

CTA Response to DMCA Reform Bill Questions from Senator Tillis

1. The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.

In filings with the U.S. Intellectual Property Enforcement Coordinator (“IPEC”), CTA has noted the importance of adapting voluntary-measure technology, as developed by larger OSPs and rights holders, for use by smaller-scale online service providers (“OSPs”) and rights holders. CTA is concerned that any attempt to set legal or regulatory thresholds for conduct could actually impede the migration, use, and improvement of these technologies. Making responsibilities and thresholds size-dependent would introduce significant complexity. More, vague guidelines or terms left to court interpretation would lead to less certainty if copyright law were revised to focus on size differences. Detailed study and testimony would be necessary as to any model proposed for drawing such lines.

2. OSPs eligible for the safe harbor under section 512 are divided into four categories (conduits, caching services, hosting services, and web location tools) that can be both under-inclusive and over-inclusive. First, what types of OSPs should be covered to account for technological advances and business practice changes that have occurred during the past twenty-two years? Second, how should the categories be revised to better cover the types of OSPs that need—rather than just appreciate—the safe harbor’s benefit? Among the possibilities would be to either increase the number of statutory categories to more explicitly cover specific types of service providers or to reduce the number of 2 statutory categories, possibly to only one, and delegate authority to the Copyright Office to identify, by regulation, the covered types of service providers. If Congress were to take the latter approach, would this raise concerns about such authority being delegated to a non-presidentially-appointed Register?

CTA is not aware of sufficient data to justify adding additional categories, or shrinking the existing number. Any such step would require additional metrics that would need to be data-based. Any such proposal should be the subject of at least one congressional hearing, and preferably should be preceded by studies

devoted to specific ideas. This has not been an area which the Copyright Office necessarily has the experience or resources to oversee.

3. Notice & Staydown. Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?

CTA agrees with the Copyright Office that “notice-and-staydown” is neither practical nor desirable. CTA has long opposed this idea, in large part because it is antithetical to fair or tolerated uses and amplifies the destructive impact of mistaken and bad-faith notices. A simple statement from the user that the use is “authorized by law” (etc.) would quickly and rightly be ignored as boiler-plate that is of little actual help to the OSP. More, “notice-and-staydown” is impractical because it does not account for licenses, fair use, and the first sale doctrine. This is why CTA has long asserted to both the Copyright Office and IPEC that the burden of identifying infringement must continue to reside with the rights holder.

4. Duty to Investigate. Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?

The representative list requirement should not be relaxed. The rights owner should have to identify precisely exactly what content they believe to be infringing, not a representative list. The problem with any “staydown” system is that, as is suggested in the question, the need to “investigate” goes far beyond the ability of an OSP to gather insight into the usage in question. No verbiage added to law or regulation would solve this.

Currently, the number of false or bad-faith counter notice filings is significant. We would support stronger penalties for those who falsely file facially valid counter notices, also a fraud exception in the statute that excuses service

providers from rejecting notices and counter notices that are facially valid but for which good cause exists to conclude that they are fraudulent.

CTA notes that one reason Congress was so careful in not imposing a “duty to investigate” is that it would force OSPs to act very conservatively, to the detriment of users. This is so because an alleged failure in a matter of judgment, based on the insufficient information available to an OSP, would expose that OSP, upon losing safe harbor protection, to potentially ruinous statutory damages. Statutory damages under Section 504 became severely out of scale with the mass production of consumer recording devices, and became even further out of scale with the online availability of content. CTA has long argued that if copyright reform is to be considered, the first subject to be addressed should be the standard for and amount of statutory damages.

5. Injunctions / site blocking. Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)’s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?

The notion of “site-blocking” as a solution was fully investigated by the 112th Congress in the context of the Stop Online Piracy Act (SOPA) and the PROTECT IP Act (PIPA) and was rejected after significant public backlash. It was also rejected by the Copyright Office in its recent Report. CTA has not gathered data on additional utility of injunctions.

6. It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress might consider improving dispute resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?

CTA has opposed every version of the CASE Act on these bases:

- It would enable non-meritorious “troll” litigants to leverage vulnerable individuals, small businesses, and even artists.
- Such cases would draw the Board into legal grey areas and courts of appeal conflicts, creating additional precedents despite the intention to create none. Such grey areas as previously noted by CTA may include:
 - o Copyrightability and copying of software, music.
 - o Standing to sue on the basis of license rather than ownership of a work.
 - o Whether fair use or the *scenes a faire* doctrine should be a defense to charges of copying music.
 - o Whether private, personal home recording infringes copyright, is subject to implied license, or is a fair use.
 - o Whether a privately commissioned arrangement of a work for a school performance infringes as a derivative work.
 - o The standard for determining contributory or vicarious infringement in a variety of contexts.
- It would set an *in terrorem* level of statutory damages for such cases, and omits the requirement of copyright registration, which pertains to courts and has been useful in discouraging “troll” litigants.
- Courts would hold this unappealable transfer of judicial authority to be unconstitutional.

