-that-do-not-restrict-speech-vidal-v-elster-guest-blog-post.htm> (discussing the oral argument held at the Supreme Court on November 1, 2023); Lisa P. Ramsey, Guest Blog Post, *Trademark Registration of Political Messages for Expressive Merchandise--In re Elster*, TECH. & MKTG. L. BLOG (Mar. 4, 2022) <https://blog.ericgoldman.org/archives/2022/03/trademark-registration-of-political-messages-for-expressive-merchandise-in-re-elster-guest-blog-post.htm> (criticizing the Federal Circuit's decision).

is a substantial (and even compelling) government interest in protecting an individual's rights of publicity and privacy to protect human dignity, an individual's right to make a living, or other personality, property, or quasi-property interests that we have in our human identity. Yet even if this occurs, any right of publicity law adopted by Congress must be narrowly tailored and, at a minimum, not harm expressive values more than necessary.

Note that Congress could protect speech interests in various ways if it decides to create a new federal right of publicity law. First, it could impose limits on what can qualify as protectable subject matter, just like copyright law only protects expression but not ideas or facts. An individual's NIVL should be protected by the law, but not that person's style of music, acting, dancing, art, writing, filmmaking, or performing. Elvis impersonators should not be liable under this law just because they look and sound like Elvis. Second, to avoid application of strict scrutiny analysis to the law, Congress should consider limiting the law's scope to uses of the NIVL in advertising and on commercial products, or exempt noncommercial uses of the NIVL from application of the law. Third, if the federal right of publicity law regulates the secondary liability of online service providers, Congress should require specific and actual knowledge of the direct infringer's unauthorized use of another individual's NIVL for liability.³¹ As discussed previously, it should also provide safe harbors for online service providers acting in good faith that want to protect both free speech rights and the right of publicity.

Finally, the legislature should give courts flexibility on remedies in certain circumstances where a ban on protected speech would significantly harm expressive values. For example, rather than grant an injunction, a court could only require a disclaimer stating that the digital replica was not authorized. Or it could require the accused infringer to disclose that the image, video, or sound recording was generated by an AI computer program and/or is inaccurate or of questionable authenticity. Implementing these rules into the law may help the government satisfy intermediate scrutiny analysis, but it is not clear whether a right of publicity law with these speech-protective provisions could satisfy strict scrutiny analysis.

As the constitutional analysis will vary depending on the alleged harms and the specific ways each statutory provision attempts to stop these harms, Congress should consider creating separate causes of action targeted at: (1) deceptive impersonation of individuals, (2) sexually explicit deepfakes, (3) protecting an individual's right of performance, and/or (4) protecting the right to control and be compensated for use of your NIVL, including in nonconfusing and nonsexual contexts. There is precedent for using separate causes of action to target disparate harms in other areas of intellectual property law. For example, the federal trademark statute contains different causes of action for unauthorized uses of another's trademark that are (1) likely to cause confusion with a prior distinctive mark (infringement) and (2) likely to cause dilution by blurring or dilution by tarnishment of a famous mark, regardless of the presence or absence of actual or

³¹ The proposed statute requires "knowledge" for liability when an accused infringer publishes, distributes, transmits, or makes available to the public the digital replica. Congress should clarify whether this refers to actual or constructive knowledge, or general or specific knowledge, as this issue has arisen in the copyright and trademark law areas. A more speech-protective approach would require actual and specific knowledge.

likely confusion (dilution).³² Due to their dissimilar purposes, the infringement and dilution provisions have different requirements for liability and distinct defensive doctrines.³³ Congress could follow a similar approach here. For example, it could enact an anti-impersonation law that targets deceptive impersonation of individuals and sexually-explicit deepfakes in commercial or noncommercial expression, but exempt noncommercial use of an individual's NIVL in a right of publicity law that applies to nonmisleading speech as long as the dispute does not involve the creation or dissemination of an AI-generated digital replica of that individual.

In sum, Congress should ensure that the final version of the No FAKES Act or a federal right of publicity law directly and materially furthers its goals, and includes sufficient defensive doctrines that protect the free speech rights of all individuals, organizations, and companies.

III. Freedom of expression may be better protected if the federal law preempts state laws, and imposes limits on transferability of a person's digital replica right

The First Amendment requires consideration of how a law may chill speech and whether that law is narrowly tailored to alleviate the targeted harms. Free speech values are better protected if it is easy to determine whether government laws prohibit or allow certain uses of a digital replica or another's NIVL. Today this is complicated. State right of publicity laws differ in various ways, and some state common law rights of publicity have a broader scope of protection than the state's statutory right of publicity.³⁴ Moreover, there are at least five different tests that lower courts use to balance First Amendment rights against the right of publicity, which can "often lead to inconsistent results, [and] leave creators and publishers uncertain about what they may say."³⁵ For these reasons, Congress should consider revising the No FAKES Act to state that the federal

³² 15 U.S.C. §§ 1114(1), 1125(a)(1), 1125(c).

³³ *Id.*; 15 U.S.C. §§ 1115(b) (defenses to infringement), 1125(c)(3) (exclusions from dilution liability). For more information about the statutory and common law defensive doctrines in trademark infringement law, see Parts I and II of Farley & Ramsey, *supra* note 3. Some of the remedies are also different for violations of the trademark dilution law. See 15 U.S.C. § 1125(c)(5). Note that while I believe trademark dilution law is an unconstitutional regulation of nonmisleading commercial speech, Ramsey, *Free Speech Challenges*, *supra* note 3, at 453–55, the First Amendment analysis will be different for right of publicity law because the laws have different goals, requirements for liability, defensive doctrines, and remedies.

³⁴ See Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1271 (2022); ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY, <https://rightofpublicityroadmap.com/> (last visited Apr. 25, 2024) (providing useful information about state right of publicity laws in statutes and the common law); see, e.g., *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992) (applying California's statutory and common law right of publicity, and only finding liability under the common law).

³⁵ Brief of 31 Constitutional Law And Intellectual Property Law Professors as Amici Curiae in Support of Petitioner, *Electronic Arts, Inc. v. Davis* at 3, 577 U.S. 1215 (2016) (No. 15-424) (discussing the (1) the transformative use test, (2) the transformative work test, (3) the relatedness test, (4) the predominant purpose test, and (5) the balancing test), <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>. I was one of the signatories of this Amicus Brief filed in 2015 in a dispute involving California's right of publicity law. See also Post & Rothman, *supra* note 23.

law preempts similar state laws, and use that same approach if it adopts a new federal right of publicity law.³⁶

National uniformity will have several benefits. Just like in federal patent and copyright law, preempting state law will simplify and clarify this area of the law. It will reduce the cost of litigation for everyone and save time by focusing the parties and the court on the federal right of publicity claim. This benefits musicians, actors, comics, models, documentary and independent filmmakers, nonprofit organizations, small businesses, and others with limited financial resources.

The federal government should do what it can to stop the creation and dissemination of music, videos, images, or text that impersonate individuals without their consent in a fraudulent or deceptive manner, or in sexually explicit contexts. Like other members of the public who are fans of music, movies, television programs, comedy, news reporting, and other creative and informational works, I generally want to know if the person singing, talking, or appearing on my radio, smartphone, computer, television, or film screen is a real human or is an AI-generated digital replica. If I am following someone on social media, I generally want to know if the text is written by the human with that photograph and name (or a known pseudonym), or if a different person or an AI computer program is engaging in impersonation of that individual.

At the same time, I am a fan of cover bands, biopics (biographical films and television series), docudramas (dramatized re-enactments of actual events), historical musicals and plays, parodies, and satire. I enjoyed Kingsley Ben-Adir's performance as the Jamaican singer-songwriter in the film *Bob Marley: One Love*; Val Kilmer's portrayal of Jim Morrison in the film *The Doors*; and the performances by the actresses in the television series *Feud* who helped bring attention to the ageism and sexism faced by Joan Crawford (Jessica Lange) and Bette Davis (Susan Sarandon) during their careers in Hollywood. I attend live music performed both by rock stars and by music tribute bands with members who sound, look, and act just like the musical artists whose songs they are performing in their cover band show. Therefore, I hope that any new federal law protecting an individual's digital replica or NIVL right will not discourage, punish, or prevent these types of creative performances and works of authorship that depict performers (rather than replace them). These types of performances are unlikely to mislead a reasonable person regarding the identity of the person who is performing.

Unfortunately, I believe it is likely that we will all be confused in the future by AI-generated digital replicas that are nearly indistinguishable from a real person's image, voice, or visual likeness. Allowing individuals to transfer or broadly license their digital replica right or other aspects of their personal identity to a company, organization, or other individual who speaks or acts on their behalf can lead to consumer confusion about whether communications by the authorized digital replica are authentic or fake. If one of the goals of the No FAKES Act is to protect an individual's right to perform or to otherwise make a living, we should be wary of allowing individuals to transfer their digital replica right to a third party in a manner which

³⁶ The International Trademark Association supports the adoption of a federal right of publicity law that preempts state right of publicity laws. RIGHT OF PUBLICITY MINIMUM STANDARDS (INT'L TRADEMARK ASS'N, proposed March 27, 2019), <https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Right-of-Publicity-Minimum-Standards-03.27.2019.pdf>.

allows that person to lose control over their identity or engage in expression protected by the First Amendment.³⁷ The *Joan is Awful* episode of Netflix's anthology *Black Mirror* television series, in which Joan's life becomes part of a real-time fictional TV show because she agreed to this in the terms and conditions of a contract with her streaming service, does a great job warning of the dangers of relying solely on freedom of contract to decide who controls our identity.

IV. Conclusion

I support many of the provisions in the proposed NO FAKES Act, but not all of them. I encourage Congress to continue consulting with stakeholders in the creative and technology industries, and with academics and attorneys with expertise in right of publicity, trademark, and copyright law to improve the Act. Finally, I am glad that Congress is considering the impact that any new anti-impersonation or federal right of publicity statute will have on freedom of expression, creativity, and innovation. I look forward to answering your questions.

³⁷ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012). In a statement submitted to the House's Subcommittee on Courts, Intellectual Property, and the Internet, Professor Rothman provided informative and insightful written testimony about the issue of transferability in right of publicity law and the two proposed bills intended to address unauthorized AI-generated performances. *Artificial Intelligence and Intellectual Property: Part II – Identity in the Age of AI: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 118th Cong. (Feb. 2, 2024) (statement of Jennifer E. Rothman, Nicholas F. Gallicchio Professor of Law, U. Penn.), https://rightofpublicityroadmap.com/wp-content/uploads/2024/02/Rothman_Statement_Subcommittee-on-IP_February-2_2024_Submitted.pdf.



MOTION PICTURE ASSOCIATION

TESTIMONY OF BENJAMIN S. SHEFFNER
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FOR THE HEARING

“THE NO FAKES ACT: PROTECTING AMERICANS FROM UNAUTHORIZED DIGITAL REPLICAS”

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY

APRIL 30, 2024

I. INTRODUCTION

Chair Coons, Ranking Member Tillis, and members of the subcommittee, thank you for the opportunity to testify today on behalf of the Motion Picture Association, Inc. (“MPA”)¹ and our member studios about legislation to regulate the use of “digital replicas” in motion pictures, sound recordings, and other expressive works.

For over a century, the studios represented by the MPA have employed innovative new technologies to tell compelling stories to audiences here in the U.S. and around the globe. From the introduction of recorded sound in the 1920s and color in the 1930s, to the dazzling special effects of *2001: A Space Odyssey*, *Star Wars*, *Jurassic Park*, *Avatar*, and *The Curious Case of Benjamin Button*, the MPA’s members have long used technology to allow filmmakers to bring their vision to the screen in the most compelling way possible.

Artificial intelligence is the latest technological innovation that has captured the attention of the world. Advancements in AI will likely lead to dramatic advancements in myriad industries from medicine to motion pictures. But with these developments also come significant concerns

¹ The MPA serves as the global voice and advocate of the motion picture, television, and streaming industries. It works in every corner of the globe to advance the creative industry, protect its members’ content across all screens, defend the creative and artistic freedoms of storytellers, and support innovative distribution models that expand viewing choices for audiences around the world. The MPA’s member studios are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

about potential misuses, including to create non-consensual pornographic deepfakes or spread disinformation about elections or national security matters, or otherwise deceive the public. MPA sees great promise in AI as a way to enhance the filmmaking process and provide an even more compelling experience for audiences. But we also share the concerns of actors and recording artists about how AI can facilitate the unauthorized replication of their likenesses and voices to supplant performances by them, which could potentially undermine their ability to earn a living practicing their craft.

Congress is now considering whether to legislate a new federal right to bar the unauthorized replication of individuals' (including actors' and recording artists') likenesses and voices. MPA agrees that legislation to address these concerns may be warranted, and the October 2023 discussion draft of the Nurture Originals, Foster Art, and Keep Entertainment Safe ("NO FAKES") Act ("Discussion Draft")² is a thoughtful contribution to the debate. However, in drafting any such bill, Congress must recognize that it would be doing something that the First Amendment sharply limits: regulating the content of speech. Enacting new legislation to address specific harms from the misuse of digital replicas likely can be done consistent with the First Amendment. But it will take very careful drafting to accomplish the goal of addressing these harms without inadvertently chilling legitimate, constitutionally protected uses of technologies to enhance storytelling in our industry, along with other creative endeavors.

My testimony will summarize the vital First Amendment issues implicated by a potential federal statute creating a "digital replica" right, emphasizing that creation of such a law would constitute a content-based regulation of speech, subjecting it to strict scrutiny, which requires both the existence of a compelling state interest to justify the regulation and narrow tailoring to serve that interest. MPA stands ready to work with Congress to ensure that any new legislation governing voices or likenesses respects First Amendment rights and creative freedoms, including those of filmmakers, broadcasters, photographers, journalists, and others who employ technologies to entertain and inform audiences in the U.S. and around the world.

II. REGULATION OF USES OF NAME, IMAGE, LIKENESS, AND VOICE

A. Existing State Right of Publicity Laws

Right of publicity is the body of state law prohibiting unauthorized exploitation of an individual's name, image, likeness, or voice ("NILV") for commercial purposes, such as in an advertisement or on merchandise. Today, in virtually every state, an individual has a cause of action if his or her likeness is used without permission on a billboard or in a television advertisement, or on a product like a coffee mug or cereal box. These laws are typically technology-neutral; they apply to uses of an individual's NILV whether done using traditional technologies like photography, or via new technologies like digital replicas created by AI-

² See Press Release of Senator Chris Coons, *Senators Coons, Blackburn, Klobuchar, Tillis announce draft of bill to protect voice and likeness of actors, singers, performers, and individuals from AI-generated replicas* (Oct 12, 2023), <https://www.coons.senate.gov/news/press-releases/senators-coons-blackburn-klobuchar-tillis-announce-draft-of-bill-to-protect-voice-and-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas>.

powered tools. Thus, no new laws are needed to address the unauthorized use of a digital replica of an individual to endorse a commercial product,³ an activity clearly prohibited by existing law.⁴

Of crucial importance, right of publicity properly understood has no place in the context of *non-commercial* speech—speech in the form of movies, television programs, books, news articles and broadcasts, songs, etc.—which receives full First Amendment protection. Recognizing the need to prevent right-of-publicity statutes from encroaching on First Amendment rights, states that have enacted or amended such statutes in the past several decades have routinely included explicit statutory exceptions, known as “expressive-works exemptions,” which make clear that this body of law has no application in the context of creative and journalistic works.⁵ States have codified these exemptions precisely because they know that, if not properly cabined to commercial uses, right-of-publicity statutes risk chilling vast swaths of speech, including art, humor, political commentary, journalism, and criticism, all of which are the lifeblood of a free and well-functioning democracy, allowing us to debate, scrutinize, and laugh at the world around us. And absent such exemptions, right-of-publicity defendants sued over references to and depictions of real people would bear the burden of asserting their First Amendment rights as affirmative defenses in individual cases, an expensive and arduous task that itself chills speech. Despite the inapplicability of right-of-publicity laws to uses in expressive works, individuals unhappy with their portrayals in such works nonetheless sometimes assert such claims (typically invoking statutes that *lack* expressive-works exemptions). The courts just as routinely hold that the First Amendment bars these attempts at censorship, though often only after lengthy and expensive litigation.⁶

³ See, e.g., Derrick Bryson Taylor, *Tom Hanks Warns of Dental Ad Using A.I. Version of Him*, N.Y. Times (Oct. 2, 2023), <https://www.nytimes.com/2023/10/02/technology/tom-hanks-ai-dental-video.html>.

⁴ One whose likeness is misused in such fashion would likely have a cause of action under the federal Lanham Act, 15 U.S.C. § 1125(a), as well as state right-of-publicity law. See, e.g., Cal. Civ. Code § 3344(a) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent...shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

⁵ See, e.g., Cal. Civ. Code § 3344.1(a)(2) (1999); Ohio Rev. Code Ann. § 2741.09 (1999); Ark. Code Ann. § 4-75-1110 (2016); N.Y. Civ. Rights Law § 50-f(2)(d) (2020); La. Stat. Ann. § 51:470.5 (2022).

⁶ See, e.g., *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (N.Y. App. Div. 2021) (holding that First Amendment barred claim by convicted murderer over portrayal in docudrama, but only after *eight years* of litigation in New York state courts, including multiple appeals and an initial court order—later overturned—that barred broadcast of television movie); *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (Cal. Ct. App. 2018) (First Amendment barred claim by actress over portrayal in docudrama (reversing trial court order allowing claim to proceed)); *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016) (First Amendment barred claim by individual allegedly portrayed in movie *The Hurt Locker*); *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So.2d 802 (Fla. 2005) (First Amendment barred claims involving movie *The Perfect Storm*); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (“Courts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features, or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual’s identity in advertising infringes on the persona.”).

The U.S. Supreme Court has addressed state regulation of NIL just once, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which involved an entertainer who performed a “human cannonball” act at an Ohio county fair. Zacchini sued a broadcaster that aired his entire act, alleging infringement of his “right to the publicity value of his performance.” *Id.* at 565. The Supreme Court held that the First Amendment did not bar Zacchini’s claim. But crucial to the Court’s reasoning was that Zacchini was not merely alleging misappropriation of his identity, but instead misappropriation of his *entire act*. And scholars have recognized that *Zacchini* was not about the “right of publicity” as that phrase is commonly used, but, rather, about a right akin to a common-law copyright, which protects event producers from unauthorized broadcasts of their events.⁷

B. A Potential Federal Name, Image, Likeness, and Voice Right

As the subcommittee is aware, several bills that would establish a new federal NILV right are already under discussion.⁸ The substance of these bills is fundamentally different from existing state right-of-publicity statutes: unlike state right-of-publicity statutes, whose scope is typically limited to commercial uses, which receive a lesser form of First Amendment protection, these proposed new federal rights would apply *in expressive works*, which are fully protected by the First Amendment. These new rights, more accurately termed a “digital-replica right” than a “right of publicity,” would aim to prevent, among other things, the unauthorized digital creation of what appears to be a performance by a recording artist or an actor—for example, the “Heart on my Sleeve” song that falsely appeared to be sung by Drake and The Weeknd.⁹ MPA acknowledges the concerns raised by such developments and has been working with Congress and stakeholders to address them (just as MPA’s members and other producers reached an

⁷ See, e.g., Lee Levine & Stephen Wermiel, *The Court and the Cannonball: An Inside Look*, 65 Am. U. L. Rev. 607, 637–38 (2016) (“[A]lthough the Court used the shorthand phrase ‘right of publicity’ to describe the cause of action before it ... the Justices’ focus ... strongly suggests that the right they believed they were confronting was in the nature of a common law copyright (as the Ohio Court of Appeals had indeed characterized it) and had little to do with the right to control the use of one’s image in an otherwise distinct creative work....”); *Wisconsin Interscholastic Athletic Ass’n v. Gannett Co.*, 658 F.3d 614, 628 (7th Cir. 2011) (observing that a “producer of the entertainment,” such as “the NFL, FIFA, or the NCAA,” “normally signs a lucrative contract for exclusive, or semi-exclusive, broadcast rights for the performance,” and that “*Zacchini* makes clear that the producer of entertainment is entitled to charge a fee in exchange for consent to broadcast”).

