

*December 1, 2020*

## **Responses of the Center for Democracy & Technology to Sen. Tillis's DMCA Reform Questions**

Section 512 of the DMCA allows online service providers to create the platforms and services that users rely on to access information and creative content, communicate with one another, and create and share their own original works. The flexibility of section 512 has fostered continued evolution and refinement in the mechanisms used to address online infringement without sacrificing the values of free expression and innovation that Congress sought to protect in enacting the DMCA.

No constituency is entirely content with every aspect of the DMCA's safe harbors or notice and takedown process. Lawful content has been removed from online services due to mistaken or abusive notices, infringing content has reappeared notwithstanding the issuance of complete and valid takedown notices, and service providers have been subject to significant liability risk despite efforts at good-faith compliance with the DMCA's requirements. However, the DMCA has been successful in balancing the competing interests of rightsholders, service providers, and users as the Internet and World Wide Web have evolved from curious adjuncts to proprietary content and services into immensely powerful tools for commerce, civic engagement, and free expression. This success could not have been achieved – and it could not be maintained – had Congress not expressly rejected imposing a duty on intermediaries to monitor and police the activity of their users.

As the Internet has grown, so has the number of takedown requests. While the increase in notices and takedowns heightens the burden for both rightsholders and service providers to combat infringement, it also reflects the degree to which section 512 has succeeded in accomplishing Congress' goals of promoting economic growth, innovation, and creativity on

the Internet. The Internet today is a much larger “network of networks” than it was in 1998. The increased volume of infringing activity deserves continued attention, but is more than offset by the Internet’s expanding potential as a powerful tool for distributing and accessing creative works, allowing creators and rightsholders unprecedented opportunities to share and monetize their works while giving consumers increasingly diverse choices of how, when, and what content they access. In short, section 512 has helped to grow the economic and cultural “pie” for both creators and consumers of electronically distributed creative works.<sup>1</sup>

There is no reason why the growth of these mutual benefits should not continue. However, the continued insistence by some that online providers should undertake a duty to monitor for infringing material is troubling.<sup>2</sup> Creating such a duty, whether through a so-called notice-and-staydown regime or generalized knowledge standards effectively undermines the neutrality of online services, turning them into gatekeepers. Requiring online service providers to act as gatekeepers runs directly counter to Congress’ intent and the plain language of the statute.<sup>3</sup> It would also destabilize the balance struck by section 512, which provides the foundation on which much of the Internet as we know it stands.<sup>4</sup> While refinements in the execution of the respective duties of rightsholders and service providers under section 512, and voluntary measures to supplement those duties, are warranted, statutory alteration of those duties is not.

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<sup>1</sup> See, e.g., Michael Masnick and Leigh Beadon, *The Sky is Rising, A detailed look at the state of the entertainment industry*, 2019 ed. (April 2019) (noting continual upward growth trends across all major sectors of the entertainment industry); Robert Shapiro and Siddhartha Aneja, *Taking Root: The Growth of America’s New Creative Economy* (Feb. 2019) (documenting that nearly 17 million Americans earned \$6.8 Billion in the year 2017 alone).

<sup>2</sup> See, e.g., Written Testimony of Douglas Preston, Authors Guild, Before the Senate Judiciary Subcommittee on Intellectual Property, *Is the DMCA’s Notice-and-Takedown System Working in the 21st Century?* At 30-31, (June 2, 2020), (“2020 DMCA Notice-and-Takedown Hearing”), Written Testimony of Kerry Muzzy, 2020 DMCA Notice-and-Takedown Hearing, at 6.

<sup>3</sup> See H.R. Rep. No. 105551, pt. 2, at 8 (1998); 17 U.S.C. § 512(m).

<sup>4</sup> 47 U.S.C. § 230; David Post, *A Bit of Internet History, Or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, Wash. Post (Aug. 27, 2015), <https://www.washingtonpost.com/news/volokhconspiracy/wp/2015/08/27/abitofinternethistoryorhowtwomembersofcongresshelpedcreatetrillionorsodollarsvalue/>.

## OSP Categories

Throughout the evolution of online services, courts have been asked to decide whether new services fit within section 512's classification system. On the whole, courts have construed the statute's language flexibly.<sup>5</sup> This flexibility has helped section 512 remain relevant in the face of ever-changing technology and has avoided the constraining effects that a rigid reading might have had on innovation for online services.

Section 512 divides online service providers into four categories, but within each of those there is room to provide services in many different ways. There are providers of unmanaged hosting, offering connectivity and server space for whatever applications (website hosting, email services, data backup) their customers choose to deploy, often with little granular access to or control over the content customers store using their services. There is a wide variety of user-generated content platforms, some of which are tailored to distributing or sharing a particular type of content (e.g., photos or video) and others of which are more tailored to enabling users to store or back up data without regard to the type of content. There are numerous websites that publish a mix of their own content and user-generated content – for example, newspaper sites that publish their own articles but also allow for user comments and discussion. In some cases the user-generated content functions may be relatively minor or ancillary, while in others they may be a key part of the site's purpose or function.

