

March 5, 2021

Senator Tom Tillis
113 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Tillis:

Thank you for the opportunity to provide feedback on your proposed Digital Copyright Act. Unfortunately, the draft as proposed creates a system for digital copyright that is clearly unconstitutional and just unworkable for internet creators, users and service providers. Rather than make some tweaks to the DMCA to improve a generally well-functioning system that has allowed creativity, expression, and innovation to thrive on the internet, it completely destroys the core framework of the DMCA and replaces it with a system that will chill online creativity, take choices away from consumers and harm the internet ecosystem. Thus, we are not providing a red line in response and instead share some feedback on the concepts within the draft and our perspective on a better way forward.

The DMCA, despite its critics, has aged well thanks to the expert drafting of Senators Hatch and Leahy. Internet creativity is flourishing. Approximately 5 billion views of videos occur on YouTube every day. In 2019 Etsy sales were approximately \$5 billion, and in the first half of 2020 sales increased 71 percent. This February, almost 3 billion hours were spent watching Twitch streamers, more than double the amount from February 2019. In 2019, Patreon made \$500 million in payouts to creators. Instagram influencers made \$2.3 billion in 2020. The Archive of Our Own (AO3) has over 5 million creative works in its repository and won a Hugo Award in 2020 for its contributions to literature. The online influencer market is estimated to have been almost \$10 billion in 2020. Internet streaming was a \$161.37 billion market in 2020. Our own study of just three years ago is a drop in the bucket of what has happened since.

The numbers are staggering. Consumers are enjoying the new forms of content available on these platforms and the growth of new creatives is not stopping anytime soon. By authoring the DMCA, Senators Leahy and Hatch unlocked this creative revolution, one that Congress should be proud of creating, and one that is exactly why we have copyright law - to promote the progress of the useful arts.

The Digital Copyright Act would have a chilling effect on the internet ecosystem. Had it passed just 10 years ago, this new creative industry would never have been created. It deter the proliferation of not just the new creative economy -- additional innovative technologies, like cloud services, would not exist. No investor would have taken a chance on the platforms and services consumers use every day on their phone, their desktop, at work and for fun. A nonprofit-run service like AO3 or Wikipedia would never be able to get off the ground due to the staggeringly high costs of complying with DCA. We would have lost billions of dollars in

economic value, and also would have missed out on an unquantifiably large amount of creative works that would never have seen the light of day.

Because the framework of the DCA as currently written is so problematic, we cannot provide specific constructive feedback on the contents of the DCA. While our reasons for this are numerous, we wanted to highlight the fundamental problems with the DCA and its repeal of the DMCA, in order to encourage a focus on multi-stakeholder collaboration to address specific concerns in the ecosystem. There are many problems that are more specific and nuanced, but at this time commentary on them would be premature.

1. The DCA makes the notice and takedown/staydown framework apply to all providers, including email, conduits and private clouds

The DCA eliminates the distinction between different types of providers. In doing so, it forces all sorts of providers, including internet access providers, email services, cloud services and more to be subject to the notice and takedown/staydown system, in a complete departure from one of the key decisions made by the DMCA's drafters. Notice and takedown, or when it qualifies, staydown does not make sense for "dumb" conduits, private activities, email and messaging services between private individuals and non-public facing storage of data.

An example illustrates just how intrusive and wrong the DCA's enactment would be. Bob takes a video with his iPhone of his kids dancing to a Taylor Swift song. Bob emails that video to his parents and also texts it to his wife. Given the personal use and the *Lenz* case, it is safe to say this is not infringing copyright. However, based on the current draft of the DCA this would trigger a series of actions to occur.

If Bob's email provider, internet access provider, his wife's email provider, wife's internet access provider, his parents' internet access provider and/or his parents' email provider received a notice on Taylor Swift's song at any time prior, this would trigger the DCA's staydown requirements without the sending of a new notice.

In combination with the DCA's duty to monitor, all of these services would have to inspect what is being sent. If they implemented a filtering technology in order to comply, it is safe to say that every level of this "transaction" would face challenges. What's more, Bob's email provider and internet access provider may have to prevent him from sending it unless they have a way to inspect the specific contents, know that the recipient is authorized under copyright law, and be willing to take on the risk of being sued.

iCloud -- or any other cloud service -- would face a similar challenge and potentially delete the video. In the unlikely event that the video made it through Bob's services, his parent's internet access and email providers would likely prevent the email from reaching their inbox with the file attached, and his wife's internet access provider would do the same for the text message. Bob could still have the video on his iPhone's harddrive, but he could only share it with people by

playing it on his phone with them present in the room. This issue alone is enough to require a return to the drawing board.