⁸ See NO FAKES Act (draft released Oct. 12, 2023); H.R. 6943 (“NO AI FRAUD Act”) (introduced Jan. 10, 2024). The NO AI FRAUD Act in particular has come under heavy criticism for its extremely broad scope and lack of adequate exceptions for legitimate, constitutionally protected uses of digital replicas, among other issues. See, e.g., Jennifer Rothman, *House’s Draft AI Bill Risks Loss of Control over Our Own Voices and Likenesses*, Rothman’s Roadmap to Right of Publicity (Jan. 23, 2024), https://rightofpublicityroadmap.com/news_commentary/houses-draft-ai-bill-risks-loss-of-control-over-our-own-voices-and-likenesses/; Elizabeth Nolan Brown, *AI Fraud Act Could Outlaw Parodies, Political Cartoons, and More*, Reason (Jan. 17, 2024), <https://reason.com/2024/01/17/ai-fraud-act-could-outlaw-parodies-political-cartoons-and-more/>; Corynne McSherry, *The No AI Fraud Act Creates Way More Problems Than It Solves*, EFF Deeplinks Blog (Jan. 19, 2024), <https://www.eff.org/deeplinks/2024/01/no-ai-fraud-act-creates-way-more-problems-it-solves>. MPA shares many of these concerns and looks forward to working with the bill’s sponsors to address them.

⁹ See Joe Coscarelli, *An A.I. Hit of Fake ‘Drake’ and ‘The Weeknd’ Rattles the Music World*, N.Y. Times, April 19, 2023, <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html>.

agreement with SAG-AFTRA on these issues in late 2023 in the context of a collective bargaining agreement). But in doing so, policymakers must tread carefully, as creation of a new right that would apply in expressive works raises serious First Amendment concerns and risks interfering with core creative freedoms. MPA would be able to support legislation in this area only if it complies with the First Amendment.

III. ANY DIGITAL REPLICA RIGHT WOULD BE A CONTENT-BASED RESTRICTION ON SPEECH, SUBJECTING IT TO STRICT SCRUTINY UNDER THE FIRST AMENDMENT.

The First Amendment’s free-speech guarantee provides extraordinary freedom for creators of expressive works, including by protecting the ability of creators to use the names and likenesses of real people. Indeed, the creative freedom guaranteed by the First Amendment, coupled with the robust protections of the Copyright Act—itsself an “engine of free expression”¹⁰—undergird this nation’s position as the unchallenged world leader in motion pictures, music, and other creative endeavors. Over 70 years ago, the Supreme Court recognized that “motion pictures are a significant medium for the communication of ideas,” and are thus fully protected by the First Amendment.¹¹ And the fact that movies or other creative works are distributed for profit does not render them “commercial speech”¹² or otherwise lessen their First Amendment protection.¹³

A. Strict Scrutiny Would Apply to a Federal Digital-Replica Right.

A digital-replica right would constitute a content-based restriction of speech. In *Reed v. Town of Gilbert, Arizona*, the Supreme Court made clear that any content-based law is “presumptively unconstitutional” and subject to the most demanding level of constitutional

¹⁰ *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

¹¹ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); see also *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”). Thus the “First Amendment... safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays.” *Sarver*, 813 F.3d at 905.

¹² The Supreme Court has defined “commercial speech” as “speech which does no more than propose a commercial transaction.” *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (1976) (internal quotation marks omitted).

¹³ See *Joseph Burstyn, Inc.*, 343 U.S. at 501 (“It is urged that motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree.”); *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023) (rejecting argument that speech receives lesser First Amendment protection when sold for a profit or by a corporation: “none of that makes a difference”); *Sarver*, 813 F.3d at 905 (The movie “*The Hurt Locker* is not speech proposing a commercial transaction. Accordingly, our precedents relying on the lesser protection afforded to commercial speech are inapposite.”); *De Havilland*, 21 Cal. App. 5th at 850 (The fact that “creative works generate income for their creators does not diminish their constitutional protection.”); *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (2006) (The protections of the First Amendment extend to “music, films, paintings, and entertainment, whether or not sold for a profit.”).

review: strict scrutiny.¹⁴ *Reed* explained that “[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”¹⁵ And a law that regulates speech based on “particular subject matter” is “obvious[ly]” a content-based law subject to strict scrutiny.¹⁶ This is true “regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.”¹⁷ *Reed*’s “stringent standard” applies to *all* content-based restrictions of speech.¹⁸ Thus, applying *Reed*, the Ninth Circuit held that “[b]y its terms, California’s right of publicity law clearly restricts speech based upon its content,” and therefore must survive strict scrutiny to be constitutional.¹⁹

1. A Federal Digital-Replica Right Must Serve a Compelling Government Interest.

As with any other content-based restriction on speech, a law establishing a digital-replica right could clear the strict-scrutiny hurdle only if it serves a compelling governmental interest.²⁰ Uses of digital replicas of living professional performers without their consent, to replace performances they might otherwise have been employed to render, might be found by courts to provide a compelling state interest sufficient to satisfy constitutional requirements, where such uses legitimately interfere with those performers’ ability to earn a living. But the government has no compelling interest in restricting creative depictions of public figures (including performers) in stories about them or the world they inhabit. Accordingly, and as discussed below, any digital-replica legislation must be narrowly tailored to address performers’ employment-based concerns without encroaching on a creator’s ability to tell stories about real people and events, or to criticize, parody, or comment on public figures.²¹

¹⁴ 576 U.S. 155, 163 (2015).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 165 (internal quotation marks omitted).

¹⁸ *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018).

¹⁹ *Sarver*, 813 F.3d at 903; see also Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 Hous. L. Rev. 903, 912 n.35 (“The right of publicity is clearly content-based: It prohibits the uncensored use of particular content (people’s name or likenesses).... But even if it’s seen as content-neutral, strict scrutiny is still the proper test, because the right of publicity doesn’t leave open ample alternative channels for the speaker to convey the content that he wishes to convey.”).

²⁰ *Reed*, 576 U.S. at 163.

²¹ Legislators, of course, have legitimate concerns about other misuses of digital replicas, including to create pornographic deepfakes without the consent of the depicted individual, or to deceive the public in election campaigns. Some of these concerns are already being addressed in narrowly targeted legislation enacted by several states. See, e.g., Cal. Civ. Code § 1708.86 (enacted 2019) (regulating non-consensual pornographic deepfakes); Cal. Elec. Code § 20010 (enacted 2019) (regulating election-related deepfakes); N.Y. Civ. Rights Law § 52-c (enacted 2020) (regulating non-consensual pornographic deepfakes). In addition, the Uniform Law Commission is considering drafting model legislation in these two areas: <https://www.uniformlaws.org/committees/community-home?CommunityKey=470ab30f-126e-4674-b265-0184eda6638c>. MPA believes that such targeted narrowly legislation directed at specific types of harm is the best approach. Broad legislation intended to address multiple

2. Any Federal Digital-Replica Right Must be Narrowly Tailored.

But a digital-replica right must also clear a second constitutional hurdle: the requirement that any law establishing such a right be “narrowly tailored to serve” the asserted compelling government interest.²² This is not merely a formal legal requirement, but a highly practical one that goes to the heart of filmmakers’ and others’ freedom to use technology to enhance the creative process, for the ultimate benefit of audiences. Digital replicas are not something that Congress should simply aim to regulate out of existence, nor could it. To the contrary, technologies that enable depictions of real people have been used for decades in film and television. Such technologies have myriad entirely legitimate uses, ones that are fully protected by the First Amendment, and which must remain outside the scope of any digital-replica statute for it to survive a constitutional challenge under the strict-scrutiny rubric.

The new digital-replica technology powered by generative AI follows in a long line of technological innovations in depictions of individuals that allow creators to achieve their visions. Perhaps the best illustration of the use of such technology came three decades ago in the beloved and now-classic 1994 film *Forrest Gump*. The film depicted Forrest—a fictional character played by Tom Hanks—navigating American life from the 1950s through the 1980s, including by interacting with real people from that era. Famously, the filmmakers, using digital-replica technology available at the time, had Forrest encounter, and even converse with, Presidents Kennedy, Johnson, and Nixon:



distinct forms of harm is more likely to encroach on First Amendment-protected speech, which could lead courts to invalidate it on overbreadth grounds. See *United States v. Stevens*, 559 U.S. 460, 473 (2010) (“In the First Amendment context, a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’” (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n.6 (2008))).

²² *Reed*, 576 U.S. at 163.

Or to take a more recent example, the producers of the series *For All Mankind*, an alternative-history version of the U.S.-U.S.S.R. space race, use digitally manipulated videos to present a fictional version of history that incorporates real people and events. As one of the series' creators explained:

[W]e... wanted this version of our history to feel as close to reality as possible. And I think the way to do that is to use real figures. When I've seen shows like this and everyone's made up, it takes you out of it a little bit.... The nature of our show, the what-if alternate history, really makes moments like this even more important.²³

For instance, in the series, John Lennon was not murdered in December 1980 but instead lived into the Reagan Administration and is depicted as being interviewed criticizing that president:



To be clear: the filmmakers did not need permission from the relevant estates to depict these individuals in fictional settings; indeed, the First Amendment guarantees the right to use “the raw materials of life...and transform them into art,”²⁴ so that creators can tell their stories in the most compelling way possible. Any digital-replica statute must be drafted in such a way that it would not interfere with the type of storytelling technique used here.

Other examples of using technology to depict individuals include using a real person's actual image (e.g., clips of interviews with real individuals in the end credits of *I, Tonya*); or using prosthetics, makeup, and visual effects to make an actor more resemble the real person he or she is portraying (e.g., Gary Oldman as Sir Winston Churchill in *The Darkest Hour*, Nicole Kidman as Virginia Woolf in *The Hours*, or Bryan Cranston as L.B.J. in *All the Way*²⁵).

²³ Ben Lindbergh, *How They Made It: The Deeply Real Deepfakes of 'For All Mankind'*, *The Ringer* (March 5, 2021), <https://www.theringer.com/tv/2021/3/5/22314809/for-all-mankind-season-2-deepfakes-ronald-reagan-john-lennon-johnny-carson>.

²⁴ *Sarver*, 813 F. 3d at 905.

²⁵ See Matt Grobar, *'All the Way' Makeup Designer Bill Corso Delves Into His Latest Emmy-Nominated Actor Transformation*, *Deadline* (Aug. 17, 2016) (describing techniques used to transform Cranston into L.B.J. for HBO film), <https://deadline.com/2016/08/bryan-cranston-all-the-way-bill-corso-makeup-emma-interview-1201803755/>.

Notably, many biopics focus on individuals who themselves are professional performers, for example: *Maestro* (Leonard Bernstein), *Bob Marley: One Love, La Bamba* (Ritchie Valens), *Coal Miner's Daughter* (Loretta Lynn), *Being the Ricardos* (Lucille Ball and Ricky Ricardo), *Walk the Line* (Johnny Cash), *Bohemian Rhapsody* (Freddie Mercury), *Ray* (Ray Charles), *Rocketman* (Elton John), *Elvis* (Elvis Presley), *Straight Outta Compton* (the members of N.W.A.), *Love and Mercy* (Brian Wilson of the Beach Boys), *Marilyn* and *Blonde* (Marilyn Monroe), and *The Dirt* (Tommy Lee of Mötley Crüe and Pamela Anderson), among countless others. No one questions that the First Amendment protects a creator's ability to use these and similar techniques to bring verisimilitude to their work. Technology simply allows the filmmaker to do the same thing with greater realism. It supports the audience's immersion in the story and suspension of disbelief, which are critical elements of cinematic storytelling. Realism, whether enhanced by technology or not, can bring to life the historical and cultural markers that enrich a story and bring the creator's artistic vision to life.

Digital replicas can also be highly effective tools for parody and satire, forms of social or political commentary that the Supreme Court has held deserve high levels of protection.²⁶ Imagine, for example, a late-night comedy show using digital replicas to poke fun at celebrities, politicians, athletes, or whoever happens to be in the news that week—a practice used to gore oxen of all political stripes.²⁷

IV. HOW THE "NO FAKES" DISCUSSION DRAFT CAN BE IMPROVED TO PROTECT PERFORMERS' RIGHTS CONSISTENT WITH THE FIRST AMENDMENT

Before legislating a new right governing the use of individuals' NILV, MPA urges the subcommittee to first pause and analyze whether the harms it seeks to address are already covered by existing law. Often the answer will be "yes," indicating that a new law is not necessary. For example, employing a digital replica to make a false statement about someone that harms that person's reputation is (subject to First Amendment limits) already actionable under state defamation law. Using a digital replica of an individual to endorse a product without the individual's consent is actionable under both state right-of-publicity law and Section 43(a) of the federal Lanham Act.²⁸ Creating a deepfake of a CEO that tells lies about her company's financial performance to manipulate its stock price could constitute securities fraud.²⁹ Laws addressing these subjects operate without regard to the particular technology employed to violate them, and the emergence of a new technology that can be abused does not

²⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (vulgar rap song parodying Roy Orbison song "Oh, Pretty Woman"); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988) (holding unanimously that First Amendment protected parody advertisement depicting a fake interview in which religious leader Jerry Falwell discusses having drunken sex with his mother in an outhouse).

²⁷ See, e.g., *Jimmy Kimmel Live*, "Trump STILL STEWING Over Jimmy's Oscars Joke, He Spins 'Bloodbath' Remarks & We Quiz MAGA Patriots," <https://youtu.be/an0l0sfNF0?si=pJJJFrdreYauN7kC&t=342>; "Donald Trump Joe Biden Interview AI Voice," <https://www.youtube.com/watch?v=kz3HH-SBX2s>.

²⁸ 15 U.S.C. § 1125(a).

²⁹ See 17 C.F.R. § 240.10b-5.

mean that a new law to address that particular technology is necessary or advisable. And, where harms that are not adequately addressed by existing law are identified, any legislation should be narrowly and carefully tailored to address them.

Such narrow tailoring is not just good policy; it is a constitutional requirement.³⁰ If a digital-replica statute is to survive constitutional challenge, it is not sufficient for Congress to enact a broad law that encompasses both speech that is properly the subject of regulation and other speech that is protected by the First Amendment, and then leave it to the courts to determine which is which in particular cases. Rather, under the Supreme Court's First Amendment "overbreadth" doctrine, "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"³¹ It will do the intended beneficiaries of a digital-replica right no favors if a law enacted by Congress is later invalidated by the Supreme Court on First Amendment overbreadth grounds. *See, e.g., United States v. Stevens*, 559 U.S. 460 (2010) (striking down on overbreadth grounds federal statute regulating depictions of animal cruelty); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down on overbreadth grounds major provisions of the Communications Decency Act of 1996).

Below, MPA offers comment on specific provisions of the NO FAKES discussion draft that we believe can be improved in such a way that the bill will protect the legitimate interests of performers, while respecting First Amendment rights and withstanding constitutional challenge.

A. Scope of the Right

Given the high hurdles erected by the Supreme Court's strict-scrutiny and overbreadth requirements, any statute establishing a digital-replica right must clearly and expressly avoid encroaching on First Amendment-protected uses such as those described above. Thus, in the context of protecting the rights of professional performers, any right must be limited to the use of a digital replica to replace a performance by a living professional performer, where the performance is of the type that the professional performer regularly engages in for gain or livelihood, and the use is likely to deceive the public into believing that the digital replica constitutes an authentic recording in which the individual participated.³² Such a formulation would ensure that the MPA's members and other creators remain free to use technology to *depict* (rather than *replace*) individuals engaging in performances—including recording artists and actors—in expressive works such as biopics and parodies.

³⁰ *See Reed*, 576 U.S. at 163.

³¹ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

³² *See Discussion Draft* § 2(c)(1)–(2).

B. Definition of “Digital Replica”

It is also vitally important that any statute define “digital replica” to include only highly realistic representations of an individual.³³ A statute must not regulate, for example, the type of cartoon versions of real-life individuals like Don King or Bono that appear in television shows such as *The Simpsons* and *South Park*, even when such depictions are easily recognizable as the people they portray:



Such depictions are obviously protected by the First Amendment and must remain outside the scope of any statute. Thus, MPA supports inclusion of the currently bracketed “nearly indistinguishable” language in the definition of “digital replica” in Section 2(a)(1) of the Discussion Draft.

C. Statutory Exemptions

As with existing state right-of-publicity laws, any federal digital-replica right must include clear statutory exemptions to provide certainty to both creators and depicted individuals.³⁴ Such exemptions help avoid unnecessary litigation, the threat of which chills speech. Clear statutory exemptions also mitigate constitutional vagueness and overbreadth concerns. As noted above, a statute is subject to invalidation on overbreadth grounds “if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”³⁵ Properly crafted exemptions that specify that uses of digital replicas of the type that are protected by the First Amendment are outside the scope of the

³³ Bills recently enacted in New York (2020) and Louisiana (2022) include well-crafted definitions of “digital replica.” See N.Y. Civ. Rights Law § 50-f(1)(c) (“a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.”); see also La. Rev. Stat. § 470.2(4).

³⁴ States that have enacted statutes regulating the use of digital replicas in expressive works have included such statutory exemptions, which MPA urges Congress to consider as models. See N.Y. Civ. Rights Law § 50-f(2)(d)(ii); La. Rev. Stat. § 51:470.5.

³⁵ *Stevens*, 559 U.S. at 473 (citation and internal quotation marks omitted).

statute bill ensures that it will *not* encompass “a substantial number of ... applications [that] are unconstitutional.”

At a minimum, a bill establishing a federal digital-replica right must include exemptions where the use is in a work of political, public interest, educational, or newsworthy value, including for purposes such as comment, criticism, or parody, or in documentaries, docudramas, or historical or biographical works, or a representation of an individual as himself or herself, regardless of the degree of fictionalization, and for uses that are *de minimis* or incidental. The Discussion Draft includes most of these exemptions in Section 2(c)(3), for which MPA thanks the sponsors. To improve these exemptions, MPA highlights the following suggestions among those specific edits we have offered:

- The bracketed term “dramatization” should be changed to “fictionalization.” Those terms mean different things. “Dramatization” refers to the act of adapting a work from one medium to another, e.g., making a movie version of a book.³⁶ “Fictionalization” refers to the degree to which the work represents reality. Using the word “fictionalization” here ensures that the exceptions apply whether a work depicts an individual in a highly factual manner, such as in a documentary, or in a work such as a partly or largely fictionalized docudrama.³⁷
- The language in Section 2(c)(3)(B)(ii) excluding uses of a digital replica to depict “the applicable individual as that individual” is helpful and necessary. To be clear, a producer should not be able to use a digital replica of a living actor to “act” in a movie in which he or she did not participate (absent consent). However, a producer does have the right to use innovative filmmaking techniques, including digital replicas, to depict actual individuals, such as in a biopic *about* an individual, including an individual who is an actor or recording artist.³⁸ To address concerns about potentially overbroad application of this exemption, however, MPA suggests clarifying that the exemption does *not* apply where the use of the digital replica is deceptive, i.e., where “the work containing the digital replica is intended to create, and does create, the false impression that the work is an authentic recording in which the applicable individual participated.”
- The exemptions should include where the digital replica is used as part of a “work of political, public interest, educational, or newsworthy value,” as do the

³⁶ See <https://www.merriam-webster.com/dictionary/dramatized>.

