October 21, 2024

The Honorable Chris Coons
Chairman
Committee on Judiciary
Subcommittee on Intellectual Property
United States Senate
218 Russell Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Committee on Judiciary
Subcommittee on Intellectual Property
United States Senate
113 Dirksen Senate Office Building
Washington, DC 20510

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

The proliferation of digital replica tools like generative artificial intelligence poses significant challenges. Like you, we are deeply concerned about possible harms to democracy and personal dignity and the potential for economic exploitation arising from this technology. Unfortunately, the NO FAKES Act—as currently drafted—not only fails to appropriately address these harms, but threatens to worsen them. There are three major issues with the bill as drafted:

1. There are serious disinformation risks that arise from takedown systems that don't contain robust put-back mechanisms and stronger consequences for false takedown requests.

Takedown requirements like the ones called for in NO FAKES are an extraordinarily powerful tool that allow the unilateral removal of content from the internet. This can be a boon for empowering individuals to combat harmful content, but we know from past legislation of this nature that these systems are vulnerable to abuse, can create overmoderation, and can be used to stifle and censor speech. We are already seeing baseless claims that unflattering or inconvenient photographs or audio are AI-generated as a means of discrediting such content.

While AI manipulation can create disinformation, *so can the removal of newsworthy content under false pretenses.*

Under the NO FAKES framework, the only recourse for users falsely accused of uploading digital replicas is to initiate expensive and lengthy litigation. This is impractical in the best of cases; in the worst, it will mean that bad actors claiming that content is synthetic will succeed in erasing newsworthy items from the public eye altogether. Without significant and easy to obtain penalties for making false takedown requests, the malfeasance of bad actors will go unchecked.

2. If a law purports to address the serious issue of synthetic non-consensual intimate imagery (NCII), it should be specifically designed to deter such conduct for everyone – not just celebrities.

While supporters of NO FAKES have held this legislation up as addressing the serious harms caused by synthetic NCII, such content is treated as no more serious or harmful than an unauthorized endorsement in an advertisement would be. While celebrities might be able to pursue civil litigation against harassers and abusers who create and publish such content, ordinary people and our children are left comparatively vulnerable.

NO FAKES is first and foremost designed to protect the commercial interests of the entertainment industry—not protect Americans from the impacts they are most likely to suffer as a result of digital replication technology.

We do not need a complex new intellectual property right, with byzantine rules and civil causes of action that are difficult to decipher for the average American, to protect people from synthetic NCII. People need clear, accessible, and fair legal mechanisms to protect their reputation, dignity, and privacy. If Congress is going to take action on synthetic NCII—and it certainly should—it should first act to deliver legislation to Americans that directly acknowledges and addresses the harms that actually impact their lives.

3. NO FAKES enables tech and media conglomerates to exploitatively snatch up the right to create digital replicas, threatening individuals and working creatives.

While NO FAKES aspires to give people control over their digital likenesses, it actually creates a system that risks entrenching the largest tech and media companies, like major record labels, giving them unprecedented control over the right to replicate someone's image and voice. While some entertainers are protected against this by collective bargaining agreements, most creative workers (and private individuals) are not. The bill as drafted contains no requirements that people be represented by counsel, or even be given clear and conspicuous notice, that they are signing over their digital replication right under the law.

One stroke of the pen could sign away someone's rights for ten years—or up to seventy years for a deceased individual—with no mechanism for reverting or withdrawing such a license, or preventing uses of which the individual or their estate disapproves.

Musicians in particular are already susceptible to exploitative contracts, and there is no reason to believe that this law will do anything other than add another line to a record contract. Emerging artists lack leverage in negotiations and would not be in a position to curtail or counter the demands of a major label in these situations. Likewise, Congress should be

concerned about how ordinary private citizens, not on the lookout for such provisions, could be swindled into unwittingly turning these rights over to powerful or unscrupulous companies.

We strongly believe that Congress should take action to address the risks and harms posed by digital replicas, but legislation that primarily serves the interests of the few—and fails to solve our pressing problems in the process—is not the solution we need.

As we've noted, digital replicas can give rise to at least three categories of harm: commercial harm, dignitary harm, and democratic harm. Given their uniquenesses and distinct audiences, there is unlikely to be a single solution that effectively addresses all three issues. We are anxious to work with Congress on solutions that include carefully balanced safeguards and limits on any new protections.

Sincerely,

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