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<sup>5</sup> See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2nd Cir. 2011) (affirming that a narrow construction of "by reason of storage" would not meet the statute's purpose), *but see Gardner v. CafePress, Inc.*, No. 3:131108, 2014 U.S. Dist. LEXIS 25405, \*8 (S.D. Cal. 2014) (failing to find that CafePress was, as a matter of law, a service provider because its services went beyond facilitating sales when it determined retail prices for goods sold through its site and paid users only a commission for those sales).

Providers of each of these kinds of hosting services are eligible for safe harbor protection because courts have recognized that section 512(c) need not be limited to passive hosting.<sup>6</sup> Major sectors of the Internet economy are based on organizing and distributing user-generated content in compelling ways, and these services rely on the legal certainty that safe harbors provide in order to operate. That certainty, however, often comes at a high price. For example, in *UMG v. Shelter Capital* the court ultimately found that the video streaming service, Veoh, was eligible as a provider under section 512(c), but the company ended in bankruptcy as a result of the extended legal battle.<sup>7</sup> This hardwon certainty should be preserved, not relitigated at the expense of more innovative start-ups.

### **Accounting for Stakeholder Differences**

Part of section 512's balance lies in its equal application to all stakeholders. The statute's obligations and standards for service providers and copyright owners are the same whether those roles are played by large corporations or individuals.<sup>8</sup> Disrupting this uniform approach to account for the diversity of participants would require division and classification, creating an uneven system that arbitrarily advantages some and disadvantages others. CDT opposes the adoption of new measures or obligations on service providers for different content categories; any new requirements beyond those currently imposed by section 512 would shift the balance of responsibilities and put providers in a policing role, the problems with which are discussed above.

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<sup>6</sup> See *Viacom*, 676 F.3d at 3940 (discussing how various functions relate to the “by reason of the storage at the direction of the user” language); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1016 (9th Cir. 2013) (“Veoh”) (“We agree that the phrase ‘by reason of the storage at the direction of the user’ is broader causal language than UMG contends, ‘clearly meant to cover more than mere electronic storage lockers.’”) (quoting *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 620 F. Supp. 2d 1081, 1088 (C.D. Cal. 2008)).

<sup>7</sup> *Veoh*, 718 F.3d at 1011; Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, *Wired* (Feb. 12, 2010), <http://www.wired.com/2010/02/veohfilesforbankruptcyafterfendingoffinfringementcharges/>.

<sup>8</sup> 17 U.S.C. § 512(k)(1).

Furthermore, scaling these measures according to the size of operator, the type of content, or the amount of content they host would create barriers to growth and favor larger providers who already have the systems and resources to perform additional measures. Growing providers would have to invest resources to meet the next level of requirements as they crossed from one class to the next; for some, this could represent an insurmountable obstacle. Finally, section 512 already divides the world of service providers according to the fundamental attributes of their services; attempting to define particular classes or tiers of service providers beyond those categories likely would pose practical problems.

### **Staydown and Monitoring**

Rightsholders' frustration with the reappearance of infringing content previously removed by a service provider is understandable and calls for further cooperation between all parties to address the "whack-a-mole" problem. But it does not warrant revising the essential balance Congress struck in the DMCA, which gives rightsholders a powerful tool to remove content without resort to judicial process but expressly relieves service providers of an obligation to monitor their services for infringing activity. That balance has been hugely successful in making the Internet an engine of economic activity, innovation, and free expression. Shifting to a "notice-and-staydown" regime will do more harm than good while still failing to achieve the unrealistic goal of eradicating infringing content from the Internet. Effort would be better focused on voluntary measures to strengthen enforcement of existing law than attempting to change it.

Rightsholders have long called for addressing reposted content by amending the DMCA "to add an affirmative duty for online service providers to monitor for, and remove reposted works that they had already received notice on[.]" or to amend the DMCA's "red flag knowledge"

provision to evict from the safe harbor service providers who prohibit or discourage monitoring of their services for reposted content.<sup>9</sup>

Even without the explicit imposition of a duty to monitor, a relaxed actual knowledge standard would upend the core of section 512's balance between rightsholders, online service providers, and users, as well as the purposes that balance serves. Section 512 makes explicit that the safe harbor shall not be conditioned on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity[.]"<sup>10</sup> Congress recognized that providing rightsholders with tools to remove content without the burden and expense of judicial process raised due process concerns.<sup>11</sup> To provide "all the process that it is due," Congress put in place the notification requirements of subsection 512(c)(3) and the "provisions for the replacement of removed or disabled material in subsection 512(f)."<sup>12</sup> A notice-and-staydown regime would place on service providers a duty to monitor for previously removed content that would short-circuit both of these due process protections. Indeed, "notice-and-staydown" is simply a duty to monitor by another name.