³⁷ The depiction of individuals in fictionalized docudramas is protected by the First Amendment. See, e.g., *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018); *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (2021).

³⁸ See *supra*, § III(A)(2) (listing examples of biopics about professional performers).

recently enacted New York³⁹ and Louisiana⁴⁰ digital-replica statutes. As above, it would be appropriate to clarify that this exemption would not apply to where the use of the digital replica is deceptive.

D. Limitation to Living Performers

Additionally, to survive strict scrutiny, any digital replica-right must apply only to living performers. Some state right-of-publicity laws apply *post mortem*. However, those laws generally cover only commercial speech (i.e., advertising and merchandising uses)—not uses in fully First Amendment-protected speech like motion pictures.⁴¹ As discussed above, a court could determine that certain unconsented uses of digital replicas to replace living actors or recording artists could interfere with their ability to earn a living, establishing a compelling state interest sufficient to satisfy the constitutional requirement. However, that employment-based interest does not exist for deceased individuals. And other purported justifications for protecting deceased performers are unavailing. Any interest in a performer's reputation or dignity is already governed by defamation and privacy law, which is personal to the individual at issue.⁴² But recognizing dignitary interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in centuries of American law, under which "there can be no defamation of the dead."⁴³

As to financial interests, while it is understandable that heirs of deceased performers (or their corporate licensees) would like additional compensation, that desire is insufficient to overcome fundamental First Amendment rights. Indeed, the Supreme Court has held that the First Amendment must prevail over interests—such as national security concerns—that are orders of magnitude greater in importance than the financial position of performers' heirs or

³⁹ N.Y. Civ. Rights Law § 50-f(2)(d)(ii).

⁴⁰ La. Rev. Stat. § 470.5(b)(2).

⁴¹ The 2023 collective bargaining agreement between the Alliance of Motion Picture and Television Producers ("AMPTP") (which includes the MPA's members) and SAG-AFTRA does address the use of digital replicas of deceased SAG-AFTRA members. It is important to recognize that an agreement between private parties, which of course binds only those parties, is much different from legislation, which binds all subject to the law's jurisdiction and must comply with the Constitution. For example, parties to an agreement (e.g., an NDA or non-disparagement agreement) may agree not to engage in speech that would otherwise be protected by the First Amendment. But that does not mean that Congress may ban that speech.

⁴² See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted *on them* by defamatory falsehood.") (emphasis added); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 821 (1979) ("It is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that His privacy has been invaded.").

⁴³ Restatement (Second) of Torts § 560, comment a (1977); see also, e.g., *Bradt v. New Nonpareil Co.*, 108 Iowa 449 (1899) ("The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action."); *Meeropol v. Nizer*, 381 F. Supp. 29, 34-35 & n.3 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Cir. 1977) (rejecting defamation and invasion of privacy claims by children of convicted and executed spies Julius and Ethel Rosenberg over statements in book because such claims expire upon the death of the subject of the statements at issue).

their corporate successors.⁴⁴ To put it in the frame of strict scrutiny, heirs' or corporate licensees' desire to profit here is not a governmental interest at all, much less a compelling governmental interest required to satisfy incursions into a fundamental constitutional right.

E. Preemption

Any federal statute establishing a digital-replica right must preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works.⁴⁵ Enacting a federal statute that *lacks* preemptive force would only exacerbate the problems associated with the “patchwork” of state laws in this area. While many state right-of-publicity statutes contain express statutory expressive-works exemptions, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray.⁴⁶ If there is to be a federal digital-replica right, it must be carefully crafted to avoid interference with First Amendment rights and should provide national uniformity.

MPA and our members thank the subcommittee for its attention to this issue of critical importance to our members and stand ready to work with Congress and stakeholders to arrive at a solution that respects performers' concerns, while safeguarding First Amendment protections and creative freedoms.

⁴⁴ See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (Pentagon Papers case); see also Diane Leenheer Zimmerman, *Money As A Thumb on the Constitutional Scale: Weighing Speech Against Publicity Rights*, 50 B.C. L. Rev. 1503, 1514, 1524 (2009) (stating that the strict scrutiny test “normally requires a clear showing of necessity for the protection of human life, public safety, or national security—not profit aggrandizement” and arguing that economic interests do not justify encroachment on First Amendment rights, except in highly unusual circumstances where denying a celebrity’s claim would result in “significant, highly particularized, and non-speculative” risk of “failure in the primary market for his talents”).

⁴⁵ To be clear, MPA is *not* advocating that a federal statute establishing a digital-replica right preempt “traditional” state right-of-publicity laws that apply to commercial uses of an individual’s NILV (i.e., in advertisements or on merchandise). Rather, we are only advocating for preemption as to state statutes that regulate NILV *in expressive works*.

⁴⁶ See Eugene Volokh, *The First Amendment, the right of publicity, video games and the Supreme Court*, The Washington Post (Jan. 4, 2016) (“Unfortunately, there are now five different First Amendment tests that lower courts use in right of publicity cases (setting aside cases involving commercial advertising, which is less constitutionally protected than other speech).... Unsurprisingly, these different tests often lead to inconsistent results, which leave creators and publishers uncertain about what they may say.”), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/04/the-first-amendment-the-right-of-publicity-video-games-and-the-supreme-court/>; Amicus Brief of 31 Constitutional Law And Intellectual Property Law Professors as Amici Curiae in Support of Petitioner in *Electronic Arts, Inc. v. Davis* (Supreme Court Case No. 15-424) (identifying five different tests: 1) the transformative use test, 2) the transformative work test, 3) the relatedness test, 4) the predominant purpose test, and 5) the balancing test)), <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>.

**Questions from Senator Tillis
for Tahliah Debrett Barnett (FKA twigs)
Witness for the Senate Committee on the Judiciary Subcommittee on Intellectual Property
Hearing “The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas”**

- 1. Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?**

Platforms should be responsible for taking down stolen works and unauthorized deep fakes immediately, and irresponsible platforms should be held accountable under the law. As I mentioned during my appearance before the Committee, 85 of my unreleased songs were recently leaked online, which could have put my entire next project in jeopardy. My label helped issue takedown notices and we were able to get the content removed. If the platforms had not faced the threat of legal liability if they failed to take it down, I am not sure I would have had the same positive result. Platforms must be incentivized to do the right thing.

- 2. Regarding the NO FAKES Act, do you agree that individuals should only have the right to license out their digital likeness if they are represented by counsel or a member of a union? If so, why?**

To fully benefit from the opportunities of AI, I should be able to license the right to use my likeness and voice on terms that I freely negotiate. Licensing those rights presents a possible, additional source of revenue.

I understand concerns around artists and other individuals who could sign licensing deals that they do not fully understand or that they later regret, particularly for those who are young or early in their careers. To this end the importance of limiting licensing agreements in time subject to reasonable renewable contractual terms and conditions must be made clear and provided for. There should be no suggestion of or opportunity for licensed rights being given in perpetuity. Equally, the NO FAKES Act, should also provide for protection of the artist's rights and image after their death in perpetuity. The law already provides for individual and societal protection from theft, fraud and crime related to deceased impersonation, developed identity and fraudulent misrepresentation. This should be no different because we are dealing with AI in the context of the performing arts. Identity theft and fraudulent misrepresentation is unlawful whatever the medium used and I would expect the Act to reflect this and make the appropriate links to existing laws. As I understand it, the proposed Bill would require that artists who license their rights must be represented by legal counsel to ensure they fully understand what they are agreeing to. Those types of safeguards seem reasonable, but otherwise, the government should not place additional limitations.

I would caution against going too far in this respect and taking away or limiting artists' power to make their own decisions about their faces, voices, and works, or making the right so restrictive that it limits their opportunities to monetize the right. To ensure the right has value to the right holders, it must be monetizable, which may require working with others who can help market and amplify it.

3. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

I will let the American lawyers debate the intricacies of US Federalism. What I can say is that I have worked hard for my image, reputation, and voice to be of commercial value in all 50 states and internationally. I need certainty across the United States that my legal protections do not depend on which state I am working in or where a bad actor appropriates my work. There should be a Federal law that establishes nationwide protections, but it should not prevent states from enacting additional protections or responding to new problems as they emerge.

4. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

I am very concerned by the categorical exemptions in the NO FAKES Act. As I understand the current discussion draft, the bill could allow a movie studio to make a "biographical" film about me and use AI to put me – my face, my voice, and my body – in places I never was and doing things I never did, and leaving me powerless to object to what is essentially the commercial release of my autobiography by a third party. I am especially afraid of how this loss of bodily autonomy in films could affect young women who could be depicted in intimate and inappropriate ways.

My understanding is that no court has ever said that the First Amendment requires this extreme license to put words in others' mouths, and Congress should not permit it now. No studio should be allowed to produce a project using my likeness or voice without my permission or that of my Estate or other legally appointed representatives. There is no censorship or limitation of First Amendment freedoms if I decline to authorize the use of my likeness or voice; the studio remains free to produce the project using an actor to portray an approximation of me, just as they do today.

5. Will deep fakes potentially dissuade talented individuals from becoming artists?

Absolutely. If anyone can produce a deep fake using my likeness or voice without my permission, it will directly undermine my ability to make a living as an artist. It will not only discourage future generations from pursuing a career in the creative industries, but it will also kill the sector as a viable career option for them. It has always been challenging to have

a career in music and the creative industries. Without reasonable guardrails, deep fakes can make it impossible.

As an artist, I have spent my entire life and career developing my individual style and artistry to express my thoughts, my lived experiences, and my aspirations and desires. My voice and likeness are the foundation of my identity and my ability to make a living from my creativity.

If Congress does not seize this opportunity to create an intellectual property right to our likeness and voice, artists will have no say over how our identities are used and, for those of us who want to lean into AI and grant those rights, we will be denied an opportunity to benefit when our own identities are used by others. I would also be concerned to ensure that the Act is equally secure in enabling protection of my personal reputation and integrity, as well as those of others in society from fraudulent misrepresentation using AI.

6A. How does it feel to see unauthorized AI fakes depicting and sounding like you?

Finding songs online, including collaborations between me and other artists that I did not create, makes me feel vulnerable because, as an artist, I am very precise. I am thoughtful and purposeful, and I take my time to create work that I am proud of. My fans trust me because they know that I put so much of myself into what I do.

The fact that somebody can take my voice, change the lyrics, change messaging, maybe work with an artist who I didn't want to work with, or maybe work with an artist who I wanted to work with is inherently wrong. This leaves me feeling very raw and very vulnerable.

It is intensely offensive to think that an AI developer can rob me of my identity and my artistry, without my permission and without compensation, to create new content that competes with my original creative work. It is wrong and immoral, and it should be illegal.

6B. How does it affect your art and your business?

The proliferation of unauthorized deep fakes will present an existential threat to creators. It threatens us professionally, financially, artistically, spiritually, and intellectually. We are entering a world where artists are actually competing with deep fake versions of themselves for revenue on streaming platforms.

Unauthorized deep fakes can harm a performer's reputation by using their voice to sing offensive lyrics that alienate their audience, that misrepresent their artistry, or that embarrass or humiliate the artist. Once something is out in the world, we cannot take it back and it can have a lasting impact on artists' income, reputation and relationship with their fans.

Creativity over time will be stifled, and the cultural harm to society will be dramatic. For many artists, it would be a career ender.

**Questions from Senator Tillis
for Duncan Crabtree-Ireland
Witness for the Senate Committee on the Judiciary Subcommittee on
Intellectual Property Hearing “The NO FAKES Act: Protecting
Americans from Unauthorized Digital Replicas”**

1. Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?

A carefully crafted notice and takedown provision could benefit all parties, providing artists and their representatives, and individuals, an expedient mechanism for removing content online.

To effectively slow or stop the distribution of content in violation of the Act, a notice and takedown should be approached as “notice and stay down,” rather than allowing a counter-notification provision, such as is in 17 USC § 512(c), that is susceptible to abuse by the very people it is intended to protect against. For example, in attempting to protect SAG-AFTRA’s rights in content we own and produce, our takedown notices to the online platforms were frequently met with entirely baseless counter-notifications by users who had no rights to use the content, let alone any legal basis for a counter-notification. These were purely coming from users rolling the dice that we would not take the only remedy left to us, which was to initiate costly litigation. This kind of loophole, and costly remedy, could be devastating to an individual whose voice or likeness is digitally cloned and proliferating online.

While the damage done by infringing copies of a copyrighted work that remain online pending litigation is largely limited to economic damages, the damage of digital replicas are far more dangerous. They pose a risk to consumers and fans misled by the content, to businesses who might be associated with the individual, and they devastate individuals’ lives and

careers. It is particularly problematic where the use deceives the public, such as the robocall featuring President Biden.

We would welcome the opportunity to work with the authors to ensure that a notice and takedown regime works in a manner consistent with the intent of the Act.

2. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

There is decades of established jurisprudence relating to state right of publicity laws which create a workable foundation. There is a good understanding of what is permitted and prohibited when it comes to traditional, commercial uses of name, image, voice and likeness. However, one of the prime focuses of this bill is digital replica use, especially via AI. We are comfortable with the No Fakes Act specifically and solely preempting conflicting state laws that regulate digital replica use in audiovisual works and sound recordings.

3. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

The known consequence of not passing the NO FAKES Act and the resulting continued threat to the livelihood and control over their identity to our members is much greater than any unintended consequence that has been expressed. The language in the law itself balancing these rights with the 1st amendment, and potential language incentivizing take downs by platforms, will mitigate any unintended consequences.

4. There is a provision in the draft bill that some have characterized as a giveaway to unions. Specifically, a giveaway to your union. Under the current draft legislation, individuals only have the right to license out their digital likeness if they hire an attorney or are a member of a labor organization.

The No Fakes Act does not require someone to be a member of a labor organization to gain its protections against unfair licensing. If a union has bargained protections over replica licensing in certain industries, the workers protected in that industry include nonmembers who work that contract. Federal law recognizes the role that collective bargaining representatives have in these types of situations. It is sound policy to acknowledge that labor organizations are in a strong position to protect individuals from the abuse of their rights, stronger than those individuals are able to do so by themselves.

Unions have proactively negotiated consent and payment guardrails for digital replica licensing in film, TV and music. These guardrails are not just for high profile individuals but for all performers, including background actors and voice professionals. These guardrails should be seen as model provisions for protection against abuse.

What are some other areas of law where an individual can only fully assert a property right by being represented by counsel or represented by a labor organization?

Licensing one's digital identity to another party is unlike any other form of property transfer. The purpose of the provision is to ensure individuals are able to protect themselves from unfairly losing control over their identity in a negotiation with entities who have outsized leverage.

If a union has not already bargained digital replica protections for the worker, the bill mandates legal representation. We are open to considering other limitations on licensing, including; time limits (CA limits a personal service contract to 7 calendar years for example), mandating detailed descriptions of use and one project at a time consent, and finally, establishing the principle that control and ownership of an individuals' cloned voice and likeness never actually transfer, they are only leased for specific, fairly bargained and consented to, uses.

There are multiple instances of complex contracts involving corporate entities and individuals who have little or no leverage. A recording artist with a record labels is one such example. Those contracts almost always make the individual artist represent and warrant that they sought and acquired guidance from qualified legal counsel prior to signing the contract. When it comes to allowing an entity to digital clone your voice & likeness, we believe the highest level of protection is mandated, and that means mandating adequate legal or union representation.

Collective bargaining agreements have a long history of providing backstops to state labor laws, to ensure workers have the best available protections. State laws are regularly drafted with provisions stating that either the law, or an applicable collective bargaining agreement, control the issue for the worker. Unions have already fought hard, and in our case endured a 4 month, to build basic protections over digital replica use. Those protections should be recognized.

**Questions from Senator Tillis
for Graham Davies**

**Witness for the Senate Committee on the Judiciary Subcommittee on Intellectual Property
Hearing “The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas”**

- 1. Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?**

DiMA's members are the leading streaming platforms in the world representing the majority of music content consumption. They primarily ingest content from trusted music partners. There is a risk that the NO FAKES Act will penalize good actors as well as bad if the liability provisions are too broad.

Further, the bill should acknowledge that even the best actors cannot know the complex chain of rights behind each of the more than 100 million tracks on their service. Indeed, that is the case today, even without new rights for AI, and the rights landscape only becomes more complicated when questions about AI are entered into the equation.

We believe that liability in general should fall on the original creator, which is the basic premise of any legal regime – that the perpetrator should be held accountable. Liability should similarly rest on those that first release offending content into the supply chain. Such a construct is even more important in the consent-based model that NO FAKES envisions, as the creator - and those closest to the content - are in the best position to know whether consent was obtained and relevant facts around how the likeness was created. They are also in the best position to defend the legality of the content, either because consent was obtained, because AI was not used, or a statutory exception applies. The further liability moves downstream from the original creator, the greater the risk of overenforcement.

Based on the supply chain of DiMA's members, and the points above, we do not believe that secondary liability is appropriate in this context. To the extent that secondary liability exposure is created under a new law, the law should ensure that it is rare—and applies only upon a finding that the service actually knew the content was on its site and was unlawful. It should also include a safe harbor that provides complete immunity when a service removes specifically identified content upon notice.

Critically, notice should not be sufficient to establish knowledge for purposes of determining liability, to ensure that the issuer of the notice doesn't act as the arbiter of the legality of the content.

- 2. Regarding the NO FAKES Act, do you agree that individuals should only have the right to license out their digital likeness if they are represented by counsel or a member of a union? If so, why?**

As a general matter, we believe this is an issue best left for artists and their advocates to determine. DiMA members do not represent artists, and we do not purport to speak on their behalf.

Organizationally, we note that an individual should never lose control of their voice as a matter of public policy. Artists at the beginning of their careers can be vulnerable and may face additional risks of making a decision that could impact their future career or ability to control their works (or in the case of this legislation, their name, image, likeness, and voice). To that end, we appreciate the proposals to mitigate such risks by requiring individuals to be represented by counsel or unions but have concerns that such requirements could both add burdens to creativity and freedom to contract and also insufficiently guard against the danger presented.

3. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

Yes. Congress should create a single, uniform, national rule that establishes a comprehensive and effective framework. Failure to preempt state law will only exacerbate the problem of the current inconsistent patchwork of laws. In addition to existing right of publicity laws at the state level, multiple bills more specifically related to AI are under consideration (or have been recently enacted) in numerous states. The proliferation of varying, and at times conflicting, laws leads to confusion and inconsistent application. The music industry does not operate on a state-by-state basis, but rather has a global reach with rights affecting global companies. Federal preemption is critical to provide for a strong, clear, consistent right, rather than a patchwork of protections and obligations.

4. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

As currently drafted, we foresee a number of unintended consequences with the NO FAKES Act, including:

- The commodification of an individual's immutable characteristics – their very personhood – by treating the right as an IP right, may be counterproductive to the goal of protecting an individual's interest in preventing unwanted uses of their image or voice.
- The NO FAKES Act sweeps in a broad range of downstream activities, including secondary actors who merely 'transmit' a digital replica, subjecting them to the full range of remedies that can be levied against actual bad actors. As currently drafted, NO FAKES would punish bad and good actors alike.
- The bill as currently drafted – with significant risk of liability on downstream services that have no involvement in the creation of offending content – would incentivize services to overly restrict or remove constitutionally protected and otherwise lawful content. Faced with unbounded liability under uncertain legal conditions, there is a

serious risk that services will significantly over-screen or censor content, threatening free speech, creative freedom (and revenue for legitimate work), and consumer choice.

