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R Street Institute’s Response to the Questions from the Office of Chairman Tillis Regarding Reform of the Digital Millennium Copyright Act

R Street is a nonprofit, nonpartisan, public policy research organization (“think tank”), whose mission is to engage in policy research and outreach to promote free markets and limited, effective government. As part of that mission, R Street regularly advocates for the removal of arbitrary legal and regulatory barriers that threaten free and open technological innovation. We welcome the opportunity to submit our response to the questions posed by Chairman Tillis with respect to reforms of the Digital Millennium Copyright Act (DMCA).

Question 1: Section 512 strikes an important balance between various stakeholders—online service providers (OSPs), rights holders and users. Importantly, this balance is maintained by ensuring the DMCA applies equally to all stakeholders. The law’s requirements are the same, regardless of size, meaning that large corporations and individuals all must comply with the law. Abandoning this uniform approach would require new divisions or classifications that would arbitrarily impose new burdens and new costs of various groups.

R Street opposes any efforts to establish different measures or obligations on service providers for different categories of content. Such changes would disrupt the careful balance of interests created by section 512 and impose new policing duties on providers which can entail substantial new costs.

Any efforts to establish new requirements based on the size of the OSP or the amount of content they host would create new costs that make it difficult for smaller providers to expand. This insulates larger providers from competition by raising the costs of potential rivals seeking to increase their market share. A growing OSP would face increasing compliance costs that hamper long-term growth opportunities and reduce competition in the marketplace. Section 512 already includes categories of providers based on their services. Any further efforts to define tiers of service or particular classes will likely encounter practical problems and impose new costs.

Question 2: As the internet has evolved and online services have expanded, the courts have been required to determine where new services fit within the section 512 classification system. Overall, the courts have applied the statute flexibly, keeping section 512 relevant even as technology continues to change. This flexibility has allowed continued innovation by OSPs, something that would have been more difficult with a more rigid reading of the statute.

While section 512 establishes four main categories for online service providers, there is room in the various categories for a variety of different services, from website hosting and email to user-generated content platforms that distribute various types of content and data. All of these providers are eligible for safe harbor protection due to court decisions that section 512(c) includes more than just passive hosting. The safe harbor allows a multitude of services that benefit content providers, OSPs and users. R Street believes that creating new legislative categories to account for technological evolution would impose new burdens and make it more difficult for section 512 to keep pace with the rapidly changing tech sector. Allowing the courts the continued flexibility to address changing technologies under the rubric of section 512 is a better approach to maintaining the balance between the various stakeholders.

Question 3: Section 512 provides a safe harbor for digital platforms when it comes to users illegally posting copyrighted materials. In general, online service providers are not liable as long as they act to remove any infringing material once identified. This “notice-and-takedown” approach is an attempt to balance the rights of internet users, online service providers and copyright holders. While there have been complaints from all parties on how the system works, by and large section 512 has created a workable framework for the digital ecosystem. Users have access to an unprecedented range of digital services and media, creators have new avenues for sharing and selling their work, and rightsholders are reaching larger audiences.

But no system is perfect, especially when applied on the scale of today’s internet. Under section 512, filtering technologies have been developed to facilitate the removal of infringing materials, but rightsholders claim not enough infringing materials are taken down, while users complain that legitimate and legal content is often removed. There are abundant examples of both problems, but without the notice-and-takedown system established in section 512, the digital ecosystem would not exist as we know it today. That is why R Street opposes any shift to a “notice-and-staydown standard.” This would require online service providers to establish filtering mechanisms to ensure infringing posts remain down. The sheer magnitude of this task would limit the scope of the digital world while raising real concerns about privacy and chilling effects on free speech. At the same time, this would impose significant costs on smaller OSPs and put them at a disadvantage relative to larger OSPs who have the resources to implement filtering programs.

Question 4: As noted in Question 3, R Street is opposed to creating a notice-and-staydown regime, which can create significant economic burdens, particularly for smaller OSPs. Adopting a notice-and-staydown standard would require OSPs to actively filter content in pursuit of infringing content. Not only are such systems costly, but they raise serious concerns about privacy. OSPs would be put in a position of having to determine whether content is infringing, licensed or exempt under copyright law. This would be complicated and challenging, leading many to adopt the lowest-cost option of simply taking content down rather than investing in the tools to make a more thorough evaluation, which can have a chilling effect on speech.

Question 5: R Street opposes any efforts to expand the use of injunctions or website blocking. Such activities can impede the flow of perfectly legal content and have significant First Amendment

implications. The current pandemic has demonstrated the importance of online access; blocking access to lawful information can impose significant costs on internet users.

Question 6: Technology has changed intellectual property in a fundamental way. Rights holders have very real concerns about protecting their works and moving forward will require changes. But given the size of the damages and complexity of the copyright law, federal courts may be the more appropriate venue for such claims. R Street opposes the CASE Act and any efforts to establish a tribunal for adjudicating claims of infringement. Such a tribunal would hold substantial authority with wide leeway when adjudicating the rights of private individuals, which many believe is a role constitutionally assigned to the courts. Moreover, it is not as if the issues to be addressed are as simple as those in a typical small claims court. Copyright law can be complex, and fair use has a long legal history that continues to evolve, which makes infringement claims more suited to a judicial resolution.

