

**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.