- By explicitly declining to preempt any law that “provides protection against the unauthorized use of the image, voice, or visual likeness of the individual,” the bill could actually encourage further fragmentation and confusion among the various state and federal laws.

5.

A. Do your members take down unauthorized AI fakes if they receive a notice from the person whose likeness or voice is being exploited without their permission?

DiMA members have strong relationships with their rightsholder partners. In the most well-known example of an AI generated song – the Drake and The Weeknd “Heart on My Sleeve” track – the track was removed expeditiously from DiMA member services in accordance with their policies and procedures, including rightsholder requests.

Our services are incentivized to act responsibly to work with rightsholder partners and protect consumers and have a strong track record of working closely with partners to remove violating content in a timely way.

B. How long does it generally take currently from notice to removal?

This may vary from member company to member company, but the services are incentivized to, and do, respond expeditiously.

C. What does a person have to do to have something removed?

Services publish their privacy, community, and other terms and guidelines on their individual sites. These policies are evidence of the voluntary steps that DiMA members take to be good partners and good actors.

While I am not privy to the contracts that exist between DSPs and rightsholders, as they are subject to confidentiality, I understand that further terms are generally included in agreements between these private parties.

6.

A. How are your member companies currently handling deep fake recordings, which are submitted to them for distribution?

Our services are incentivized to act responsibly to work with rightsholder partners and protect consumers. They have a strong track record of working closely with partners to prevent violative content from being submitted for distribution, and removing it in a timely way, as well as various policies and guidelines incorporated in terms of service

B. What policies are currently in place to deal with this?

Policies and procedures vary from member company to member company. Some such policies may be included in the individual contractual relationships that DiMA members have with rightsholder partners. Services also publish terms of service.



May 21, 2024

Senate Committee on the Judiciary
 Attn: Madeline Lubeck, Hearing Clerk
 224 Dirksen Senate Office Building
 Washington, DC 20510

via email: Record@judiciary-dem.senate.gov

Re: Response to follow-up questions for the record from Senator Tillis regarding the hearing concerning "The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas"

Dear Ms. Lubeck,

Thank you for the opportunity to appear before the Senate Judiciary Subcommittee on Intellectual Property on April 30, 2024, to speak on behalf of Warner Music Group (WMG) and the recorded music industry in support of the NO FAKES Act. I appreciated the thoughtful exchange with the Committee and welcome the additional questions from Senator Tillis, which I am happy to provide answers to below.

1. Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?

Online platforms have an important role to play and need to act responsibly. It is not realistic to expect that platforms will expeditiously take down unauthorized deep fakes unless there are consequences for violations, particularly if the deep fakes drive viral engagement.

WMG is not opposed to a notice-and-takedown system that provides rightsholders with a simple mechanism to have unauthorized voice clones removed immediately. The growing proliferation of unauthorized deep fakes requires not just a way to notify platforms of infringements, but also technological solutions that can match the speed and scale of the problem.

Congress should be careful to avoid the pitfalls of the Digital Millennium Copyright Act (DMCA). The DMCA notice-and-takedown process was created 26 years ago and has resulted in major inefficiencies, disincentivized responsible behavior, and placed too great a burden on rightsholders. Platforms should cooperate with rightsholders and enable systems that work more effectively than the endless "whack-a-mole" process that resulted from the DMCA. The provision should dictate takedown and staydown so the removed content can't be immediately re-uploaded.

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Any takedown provision should be simple and effective, and should err on the side of protecting the individual whose likeness and voice is being used. If there are questions regarding whether a particular unauthorized use is protected by the First Amendment, the content should be kept down pending a final adjudication to avoid potentially irreparable reputational or financial harm.

2. Regarding the NO FAKES Act, do you agree that individuals should only have the right to license out their digital likeness if they are represented by counsel or a member of a union? If so, why?

All of the artists WMG negotiates with are represented by counsel, and many of them are also members of a union. While artists are ultimately the best judges of what is right for them and should be able to freely negotiate commercial terms, we support public policies that encourage attorney or union representation.

3. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

WMG urges Congress to pass a strong federal law protecting individuals from the unauthorized exploitation of their digital replicas. To ensure that federal voice and likeness protections prevail over conflicting state laws and to establish a uniform intellectual property right across every state, limited preemption would be appropriate to the extent of the scope of the new federal right. But state laws that provide enhanced protections and that are supported by decades of helpful jurisprudence regarding protection of voice and likeness should be allowed to stand to the extent they do not conflict with the federal law.

4. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

Congress must protect Americans' First Amendment speech rights in the age of AI, but maintaining the discussion draft's broad categorical exemptions for speech that go beyond First Amendment protections risks causing widespread abuse and depriving deserving individuals of remedies in cases where the unauthorized use of their likeness or voice goes beyond what is protected by the First Amendment. The First Amendment does not protect specific categories of speech. The Courts balance the facts in each case to determine whether a particular use is protected under the circumstances. The ELVIS Act, which was recently enacted in Tennessee and could be instructive here, strikes the right balance as it allows for certain unauthorized uses to the extent they fall within First Amendment protections.

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It is not appropriate simply to apply copyright exemptions to a new Federal right of publicity. The nature of the rights are different and, therefore, they should be treated differently. Freedom of speech fundamentally protects the right of every American to express their own views and thoughts. Freedom of speech does not, and should not, extend to putting thoughts, views and expression into other people's mouths, which would be a violation of the mimicked individual's First Amendment right to self-expression.

Arguments that this Bill will kill parody and satire, like "Saturday Night Live", or limit the production of documentaries and biopics are nonsense. Parody and satire are alive and well without using generative AI. Documentaries rely on factual information and archived footage or recordings. Recreating a fictionalized version of events as imagined by a screenwriter is not a documentary. There should be no right to use a real person's voice and image in a fictionalized or dramatized version of events that may or may not have happened, particularly when the audience may be confused as to what is genuine and what comes from the imagination of the producer or screenwriter. If an individual refuses to authorize the use of their voice or likeness for a particular project, the producers can hire an actor to portray the individual, just as they do today.

5A. Can you walk me through what rights artists typically grant to record labels under an exclusive sound recording agreement?

WMG offers a variety of contract options to artists, ranging from DIY to distribution-only deals to distribution plus services deals to full-service recording contracts depending on the services that the artist desires. All distribution-only deals, distribution plus services deals and full-service recording deals contracts are individually negotiated.

In a traditional, full-service exclusive recording contract, the label and artist typically agree to an initial recording term during which the artist agrees to record and deliver, and the label agrees to fund, one album, with a negotiated number of options to extend the recording term for the delivery of additional albums. The label receives exclusive rights to all sound recordings created during the recording term either for life of copyright or an otherwise mutually agreed period of time and the right to market, distribute, sell and otherwise license the recordings during that period.

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5B. Are likeness rights included?

Typically, for the exclusive term of a recording contract, the label is granted exclusive name, likeness, image and voice rights limited to uses related to sound recordings, including the right to publicize and market the recordings.

5C. Why do you believe these new digital replica rights need to be fully transferable? Why isn't a license enough?

The rights need to be fully transferable so artists, if they wish, have the opportunity to better monetize them.

6. Why has the music industry pushed back against broad categorical exceptions?

See answer to Question 4 above.

7. Some have suggested that existing IP and publicity laws are enough to address AI fakes.

a. Why do you think that Congress needs to act?

Simply browsing any social or news media platform and seeing the mass proliferation of deep fakes, reports of election interference and non-consensual pornography should be enough to demonstrate that existing intellectual property and publicity laws are insufficient to protect Americans' likenesses and voices. The practical challenges of enforcement under the existing state framework are vast, and I appreciated Senator Tillis' candid and thoughtful remarks at the hearing on his position that Congress must do something to address these problems.

There is currently no federal law that is fit for the purpose of addressing AI-generated unauthorized voice and likeness replicas. State publicity laws are a patchwork of inconsistent statutes and common law that cannot provide certainty in the age of AI or for individuals doing business nationwide. A federal intellectual property right for voice and likeness would provide uniform, baseline protections regardless of where a person lives.

To date, many platforms have taken down deep fake recordings based on copyright claims. However, there is a gap in the law to address cases when a deep fake recording does not infringe an existing copyrighted sound recording or musical composition. In those instances, there is no federal law that allows the individual whose voice is being appropriated to demand that the recording be taken down. Between June 2023 and April 2024 when I appeared before

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the committee, the music industry issued more than 60,000 notices asking digital platforms to remove deep fakes featuring known artists' voices and likeness. Of those, around 26,000 were based on personality rights alone (i.e., they did not infringe an existing copyrighted sound recording or musical composition). Without a clear federal legal framework protecting these rights, some platforms have argued that they are not required to remove them unless the deep fake contains unauthorized copyrighted sound recordings or musical compositions.

b. How responsive have platforms been to takedown requests for AI fakes?

Some platforms have responded to our requests for removal and some have resisted. Some take AI fakes down in a matter of hours, others take days or weeks, and others simply do not act. Some have argued that under Section 230 of the Communications Decency Act, they are not required to remove them. Some have argued that because there is no Federal right they are not required to remove them.

8. In your opinion, does the release of a song using an artist's voice, without permission, affect an artist's career?

Unauthorized deep fakes could have a devastating impact on artists, who spend years developing and honing their distinctive voice and style upon which their careers are based. Each artist's likeness and voice belong to them. Allowing others to steal their likeness and voice is tantamount to stealing their business and career, and puts the artist in the perverse position of competing with themselves for revenue on streaming platforms. Unauthorized exploitation of an artist's voice robs them of their autonomy and control over their artistic vision, and interferes with their relationships with fans. The effects could be destructive personally and financially, and could dilute the quality of the art that fans have come to rely on. The societal cost is a stifling of creativity that leaves us diminished culturally.

To be clear, there are multiple examples of responsible uses of generative AI to reinvigorate or expand an artist's career and work. In my testimony, I mentioned the examples of using AI to help recreate legendary lost voices like those of French chanteuse Edith Piaf and Costa Rican singer-songwriter José Capmany in collaboration with their estates. On May 5, following my appearance before the Subcommittee, we released "Where that Came From," a new recording by American icon Randy Travis who suffers from aphasia following a stroke of more than a decade ago. AI has allowed him to release new music in his voice and style. The recording highlights our commitment to putting human artistry first and using AI collaboratively with our artists to expand and enhance their creativity.

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9. Some have called for digital replica legislation to include a mechanism that allows individuals to regain rights to their likenesses after a certain period of time, if they have licensed or transferred control to a rightsholder, such as a record label. What are your thoughts on this effort?

Allowing an artist the ability to renegotiate the terms of use of their voice and likeness rights after a certain period of time in some cases may be appropriate. For example, if the term of rights under the NO FAKES Act is life plus 70, the same as the duration of copyright, it could make sense to include a termination right akin to the termination right under Section 203 of the Copyright Act.

Once again, I appreciate the opportunity to contribute to the Subcommittee's work as you consider a Bill that would establish a Federal right of publicity. I strongly urge Congress to pass legislation this year to protect the likeness and voice of Americans from unauthorized appropriation by generative AI systems. Should Members of the Committee have additional questions for me or require clarification as they consider the Bill, please contact Mark Baker (mark.baker@wmg.com; +1-917-319-0624).

Sincerely,



Robert Kyncl
Chief Executive Officer

cc: Michelle Ankenbrand (Michelle_Ankenbrand@judiciary-dem.senate.gov)
James Barton (James_Barton@judiciary-dem.senate.gov)

Answers to Questions from Senator Tillis for Lisa Ramsey

U.S. Senate Committee on the Judiciary
 Subcommittee on Intellectual Property April 30, 2024 Hearing on
 “The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas”

May 21, 2024

Lisa P. Ramsey
 Professor of Law
 University of San Diego School of Law

Chair Coons, Ranking Member Tillis, and other Members of the Subcommittee: Thank you for the opportunity to answer the following Questions from Senator Tillis for the Record.

Question 1: Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?

I do not recommend enacting a strict liability rule in the No FAKES Act if such a rule would apply to companies, organizations, or human beings that do not intentionally or knowingly create or disseminate an unauthorized “digital replica” of an individual.¹ Imposing strict liability in these circumstances will stifle innovation and chill expression protected by the First Amendment. Below I provide some background information about the legal doctrines of direct and indirect liability, as this relates to the current strict liability rule in the Act and your question of whether online service providers should implement a notice and takedown provision. I also recommend that Congress include a safe harbor defense in the Act for companies that implement an effective notice and takedown system with a counter notice provision, as this will protect online service providers from liability for their users’ wrongful actions regarding unauthorized digital replicas.

Direct and indirect liability rules in the No FAKES Act

Potential defendants under the No FAKES Act. The proposed No FAKES Act currently applies to any “person” (including companies, organizations, and human beings) that engages in certain activities relating to unauthorized digital replicas of the image, voice, or visual likeness of an individual which are newly created and computer generated. The activities set forth in Section 2(c)(2) include “(A) [t]he production of a digital replica without consent of the applicable

¹ Section 2(a) of the October 11, 2023 discussion draft of the No FAKES contains the following definition of a “digital replica”: “The term ‘digital replica’ means a newly-created, computer generated, electronic representation of the image, voice, or visual likeness of an individual that—(A) is [nearly indistinguishable] from the actual image, voice, or visual likeness of that individual; and (B) is fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear.” (brackets in original). Section 2(b) (“Digital Replication Right”) explains that individuals have the right to authorize use of their image, voice, or visual likeness in a digital replica and may license or transfer their digital replica right to others in certain circumstances. For the sake of clarity and to avoid repetition, in this document I use the phrase “individual” when discussing the person depicted in the digital replica and “human being” to refer to a person that uses that individual’s digital replica, as phrases like “when an individual uses an individual’s voice” may be unclear.

individual or rights holder” and “(B) [t]he publication, distribution, or transmission of, or otherwise making available to the public, an unauthorized digital replica, if the person engaging in the activity has knowledge that the digital replica was not authorized by the applicable individual or rights holder.” Section 2(c)(2)(A) is a strict liability provision, while Section 2(c)(2)(B) only applies if the defendant has knowledge this is an unauthorized digital replica. Both provisions impose liability even if the defendant has no intent to harm the individual.

My understanding is that this language in Section 2(c)(2) of the proposed No FAKES Act covers (or could be interpreted to cover) the following potential defendants:

- (1) **human creators of unauthorized digital replicas:** human beings that engage in conduct that directly results in the production of an unauthorized digital replica of an individual, such as by asking an artificially-intelligent computer program in one or more prompts to generate a new electronic representation of the image, voice, or visual likeness of that individual without consent of the individual or rights holder;
- (2) **entity creators of unauthorized digital replicas:** technology companies and others that sell or provide goods or services that enable human creators to produce unauthorized digital replicas of an individual;²
- (3) **online service providers that host or disseminate unauthorized digital replicas:** online service providers that did not create the unauthorized digital replica but that—with knowledge that the digital replica created by another is unauthorized—sell or provide services that allow users to upload the unauthorized digital replica to their platform (such as a website or app), and then publicly display or perform, distribute, transmit, or otherwise make available to the public that unauthorized digital replica;
- (4) **humans that host or disseminate unauthorized digital replicas:** human beings who—with knowledge the digital replica created by them or by another is unauthorized—upload or repost that unauthorized digital replica, and then publicly display or perform, distribute, transmit, or otherwise make available to the public that unauthorized digital replica (such as through a personal website, texts, emails, social media posts, or other activities on an online platform); and
- (5) **employers of humans who violate the No FAKES Act:** an employer of human beings who create, host, or disseminate the unauthorized digital replica in a way which violates the Act if those employees are engaging in those activities within the scope of their employment.

Some of these defendants are strictly and directly liable under the Act for creating or disseminating the unauthorized digital replicas, while other defendants are indirectly liable for the wrongful conduct of others in certain circumstances if they have knowledge that the digital replica was not authorized by the applicable individual or rights holder.

² Note that human beings could—like entities—personally sell or provide goods or services that enable other human creators to produce unauthorized digital replicas of an individual. To distinguish these human beings from the human creators that engage in conduct that directly results in the production of the unauthorized digital replica and to simplify the discussion below, I use the term “entity creators” for this category of potential defendants that include these human beings who are not themselves asking the artificially intelligent computer program to create a particular digital replica of an individual.

The legal doctrines of direct liability and indirect liability. The proposed No FAKES Act contains a strict liability provision that imposes direct liability on a human being or entity that produces an unauthorized digital replica regardless of their mental state. Section 2(c)(A), which applies to “[t]he production of a digital replica without consent of the applicable individual or rights holder,” does not require an intent to cause harm, knowledge that a certain sound recording, image, or audiovisual work actually contains a “digital replica” of an individual as that term is defined in the Act, or knowledge that this digital replica is unauthorized. (Most human creators of unauthorized digital replicas likely know this song, picture, or video contains a “digital replica” and that they produced it without the consent of the individual or rights holder, but some may not.) This is a direct liability provision because it imposes liability on defendants that intentionally engage in the conduct which violates the law—here, the production of a digital replica without consent.

Indirect liability provisions hold an entity or human being who did not directly or intentionally engage in wrongful conduct liable for the unlawful actions of others in certain circumstances.³ For example, employers may be vicariously liable for violations of the law by their employees if the employees were acting within the scope of their employment when they directly engaged in the wrongful activity. The employer may be indirectly liable even if it did not know its employees were violating the law if the employer financially benefited from this conduct and had the ability to control it. In addition, companies, organizations, and human beings may also be indirectly liable for contributing to another’s direct violation of a law by intentionally inducing or encouraging that unlawful conduct, or by continuing to supply their goods or services to bad actors after learning about specific instances of their illegal activity.⁴ Knowledge of the direct infringer’s unlawful conduct is required for these types of indirect liability claims. One reason for this rule is that it is impossible to deter behavior that is not done knowingly.

Entity creators of unauthorized digital replicas. Like human creators, entity creators of digital replicas may be directly liable under Section 2(c)(A) if their goods or services are used by human creators to produce an unauthorized digital replica regardless of whether that entity knew that bad actors were using their products to violate the Act. Moreover, Section 2(d)(3)(B) states that “[i]t shall not be a defense in a civil action brought under this subsection that the defendant . . .

³ Note indirect liability is also called “secondary liability” or “intermediary liability” when online service providers host or disseminate harmful content uploaded or created by their users. The distinction between strict liability for direct infringement and requiring intentional acts or knowledge for indirect infringement is universal across intellectual property laws. Patent, copyright, and trademark infringement are each strict liability offenses; one can directly infringe without intent or knowledge. On the other hand, inducing or contributing to patent, copyright, or trademark infringement can only be accomplished with intentional conduct and/or knowledge of another’s wrongful behavior, respectively.

⁴ For example, compare the direct liability provision in federal patent law, 35 U.S.C. § 271(a) (patent infringement), with the indirect liability provisions in 35 U.S.C. § 271(b) (inducement of infringement) and 35 U.S.C. § 271(c) (contributory infringement). The federal copyright and trademark statutes do not have separate provisions covering indirect liability, but these doctrines have been developed by the Supreme Court in the common law. See *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster*, 545 U.S. 913 (2005) (applying inducement theory in a copyright dispute); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (borrowing standards from the patent statute for contributory infringement liability in copyright law); *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844 (1982) (discussing contributory infringement in trademark law); *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010) (same).

did not participate in the creation, development, distribution, or dissemination of the applicable digital replica.” The technology company may not know that its users are entering prompts that result in their computer program producing unauthorized digital replicas that violate the law. They may not want their users to engage in this wrongful conduct. On the other hand, some entity creators may actively encourage violations of the law and/or knowingly participate in the creation or development of an unauthorized digital replica.