Question 7: Automated systems are far from perfect, and their use in the notice-and-takedown process has received criticisms from both sides. The recording industry, for example, considers the notice-and-takedown process ineffective, with far too much pirated content still available on the Internet. On the other hand, many users claim that notice-and-takedown bots mistakenly flag uses of copyrighted materials that are perfectly legal—either through the fair use doctrine or licensing permissions.

Given such criticisms, and the potential for abuse, automated processes must be monitored carefully, particularly when there is not a 100 percent match between allegedly infringing material and the allegedly infringed work. R Street views automated processes as an important tool for the notice-and-takedown process but encourages caution in their use. At the same time, R Street believes it is important for private firms to continue to innovate and improve automated systems; we do not believe it is the government's role to establish rules or regulations defining how automation is used.

Question 8: In order to reduce unnecessary burdens on OSPs, it is important to reduce the over-sending of notices. One way to do this would be to re-examine the role of statutory damages and the incentives they generate. R Street believes that the use of any statutory damages should be re-evaluated, and, if there is a continued use of statutory damages they should be redesigned to more effectively match the realities of today's online world and reduce incentives for over-sending notices.

Question 9: R Street opposes any efforts to require the Copyright Office to help establish standard technical measures (STMs) to help rights owners protect their works. First, the Copyright Office lacks the expertise to design such standards, and second, the incentive to develop a standard technical measure lies with the rights holders. If, in fact, there are benefits to developing effective STMs, rights holders can do so without a prompt from the Copyright Office. And, as others have noted, STMs are not necessarily relevant, given that section 1201 bars the circumvention of technological protection measures.

Question 10: R Street opposes any attempts to establish government oversight of how OSPs attempt to monetize content. OSPs should be free to innovate and compete in the rapidly changing online

ecosystem; regulatory mandates on monetization practices are likely to be static and risk imposing rules and practices that soon lag behind the technologies that drive the evolution of the internet.

Question 11: R Street supports exemptions that seek the ability to bypass technical protection measures (TPMs). Section 1201 is presumed to reach all sorts of circumventions done by people simply trying to fully use, modify or otherwise explore the computing logic of the devices they legitimately possess. Whether it is to be able to connect a mobile device to another network, discover the vulnerabilities of a medical device, repair a broken tractor or simply ensure that one's TV is not spying on them, section 1201 deters all these non-copyright activities because of the overly expansive definition of a TPM. A default assumption appears to have evolved that for all intents and purposes a TPM is anything that controls any access, including access to the computing logic of a device. This definition appears to be predicated on the fact that a TPM may itself be a piece of software, and software may be copyrighted, even though the circumvention has little to do with affecting the exclusive rights of whatever copyright that software might have. Our view is that significant restraint should be exercised before the Copyright Office decides that a person is bound by law not to modify anything that has software in it.

Question 12: The fact that it was necessary to petition for exemptions covering security research of medical devices and automobiles, even though "security research" is already an included exemption in section 1201 shows why a much more definitive solution is necessary. R Street believes that including activities such as "security research" is simply not sufficient to keep up with a rapidly changing technology frontier. Computing faculties are becoming better, faster and more ubiquitous all the time. There is no way for the Copyright Office to keep up, nor should it have to. R Street believes providing broader and more flexible exemptions is necessary to avoid unnecessary restrictions on the use of technologies by consumers.

Question 13: The copyright office is not endowed with the authority or expertise to be an all-purpose evaluator of how people use their computing technology or judge its effects. On the contrary, the more present non-copyright issues, the more important it is that copyright law not interfere with those uses, and especially not when that interference is motivated by the desire to protect society from unwanted consequences arising from technology use and development. First, there are many other regulatory bodies—state and federal—that are capable, and indeed better able, to address whatever harms may arise from innovation. And secondly, the ubiquity of computing devices in an increasing, even infinite number of items, illustrates the critical need for people to have complete dominion over them, to discover the full extent of their effects and vulnerabilities. R Street believes the Copyright Office is not in the position to police when bad actors have deployed software on their devices, but the public is, and it must be unambiguously legal for individuals to do so.

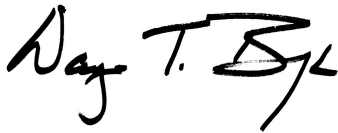
Question 14: A number of improvements have been suggested for section 1201 to offer some relief for petitioners: presumptive renewal of previously granted exemptions; reducing the enormous burdens of petitioning for, and substantiating, needed exemptions; and creating permanent exemptions. R Street believes these changes would help alleviate some of the difficulty faced by the public seeking to obtain

the legal relief necessary to perform the circumventions of TPMs for non-infringing activities. But every exemption sought, even if ultimately granted, represents a use that has already been chilled, and no amount of hardcoded exemptions baked into the statute will ever be able to cover all the uses that have yet to be imagined.

Question 15: R Street opposes and changes to section 1202.

R Street looks forward to participating in any further discussions about reforming the Digital Millennium Copyright Act.

Respectfully submitted,

A handwritten signature in black ink that reads "Wayne T. Brough". The signature is written in a cursive, slightly stylized font.

Wayne T. Brough
Senior Managing Fellow for Technology and Innovation
R Street Institute

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