Questions from Senator Tillis
for Duncan Crabtree-Ireland
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?**

A carefully crafted notice and takedown provision could benefit all parties, providing artists and their representatives, and individuals, an expedient mechanism for removing content online.

To effectively slow or stop the distribution of content in violation of the Act, a notice and takedown should be approached as "notice and stay down," rather than allowing a counter-notification provision, such as is in 17 USC § 512(c), that is susceptible to abuse by the very people it is intended to protect against. For example, in attempting to protect SAG-AFTRA's rights in content we own and produce, our takedown notices to the online platforms were frequently met with entirely baseless counter-notifications by users who had no rights to use the content, let alone any legal basis for a counter-notification. These were purely coming from users rolling the dice that we would not take the only remedy left to us, which was to initiate costly litigation. This kind of loophole, and costly remedy, could be devastating to an individual whose voice or likeness is digitally cloned and proliferating online.

While the damage done by infringing copies of a copyrighted work that remain online pending litigation is largely limited to economic damages, the damage of digital replicas are far more dangerous. They pose a risk to consumers and fans misled by the content, to businesses who might be associated with the individual, and they devastate individuals' lives and

careers. It is particularly problematic where the use deceives the public, such as the robocall featuring President Biden.

We would welcome the opportunity to work with the authors to ensure that a notice and takedown regime works in a manner consistent with the intent of the Act.

2. Regarding the NO FAKES Act, should there be a preemption clause in cases of conflict with state laws? If so, why?

There is decades of established jurisprudence relating to state right of publicity laws which create a workable foundation. There is a good understanding of what is permitted and prohibited when it comes to traditional, commercial uses of name, image, voice and likeness. However, one of the prime focuses of this bill is digital replica use, especially via AI. We are comfortable with the No Fakes Act specifically and solely preempting conflicting state laws that regulate digital replica use in audiovisual works and sound recordings.

3. Regarding the NO FAKES Act, what unintended consequences do you foresee, if any?

The known consequence of not passing the NO FAKES Act and the resulting continued threat to the livelihood and control over their identity to our members is much greater than any unintended consequence that has been expressed. The language in the law itself balancing these rights with the 1st amendment, and potential language incentivizing take downs by platforms, will mitigate any unintended consequences.

4. There is a provision in the draft bill that some have characterized as a giveaway to unions. Specifically, a giveaway to your union. Under the current draft legislation, individuals only have the right to license out their digital likeness if they hire an attorney or are a member of a labor organization.

The No Fakes Act does not require someone to be a member of a labor organization to gain its protections against unfair licensing. If a union has bargained protections over replica licensing in certain industries, the workers protected in that industry include nonmembers who work that contract. Federal law recognizes the role that collective bargaining representatives have in these types of situations. It is sound policy to acknowledge that labor organizations are in a strong position to protect individuals from the abuse of their rights, stronger than those individuals area able to do so by themselves.

Unions have proactively negotiated consent and payment guardrails for digital replica licensing in film, TV and music. These guardrails are not just for high profile individuals but for all performers, including background actors and voice professionals. These guardrails should be seen as model provisions for protection against abuse.

What are some other areas of law where an individual can only fully assert a property right by being represented by counsel or represented by a labor organization?

Licensing one's digital identity to another party is unlike any other form of property transfer. The purpose of the provision is to ensure individuals are able to protect themselves from unfairly losing control over their identity in a negotiation with entities who have outsized leverage.

If a union has not already bargained digital replica protections for the worker, the bill mandates legal representation. We are open to considering other limitations on licensing, including; time limits (CA limits a personal service contract to 7 calendar years for example), mandating detailed descriptions of use and one project at a time consent, and finally, establishing the principle that control and ownership of an individuals' cloned voice and likeness never actually transfer, they are only leased for specific, fairly bargained and consented to, uses.

There are multiple instances of complex contracts involving corporate entities and individuals who have little or no leverage. A recording artist with a record labels is one such example. Those contracts almost always make the individual artist represent and warrant that they sought and acquired guidance from qualified legal counsel prior to signing the contract. When it comes to allowing an entity to digital clone your voice & likeness, we believe the highest level of protection is mandated, and that means mandating adequate legal or union representation.

Collective bargaining agreements have a long history of providing backstops to state labor laws, to ensure workers have the best available protections. State laws are regularly drafted with provisions stating that either the law, or an applicable collective bargaining agreement, control the issue for the worker. Unions have already fought hard, and in our case endured a 4 month, to build basic protections over digital replica use. Those protections should be recognized.