Congress should consider revising the No FAKES Act so that a technology company is not directly liable for the wrongful conduct of its users when that entity did not intentionally induce human creators to produce unauthorized digital replicas and the goods or services of the entity creator can be used in ways that do not violate the Act. Examples include use of the company’s computer program to create authorized digital replicas, or to produce unauthorized digital replicas that are displayed or performed in nondeceptive ways in news reporting, a documentary, parody, or criticism.⁵ In patent and copyright law, courts consider whether a defendant’s product has substantial noninfringing uses when determining indirect liability, so a similar approach makes sense here. The sponsors of the No FAKES Act should revise the draft bill so that entity creators of digital replicas are not strictly or directly liable under the Act when they did not intentionally or knowingly produce unauthorized digital replicas. This will make the bill (if passed) less likely to chill innovation in the digital technology field.

The bill should instead provide that technology companies and other entity creators can be sued under a theory of indirect liability. Thus, if that company actively encouraged human creators to produce unauthorized digital replicas that violate the Act, the Act could allow that entity to be held indirectly liable for intentional inducement of this unlawful conduct if it had knowledge its users were producing unauthorized digital replicas.

Hosting or disseminating unauthorized digital replicas.⁶ For defendants that engage in the “publication, distribution, or transmission of, or otherwise making available to the public, an unauthorized digital replica,” Section 2(c)(2)(B) only imposes liability if the defendant has “knowledge that the digital replica was not authorized by the applicable individual or rights holder.” This is a direct liability provision for entities and human beings that knowingly engage

⁵ Section 2(c)(3) of the proposed No FAKES Act contains a list of specific exclusions for the applicable digital replica’s

- (A) use as part of a news, public affairs, or sports broadcast or report;
- (B) use in documentaries, docudramas, or historical or biographical works that depict the applicable individual as that individual;
- (C) use for purposes of comment, criticism, scholarship, satire, or parody;
- (D) use in an advertisement or commercial announcement for the purposes described in (A), (B), or (C); or
- (E) use in ways that are de minimis or incidental.

These exclusions can apply regardless of the degree of dramatization. As discussed in my written testimony, it is critical to include these types of specific exclusions to liability in the Act to increase clarity and predictability in the law for potential defendants and online service providers who receive notice and takedown requests that may be frivolous. Please see that testimony for some suggested revisions to the Act relating to these exclusions.

⁶ For useful information about the United States’ legal framework governing online service providers that publish third-party content and how Section 230 of the Communications Decency Act protects free speech on the Internet, see Eric Goldman, *The United States’ Approach to ‘Platform’ Regulation*, Santa Clara Univ. Legal Studies Research Paper (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404374.

in this unlawful activity, and an indirect liability provision when applied to online service providers whose platforms are knowingly used by others who are directly engaging in wrongful conduct. Once an online service provider is informed via a valid notice and takedown request that its user added an unauthorized digital replica of an individual to its website or app, it may be liable for contributing to another person's violation of the Act if the entity refuses to remove that unlawful sound recording, image, or audiovisual work in a timely manner. In addition, if an online service provider actively encouraged others to publish or disseminate unauthorized digital replicas on its platform, it may be held indirectly liable for intentional inducement if its users engage in these activities and it knows about them.

No liability without actual and specific knowledge this is an unauthorized digital replica.

Including a knowledge requirement for liability in Section 2(c)(2) of the Act will promote technological innovation and better protect freedom of expression, but only if Congress clarifies that defendants can only be liable under the Act if they had actual and specific knowledge that a particular sound recording, image, or audiovisual work contains an unauthorized digital replica of an individual.⁷ General knowledge of some wrongful conduct by a user on the platform should not be sufficient for liability under the Act. Online service providers that host or disseminate songs, pictures, or videos uploaded and/or produced by their users may not know whether this digital replica is authorized or not, or whether it is a "digital replica" as that phrase is defined in the Act, until the holder of the digital replica right files a notice and takedown complaint asking the company to remove the unauthorized digital replica and provides evidence to support the allegations of unlawful conduct by the platform user.

Online service providers should not automatically take down all digital replicas uploaded to their platforms, as some digital replicas are authorized. Artists like FKA Twigs create and disseminate digital replicas of their own voice, image, or visual likeness. Advances in technology may eventually make it easier and inexpensive for online service providers to determine whether most or all uses of them are—or are not—authorized, but my understanding is this is not currently possible.

It may also be difficult and costly for an online service provider to determine whether a certain sound recording, image, or audiovisual work uploaded to its website or app contains a "digital replica" of an individual that is covered by the No FAKES Act. Certain unauthorized uses of a person's name, image, voice, or likeness ("NIVL") will not be "a newly-created, computer-generated, electronic representation of the image, voice, or visual likeness of an individual" that qualifies as a "digital replica" under the narrow definition in the Act. A song, picture, or video may sound or look like a certain celebrity or regular person, but not actually constitute a digital replica that is "nearly indistinguishable" from the actual voice, image, or visual likeness of that individual. It is not uncommon for one person to sound or look like another person. It is also unclear how the online service provider will determine whether the "individual did not actually perform or appear" in the song, picture, or video without considering evidence provided by the complaining party or the platform user.

⁷ In (admittedly) rare circumstances, human creators may not intend to create a digital replica that is nearly indistinguishable from a real person, but may instead accidentally produce an unauthorized digital replica of an individual due to the sound recordings, images, or audiovisual works used to train the artificially intelligent computer program that created that digital replica.

For all of these reasons it is critical that Congress clarify that online service providers must have actual and specific knowledge of another's violation of the Act on their platforms to be contributorily liable under the Act for failure to remove the unauthorized digital replica. This is the best way to balance an individual's digital replica rights against the right to freedom of expression. Imposing liability on a strict liability basis is problematic because online service providers cannot determine on their own what activities of their users violate the Act. Congress should immunize online service providers from liability if they implement an effective notice and takedown system in this context, as discussed next.

Notice and takedown system

Congress should consider adding a safe harbor defense to the No FAKES Act that is similar to Section 512 of the Digital Millennium Copyright Act (DMCA), which permits an online service provider to avoid liability if it adopts a notice and takedown system. This will provide public figures and regular people a way to enforce their digital replica rights protected by the Act in a fast and inexpensive way. Once the individual or rights holder files a complaint under the notice and takedown procedure which identifies a specific unauthorized digital replica of that individual that is published or disseminated on the platform, that online service provider could be liable for contributory infringement under the Act unless it removes the sound recording, image, or audiovisual work that contains this digital replica from its platform in a timely manner.

Complaining parties should have to declare, under penalty of perjury, that they are the individual depicted in the digital replica or are explicitly authorized to act on that person's behalf. One potential problem with a notice and takedown system in the context of the No FAKES Act is that the complaining party may not be the individual depicted in the digital replica or another legitimate holder of the digital replica right. It may instead be a bad actor trying to suppress the speech of the individual or someone else who has published or disseminated this digital replica with authorization.

In copyright and trademark disputes, online service providers typically require the complaining party to include a registration number or other evidence which shows that they actually own the intellectual property that is the subject of the complaint, or the platform rules require them to declare under penalty of perjury they are the intellectual property owner. For the No FAKES Act, it is not clear how individuals or rights holders will prove they own the digital replica right, or how the online service provider will determine the true identity of the complaining party and the responding party in a dispute involving a digital replica. If the platform requires human parties to upload a copy of their driver's license or passport to prove their identity, this could create serious privacy concerns. Also this alleged proof of a person's identity could be fake. The platform could require an entity rights holder to upload a copy of the agreement which gives them the ability to enforce the digital replica right that they own or have licensed (such as a will or license agreement), but such a document could also be fake. Unlike with copyright and trademark registrations, there is no government database that can be independently checked to confirm the authenticity of such a document.

As I discussed in my written and oral testimony on April 30, 2024, online service providers should also accept and respond to counter notices filed by platform users in connection with this

notice and takedown system. They should also be immunized from liability when they replace material in response to a valid counter notice. Platform users need a way to respond when they are falsely accused of wrongful conduct, and online service providers should be able to immediately put the material back up (and not wait 10 days), if bad actors file abusive complaints to suppress speech and/or the complaint is frivolous because this is not an unauthorized digital replica or the Act's specific exceptions to liability apply in the dispute. It is also important that the notice and takedown system allow the online service provider to remove the material again if the digital rights holder files a lawsuit, and require platform users to agree to personal jurisdiction in a certain U.S. court when they file the counter notice. If the counter notice is frivolous and the digital replica right holder files a complaint with a trial court that now has personal jurisdiction over the platform user, the online service provider can protect the interests of the plaintiff and the public (who may be confused by a deceptive digital replica) by removing the unauthorized digital replica and keeping it down unless the lawsuit is resolved in favor of the defendant.

Online service providers should educate their users about these rules, and make sure they are aware of the option to file a counter notice once the platform receives a notice and takedown request. These rules will make the system less likely to suppress and chill expression allowed by the Act and/or protected by the First Amendment, but only if the online service provider reinstates the creative or informational work containing the digital replica on the platform in a timely manner after receiving the counter notice and determining there is no violation of the Act.

Furthermore, Congress should consider adopting rules that require complaining and responding parties in the notice and takedown process to only submit statements to the online service provider that are truthful and made in good faith based on a reasonable factual investigation and reasonable understanding of the law. Among other things, the Act could require the complaining or responding party to declare under penalty of perjury that they have a reasonable good faith belief in the accuracy of the substantive claims in the takedown notice or defenses in the counter notice. If the complaining or responding party is engaging in abusive behavior or making false allegations in bad faith during the process, Congress could allow the opposing party and the online service provider to recover actual or statutory damages and attorney's fees from them.

Advantages. Litigation can be expensive and take a long time, so the notice and takedown system is better if the digital right holder's goal is to get the digital replica immediately removed from the platform. Filing a lawsuit in court may also be difficult because the complaining party may not be able to identify the name and/or address of the person(s) who produced the unauthorized digital replica or who directly engaged in other violations of the Act. A trial court in the United States may also not have personal jurisdiction over foreign person(s) that produced the unauthorized digital replica, published it on the platform, and/or disseminated it to others using the website or app of the online service provider. Owners of copyright and trademark rights can request that online service providers remove infringing materials from their platforms, so it seems fair to also allow individuals who are being impersonated online in a deceptive manner via an unauthorized digital replica to request removal of sound recordings, images, or audiovisual works that violate the No FAKES Act.

Potential disadvantages. Individuals and rights holders may prefer strict liability under the Act because of what has been called the “whack a mole” problem. It takes time and money to monitor websites or apps for violations of the law and then send a notice and takedown request to platforms that are hosting this unlawful expression. Every time a complaint is filed under a notice and takedown system against someone violating the law and the content is removed, numerous other platform users (or the same user) may continue to publish or disseminate the unauthorized digital replica elsewhere on the platform. This may be true, but holding online service providers strictly liable in this context is inconsistent with other intellectual property laws and could stifle technological innovation and freedom of expression on the platform. The liability rules in the No FAKES Act should be different for accidental or unknowing creation or dissemination of unauthorized digital replicas.

There are also disadvantages of a notice and takedown system from the perspective of free speech advocates and online service providers.⁸ Current technology does not make it easy or inexpensive to determine whether a digital replica is authorized or otherwise violates the No FAKES Act. Thus, online service providers may automatically remove a digital replica once someone files a notice and takedown request without considering whether it is authorized, an exception to liability applies, or if this expression is protected by the First Amendment. As the Act currently allows plaintiffs to obtain \$5,000 in statutory damages for each violation of the Act, smaller online service providers may be unable to take the risk of leaving up protected expression that is clearly allowed by the law. Moreover, start-up companies and smaller platforms with limited resources may not be able to afford to hire sufficient human employees or pay for certain types of technology that helps them to detect, filter, or remove unauthorized digital replicas within a short timeframe. If individuals and rights holders file complaints solely using automated technology (without human review of whether the use is unauthorized or is a digital replica), trolls file abusive complaints, or if a first-time complaining party does not properly understand the requirements for a violation of the Act or the exceptions to liability, the takedown request may be frivolous. Requiring all of the parties to act reasonably and in good faith is essential in the notice and take down process.

For all of these reasons, Congress should encourage—rather than require—online service providers to adopt a notice and takedown system by creating a safe harbor defense. If Congress requires online service providers to adopt a notice and takedown system with monetary damages for noncompliance within a certain timeframe, this may encourage bad actors or “trolls” to file numerous complaints that cannot be handled in a timely manner by a smaller or medium size platform. Such damages awards could drive that online service provider out of business, harm competition, and entrench dominant platforms with more resources.

⁸ For an informative discussion of the advantages and disadvantages of the notice and takedown regime created by Section 512 of the Digital Millennium Copyright Act, see Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE (American Assembly 2016).

Question 2: Regarding the NO FAKES Act, do you agree that individuals should only have the right to license out their digital likeness if they are represented by counsel or a member of a union? If so, why?

Individuals should have the right to license use of digital representations of their voice, image, or visual likeness in writing without being required to hire an attorney or be a member of a union. Still, it is critical to have informed written consent when individuals agree to license their digital replica right and require these types of provisions to be reasonable, separately negotiated, and focused on use of the person's digital replica for a specific purpose. If they are not, courts should deem that license agreement to be unenforceable. If digital replica right licenses are not limited in significant ways, this will undermine the objectives of the NO FAKES Act, which include preventing public deception and protecting the ability of people to control uses of their identity.

There is more likely to be informed consent to a reasonable agreement if the individual was represented by an attorney with expertise in this area of the law and the parties separately negotiated the agreement. Moreover, licenses should be limited to specific uses of the digital replica, such as use only in connection with a particular song/album, television series, or film/film series. If the license extends over a long period of time, there must be additional informed and specific consent for each use. If uses of the digital replica are not enumerated (or restricted), an individual could accidentally grant the licensee the ability to use her digital replica in a sexually explicit film or in another unexpected manner on the first day of the license. If exclusive licenses are allowed under the Act, they should not prevent the individual who licensed the digital replica right from personally performing, as this is inconsistent with the Act's goal of protecting that person's right of performance. To protect children under 18 whose digital replica rights are licensed by their parents and inexperienced individuals who enter into license agreements with unreasonable terms, the Act could allow revocation (and renegotiation) of a license agreement relating to the digital replica right after a certain period of time (such as 1 year) to protect the personality rights of these individuals to control their identity.

If the digital replica provision is one of many terms in a long contract relating to the performance of a musical artist or actor, or it is listed within the numerous terms and conditions of a form contract whose main focus is not the license of an individual's digital replica right, this digital replica right provision might be missed or not fully understood by an individual who is not experienced in reviewing or interpreting contract terms. Also some people may not fully understand that a broad license agreement allowing any use of their digital replica for a significant amount of money could result in the licensee creating and disseminating sexually explicit uses or other uses of the digital replica which could harm that individual's dignity and reputation (such as by programming the digital replica to make racist or sexist comments). Book authors license their copyright in a specific book or series of books to a publisher—not their copyright in all the creative works they will write within a certain time period—so it is reasonable to limit digital replica right licenses to specific negotiated uses of a person's identity.

Importantly, having an attorney review a contract will not guarantee that the agreement is reasonable and fair, especially if the attorney does not have expertise in this area of the law and the individual has little bargaining power. New musicians, actors, and student athletes often have weak bargaining power, so the attorney may advise such performers or athletes that their options

are to simply walk away or agree to a broad and lengthy digital replica right license because the provisions in this take-it or leave-it contract cannot be reasonably negotiated. Moreover, many individuals are not union members, and some licensees may not be parties to a collective bargaining agreement. Even if they are, the union may not have negotiated contract terms with the licensee that benefit this particular individual given their unique circumstances. A more personalized approach is best when a contract licenses use of a digital replica of a person's voice, image, or visual likeness that is nearly indistinguishable from that individual.

Public policy concerns here counsel in favor of explicit statutory limitations on the types of terms that are allowed in a contract covering digital replica rights to protect an individual's dignity, reputation, and other personality rights.⁹ Rather than require individuals to hire an attorney or join a union before they can license their digital replica right, it is better to let the person with that voice, image, or visual likeness decide on a case-by-case basis how their digital replica right will be used with guardrails to preserve their ongoing control over their identity and with protections to prevent the public from being deceived by performances that were not specifically authorized or approved. The Act can allow various entities other than the individual to enforce digital replica rights without giving these entities the ability to own another person's digital identity. Such limits are essential to prevent an individual's digital replica from being controlled by others and forced to do and say things they never did (and would never do) in violation of their constitutional rights of liberty and freedom of speech.

Question 3: Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

Yes, the No FAKES Act should preempt state laws targeting wrongful uses of digital replicas to increase clarity and predictability in the law. We live in a global marketplace and community. It is costly and inefficient for individual owners of digital replica rights, their licensees, and users of unauthorized digital replicas to determine the content of the various state statutes and common law doctrines in the United States that protect these rights. These variations in state laws can make it difficult for parties to draft licensing agreements that are consistent with the relevant state laws, and for online service providers and their users to decide what can and cannot be published or disseminated on Internet platforms.

Moreover, some state laws may not properly balance the digital replica right against the right to freedom of expression protected by the First Amendment. A single state's restrictive digital replica law could lead to online service providers like YouTube removing content from their platform that is prohibited in that state but allowed in every other state. Another benefit of federal preemption is that it eliminates the need for courts to spend time resolving choice of law issues, as it may be unclear which state law applies in a dispute about an alleged violation of a

⁹ Note that federal copyright law protect authors in certain ways when they enter into contracts with others, including with the requirement that transfers of copyright ownership must be in a signed writing, and the inalienable (non-waivable) right of authors or their heirs to terminate the exclusive or nonexclusive grant of a transfer or license of copyright in a work under certain circumstances. See Justin Hughes & Robert Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 561-563 (2016).

digital replica right. Scholarship relating to copyright preemption of state right of publicity laws may provide some guidance to Congress on how to draft preemption language that furthers the goals of the No FAKES Act and which better protects expressive values than a system with federal and state laws that cover the same wrongful conduct.¹⁰

Question 4: Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

Increased attempts to chill expression on the Internet by “trolls” or others. Congress should do what it can to discourage abusive behavior by people who may try to invoke the Act to suppress speech protected by the First Amendment or extract settlements from innocent parties by falsely claiming the digital replica right is violated. These bad actors may send frivolous cease and desist letters that encourage self-censorship of expression and payment of money by the recipient who is informed by this letter that the Act allows awards of actual and statutory damages, punitive damages, and attorney’s fees if the complaining party prevails. Trolls acting in bad faith may also file notice and takedown complaints with online service providers when the challenged expression is authorized, not a “digital replica” under the Act, or allowed by one of the specific exceptions in the Act. A notice and takedown system is better than imposing strict liability in the Act, but it still encourages private censorship by online service providers who will usually immediately remove songs, pictures, or videos alleged to violate the digital replica right. A counter notice provision can help in these circumstances. Finally, the owner of a digital replica right may file a “Schedule A” complaint in a U.S. district court alleging online violations of the Act by numerous defendants in circumstances where the court does not have personal jurisdiction over all the defendants and they are not properly joined together in a single lawsuit.¹¹

Complications regarding Section 230 of the Communications Decency Act. The current version of the Act provides in Section 2(f) that “[t]his section shall be considered to be a law pertaining to intellectual property for the purposes of section 230(e)(2) of the Communications Act of 1934 2 (47 U.S.C. 230(e)(2)).” One potential unintended consequence is that courts will determine that state right of publicity laws are also intellectual property laws for purposes of that law. If this occurs, there may be numerous lawsuits filed against online service providers not just for violations of the No FAKES Act, but also for violations of state statute and common law

¹⁰ See JENNIFER E. ROTHMAN, *THE RIGHT OF PUBLICITY: PRIVACY REIMAGINED FOR A PUBLIC WORLD* 160–179 (Harvard Univ. Press 2018); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199 (2002); Guy Rub, *A Less Formalistic Copyright Preemption*, 24 J. INTELL. PROP. L. 327 (2018); Rebecca Tushnet, *A Mask Eats into the Face: Images and the Right of Publicity*, 38 COLUMBIA J. L. & ARTS 1 (2015); see also Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark’s Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARVARD L. REV. 1271 (2022); Jennifer E. Rothman, *The Other Side of Garcia: The Right of Publicity and Copyright Preemption*, 39 COLUMBIA J. L. & ARTS 441 (2016).