However burdensome, requiring rightsholders to separately identify instances of infringement places that responsibility in the hands of the party with the best information about whether posted content is infringing – a determination that may change over time and is dependent on circumstances (for example, the context-specific conditions of fair use or a change in the rightsholders' preferred monetization strategy). Shifting that burden to the service provider undermines two key concerns of section 512. First, it requires service providers to monitor their users. As suggested by the title of section 512(m) – "PROTECTION OF PRIVACY" – this is not a role Congress intended or wanted service providers to undertake. Barring reappearance of

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<sup>9</sup> US H.R. Subcomm. On Courts, Intellectual Property, and the Internet, *Section 512 of Title 17: Hearing Before the Subcomm.* (March 13, 2014) at 7. See also, Written Testimony of Douglas Preston, *supra*, n.6.

<sup>10</sup> 17 U.S.C. § 512(m)(1).

<sup>11</sup> See S. Rep. No. 105190, at 2021.

<sup>12</sup> *Id.* at 21.

previously flagged content would require ongoing, pervasive scrutiny and filtering of material posted by users. Pervasive scrutiny raises serious privacy concerns. Similarly, pervasive filtering raises serious free expression concerns, particularly considering that under a notice-and-staydown regime content flagged once must disappear from a service provider's platform permanently.

Second, a service provider would lose the protection of section 512's limitation on liability in the event of previously removed content reappearing. As the Ninth Circuit explained in *Veoh*, Congress "was loath to permit the specter of liability to chill innovation that could also serve substantial socially beneficial functions."<sup>13</sup> A duty to monitor for reappearing content would raise that very specter of liability and chill innovation in online services that allow for the creation and posting of user-generated content.

A duty to monitor would fall especially hard on startups and other small entities, particularly those operating on a nonprofit basis. Larger and better-established firms can devote significant resources to content identification systems and automated "trusted partner" programs that allow rightsholders to flag content for removal before it is posted.<sup>14</sup> However, "the vast majority of service providers do not have the resources to develop such technology, and instead rely on human review and responses to notices of claimed infringement."<sup>15</sup> A duty to monitor could cause smaller entities to either refrain from allowing users to create or post content, or face bet-the-company liability if they allow users to do so.

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<sup>13</sup> *Veoh*, 718 F.3d at 1014.

<sup>14</sup> The cost of developing these technologies can be significant. For example, YouTube's proprietary Content ID system reportedly cost more than \$30 million and 50,000 hours to develop. Booz & Co., *The Impact of U.S. Internet Copyright Regulations on Early Stage Investment: A Quantitative Study* 13 (2011), <http://www.strategyand.pwc.com/media/uploads/StrategyandImpactUSInternetCopyrightRegulationsEarlyStageInvestment.pdf> (citing Eric Schmidt, Executive Chairman, Google, MacTaggart Lecture, Edinburgh International Television Festival, Aug. 26, 2011).

<sup>15</sup> Internet Archive, *Comments of the Internet Archive on the U.S. Copyright Office Notice of Inquiry on the Digital Millennium Copyright Act Section 512 Safe Harbors 2* (Mar. 22, 2016) ("Internet Archive Comments"), available at [https://archive.org/stream/InternetArchiveDMCA512Comments/Internet%20Archive%20DMCA%20512%20Comments\\_djvu.txt](https://archive.org/stream/InternetArchiveDMCA512Comments/Internet%20Archive%20DMCA%20512%20Comments_djvu.txt).

Rejecting a “notice-and-staydown” duty to monitor is not tantamount to doing nothing to address the “whack-a-mole” problem. While the DMCA does not impose a requirement to prevent the reposting of infringing content, it also does not prevent service providers from taking steps to do so.<sup>16</sup> Major online service providers can and do take measures to stop previously removed content from reappearing. However, it is essential that such measures are voluntary and not a prerequisite for section 512’s limitation on liability. Mandatory monitoring would raise serious legal and technical issues that would be a net loss to the Internet’s role as an engine of innovation and free expression. CDT agrees strongly with the Department of Commerce that “[v]oluntary cooperation between ISPs and rights holders would offer a more flexible way of addressing this problem.”<sup>17</sup>

## Knowledge Standards

A general knowledge standard, particularly when coupled with an understanding of willful blindness that would require service providers to seek such knowledge, would evict nearly any service provider from the safe harbor if they do not either prevent the posting of user-generated content or monitor that content and the users who post it. That obligation would be at odds with the clear language of the statute and Congress’ intent not to require service providers to engage in such monitoring. Section 512(m)(1) states that service providers have no duty to monitor (other than to accommodate standard technical measures). As the district court in *Viacom* explained, a general knowledge standard would impose a responsibility to ferret out instances of infringement at odds with the respective roles and duties of rightsholders and service providers under section 512: “To let knowledge of a generalized

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<sup>16</sup> See H.R. Rep. No. 105796, at 73 (1998) (“This legislation is not intended to discourage the service provider from monitoring its service for infringing material.”).