2. The DCA turns any provider of any type of internet services into the police, judge and jury

One of the issues with the DMCA as written is it allows allegations of copyright infringement, not *actual* infringement. This allows content to be taken down permanently unless there is either a counter-notice or the intermediary feels so confident it is not infringing that they keep the content up and take on the liability burden. Less than 1% of [notices](#) sent receive a counter-notice, permanently removing content from the internet. However, a far lower share of that content is actually infringing copyright.

The DCA shifts the burden onto providers to monitor for and identify potentially infringing content. They are required to remove any content if it is “likely” infringing - a big change from the DMCA’s test of “facts and circumstances from which infringing activity is apparent.” The “Likely” standard is extremely subjective and in reality it will force any intermediary to be overly-cautious and institute a lesser standard to avoid liability for tens of billions in damages. This “likely” standard will actually create a much lower “maybe” standard to avoid massive legal risk and uncertainty. Additionally, without rights holders providing notices for each alleged infringement, it is extremely challenging for a provider to make this determination for the particular use. As a result, under the DCA massive amounts of non-infringing content will never get to be shared using the internet in any way.

Furthermore, it is not necessary to change the red flag knowledge standard. Those complaining about judicial interpretation of the red flag knowledge standard under the DMCA point to two cases as the most problematic: [Perfect 10](#) and [Viacom](#). However, they always omit a key fact: some of the content in those cases was not infringing, thus the infringement was not apparent nor should it have been. Given the unique facts of those cases, the courts reached the right decision, yet the testimony of witnesses and submissions to the IP Subcommittee throughout 2020 conveniently leave this key fact out. It’s time to ignore false flags from the content industry and leave the red flag knowledge standard as it is: working as it was intended.

The bill also guts the current “no duty to monitor” requirement by permitting “reasonable monitoring.” Combined with the red flag knowledge change and the move to staydown for certain content, this actually creates a “duty to monitor” requirement in practice. The notice requirements allowing for a “*non-exhaustive* representative list” eliminate requirement of location-specific information in notices, adding to the broad duty to monitor.

Reasonable monitoring can still leave internet providers open to red flag knowledge problems, as well as liability on staydown eligible content, without even getting at the problem of locating content that has been noticed. In the end, this will create a copyright surveillance state at every layer of the internet, one that fundamentally violates the privacy of many Americans. Imagine if

the phone company was required to inspect every phone call. That is what the DCA does for internet communications.

In order to implement the new-found surveillance state, it will require the implementation of often flawed and expensive filtering systems. Current technology is not up to the task of dealing with the subjective nature of what is and is not infringing copyright - this has been borne out by even the most sophisticated filtering tools on the market today. Additionally, even if non-infringing content gets past one filtering system, there are multiple company systems it will have to go through. So, while content might be on a platform, a potential consumer could be blocked from accessing that content by their ISP, a cloud service for that platform or see it removed from search results. That is of course on top of the platform's filter.

This is a serious problem for small businesses. One potentially infringing photo on a website for a small local business would likely cause their website to be taken off line (or at least the page with the infringing content) as well as their business being removed from search results. The idea that a webpage could be taken offline without any due process until the photo is removed is a serious problem; the punishment simply does not meet the crime. This would apply to any type of operation, including charities, schools, libraries, local government, small businesses, political campaigns, official congressional pages, and so much more.

Additionally, the notice and staydown provisions provide an impossible catch-22 for any business, organization or individual subject to its requirements. By requiring the blocking of any re-upload of complete and near complete copies (and shorter portions if the provider derives its commercial value predominantly from short-form media) platforms will be doomed to fail in their good faith attempts to comply. There will be infringing activity that still occurs and makes it through even with the best, most conservative filters imaginable. Because of that, if a platform, cloud provider, e-commerce company or other third-party service providers want to allow the use of any copyrighted content on their platforms, they will inherently have accidental slip ups at a cost of up to \$150,000 each.

3. The DCA does not contemplate the unique issues around physical goods

By creating a one size fits all approach, the legislation does not capture all of the ways the DMCA applies online. Additionally, it reads to only combat illicit uses of intellectual property online and does not consider e-commerce and other uses of platforms. If considering changes to the DMCA, it's prudent to consider every usage of the internet. The internet is more than simply an entertainment machine, it's an economic engine -- an important point that the original drafters of the legislation understood.

Using Bob from earlier, imagine he goes onto Etsy to buy a t-shirt that is a parody of his favorite TV show. Bob assumes the shirt is not copyright infringing. However, the large TV studio disagrees and believes it is not a fair use. Under current law, if Bob wants to purchase the t-shirt he can and the dispute will be between the t-shirt seller and the TV studio.

Under the DCA, this dynamic completely changes. The studio has many shots at preventing the t-shirt from being sold. They can send a notice under the DCA to Etsy, to search engines that link to the Etsy content, to Bob's internet access provider and others. While Etsy is much more likely to understand copyright and support their artist, the others who have no relationship with the seller have no incentive to allow the transaction

The DCA places a burden on all of the internet services involved to monitor for all uses and attempts to use the image on the t-shirt that is copyrighted. However, unlike a digital file, there are no metadata or underlying technological identifiers on a physical good. How are filters supposed to accurately find the use of the copyright work, let alone understand the nuance between the original image and the parody of it?