¹¹ For information about the system of mass-defendant intellectual property litigation called the “Schedule A Defendants Scheme” which capitalizes on weak spots in the Federal Rules of Civil Procedure, judicial deference to intellectual property owners, and online marketplace’s liability exposure, see Eric Goldman, *A SAD Scheme of Abusive Intellectual Property Litigation*, 123 COLUMBIA L. REV. 183 (2023).

provisions that protect an individual's name, voice, image, or likeness (NVIL).¹² Unlike in copyright and trademark law, there is no government registry of NVIL rights so it may be difficult for online service providers to determine whether the complaining party or responding party actually owns the NVIL right. Thus Congress should consider simply saying that section 230 of the Communications Decency Act does not immunize online service providers from liability for violations of the No FAKES Act without saying that the law is an intellectual property law, especially since the Act and state right of publicity laws protect an individual's human dignity, right to privacy, and other personality rights.

The lack of narrow tailoring of the law to further the Act's goals will cause confusion. If Congress does not separate the No FAKES Act into different causes of action that target its diverse goals and include different requirements for liability and tailored defenses, this could create problems. For example, the "Exclusions" provision in Section 2(c)(3) of the Act provides that there is no violation of the law if "the applicable digital replica is used as part of a news, public affairs, or sports broadcast or report." Thus, I assume that news organizations, reporters, bloggers, and similar types of commentators are not liable if their news reporting or commentary discusses the harm caused by another's creation or dissemination of an unauthorized digital replica. This law protects expressive values. One issue for Congress to consider, however, is whether the exemption will be read more broadly than Congress intends. For example, I assume Congress did not intend to exempt from liability the creation of an unauthorized digital replica of a news reporter who is currently living (such as Christiane Amanpour) or deceased (such as Walter Cronkite), or a person who plays sports (such as LeBron James or Cristiano Ronaldo), and have that unauthorized digital replica report on the news or provide commentary in connection with a professional sports event. The current language in the No FAKES Act may allow this type of use, but I doubt that Congress intended these types of uses of an unauthorized digital replica to be exempted from liability under the law, especially if they are deceptive.

Litigation about international issues. As the Internet is global, the online dissemination of unauthorized digital replicas easily crosses borders and can harm anyone in any country. The title of the April 30 hearing focused on protecting "Americans" but it appears from the hearing and the language of the Act that citizens of a foreign country, including the UK-based musical artist and actor FKA Twigs, could file a lawsuit alleging violations of the Act that occur in the United States. Moreover, as I discussed in footnote 22 of my written testimony, the Act does not clearly state that the law applies to the creation or dissemination of unauthorized digital replicas outside the borders of the United States. If a lawsuit targets only foreign conduct by the defendant, the accused party may argue the law does not apply because of the presumption against extraterritorial application of the law, especially if the accused party is not a U.S. citizen.

¹² Courts disagree on whether the exemption from liability in Section 230 of the Communication Decency Act applies to state right of publicity claims. See Jennifer E. Rothman, *Third Circuit Holds that Newscaster's Right of Publicity Claim can Proceed against Facebook*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Sept. 28, 2021), https://rightofpublicityroadmap.com/news_commentary/third-circuit-holds-that-newscasters-right-of-publicity-claim-can-proceed-against-facebook/. See also Brian L. Frye & Jess Miers, *Combating Internet Trolls: The Right of Publicity and Section 230*, LANDSLIDE (September/October 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3693418.

On the other hand, Section 2(c)(2)(B) applies to “making available to the public” an unauthorized digital replica. The digital right holder may argue this language suggests a lawsuit can be filed in any jurisdiction in the United States once the replica is intentionally posted on the Internet in a manner that is accessible to people within the United States. This rule could apply regardless of whether the defendant posted or disseminated the unauthorized digital replica from within the United States, or if the file was actually distributed to someone in the United States.

Litigation about inconsistent language. The scope of rights listed in Section (d)(3)(B) of the No FAKES Act is different than the rights listed in Section (c)(2)(A) and (B), so this may lead to litigation about the reason for the difference. In Section 2(d)(3)(B) the proposed law includes the words “creation, development, distribution, or dissemination of the applicable digital replica” while Section 2(c)(2) includes the language “production” in (A) and “publication, distribution, or transmission of, or otherwise making available to the public” in (B). Congress should consider using similar language in both parts of the law because this different language may cause confusion. Lawyers may disagree about whether “creation” is synonymous with “production”, the meaning of the term “development”, and whether the phrase “dissemination” covers “transmission” and other ways an accused party may make available the unauthorized digital replica to the public. Also Section (c)(2)(B)’s language “publication . . . or transmission of, or otherwise making available to the public” is different than words used by Congress in Section 106 of the U.S. Copyright Act, like public “display” (*e.g.*, of an image or hologram) or public “performance” (*e.g.*, of a sound recording or audiovisual work). If this language is intended to provide broader digital replica rights than the exclusive copyright rights of public display and performance set forth in Section 106, Congress may want to clarify this.

Litigation about the digital replica definition. There is currently some disagreement about whether the definition of “digital replica” in the Act only applies to digital representations or deepfakes created by artificially intelligent (AI) computer programs, or to any new electronic representation of the image, voice, or visual likeness of an individual that is created using computer technology and which satisfies the requirements in (A) and (B) of Section 2(a)(1). An example would be a sexually explicit photorealistic deepfake where the human creator used a computer program to add the face of a female celebrity to the body of another woman who is nude, but this change was done without the use of an AI computer program. Another example would be a photorealistic drawing or painting that was created by hand using a digital tablet (such as an iPad) in place of physical ink or paint. As this issue is critical to determining whether the Act applies, Congress may want to revise the language to clarify this.

Litigation about the statutory damages provision. In the Remedies part of the proposed law, Section (d)(4), the Act allows the plaintiff to opt for a statutory damages recovery of “\$5,000 per violation.” Congress should clarify what is a “violation” under the law. For example, if there is only a single song, picture, or video that contains the unauthorized digital replica, does that mean there is just one violation of the law, or is there a violation of the law every time the creative or informational work is published, distributed, transmitted, or made available to the public? If a teenager posted an unauthorized sexually explicit deepfake video he created of a classmate on Instagram, his friends repost it, and this video goes viral and is viewed thousands or millions of times, it is not clear how many violations of the Act occurred in that situation.

Is the teenager liable for one violation of the Act since there is one digital replica (\$5,000), two violations of the Act since he produced the digital replica and published it on social media (\$10,000), or \$5,000 times the total number of posts, reposts, and/or views of that digital replica by him, his friends, and random people, plus one (the violation for his production of the digital replica)? It is also unclear whether an online service provider would be liable for single or multiple violations of the Act in this circumstance if it did not remove the digital replica in a timely manner upon receiving knowledge it was unauthorized and was unlawful under the No FAKES Act. When a defendant is only indirectly liable under the Act, Congress should consider letting courts depart from the \$5,000 per violation statutory damages award if its infringement is not intentional, the online service provider had a good faith belief its user was not violating the Act, and the defendant has limited financial resources and/or responded to the removal request in a reasonable time given the size and sophistication of the company.

Question 5: The NO FAKES Act currently does not have federal preemption. What are your thoughts on this? And what should the bill preempt: only state digital replica bills or all state rights of publicity?

As I discussed in my answer to Question 3, I think the Act should preempt state law but the scope of this preemption should vary depending on the final version of the Act. If the Act only applies to wrongful use of unauthorized digital replicas, it should only preempt state laws focused on protecting an individual's digital replica right. If Congress decides to adopt a broad federal right of publicity law that protects the name, voice, image, or likeness of individuals, then that federal law should preempt all state right of publicity statutes. This type of preemption is called field preemption and is similar to the approach in federal patent law. Congress should also consider whether to draft the Act in such a way that it leaves in place the common law of states relating to appropriation or the right of publicity, and the precedents in those states relating to these judge-made laws, and only preempt these state common law rights when there is a conflict.

Question 6: Trademark law deals mostly with “likelihood of consumer confusion” over the source of a product. Someone’s voice and likeness aren’t just source identifiers, though – for professional artists, they are also the product. While the NO FAKES Act doesn’t fall directly in the trademark space, what are your thoughts on this?

I agree that an individual's voice, image, and visual likeness can identify that human being as the source of a performance and that these characteristics of a person's identity are also the product desired by consumers. Importantly, many unauthorized uses of a digital replica of a well-known performer will violate the federal Lanham Act and state trademark and unfair competition laws that regulate trademark infringement and false endorsement.

Notably, the merger of source identifier and product is not unique to people. This is true in trademark law today. For example, it is not uncommon for fans of a particular brand of clothing or sports team to pay more money for a shirt or hat that has the logo of a company (Nike) or

team (UCLA) prominently displayed on the front or back of the merchandise. Trademark law also protects the trade dress of a product if it is distinctive and not functional. An example is the three-dimensional shape and design of LEGO Group's minifigure toy. In this context, the subject matter that is protected by the law—the toy's shape and design—is serving as a source identifier for the toy and it is also the product desired by consumers.

Some attorneys and academics believe that trademark law should only target uses of another's mark that cause source confusion. One reason is that false and misleading commercial speech are outside the scope of the First Amendment's protections, and source-confusing uses of another's mark in commercial and noncommercial speech can cause significant harm to consumers and the trademark owner. Current federal trademark infringement law, however, does not just regulate source-confusing uses of trademarks. It protects distinctive trademarks against unauthorized uses that cause confusion about the trademark owner's sponsorship or approval of this use, or the parties' affiliation or connection, among other things. False endorsement claims can also be brought by celebrities who claim consumers are likely to be confused about whether they endorse certain products regardless of whether they own trademark rights in certain aspects of their identity. Finally, trademark dilution law applies outside the context of source confusion, as it protects famous marks against uses that are likely to dilute the distinctiveness of the mark or harm its reputation regardless of whether this use is likely to cause confusion. Like the No FAKES Act, state right of publicity laws do not require evidence this use of someone's voice, image, or visual likeness is likely to cause confusion, so these laws are more like trademark dilution law than trademark infringement law when the use is not deceptive.

Question 7: (a) Can you explain why, thus far, we only have seen state level publicity rights? (b) And how does this intersect with the First Amendment?

As I discussed in my written testimony and above, the Lanham Act does protect the right of publicity in federal law through false endorsement claims, at least for those with commercial personalities. It is true, however, that there is no overarching right of publicity law at the federal level that mirrors the state right of publicity framework, which originated with state common law and the right of privacy. I do not know for sure why similar laws have not been passed in federal legislation, but my understanding is that such laws have been proposed a number of times before in and to Congress. I have some ideas about why a state regime has dominated this space.

First, the U.S. Constitution explicitly allows Congress to protect patent and copyright rights, but there is not a provision that specifically gives the federal legislature the power to protect an individual's right of publicity. Moreover, right of publicity violations are torts that implicate a person's privacy rights and other dignitary interests. States usually are the government bodies that protect members of the public from another's harm to these types of interests. Now that the Commerce Clause is currently interpreted in a broad manner to give Congress the power to regulate trademarks, it is not surprising that Congress finds its power to regulate the digital replica right in this clause of the Constitution. Section 2(c)(1) of the No FAKES Act provides that the Act applies to "[a]ny person that, in a manner affecting interstate or foreign commerce (or using any means or facility of interstate or foreign commerce), engages in an activity described in paragraph (2)" While the U.S. Constitution also protects property rights and

some people refer to the digital replica right as a “property” right, it is more fitting to characterize this as a “personality” right since the Act protects aspects of a person’s identity from uses that may harm their human dignity and reputation. The digital replica right, like the rights of publicity and privacy, is different in kind than property like a house or car.

The First Amendment applies to federal and state laws regulating digital replicas and the right of publicity.¹³ As I discussed in my written testimony, the U.S. Supreme Court held in *Zacchini* that Ohio’s state misappropriation law did not conflict with the First Amendment in a case involving a news station’s broadcast of the entire act of a human cannonball artist’s performance. Outside this narrow context of a broadcast of an individuals’ entire act that substituted for his performance, the Court has not clarified how to balance the right of publicity against the free speech right in the First Amendment when the expression is not deceptive.

The No FAKES Act currently applies to uses of digital replicas that are not false or misleading, so there is a chance that the Supreme Court will find this law invalid under the First Amendment if Congress does not make the speech-protective revisions to the law that I discussed in my written and oral testimony. The Court could also find state right of publicity laws to be inconsistent with the First Amendment when they are applied in contexts different than the *Zacchini* case. I commend Congress for including several specific exceptions to liability in the Act, and think that these limitations should apply when use of a digital replica is not deceptive. If state legislatures do not include similar limits on the right of publicity in their states, this increases the chance the Court will find these state laws unconstitutional.

¹³ For a helpful discussion of how courts have applied the First Amendment in the right of publicity context, see Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86 (2020). Congress may also want to consider enacting a federal law that targets Strategic Lawsuits Against Public Participation, or SLAPP suits, that attempt to suppress expression protected by the First Amendment. See, e.g., Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. OF LEGIS. & PUB. POL’Y QUORUM (2020), <https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/>.



MOTION PICTURE ASSOCIATION

RESPONSES BY BEN SHEFFNER
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MOTION PICTURE ASSOCIATION, INC.

TO QUESTIONS FROM SENATOR THOM TILLIS

REGARDING THE HEARING “THE NO FAKES ACT: PROTECTING AMERICANS FROM
UNAUTHORIZED DIGITAL REPLICAS” (APRIL 30, 2024)

SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY

MAY 21, 2024

1. Regarding the NO FAKES Act, which is currently a strict liability bill, should there be a notice and takedown provision? If so, why?

MPA agrees that if there is to be a digital-replica right, which of course must be subject to effective First Amendment protections, then rights holders should have a remedy for violations of such right, including a means for securing the removal of materials where dissemination is prohibited by the statute. Traditional principles of direct and secondary liability are one way to do that, as seen in the trademark context.¹ Notice-and-takedown and/or safe-harbor provisions are another. MPA is open to discussing any of these options, again with the goal of ensuring that remedies are available here as they should be in any statutory enforcement context, subject to constitutional protections. To this end, MPA does not believe it is appropriate to import the notice-and-takedown provisions of Section 512 of the Digital Millennium Copyright Act, 17 U.S.C. § 512, into the NO FAKES Act. The DMCA process is complex, and, as the U.S. Copyright Office has noted, has not “achiev[ed] the balance Congress originally intended”² in seeking to encourage collaborative efforts between service providers and copyright owners to detect and deal with the problem of online copyright infringement. In the end, it is crucial that the approach here align with the scope and nature of the right established—including the adequacy of protections adopted to safeguard First Amendment-protected speech interests—in order to ensure that the enforcement mechanisms do not encroach on legitimate, constitutionally protected expressive activity.

¹ See *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

² U.S. Copyright Office, *Section 512 of Title 17, A Report of the Register of Copyrights* (May 2020), at 83, available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

2. Regarding the NO FAKES Act, do you agree that individuals should only have the right to license out their digital likeness if they are represented by counsel or a member of a union? If so, why?

No. Absent compelling reasons, parties should enjoy their traditional freedom to contract, including by licensing rights they own to others, typically in exchange for money. The motion picture, television, and music industries operate pursuant to countless such agreements, where, for example, a novelist may license to a producer the right to make a movie version of her book, or a songwriter may grant a license to a producer to have his song featured in a television show. The law does not require that either the licensor or licensee in such transactions be represented by counsel or a union (or by any other adviser, such as a talent agent or manager). MPA sees no compelling reason to deviate from this longstanding set of legal and business practices in the digital-replica context. We also note that the law permits individuals to engage in major, sometimes life-altering, transactions, such as buying and selling a home, making a will, enlisting in the military, or even adopting a child, without legal representation. It would be highly incongruous for Congress to require legal (or union) representation in the much lower-stakes context of licensing use of a digital replica.

3. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

Yes. A federal statute establishing a digital-replica right should preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works. MPA's members distribute their movies and television programs in all 50 states. Enacting a federal statute that lacks preemptive force would only exacerbate the problems associated with the "patchwork" of existing state laws in this area, some of which specifically regulate digital replicas. Approximately half of the states have enacted right-of-publicity statutes, while nearly all of the rest recognize similar rights through the common law. These laws typically cover uses of one's name, image, likeness, or voice ("NILV") for commercial purposes, i.e., in advertisements or on merchandise. Three states—New York, Louisiana, and Tennessee—have recently enacted statutes explicitly addressing the use of digital replicas in expressive works, such as sound recordings, movies, and television programs.³ While many state right-of-publicity statutes contain express statutory exemptions for uses of NILV of the type protected by the First Amendment, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray.⁴ If there is to be a federal digital-replica right,

³See N.Y. Civ. Rights Law § 50-f(2)(b) (2020); La. Rev. Stat. § 470.1-470.6 (2022); Tenn. H.B. 2091 (2024) (amending Tenn. Code. Ann. § 47-25-1101 *et seq.*, effective July 1, 2024).

⁴See Eugene Volokh, *The First Amendment, the right of publicity, video games and the Supreme Court*, The Washington Post (Jan. 4, 2016) ("Unfortunately, there are now five different First Amendment tests that lower courts use in right of publicity cases (setting aside cases involving commercial advertising, which is less constitutionally protected than other speech). . . . Unsurprisingly, these different tests often lead to inconsistent results, which leave creators and publishers uncertain about what they may say."), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/04/the-first-amendment-the-right-of-publicity-video-games-and-the-supreme-court/>; Amicus Brief of 31 Constitutional Law And Intellectual Property Law Professors as Amici Curiae in Support of Petitioner in *Electronic Arts, Inc. v. Davis* (Supreme Court Case No.

it must be carefully crafted to avoid interference with First Amendment rights and should provide national uniformity. Notably, of the witnesses at the April 30 hearing who addressed the preemption issue, all (myself included) expressed support for including a preemption clause in the NO FAKES Act.⁵

Note that MPA is **not** seeking full preemption of all state right-of-publicity law, but only of state regulation of uses of NILV *in expressive works*. We see no compelling need for federal preemption of routine applications of traditional right-of-publicity law, for example, where a person's name or likeness is used without authorization in an advertisement or on a piece of merchandise. But in this novel area of regulation of the use of digital replicas in expressive works, a single, national standard should apply.

4. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

The creation of a digital-replica right that would apply in expressive works is novel. While three states—New York, Louisiana, and Tennessee—have recently enacted statutes creating such rights,⁶ MPA is unaware of a single claim being filed under any of these new provisions, so their practical effect remains uncertain. MPA remains hopeful that the version of the NO FAKES Act that will be introduced in coming weeks will adequately address the concerns we and others have raised about its broad scope. Nonetheless, the novelty of such a new right does create uncertainty and potential unintended consequences, which could include the following:

- **Chilling effect on legitimate uses of digital replicas.** In my written testimony, I noted several examples of uses of digital replicas that did not require the consent of the depicted individuals, involving the movie *Forrest Gump* and the streaming series *For All Mankind*. Depending on the final text of the NO FAKES Act, filmmakers may be uncertain whether they are permitted to depict individuals using such technology. That uncertainty could lead them to shy away from

15-424) (identifying five different tests: 1) the transformative use test, 2) the transformative work test; 3) the relatedness test; 4) the predominant purpose test; and 5) the balancing test)), <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>.

