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.

1633 Broadway, Warner Music Group , New York, NY 10019

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.

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.

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

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.

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)