December 18, 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 disinformation[3] 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.

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[1] *See:* "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," *Senator Chris Coons*, (Oct. 13, 2023), 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] Coscarelli, Joe, "An A.I. Hit of Fake 'Drake' and 'The Weeknd," Rattles the Music World," *The New York Times,* (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/arts/music/ai-drake-the-weeknd-fake.html
[3] Satariano, Adam & Mozur, Paul, "The People Onscreen Are Fake. The Disinformation Is Real." *New York Times*, (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/technology/artificial-intelligence-training-deepfake.html

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 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 laws[7] – 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

[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

[5] Krol, Malgorzata, "A Scene Preserved; Forensic Digital Twin," *Hexgaon*, (Aug. 17, 2021), https://blog.hexagongeosystems.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).

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 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,

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[9] Thayer, Caroline, "Tom Hanks warns fans 'AI version' of him in dental ad was done without consent: 'beware'," *Fox News*, (Oct. 2, 2023), https://www.foxnews.com/entertainment/tom-hanks-warns-fans-ai-version-of-him-dental-ad-done-without-consent-beware

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