⁵ See Hearing in the Senate Judiciary Committee's Subcommittee on Intellectual Property on "The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas" (April 30, 2024), available at <https://www.judiciary.senate.gov/committee-activity/hearings/the-no-fakes-act-protecting-americans-from-unauthorized-digital-replicas>, <https://www.techpolicy.press/transcript-us-senate-judiciary-subcommittee-hearing-on-the-no-fakes-act/> (transcript). Robert Kyncl, CEO of Warner Music Group, testified: "Doing anything state by state is a very cumbersome process. Twigs' content getting on a platform unauthorized, if we have to fight that state by state, it's untenable. It just doesn't work." Graham Davies, President and CEO of the Digital Media Association, testified: "We support the committee's efforts to bring forward legislation at the federal level, which should preempt existing state laws to keep pace with new technology." Prof. Lisa Ramsey of the University of San Diego testified: "Congress can better protect expressive values by allowing the new federal statute to preempt the inconsistent state laws that protect the right of publicity and digital replica rights...."

⁶ See *supra*, note 3.

engaging in such depictions—a classic chilling effect that the First Amendment does not allow.⁷

- **Interaction with copyright law.** Enactment of a federal digital-replica right is likely to raise thorny questions about how this new right would interact with copyright law. Professor Jennifer Rothman of the University of Pennsylvania, a leading scholar in this area, noted the potential conflict between a federal digital-replica right and copyright law in a recent written submission to the U.S. Copyright Office, opining that “[a]ny federal legislation restricting uses of such copyrighted works will need to address this potential conflict.”⁸ In other words, a federal digital-replica right, if not drafted and interpreted correctly, could potentially interfere with a copyright owner’s right to exploit its works under the Copyright Act. Added Rothman: “State right of publicity laws are sometimes preempted by federal copyright law when the two laws clash, but the case law does not provide a stable or predictable roadmap for Congress to employ at the federal level. The best way to read these cases and conflicts, however, and one which may provide some guidance is that when a person appears in a copyrighted work with permission, it is appropriate to provide some latitude for a copyright holder to make anticipated and related uses of the copyrighted work in derivative works, unless limited by contract or collective bargaining agreements.”⁹
- **Use of right to censor online depictions.** As noted in response to Question 1, MPA supports the inclusion of a notice-and-takedown process to facilitate enforcement of the rights created under the NO FAKES Act, provided that the rights, and such enforcement mechanism, include adequate protections for free expression. However, we recognize the potential for abuse by, for example, individuals who do not like how they are depicted in a post on a social-media platform and attempt to censor such depictions with meritless takedown notices that ignore that others have a First Amendment right to comment on the world around them.
- **Post-mortem dignitary rights.** MPA remains concerned that recognition of a post-mortem digital-replica right could encourage the heirs of deceased individuals, or their corporate successors, to attempt to use such right to censor portrayals of such individuals that they do not like. As noted in my written testimony, recognizing dignitary or reputational interests of deceased individuals, and giving heirs or corporate successors the ability to sue over them, would represent a radical change in longstanding American law, under which “there can

⁷ See *Walker v. Birmingham*, 388 U.S. 307, 345 (1967) (noting the Supreme Court’s “overriding duty to insulate all individuals from the ‘chilling effect’ upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise”).

⁸ Comments of Jennifer E. Rothman to the U.S. Copyright Office in response to Artificial Intelligence and Copyright, Notice of Inquiry and Request for Comments, 88 Fed. Reg. 59942 (Aug. 24, 2023), Docket No. 2023-6 (Oct. 25, 2023), at 7, available at https://rightofpublicityroadmap.com/wp-content/uploads/2023/10/Prof-Rothman-Comments-to-Copyright-Office-on-Right-of-Publicity-and-AI_October-2023.pdf.

⁹ *Id.* (footnote omitted).

be no defamation of the dead.”¹⁰ MPA has acknowledged the legitimate interest in regulating unconsented uses of digital replicas to replace living performers’ performances because of the potential impact on their livelihoods. After the death of the performers, however, that interest no longer remains, and thus the restriction would be unlikely to meet the strict scrutiny standard, which is necessary to overcome the presumption of unconstitutionality for any content-based restriction on speech.¹¹

5. **State-level right of publicity laws restricting commercial speech have existed for many decades, have developed their own case law, and are now well-understood. The digital replica right proposed by the NO FAKES Act, however, would affect non-commercial speech – beyond what most state laws currently cover.**

Could you explain how novel this proposed right would be in the context of existing right of publicity laws, and how we should consider preempting similar state-level digital replica laws, especially when this is such new territory?

As the question correctly notes, state right-of-publicity laws regulating commercial uses of names, images, and likenesses have existed for a very long time—well over a century. For example, New York’s statute, enacted in 1903 in response to unauthorized use of a woman’s image to advertise flour,¹² has always applied only to uses of one’s likeness “for advertising purposes or for the purposes of trade.”¹³ But more modern right-of-publicity statutes are typically limited to commercial uses as well. The law is clear, however, that expressive works such as movies, television shows, and books are not commercial speech and are fully protected under the First Amendment,¹⁴ notwithstanding that such works are typically made and distributed for profit.¹⁵ Thus, since the late 1990s, states that have enacted right-of-publicity statutes have taken

¹⁰ Restatement (Second) of Torts § 560, comment a (1977); *see also, e.g., Bradt v. New Nonpareil Co.*, 108 Iowa 449 (1899) (“The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action.”); *Meeropol v. Nizer*, 381 F. Supp. 29, 34-35 & n.3 (S.D.N.Y. 1974), *aff’d*, 560 F.2d 1061 (2d Cir. 1977) (rejecting defamation and invasion of privacy claims by children of convicted and executed spies Julius and Ethel Rosenberg over statements in book because such claims expire upon the death of the subject of the statements at issue).

¹¹ *See Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015).

¹² *See Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111, 119 (2018) (explicating history of New York law in this area).

¹³ New York Civil Rights Law § 51. While technically a “right of privacy” statute, Section 51 operates similarly to a right-of-publicity law, though it applies only to living individuals. *See Smith v. Long Island Jewish-Hillside Med. Ctr.*, 118 A.D.2d 553, 554 (1986).

¹⁴ *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee.”).

¹⁵ *See Joseph Burstyn, Inc.*, 343 U.S. at 501 (“It is urged that motion pictures do not fall within the First Amendment’s aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree.”); *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023) (rejecting argument that speech receives lesser First Amendment protection when sold for a profit or by a corporation: “none of that makes a

great care to limit their scope to include only commercial uses, and have included explicit statutory exemptions to ensure that they cannot be misapplied to interfere with depictions of individuals in expressive works.¹⁶

Regulating the use of digital replicas in expressive works is indeed novel. New York did so in 2020, Louisiana in 2022, and Tennessee this year.¹⁷ MPA is unaware of a single case being brought under the digital-replica provisions of either the New York or Louisiana statutes, and the new Tennessee law does not go into effect until July 1, 2024. MPA believes that the novelty of the right that would be created by the NO FAKES Act does counsel in favor of having the bill preempt existing state laws to the extent that they apply to the use of digital replicas in expressive works.¹⁸ Enacting a federal statute that lacks preemptive force would only exacerbate the problems associated with the emerging “patchwork” of state laws in this area. The MPA’s members typically distribute their movies and television programs in all 50 states, and evaluating how novel statutes, uninterpreted by any court, apply to uses of new technologies, would create a significant and unnecessary burden, and the inherent uncertainty would chill speech. While many state right-of-publicity statutes contain express statutory expressive-works exemptions, not all do, and the case law regarding the proper test for evaluating First Amendment defenses in this context is in disarray.¹⁹ If there is to be a federal digital-replica right, it should be carefully crafted to avoid interference with First Amendment rights and should provide national uniformity. As noted above, of the witnesses at the April 30 hearing who addressed the preemption issue, all (myself included) expressed support for including a preemption clause in the NO FAKES Act.²⁰

difference”); *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016) (The movie “*The Hurt Locker* is not speech proposing a commercial transaction. Accordingly, our precedents relying on the lesser protection afforded to commercial speech are inapposite.”).

¹⁶ See, e.g., Cal. Civ. Code § 3344.1(a)(2) (1999); Ohio Rev. Code Ann. § 2741.09 (1999); Ark. Code Ann. § 4-75-1110 (2016); N.Y. Civ. Rights Law § 50-f(2)(d) (2020); La. Stat. Ann. § 51:470.5 (2022).

¹⁷ See *supra*, note 3.

¹⁸ To be clear, MPA is *not* advocating that a federal statute establishing a digital-replica right preempt “traditional” state right-of-publicity laws that apply to commercial uses of an individual’s NILV (i.e., in advertisements or on merchandise). Rather, we are only advocating for preemption as to state statutes that regulate NILV *in expressive works*.

¹⁹ See Eugene Volokh, *The First Amendment, the right of publicity, video games and the Supreme Court*, The Washington Post (Jan. 4, 2016) (“Unfortunately, there are now five different First Amendment tests that lower courts use in right of publicity cases (setting aside cases involving commercial advertising, which is less constitutionally protected than other speech). . . . Unsurprisingly, these different tests often lead to inconsistent results, which leave creators and publishers uncertain about what they may say.”), available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/04/the-first-amendment-the-right-of-publicity-video-games-and-the-supreme-court/>; Amicus Brief of 31 Constitutional Law And Intellectual Property Law Professors as Amici Curiae in Support of Petitioner in *Electronic Arts, Inc. v. Davis* (Supreme Court Case No. 15-424) (identifying five different tests: 1) the transformative use test, 2) the transformative work test; 3) the relatedness test; 4) the predominant purpose test; and 5) the balancing test)), available at <https://www.scotusblog.com/wp-content/uploads/2015/11/15-424-Amici-Brief.pdf>.

²⁰ See *supra*, note 5.

- 6.
- a. **In practice, how do film and television productions use “expressive works exemptions” found in most state right of publicity laws?**

Expressive-works exemptions in existing state right-of-publicity laws provide clarity and certainty to producers so that they know what uses of an individual’s NILV are permitted, and which are not (absent consent), before they spend tens or even hundreds of millions of dollars producing a movie or television series. This clarity helps avoid much litigation over depictions of real people in the MPA’s members’ works. For example, the MPA’s members routinely receive letters from individuals (or their attorneys) who learn that they, or their deceased family members, will be depicted in a movie or television show. These letters either demand payment for such depiction or insist that the depiction is simply not permitted absent consent.²¹ Where a statute contains an expressive-works exemption, such meritless claims can typically be resolved quickly with a straightforward letter in response, citing to the exemption.

And, in the event a claim results in litigation, a court can usually determine whether an expressive-works exemption applies at the motion-to-dismiss stage, before the parties engage in expensive and burdensome litigation. For example, in *Marshall v. ESPN Inc.*, a group of college athletes brought a putative class action under Tennessee right-of-publicity law, alleging that television networks violated their rights by broadcasting games in which they played. The district court quickly granted the defendants’ motion to dismiss, citing the statute’s explicit exemption for “sports broadcast[s].”²² And the Sixth Circuit took only three paragraphs to affirm, holding that “the plaintiffs’ statutory claim under the Tennessee Personal Rights Protection Act is meritless because that Act expressly permits the use of any player’s name or likeness in connection with any ‘sports broadcast.’”²³

By contrast, when a statute lacks an expressive-works exemption, even completely meritless cases can take years and vast amounts of legal fees to resolve. For example, take the case of Christopher Porco, an individual convicted of murdering his father and attempting to murder his mother, now serving a life sentence in a New York prison. Upset that a Lifetime docudrama about his notorious case depicted him without his permission, Porco sued in 2013 under New York’s 1903 law, which lacks an expressive-works exemption.²⁴ It was not until 2021—after *eight years* of litigation, including an injunction against broadcast of the movie

²¹ To be clear, such claims that depiction of individuals in docudramas, biopics, and similar works requires consent from the depicted individuals (or their heirs) are without merit. Indeed, the ability to engage in such depictions is guaranteed by the First Amendment. See, e.g., *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018) (First Amendment barred claim by actress over portrayal in docudrama (reversing trial court order allowing claim to proceed)); *Sarver v. Chartier*, 813 F.3d 891, 896 (9th Cir. 2016) (First Amendment barred claim by individual allegedly portrayed in movie *The Hurt Locker*); *Tyne v. Time Warner Entm’t Co., L.P.*, 901 So.2d 802 (Fla. 2005) (First Amendment barred claims involving movie *The Perfect Storm*); *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (“Courts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features, or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual’s identity in advertising infringes on the persona.”).

²² *Marshall v. ESPN Inc.*, 111 F. Supp. 3d 815, 827 (M.D. Tenn. 2015) (citing Tenn. Code Ann. § 47–25–1107(a) (exempting from the statute’s scope “any news, public affairs, or sports broadcast or account”).

²³ *Marshall v. ESPN*, 668 F. App’x 155 (6th Cir. 2016).

²⁴ N.Y. Civil Rights Law § 51.

(later overturned)²⁵ and multiple appeals—that a court finally put an end to Porco’s attempt to use New York’s law to censor Lifetime’s movie.²⁶ Had New York’s statute included an expressive-works exemption, that utterly meritless lawsuit would likely have been dismissed early in the litigation.

b. How do these exemptions affect the production process for film and television projects?

A key part of producing a movie or television program is the “clearance” process, where attorneys and other specialists carefully vet the in-progress work to assess legal risks and determine whether it is necessary to obtain permission from third parties for inclusion of certain material. For example, attorneys conducting clearance analyze whether, or to what extent, the studio faces risk of claims for copyright and trademark infringement, or for defamation or invasion of privacy. When a project depicts real people—an extremely common occurrence—the clearance process includes evaluation of potential right-of-publicity claims. The analysis of potential right-of-publicity claims is greatly aided by the inclusion of an expressive-works exemption in a right-of-publicity statute, which makes clear whether the statute, on its face, would require the consent of the depicted individual. By contrast, when a statute does not contain an expressive-works exemption, the producer must engage in analysis under what the California Assembly Judiciary Committee counsel recently termed the “convoluted and murky” case law in this context to determine the validity of a potential claim.²⁷ Where the answer is unclear, producers may decide not to proceed with the depiction of an individual—a classic example of a First Amendment “chilling effect.”

7. In your testimony you talk about the Supreme Court’s “overbreadth” standard. Can you explain what that means and how that relates to the NO FAKES Act?

In recognition of the fundamental importance of the First Amendment, the Supreme Court has established various doctrines to facilitate challenges to statutes that may infringe upon the right to free speech. One such doctrine is “overbreadth.” Under the overbreadth doctrine, “a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”²⁸ In other words, if a statute that regulates speech applies on its face both to speech that may properly be proscribed, but also to a substantial amount of speech that is protected by the First Amendment, a court may strike down the entire statute on overbreadth grounds. Put another way, Congress (or a state legislature) may not simply pass a broad speech regulation that encompasses both protected and unprotected speech and leave it to the courts to adjudicate

²⁵ *Porco v. Lifetime Ent. Servs., LLC*, 116 A.D.3d 1264 (N.Y. App. Div. 2014) (holding that temporary restraining order enjoining the impending broadcast of the movie was an unconstitutional prior restraint on speech).

²⁶ *Porco v. Lifetime Ent. Servs., LLC*, 195 A.D.3d 1351 (N.Y. App. Div. 2021) (reversing trial court’s denial of Lifetime’s motion for summary judgment).

²⁷ Bill Analysis of A.B. 1836 by the California Assembly Committee on Judiciary (April 30, 2024), at 8, available at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240AB1836#.

²⁸ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

which is which in particular cases. Rather, it must draft carefully to ensure that the scope of the statute does not include substantial amounts of First Amendment-protected speech.

United States v. Stevens is a good example of how the overbreadth doctrine operates in practice. That case involved a criminal statute passed by Congress in 1999 to regulate depictions of cruelty to animals, specifically “animal crush” videos that “appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.”²⁹ A defendant charged with violation of the law moved to dismiss his indictment, arguing that the statute was facially invalid because its scope encompassed substantial amounts of speech that is protected by the First Amendment. For example, it would cover photographs of dead animals in a hunting magazine, even where the animal had been hunted in full compliance with relevant law.³⁰ And, the Court held, the exemptions in the statute for certain First Amendment-protected activities were insufficient.³¹ Therefore, the Court held, the entire statute was “substantially overbroad, and therefore invalid under the First Amendment.”³²

Another example involved the Communications Decency Act of 1996, an “unusually important legislative enactment”³³ whereby Congress attempted to restrict minors’ access to sexually explicit material on the then-nascent internet. Despite what the Supreme Court termed the “legitima[te] and importan[t] ... congressional goal of protecting children from harmful materials,” it nonetheless struck down, on overbreadth grounds, major portions of the statute aimed at restricting minors’ access to indecent, obscene, and “patently offensive” material.³⁴ The Court was compelled to do so because the means by which Congress attempted to accomplish its goals would have restricted *adults’* access to material that they had the First Amendment right to view: “[T]he CDA places an unacceptably heavy burden on protected speech, and ... the defenses do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”³⁵

If enacted, potential First Amendment challenges to the NO FAKES Act would be evaluated under the overbreadth doctrine (among other First Amendment tests). Therefore, in order to survive, the statute must not encompass “a substantial number of ... applications [that] are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”³⁶ To meet this test, Congress must take care to carefully craft the statute to encompass its legitimate goals (e.g., protecting the ability of professional performers to earn a living practicing their craft) without sweeping in uses of digital replicas that are protected by the First Amendment (e.g., to parody or satirize an individual, or to depict an individual in a

²⁹ *Stevens*, 559 U.S. at 466.

³⁰ *See id.* at 476.

³¹ *See id.* at 477-80. The exemptions provision that the Court found inadequate to save the statute from overbreadth challenge covered “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

³² *Id.* at 482.

³³ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857 (1997).

³⁴ *Id.* at 849.

³⁵ *Id.* at 882.

³⁶ *Stevens*, 559 U.S. at 473.

docudrama or biopic, or to have fictional characters interact with historical figures (for example, in works such as *Forrest Gump*, *For All Mankind*, and *Once Upon a Time in Hollywood*). Thus, various provisions in the bill, including the scope of the right, the term of protection, and the statutory exceptions, all must be calibrated to target the categories of speech that may properly be the subject of regulation without encroaching on those categories that may not.

8. **In your testimony you suggest that any statute defining “digital replica” to include only “highly realistic” representations of an individual.**

Could you elaborate on why that is important and whether the NO FAKES Act addresses this issue?

MPA believes that a digital-replica right that applies in expressive works could survive First Amendment challenge if it is tailored to protect the ability of professional performers to earn a living—which might be threatened by the use of digital replicas to replace their performances. Indeed, in the *Zacchini* case, in rejecting Scripps-Howard’s First Amendment defense, the Supreme Court cited the effect of the broadcast of the human-cannonball performer’s “entire act” on his “ability to earn a living as an entertainer.”³⁷

MPA acknowledges that replacement of performers with highly realistic digital replicas of their likenesses or voices in new works in which they would typically perform could jeopardize their ability to earn a living as performers. However, that would not be the case with cartoon versions of an actor’s likeness, or with an imitator—as opposed to replicator—of a recording artist’s voice. Additionally, if the bill is not confined to highly realistic representations, that increases the likelihood that it would encompass significant amounts of First Amendment-protected speech, such as parodic or satirical cartoon versions of individuals that regularly appear on television programs like *South Park* or *The Simpsons*, or tribute bands. As noted in response to Question 7, an overbroad scope would make the statute vulnerable to being struck down on overbreadth grounds.

