September 6, 2024

The Honorable Chris Coons
Chair
Subcommittee on Intellectual Property
United States Senate
218 Russell Senate Office Bldg.
Washington, DC 20510

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

Dear Senator Coons and Senator Tillis:

The undersigned groups write to express serious concerns about the NO FAKES Act, S. 4875. We represent a broad cross-section of groups dedicated to balanced copyright and a free and open internet, including libraries, civil libertarians, online rights advocates, start-ups, consumers, and technology companies of all sizes. We understand and share the serious concerns many have expressed about the ways digital replica technology can be misused, with harms that can impact ordinary people as well as performers and celebrities. These harms deserve the serious attention they are receiving, and preventing them may well involve legislation to fill gaps in existing law. Unfortunately, the recently-introduced NO FAKES bill goes too far in introducing an entirely new federal IP right.

Below are some of the most serious concerns raised by the NO FAKES Act:

- **NO FAKES offers a blunt solution before we understand the problem.** Digital replicas are already regulated by a laundry list of current state and federal laws related to privacy, publicity, fair competition, fraud, intellectual property, election integrity, and false advertising, among others. Before adding yet another layer of regulation, Congress should be sure it has identified a significant gap in the existing framework, and that its intervention will make things better rather than worse than the legal status quo. NO FAKES does not pass this test. Unlike proposals for targeted regulation to prevent novel

harms such as AI-generated non-consensual intimate imagery, NO FAKES creates a massive new regulatory regime that is redundant and even inconsistent with existing law.

- **NO FAKES endangers expressive platforms and creates a classic heckler's veto.** NO FAKES creates an exception to the platform protections in Section 230, a crucial provision that has enabled the flourishing of online expression and creativity by empowering platforms to moderate the content they host without facing undue liability for users' speech. The liability that NO FAKES would impose will lead platforms to err on the side of censorship. Platforms become potentially liable as soon as they receive a notice that an allegedly unauthorized replica is present on their system, and damages can multiply quickly ($5000 per copy made, transmitted, or displayed, with a $1million/claim cap that will be cold comfort for even medium-sized platforms). A platform that receives a valid notice must remove "all instances" of a replica, which will lead to overbroad filtering that risks censoring lawful uses. And unlike Section 512 of the DMCA, NO FAKES lacks a simple counter-notice mechanism to allow speakers to have their work restored if they believe a takedown is invalid. Instead, the target of a takedown request must file suit in federal court within 14 days to defend their speech. Abusive takedowns will be inevitable.
- **NO FAKES creates a licensable, transferable right that endangers depicted individuals and could enable misinformation.** A digital replica right that can be licensed or transferred without substantial limits threatens the liberty and autonomy of the right's intended beneficiaries. While NO FAKES includes some limitations on license and transfer, it still leaves room for abuse. The requirement of a "signed writing" and a "reasonably specific description of the intended uses" of a replica still leaves the door open to the use of a simple click-through license to obtain an exclusive 10-year right to create indefinitely many sound recordings or audiovisual works that match a particular description. Professional performers and private people alike could find themselves alienated from their own likeness for up to a decade, unable to create or authorize the creation of works that incorporate their digital replica. At the same time, nothing in the bill would stop a licensed user from deploying a digital replica to create misinformation, including videos that show someone doing or saying things they never did or said, with no disclosure that the performances are synthetic.
- **NO FAKES' 70-year post-mortem term of protection encumbers speech and threatens living performers.** As the U.S. Copyright Office has explained and many state laws acknowledge, the interests vindicated by rights of publicity diminish drastically

once a depicted person is deceased, and the burden of such rights on free expression becomes much harder to justify. Lucrative markets in the personae of deceased performers would also threaten the livelihoods of living performers, as commercial interests would invest in cultivating and monetizing the appearances of dead celebrities. Because of the retroactive application of the Act, the heirs of celebrities who passed away within the past ten years, such as Prince or Carrie Fisher, could prevent other family members from making digital replicas of their famous relatives. The threat of a tax bill associated with this new inherited asset will create pressure on heirs to license or transfer the right, leading to commercial uses in cases where the celebrity or their family may not have wanted them.

- **NO FAKES will lead to extensive litigation.** By creating a new IP right with many imprecise terms, NO FAKES will precipitate a torrent of lawsuits among studios, record labels, artists, artists' family members, and individuals. Ultimately, only the lawyers will benefit.
- **NO FAKES impermissibly burdens First Amendment protected speech.** The broad intellectual property right created by the NO FAKES Act is a content-based regulation of protected speech. Thus it must survive "strict scrutiny"—the bill must be narrowly tailored to serve a compelling state interest. While NO FAKES purports to address a laundry list of state interests, the IP right it creates is not narrowly tailored to any one of them (nor is it clear, as mentioned above, that these interests lack sufficient protection under current law). Rather, NO FAKES creates a chilling presumption that any use of a digital replica requires authorization, subject to a closed list of exceptions with uncertain scope. Speakers are expected to make fraught determinations such as whether their speech qualifies as "bona fide" news reporting or public affairs programming, whether their use of a digital replica is "materially relevant," and whether their historical work has engaged in more than "some degree of fictionalization." The result will inevitably chill protected speech.
- **NO FAKES exceeds Congress's Constitutional authority by expressly creating an "intellectual property" right in factual information.** The IP Clause of the Constitution says Congress may grant IP rights only in the "writings and discoveries" of "authors and inventors." While these terms have been construed broadly to include all manner of human invention and creative expression, they specifically do not include facts. Since a person's voice and appearance are matters of fact, the Constitution prohibits granting an exclusive intellectual property right in their use. Invocation of the Commerce Clause by a

bare recitation that the law addresses interstate commerce does not suffice to avoid this limitation. As the Supreme Court explained in *Railway Labor Executives' Ass'n. v. Gibbons,* 455 U.S. 457, 469 (1982), to permit such a move "would eradicate from the Constitution a limitation on the power of Congress."

As currently written, the NO FAKES Act does more harm than good, and will not survive judicial review. We encourage Congress to explore approaches that are more narrowly tailored to fill the gaps, if any, in existing legal protections for privacy, publicity, and related interests.

Signed,

Re:Create
Association of Research Libraries (ARL)
American Library Association
Computer & Communications Industry Association
Center for Democracy and Technology
Electronic Frontier Foundation
Engine
Organization for Transformative Works
Public Knowledge
R Street Institute

CC: U.S. Senate Committee on the Judiciary