Written Testimony of Duncan Crabtree-Ireland

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Subcommittee on Intellectual Property

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Thank you, Chairman Coons, Ranking Member Tillis, and Members of the Subcommittee on Intellectual Property. This hearing on the NO FAKES Act is of existential importance to the livelihood of our members and we appreciate the opportunity to testify on their behalf.

My name is Duncan Crabtree-Ireland. I am the National Executive Director of SAG-AFTRA, the country's largest union for entertainment and media artists. SAG-AFTRA's membership includes over 160,000 actors, news and entertainment broadcasters, recording artists and other entertainment professionals (collectively "artists"). Hundreds of thousands of individuals have work under our contracts, including many who have served in the Senate, the House, and even the White House.

I am here today to provide testimony regarding the NO FAKES Act and the importance of protecting performers, and all individuals, from non-consensual replication and use of their voice and likeness. AI technology, left unregulated, poses an existential threat not only to SAG-AFTRA's members, but to civil discourse, student health & welfare, democracy and national security.

I am the chief negotiator for the union's contracts, including last year's historic agreement with the major entertainment studios which was only finalized after the longest entertainment industry strike in over forty years, a strike that lasted nearly four months. That negotiation

resulted, among other things, in the introduction of the first comprehensive terms governing the use of artificial intelligence (AI) in filmed entertainment projects. The strikes – and the public's response to them – highlighted the importance of AI, both to the entertainment industry and the broader public. Subsequent to that negotiation, we successfully concluded similar negotiations with the major record labels, negotiations which again resulted in the first comprehensive terms related to A.I. in the music industry.

Without a federal property right over their voice and likeness, our members cannot control what others do with AI generated digital replicas of them and cannot successfully demand compensation for that use. For an artist, their voice and likeness are the foundation of their performance, brand, and identity, developed over time, through investment and hard work. Taking that voice and likeness is a form of theft. It is definitely unethical and must be made illegal.

While SAG-AFTRA's core responsibility is to negotiate, administer, and enforce the collective bargaining agreements under which our members work, the union is also charged with advocating on behalf of our members for legislation that directly impacts their work and their careers. SAG-AFTRA has long fought for right-of-publicity laws and voice and likeness protections throughout the United States. The exponential proliferation of artificial intelligence technologies, technologies which allow for rapid and realistic fakes of voices and likenesses in audiovisual works and sound recordings, makes this fight urgent for our members.

While I am here to speak primarily about artists, we mustn't ignore all the ways in which we are all now threatened. I urge this body to take seriously the warnings being sounded by AI experts in all industries, across the political spectrum, and around the world. Current AI voice

simulation software is able to create a convincing replica of any person's voice from a four second sample, enabling them to impersonate anybody. Imagine a scenario where somebody receives a call from the AI-generated voice of a family member who states that harm will come to them if a ransom is not immediately digitally transferred. Or a scenario where one of our artists loses a job to a digital replica of their own voice or image. These aren't far-fetched science fiction; they are already happening. That's why swift consideration and passage of the NO FAKES Act is essential.

Like all Americans, SAG-AFTRA members need the ability to give or withhold consent, exercise control, and receive compensation for the use of their voice and likeness. NO FAKES would enshrine the core principles of Informed Consent and Compensation into federal law and demonstrate to the rest of the world that the United States is leading on protecting the identity and livelihood of individuals in the age of generative AI.

I speak from experience when it comes to the risks and the harm from nonconsensual replication of voice and likeness. During the ratification campaign for SAG-AFTRA's contract with the major studios, a contract focused on AI protections, a deepfake of me was created by an unknown party. This deceptively impressive looking, and sounding, deepfake Duncan made false statements about the contract and urged members to vote NO on it, a contract that I negotiated and I strongly supported. Despite a disclaimer in the fine print of the caption that it was a deepfake, many members never saw or read that disclaimer. I was contacted by many members asking me why I opposed the very contract I had worked so hard to negotiate. But beyond that, there is something uniquely dehumanizing in having your own voice and image turned against you, turning any conception of freedom of speech on its head. To have your own voice used to speak the opposite of what you believe - and have no way to stop it - is the

ultimate violation of everyone's right to freedom of expression and association.