The definition of “digital replica” in the October 12, 2023, NO FAKES Act discussion draft goes much of the way toward addressing the issues described above. However, MPA recommends several edits to tighten the definition. Most importantly, the bracketed “nearly distinguishable” language in the discussion draft should be included in the bill. Also, MPA has proposed a slightly re-worked definition, modeled on language in digital-replica legislation enacted in New York in 2020 and Louisiana in 2022,³⁸ which we believe would best address concerns about overbreadth:

³⁷ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

³⁸ See N.Y. Civ. Rights Law § 50-f(1)(c) (defining “digital replica” as “a newly created, original, computer-generated, electronic performance by an individual in a separate and newly created, original expressive sound recording or audiovisual work in which the individual did not actually perform, that is so realistic that a reasonable observer would believe it is a performance by the individual being portrayed and no other individual.”); see also La. Rev. Stat. § 470.2(4).

The term “digital replica” means a newly-created, computer-generated, electronic visual or audio performance of an individual in a separate and newly created, original expressive audiovisual work or sound recording in whose creation the individual did not actually participate, that is so realistic that a reasonable observer would believe it is a performance by the individual and that of no other individual. A digital replica does not include the electronic reproduction, computer generated or other digital remastering of an expressive sound recording or audiovisual work consisting of an individual’s original or recorded performance.

9. **We have numerous state digital replica bills this session. And one even passed into law – the Tennessee ELVIS Act.**

Are any takeaways that we should consider for the NO FAKES Act?

As noted, legislation to regulate the use of digital replicas has been introduced in numerous states this year, including Tennessee, California, Illinois, Kentucky, Mississippi, Virginia, and Louisiana (despite the fact that it enacted a bill on this subject only two years ago). Generally speaking, this state legislation has raised similar issues as those that the subcommittee and the sponsors of the NO FAKES Act are currently considering, including the scope of the right, the definition of “digital replica,” the statutory exemptions, and the existence and length of a post-mortem term.

MPA will specifically address Tennessee’s bill, which is the only one of these to have actually been enacted thus far in 2024. MPA does have significant concerns about the breadth and scope of Tennessee’s new law, which led us to oppose passage. The law creates an extremely broad new cause of action for “publish[ing], perform[ing], distribut[ing], transmit[ing], or otherwise mak[ing] available to the public an individual’s voice or likeness, with knowledge that use of the voice or likeness was not authorized.”³⁹ Note that this cause of action is not limited to addressing the issues that the sponsors of the bill cited as their motivation: protecting recording artists and other performers from unauthorized digital replicas. The new law may appear to include in Section 47-25-1107 most of the statutory exemptions favored by MPA and others, including for parody, satire, comment, criticism, and where the use of the voice or likeness is “a representation of the individual as the individual’s self in an audiovisual work.” However, the statute dictates that those exemptions only apply “[t]o the extent such use is protected by the First Amendment,” which negates the effectiveness of the exemptions by requiring courts to engage in the First Amendment analysis to determine whether the statutory exemptions apply. Put another way, what the legislature gave with the exemptions, it took away with the “to the extent” clause, which renders them a virtual nullity. And lastly, the Tennessee statute has an unjustifiably and absurdly long post-mortem term of *forever*.⁴⁰

B.S.S.

³⁹ Tenn. Code Ann. § 47-25-1105(a)(2) (effective July 1, 2024).

⁴⁰ *Id.* § 47-25-1104. To be sure, the right terminates if, following a period of ten years after the individual’s death, the right is not commercially exploited for two years. *Id.* § 47-25-1104(b)(2)(A). But if the commercial exploitation continues, the right continues to exist, potentially in perpetuity.



May 7, 2024

The Honorable Christopher Coons
Chairman
Senate Judiciary Subcommittee on Intellectual Property
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Senate Judiciary Subcommittee on Intellectual Property
224 Dirksen Senate Office Building
Washington, DC 20510

**Letter for the Record: Senate Judiciary Subcommittee on Intellectual Property Hearing,
"The NO FAKES Act: Protecting Americans from Unauthorized Digital Replicas"**

Dear Chairman Coons and Ranking Member Tillis:

The Entertainment Software Association (ESA), the trade association representing video game publishers and console makers, shares your goal of protecting consumers and creators alike from non-consensual digital recording in audiovisual works. We thank you for the opportunity to provide comments on the NO FAKES Act and appreciate your interest on this issue.

As the only entity that represents the interests of U.S. video game industry, we believe that ESA can offer a unique perspective on artificial intelligence (AI) and its deployment in the private sector. Video games have been using AI as a tool for decades to create games and improve the player experience in a variety of ways, including for building background and terrain, processing or analyzing data within a game, and creating computer-controlled dialogue for "non-player" characters. In addition, AI is an invaluable tool for the video game industry to promote player safety by detecting and rooting out malicious activity.

Given the rich and long-standing history of using AI in the video game ecosystem, ESA members urge that the subcommittee amend the NO FAKES Act to avoid unintended consequences to video game development, as outlined below.

Provide Greater Clarity

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 a football game), 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. Accordingly, ESA recommends that the NO FAKES Act be revised to reflect that video game characters and portrayals are outside the scope of digital replicas, as defined in the legislation.

Minimize Restraints on Creativity

ESA is also concerned that the NO FAKES Act 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. 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. Additionally, as drafted, the distribution and dissemination language in the bill could be used to hold developers liable for game characters they or their users create without specific intent or the knowledge of video game companies. This could create new liabilities for video game players and the industry and reduce creativity. To prevent this outcome, ESA suggests revising the language in the bill so that liability would only attach to the commercial exploitation of an unauthorized digital replica, as several state laws currently require.

Similarly, 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 the freedom of expression, especially when those restrictions apply to expressive works. As such, ESA recommends that the NO FAKES Act remove postmortem rights from the legislation to preserve artist creativity and freedom of expression.

Prioritize Consumers

ESA is also concerned about the legislation's requirement that individuals must be represented by a lawyer to enter into a contract with a third party for their voice and



visual likeness. Today, many ESA members contract directly with performers or a talent agency, but not necessarily an attorney. This requirement would create unnecessary expense and delay for individuals who want to enter into a contract for their rights. To reflect this reality, ESA respectfully requests that the NO FAKES Act be amended to allow individuals to freely contract with third parties on their own or with their authorized representative.

Preemption

Finally, strong federal preemption is necessary to address the growing state patchwork of conflicting digital replica laws. To minimize conflict between state and federal law, exemptions in the federal legislation should be at least as strong as those found in state right of publicity legislation, including those with expressive works exemptions.

Thank you for considering these recommendations as you finalize your draft legislation. Please do not hesitate to contact my colleague [Annie Chavez](#) or me if you have any questions or would like additional information.

Sincerely,

Stanley Pierre-Louis
President and CEO
The Entertainment Software Association



April 25, 2024

The Honorable Chris Coons
Chairman
Subcommittee on Intellectual Property
Senate Judiciary Committee
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Intellectual Property
Senate Judiciary Committee
Washington, DC 20510

Dear Chairman Coons and Ranking Member Tillis,

The Independent Film and Television Alliance® (IFTA®) submits this letter for the record of the April 30, 2024, hearing on “The *No Fakes Act /Protecting Americans from Unauthorized Digital Replicas*” to provide its views on this proposed legislation. Congress is now considering the establishment of a new federal right to prohibit the unauthorized replication of any individual’s likeness and voice. IFTA agrees that federal legislation may be timely to uniformly address such unauthorized use, but any new federal digital replication right must pass First Amendment muster including freedom from any “chilling” effects upon constitutionally protected expressions of speech and creativity. Moreover, if such a federal right is established, it should provide for consistency and preempt the various state laws that have been approved or are being developed by state legislatures.

Headquartered in Los Angeles, IFTA is the worldwide trade association that represents the independent film and television industry globally. IFTA, established over 40 years ago, remains dedicated to protecting and strengthening the Independents’ ability to compete effectively in an ever-changing and challenging global marketplace. IFTA Members have produced, distributed, and

financed the world's most prominent films, including twenty-six of the last forty-one Academy Award® winners for Best Picture, most recently *Everything Everywhere All at Once*, *CODA*, and *Parasite*.

As copyright owners, independent producers, and small business owners, IFTA Members reside and do business on Main Street, USA and produce more than 70% of the films made in the United States, generating more than \$4.1 billion in sales revenues annually while creating hundreds of thousands of jobs and millions of dollars in economic impact. Freedom of expression and protected speech are at the heart of this economic activity and of the U.S. film and television industry. Accordingly, IFTA believes that any legislation creating a digital replica right must include clearly articulated protections for First Amendment expression and well-balanced provisions to avoid unintended consequences chilling Constitutionally protected speech.

In addition to the First Amendment, Copyright Law is the foundation of our Industry's ability to develop stories, to protect their creative work-product, and to finance and to distribute productions. At every stage, our companies must acquire, clear, and warrant the rights to make use of copyrighted content to investors and distributors. The acquisitions of these rights are memorialized in tens of thousands of contracts each year to form a "chain of title" evidencing copyright ownership of the film or program. The chain of title and its copyright ownership must be clear and concise for financial institutions and distributors to participate in the investment and distribution of production or to prevent unauthorized use. The introduction of any new right, such as a digital replica right, must be undertaken carefully to ensure that thousands of existing contractual relationships remain settled and that new rights can be accurately reflected in future transactions.

Our industry's need for consistency also calls for measures that reconcile the disparate

legislation on unauthorized digital replicas that may emerge from state legislation. Thus, we believe that a federal law that preempts state laws on the same subject matter will best serve our industry's interests, eliminating risks of conflicting requirements and supporting the most secure environment for financing and distribution.

As the proposal is considered by Congress, we ask that these important concerns of IFTA Members, and the needs of small business, independent producers and copyright owners be considered. While the current bill provides a meaningful framework, we ask that the provisions are fine-tuned to ensure First Amendment principles are protected and that the legislation creates a uniform federal approach that preempts and supersedes state law of the same scope of protection. We support the Subcommittee's engagement on this bipartisan proposal and look forward to working with you and other stakeholders on this issue. Thank you very much.

Submitted On Behalf of IFTA by,

Jean Prewitt, President & Chief Executive Officer

Susan Cleary, Vice President & General Counsel

Ian Bonifield, Deputy General Counsel & Director, IFTA Collections

**National Association of Voice Actors Testimony
Before the
United States Senate
Committee on the Judiciary
Subcommittee on Intellectual Property
The No Fakes Act: Protecting Americans from Unauthorized Digital Replicas**

April 30, 2024

Chairman Coons, Ranking Member Tillis, and members of the Committee, the National Association of Voice Actors submits this testimony endorsing the NO FAKES Act.

Voice actors are at the forefront of groups negatively affected by the rise of unregulated AI, Generative AI, Machine Learning, and Voice Synthesis. The digital replication and use of our voices is putting us in the position of competing against ourselves, forcing our voices to carry messages we had no participation in creating or condoning, and denying us payment for the use of our asset, our voice. We are artists, Americans, and our livelihood and profession are at risk as a result of an activity we consider theft. We strongly request that you act to right this wrong.

Many public and private facing AI companies have used voice recordings from voice actors as the foundation of their programs and systems without proper consent, control, or compensation. The current patchwork of state laws affords protections to some voice actors, but those protections are contingent upon the state in which the voice actor lives and are not easily understood nor enforced. As such, the current global state of emerging tech makes it immensely difficult for voice actors to protect the rights to their voice, image, name, or likeness. Creating a national right of publicity and establishing voice as a property right would provide a basic level of protection and rights to biometric data that would allow for voice actors across the country to continue to survive in a changing world that threatens to destroy a multibillion-dollar industry. It would also force internet platforms to recognize requests to stop carrying digital replicas violating our property rights once we have them. Until then, they will continue to ignore us.

Additionally, eighty percent of voice over work in the United States is non-union. Meaning that even with the beneficial protections SAG-AFTRA has been successfully achieving, most of the voice actors in the United States will remain vulnerable to the unbalanced business practices that are widespread within the AI and voice industry. Creating a Requirement of License whereby a working-class, blue-collar voice actor would need to be represented by counsel before any digital replica could be created, would create a more equitable business environment for the small businesses that are created by a professional voice actor.

These protections can be created and put in place in a way that respects the value of the human voice and the work of the human voice actor without stifling or slowing down the

development of emerging technology. With protections in place for the human voice, enforcing consent, control, and fair compensation is achievable.

18 December 2023

The Honorable
Christopher Coons
United States Senator
218 Russell Senate Office Building
Washington, DC 20510

The Honorable
Amy Klobuchar
United States Senator
425 Dirksen Senate Office Building
Washington, DC 20510

The Honorable
Marsha Blackburn
United States Senator
357 Dirksen Senate Office Building
Washington, DC 20510

The Honorable
Thom Tillis
United States Senator
113 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators,

We the undersigned are a bipartisan coalition of unapologetic defenders of free expression writing to express our concerns with the recently released draft legislation called the Nurture Originals, Foster Art, and Keep Entertainment Safe, or NO FAKES Act.¹ While well-intentioned, as released, the bill would give both celebrities and ordinary people sweeping powers to control generative AI tools.

Protection against generative AI related harms is a worthy goal – and we understand performers’ concerns about having their performances replaced by digital replicas without their consent.² Moreover, we share broader policymaker concerns with malicious actors exploiting this technology to create “deepfakes” that can be used to peddle disinformation³ and harm ordinary people.

But in its zeal to protect performers from AI clones, the draft legislation goes too far – reaching well beyond its stated goals by introducing sweeping liability for commonplace uses of AI tools in professionally produced media, and even amateur web videos and songs, while at the same time creating new barriers to small creators and undermining free expression.

Overbroad restrictions on this technology will also have consequences that extend far beyond the film, television and music industries. Generative AI tools may be legitimately utilized by journalists, historians, video game developers, forensic scientists, marketers, product designers, doctors, educators, engineers, political activists, and students to enhance their work and tell compelling stories with fidelity to their vision.

For instance, the island nation of Tuvalu is looking to create a digital replica of their entire country to preserve their culture from the threat of rising tides,⁴ and law enforcement is exploring the use of

¹ <https://www.coons.senate.gov/news/press-releases/icymi-senators-coons-blackburn-klobuchar-tillis-announce-draft-of-bill-to-protect-voice-and-likeness-of-actors-singers-performers-and-individuals-from-ai-generated-replicas>

² <https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html>

³ <https://www.nytimes.com/2023/02/07/technology/artificial-intelligence-training-deepfake.html>

⁴ Fainu, Kalolaine, “Facing extinction, Tuvalu considers the digital clone of a country,” *The Guardian*, (Jun. 2023), <https://www.theguardian.com/world/2023/jun/27/tuvalu-climate-crisis-rising-sea-levels-pacific-island-nation-country-digital-clone>

generative AI for crime scene reconstruction.⁵ Additionally, generative AI tools enabled the production of content which otherwise would have been unachievable due to government restrictions imposed on content creators during the COVID-19 pandemic.

The “Right to be Forgotten” in Europe should also serve as a cautionary tale. While intended to protect average people from potential reputational harms enabled by the internet, the doctrine was manipulated in Europe by various parties, including political candidates, the affluent, and even criminals,⁶ to selectively control their narratives and information accessible about them. Overbroad restrictions on generative AI have the potential for similar misuse. This could extend to the estates of individuals who might employ legal tactics to suppress artists and individuals from depicting controversial figures. It is essential to safeguard the freedom of creators to depict stories about individuals like Roger Ailes and Harvey Weinstein without the threat of legal reprisal.

These issues predate AI. Indeed, state “right of publicity” laws protect performers against the unauthorized use of their name, image, likeness, and voice for commercial purposes without suppressing First Amendment protected speech. Many of these laws achieve this vital balance through the inclusion of statutory exemptions for “expressive works” such as movies, shows, books, songs, news reporting and more. The NO FAKES Act includes some protections – but lacks several important expressive works exemptions that are routine in modern state right of publicity laws⁷ – marking a dangerous expansion of state power into the realm of free expression.

Media has always been used to speak truth to power, shed sunlight on leaders and institutions and depict public and historical figures. As the California Court of Appeal explained in *De Havilland v FX Networks, LLC*⁸:

Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star—“a living legend”—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator’s portrayal of actual people.

The NO FAKES Act would eviscerate this principled standard.

Overbroad restrictions on generative AI tools could also disproportionately harm small creators, to the benefit of large, incumbent companies. Without adequate expressive works exemptions, creators would be forced to try to prove to courts that a particular use is protected by the First Amendment—an onerous and expensive task. While large corporations can afford to employ armies of First Amendment lawyers to defend their rights, small creators can’t, and would thus shy away from legitimate uses of

⁵ Krol, Malgorzata, “A Scene Preserved; Forensic Digital Twin,” *Hexagon*, (Aug. 17, 2021),

<https://blog.hexagoneosystems.com/crime-crash-fire-scene-preserved-forensic-digital-twin/>

⁶ Stephens, Mark, “Only the powerful will benefit from the ‘right to be forgotten,’” *The Guardian*, (May 18, 2014),

<https://www.theguardian.com/commentisfree/2014/may/18/powerful-benefit-right-to-be-forgotten>; Kharpal,

Arjun, “right to be forgotten helping terrorists: UK government,” *CNBC*, (Nov. 12, 2014),

<https://www.cnbc.com/2014/11/12/right-to-be-forgotten-helping-terrorists-uk-government.html>

⁷ N.Y. Civ. Rights Law §50-f; La. Stat. Ann. § 51:470.1 et seq.

⁸ *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018).

generative AI that could be challenged by unhappy celebrities or others. By imposing unbalanced limitations on this technology, the NO FAKES Act risks reinforcing a structure that primarily benefits those with the financial means to assert their First Amendment rights.

Crucially, the inclusion of expressive works exemptions would not deprive performers or citizens of legal recourse to defend themselves. For instance, Tom Hanks recently warned fans that an online video featuring his likeness promoting a dental plan was fabricated.⁹ Fortunately, any existing state right of publicity law provides Mr. Hanks ample legal authority to protect himself from this clear violation and others like it. Similarly, ordinary citizens can protect themselves from harmful uses of digital replicas through well-established bodies of law addressing defamation and fraud.

We understand and support performers' desire not to be digitally replaced in new works in which they otherwise would have performed – as well as broader concerns regarding generative AI. But in crafting this legislation, policymakers must take care not to overreach by banning legitimate uses that are fully protected by the First Amendment. As currently written, we believe the discussion draft of the NO FAKES Act fails to appropriately strike this balance and must be amended to address these concerns before introduction.

Sincerely,

Jeff Westling
Director of Technology and Innovation Policy
American Action Forum (for identification only)

Curt Levey
President
Committee for Justice

Jessica Melugin
Director of Center for Technology and
Innovation
Competitive Enterprise Institute

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Yael Ossowski
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Executive Director
Innovation Economy Alliance

Tom Giovanetti
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⁹ <https://www.foxnews.com/entertainment/tom-hanks-warns-fans-ai-version-of-him-dental-ad-done-without-consent-beware>

Dr. Edward Longe
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cc:
Sen. Dick Durbin
Sen. Lindsey Graham
Sen. Sheldon Whitehouse
Sen. Chuck Grassley
Sen. Richard Blumenthal
Sen. John Cornyn
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Sen. Mike Lee
Sen. Cory Booker
Sen. Ted Cruz
Sen. Alex Padilla
Sen. Josh Hawley
Sen. Jon Ossoff
Sen. Tom Codon
Sen. Peter Welch
Sen. John Kennedy