7. More generally, the notice- and counter-notice sending process have many shortcomings. These could be improved by clarifying when automation is appropriate and that OSPs cannot erect requirements beyond those in section 512(c)(3); by authorizing the Copyright Office to develop standardized web forms for notices and counter-notices and to set regulations for the communications that OSPs must deliver to a user when their content is taken down or had access disabled (including offering information about the fair use doctrine as codified in section 107 and as illustrated in the Copyright Office’s Fair Use Index); and by increasing privacy protections for notice and counter-notice senders by masking certain personally identifiable information, including address and phone number. How could this best be done? Please provide specific provisions for accomplishing these goals.

We see potential benefits in standardized forms for notices. Beyond that, CTA is unaware of sufficient data or metrics for regulating OSP or rights holder automation. Study into the feasibility and consequences of such an approach would be necessary before it could be translated into legislative provisions.

8. At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?

We see potential benefits in heightening the requirement for identifying the copyrighted work to give specific requirements. Beyond that, CTA believes that the burden to identify infringement must remain with the rights holder. Therefore CTA must await the responses of “content” stakeholders before commenting on this question.

9. Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?

CTA has supported the development of consensus and licensed technical measures to protect content when it is first distributed. The notion that this activity can succeed in the far more diverse and dynamic ISP or OSP context raises challenges of diverse technology, circumstance, and use that have yet to be overcome – hence the growing, and now conclusive, acknowledgement that as of today no “STMs” yet exist. Standards development requires voluntary participation, agreed objectives, and a consensus as to both goals and available tools. It is also fraught with competitive concerns that require antitrust counsel and oversight. CTA is unaware of data or experience demonstrating areas ripe for such development, or – if the Copyright Office is to be involved – that the Office would have the necessary resources or experience. To even demonstrate practicality, there should be studies and hearings prior to any drafting.

10. One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP’s monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?

CTA must await the views of other stakeholders before commenting on this question.

11. One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP's monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?

The Copyright Office in the "2018" round did allow third-party assistance by professional repairers so long as the professionals "stand in the shoes" of the device user so may be considered "users" themselves. The real stumbling block is the need for professional-level software tools, that even a repair professional must obtain from a third party. The Copyright Office considers this to be "trafficking," which it lacks the power to exempt.

12. The Copyright Office has recommended revising some of the permanent exemptions so that they are better tailored to the types of uses sought today. In particular, the exemptions for security testing and encryption research should be revised to expand the types of activities permitted, ease the requirements to seek authorization from the owner of the relevant system or technology, and eliminate or clarify the multifactor tests for eligibility. What thoughts do you have about revising these existing permanent exemptions, and how would you recommend that be done?

Such proposals have been extant for several cycles, including the current "2021" round, and are consistent with Copyright Office proposals for congressional amendment. They should receive due consideration in any legislation.

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CTA has consistently supported assuring the enablement of assistive technologies for people with disabilities.

14. There are various ways that the triennial rulemaking process could be streamlined to be more efficient and so that section 1201 better accounts for user concerns. These

include establishing presumptive renewal of exemptions adopted in the previous rulemaking cycle, shifting the burden to those who want to oppose an exemption from the previous rulemaking, and authorizing the Librarian, upon recommendation of the Register, to make permanent a temporary exemption that has been renewed twice without opposition and without modification. How ought section 1201 be revised to reflect the stakeholder desire for a less burdensome triennial rulemaking process and consumer interests, and what other means should be adopted to make the rulemaking process more efficient?

CTA would expect to support such provisions in any legislation addressing the DMCA.

15. Though it did not receive as much attention during my hearings as sections 512 and 1201, Section 1202 is another important part of copyright law added to title 17 by the DMCA, and it too is in need of modernizing. For example, Congress could amend section 1202 to drop the double-intent standard and only require a copyright owner to prove that a defendant removed or altered rights management information (knowingly or not) with the knowledge that it would encourage infringement. And Congress could adopt the Copyright Office's recommendation to enact a new section 1202A to provide the author 5 of a copyrighted work—rather than just the copyright owner—with a right of action when someone removes or alters rights management information with the intent to conceal an author's attribution information. Do you think that the proposed legislative text that appears on page 98 of *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* is the best way to add a right for the copyright owner, or would you recommend different text? And what are your thoughts on revising section 1202's double-intent standard?

The penalties for removal of copyright management information need to be clarified because it is currently not clear what constitutes a single violation. We also favor keeping the double intent standard. Beyond this, CTA views these proposals as sufficiently novel as requiring a record to be built through studies and hearings before CTA could comment.