<sup>17</sup> U.S. Commerce Dep’t Internet Policy Task Force (IPTF), *Copyright Policy, Creativity, and Innovation in the Digital Economy* 56 (July 2013) (“Green Paper”), available at <http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf>.

practice of infringement in the industry, or a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA."<sup>18</sup>

Every website or service that allows user-generated content operating at any scale knows that some users will inevitably post infringing content. Congress also knew this, which is why it created the DMCA safe harbor. If such general knowledge disqualified a service provider for the safe harbor, no service provider allowing users to post their own content would qualify for it. If service providers were deemed to have constructive knowledge of infringing activity because they failed to seek it out, section 512's limitation on liability would lie beyond the reach of both those who investigate infringement on their services and those who do not. The safe harbor would become a mirage.

Fortunately, courts have consistently interpreted actual and red flag knowledge to refer to specific instances of infringement. The DMCA's notice process is the proper framework for rightsholders, who are "better able to efficiently identify infringing copies" to communicate with providers regarding acts of infringement.<sup>19</sup> Congress intended this framework to provide "strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringement."<sup>20</sup> A framework pursuant to which rightsholders could use information about instances of infringement to evict service providers from the safe harbor rather than initiate a takedown pursuant to section 512(c) would destroy the cooperation between rightsholders and service providers envisaged by the statute.

Interpreting actual and red flag knowledge to require specific knowledge of particular infringing activity allows service providers to investigate potential infringement on their services without

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<sup>18</sup> *Viacom*, 718 F. Supp. 2d at 522.

<sup>19</sup> *UMG Recordings*, 620 F. Supp. 2d at 1022.

<sup>20</sup> H.R. Rep. No. 105551, pt. 2, at 49.

risking loss of their protection under the safe harbor. Section 512 has been hugely successful in fostering the Internet as a place for vibrant commercial, innovative, and expressive activity. An expansive reading of section 512's actual and red flag knowledge provisions would put that success greatly at risk.

## **1201 Reform**

CDT has participated in the last 3 triennial rulemakings held by the Library of Congress under section 1201 of the DMCA. Each time, we have advocated for a broader exemption for computer security research providing more clarity and certainty to researchers. While we appreciate your interest in reforms to section 1201, we suggest that more substantial changes are necessary to provide long-term mitigation of the problems the statute causes.

The most straightforward and effective way to address the broad range of problems caused by section 1201 would be to adopt legislation to establish a "nexus" requirement between copyright infringement and liability under section 1201.<sup>21</sup> As it is now, section 1201 prevents many legitimate uses of copies of works purchased by American consumers, including for research, repair, modification, improved accessibility, and preserving the functionality of older software. While section 1201 creates many direct negative impacts for consumers, it also enables makers of software and devices to implement vertical restraints on trade through consumer lock-in and liability-backed barriers to interoperability. These barriers harm competition, resulting in higher prices and fewer choices for consumers for everything from coffee pods to tractor repair. But tying liability under 1201 to infringement of an exclusive right created under section 106 would solve many of these problems by allowing consumers to make lawful uses of the works they purchase without fear of incurring liability.

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<sup>21</sup> Rep. Zoe Lofgren introduced this approach in the Unlocking Technology Act of 2015, <https://www.congress.gov/bill/114th-congress/house-bill/1587/text>.

Although smaller reforms to some aspects of section 1201 and its triennial review process might produce improvements for stakeholders, such as presumptive renewals of temporary exemptions, switching the burden of proof to opponents of exemptions, and addressing the usability issues raised by NTIA in 2018,<sup>22</sup> the larger issue is that 1201 is unmoored from legitimate copyright concerns. We urge you to focus first on reforms at this fundamental level, rather than just making minor adjustments to address only a few of the statute's problems.

Respectfully,

Stan Adams  
Deputy General Counsel  
sadams@cdt.org

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<sup>22</sup> Recommendations of the National Telecommunications and Information Administration to the Register of Copyrights, Sept. 25, 2018, at 3-4, [https://cdn.loc.gov/copyright/1201/2018/2018\\_NTIA\\_DMCA\\_Letter.pdf](https://cdn.loc.gov/copyright/1201/2018/2018_NTIA_DMCA_Letter.pdf).