While myriad state laws offer individuals protection against misappropriation of their names, images, voices, and likenesses, there is no corresponding federal law. This patchwork of state laws has, to a degree, served its purpose over the years. However, with the rapid proliferation of generative AI technologies, overarching federal protections are critical. And these protections must address the novel concept of realistic digital clones. Despite rights of publicity being widely recognized as intellectual property rights, courts have split on whether they fall within the scope of the immunity conferred on internet service providers under Section 230. This judicial schism has mitigated enforcement of the right, even in some of the most egregious examples. Service providers are simply not quick to respond, and an artist cannot unring the bell once a digital clone has been propagated. At best, it becomes a game of whack-a-mole that places the burden on the individual whose image has been exploited.

Enshrining this important protection as a federal intellectual property right will ensure individuals are protected and service providers are incentivized to act. Importantly, a comprehensive federal statute will also deter nefarious behavior before it manifests itself. It is true that the nature of damages will differ between individuals and professionals or personalities whose voice and likeness form the very basis for their careers. This difference should not impact liability but, consistent with Supreme Court precedent, should be taken into consideration in how damages are calculated.

Current case law in this area was created prior to the advent of the Internet and generative AI, and accordingly, is woefully inadequate to address the current proliferation of fake images. In the only Supreme Court case to address these rights, the plaintiff was a human cannonball performer whose short act was broadcast in its entirety by a television news broadcast. In that

case, the Court held that the right of publicity provides "an economic incentive for him to make the investment required to produce a performance of interest to the public."[1] The Court analogized the right of publicity to copyright and patent and acknowledged that the time devoted to "creative activities deserve[s] rewards commensurate with the services rendered."[2] Despite the *Zacchini* case involving the plaintiff's entire act, the Court never made that a requirement and subsequent courts have routinely followed *Zacchini*'s holding and reasoning.

Some will argue that there should be broad, categorical First Amendment-based exemptions to any legislation protecting these important rights; however, nothing in the First Amendment requires this. The Supreme Court made this clear over half a century ago – the First Amendment does not *require* that the speech of the press, or any other media, be privileged over protection of the individual being depicted.[3] To the contrary, most courts apply balancing tests to determine which right will prevail.

The most prominent balancing test, the transformative use test, was derived from the Copyright Act's fair use factors. It protects the use when the depiction of the individual has been "transformed" into new expression, such as where the individual is being depicted as a futuristic space reporter with hot pink hair or a half-man, half-worm character.[4] On the other end of the spectrum, if the individual is being depicted doing what they are known for and for what they would normally be compensated for, the right of publicity prevails over the First Amendment.[5]

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[1] *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 576 (1977).
[2] *Id.*
[3] *Zacchini*, 433 U.S. 562

[4] *See Kirby v. Sega of America, Inc.*, 144 Cal.App.4th 47, 55-57, 50 Cal.Rptr.3d 607 (2006); *Winter v. DC Comics*, 30 Cal. 4th 881, 69 P.3d 473, 134 Cal. Rptr. 2d 634 (2003).

[5] *See, e.g., Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013) (In the game at issue, the digital version of the athlete did does what the real one did, "he plays college football, in digital

Another common balancing test explores whether the depiction is something that is in the public interest. This is the test typically used in connection with news reporting, docudramas, or similar fact-based works, even when they are fictionalized.

These balancing tests are critical, and they are incorporated into the NO FAKES Act. They ensure that the depicted individual is protected and rewarded for the time and effort put into cultivating their persona, while not unduly burdening the right of the press to report on matters of public interest or the entertainment media to tell stories. At the same time, these tests help ensure the depicted individual is not *compelled* to speak for the benefit of third parties who would misappropriate the value associated with the persona they have carefully crafted, and perhaps associate them with a message that they don't believe in, or which may be anathema to them. With new AI technologies that can now realistically depict an individual's voice or likeness with just a few seconds of audio or a single photograph, it is all the more important that broad categorical exemptions be avoided and that the courts be empowered to balance the competing interests.

There have been multiple hearings on AI technologies during this term. The companies behind many of these technologies have asked for legislation so they better understand the appropriate boundaries on their conduct. The NO FAKES Act will provide them with important guidance while helping to ensure individuals are protected from exploitation that puts their livelihoods and reputations at risk.

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recreations of college football stadiums, filled with all the trappings of a college football game"); *No Doubt v. Activision Publishing, Inc*., 192 Cal. App. 4th 1018, 1036 (2011) (Defendant violated the band members' right of publicity by using their names, images, and likenesses beyond the authorized scope). *See, also*, *Keller v. Electronic Arts Inc*., 724 F.3d 1268 (9th Cir. 2013).

Thank you again for this opportunity to speak today. I look forward to answering your questions.