



September 17, 2024

The Hon. Chris Coons, Chair
Subcommittee on Intellectual Property
United States Senate
218 Russell Senate Office Bldg.
Washington, DC 20510

The Hon. Thom Tillis, Ranking Member
Subcommittee on Intellectual Property
United States Senate
113 Dirksen Senate Office Bldg.
Washington, DC 20510

Dear Chairman Coons, Ranking Member Tillis, and Members of the Subcommittee:

I write today on behalf of Chamber of Progress, a tech industry coalition promoting technology's progressive future. S. 4875, the Nurture Originals, Foster Art, and Keep Entertainment Safe (NO FAKES) Act of 2024, proves the adage that bad facts make bad law. I urge you to oppose it.

The misuse of generative artificial intelligence technology to violate the privacy and other rights of individuals and public figures alike is reprehensible and stories of its effects are personally compelling. It's equally clear that the NO FAKES Act, if enacted, would make exceedingly bad law.

NO FAKES Needlessly Takes a Jackhammer to the Deepest Foundations of Copyright

Since its inception, the bedrock premise of U.S. copyright has been that facts are not copyrightable. Only the specific and unique way something is communicated in a "tangible medium of expression" is. That's true because – as courts have consistently recognized for decades – copyright itself must be balanced against all of our rights under the First Amendment and allowing anyone to own facts can't be squared with those rights.

Courts consistently have found that faces and voices themselves – as distinct from how they may be used and "fixed" in a given work like a film, photo, or song – are facts. The NO FAKES Act's grant of a sweeping new intellectual property right in likenesses and voices thus may well be unconstitutional.

NO FAKES Dangerously Weakens Online Service Providers' Sec. 230 Safe Harbor

NO FAKES creates an exception to the longstanding "safe harbor" from liability provided to online service in Section 230 of the Communications Decency Act in a manner that effectively requires OSP self-censorship in self-defense.

By adopting requirements to take information down immediately on demand and ask questions later, with no penalties for false takedown requests but large penalties for failing to comply instantly, the law virtually assures its own abuse. That jeopardizes the freedom of expression that the law was intended to afford all internet users.

It also poses particular risks to anyone using digital replicas in parody, satire, or other constitutionally protected political speech on such hot-button issues as LGBTQ+ rights or other civil rights.

NO FAKES Unjustifiably Trenches on All Americans' Protected Free Speech Rights

NO FAKES is a content-based regulation of speech. To be constitutionally valid, the law must be narrowly tailored to meet Congress' "compelling state interest." NO FAKES, however, authorizes heart surgery with a machete.

Its IP right isn't "tailored" to any of the harms at which it is facially aimed. Further, information posters are required to either censor themselves or risk correctly making judgments about whether their speech is "bona fide" news reporting, use of a digital replica is "materially relevant," or whether their version of dramatizing history goes beyond an undefined permitted "degree of fictionalization."

The ambiguity of these terms also may result in significant challenges and self-censorship for marginalized, under-resourced creators (e.g., a community activist who produces a video critiquing a public figure who must guess under penalty of the ACT whether a court will subjectively consider their work to be a bona fide commentary).

Further, unlike rights of publicity and misappropriation of name and likeness statutes upheld by the courts, liability under NO FAKES is not limited to commercial uses. These vague concepts assure that NO FAKES will chill constitutional speech.

The NO FAKES Act would radically alter the core of US copyright law and, in multiple ways, undermine the speech rights of all Americans. It is bad law. The Chamber of Progress urges you to reject it.

Sincerely,

A handwritten signature in black ink, appearing to read "Adam M. Eisgrau". The signature is fluid and cursive, with a large initial "A" and "E".

Adam M. Eisgrau
Senior Director - AI, Creativity & Copyright Policy