Additionally, this sets up a liability trap for all these internet services. They now have legal risk depending on if the parody is a fair use or not. Rather than go after the Etsy small business, it will make sense to go after the deeper pockets of the internet services for up to \$150,000 in damages. The internet services will also have to consider the costs of a potentially expensive litigation that is likely a fair use parody. This is a bonanza for IP lawyers. It will certainly be easier to go after the big internet business than the actual artist who created the fair use parody.

This is not just a problem from notice and staydown -- the *de facto* duty to monitor requirements of the DCA create the same dilemma. And while Bob and Etsy are just one example, there are many creators selling their physical creations on services like Society6, Redbubble, Shapeways, and countless others. How are these platforms going to comply with the DCA when it comes to the requirements on them? This will be to the financial detriment of all the creators that are using those platforms while preventing them from benefiting from their creativity.

4. The DCA fails to address the harms of false notices and makes it even harder to send a counter-notice

The draft legislation forces anyone sending a counter-notice into the CASE Act's "Copyright Claims Board" (CCB) jurisdiction. Re:Create believes that the CCB opt-out process as codified by the CASE Act does not comply with the Seventh Amendment right to a trial by jury. That will ultimately be up to the courts to decide. However, the current draft legislation forces counter-notice senders to consent to jurisdiction of the CCB. In doing so, the only way they can voluntarily opt-out of the CCB is not to exercise their right to counter-notice. That is an absurd proposition that takes away any argument around voluntary consent to CCB jurisdiction, further proving that it is unconstitutional. It will also massively discourage the sending of counter-notices, something that is already a big problem.

Second, the DCA requires a counter-notice sender to explain why the notice was abusive/mistaken and to explain why their use is licensed and fair. This creates a lot of extra work to counter-notice, and also requires the counter-notice sender to prematurely make their legal arguments known to the notice sender without placing the equivalent conditions on filing a

notice. This is not just unfair to the recipients of notices, but will also only further discourage counter-notices.

Third, it allows the notice sender to “challenge” a counter-notice, but gives no details on how or by whom that challenge is to be adjudicated. A lot more details are needed on this before its impact on counter-notices can be judged, but it is likely to have the impact of curtailing the sending of counter-notices. Studies show that about a third of all notices are bad, and yet less than one percent of notices are countered, creating a wide gap. We should be doing everything in our power to encourage the sending of counter-notices in these cases.

5. The DCA’s notice and staydown provisions will have a chilling impact on fair use, likely violating the First Amendment

The notice and staydown provisions in the DCA create a system where sending a single notice suffices as a notice on *all* uses of that work, past, present and future. While that is a convenient option for notice senders, it leaves internet services with two options: do their own copyright analysis of the use and hope they get it right, or just take down all future uses, even if they are lawful. This shifts how lawful uses are exercised - it would require sending a counter-notice to have lawful uses on the internet, especially fair uses.

The current counter-notice system is already flawed, as many have testified about in the Copyright Office 512 roundtables and before the IP Subcommittee in 2020. However, when added to the forced consent to CCB jurisdiction to counter-notice, this could have the effect of taking almost all fair use cases out of the courts and placing them instead in a venue with no substantive right to appeal, just in order to exercise fair use rights. This sets up a trap for Americans - choose to sacrifice their 7th Amendment rights to a trial by jury or their First Amendment rights to free speech.

6. The “reasonable best practices” developed by the Copyright Office and NTIA would create a government-mandated prior restraint on free speech

This provision has serious First Amendment problems, as it would allow the federal government to create regulations forcing speech holders to meet certain conditions to be allowed to “speak”. Under copyright law, you exercise your speech rights and are then subject to the consequences of doing so. However, by mandating best practices, this would fundamentally change that dynamic to the government policing what is said before it is said. This is the government creating a prior restraint on speech before it is permitted. That violates the First Amendment.

7. The DCA empowers the flawed CCB on misrepresentation claims

As Re:Create has argued for the last couple years, the CCB created in the CASE Act will likely become an opt-out factory, especially for copyright sophisticated companies and individuals that know the process and procedure. This is because these people will know that court is too

burdensome and costly to actually file an action (which is ironically why the CCB was created in the first place).

Thus, the CCB is a terrible venue to deal with misrepresentation and fraudulent notice claims. Most notice senders will just opt-out of a CCB action, leaving afflicted parties with a false solution.

8. The DCA could result in Americans losing internet access because of mere allegations of infringement

Throughout this process, many commenters have raised the serious concerns of termination of internet access as a potential remedy, including the Copyright Office itself in its [follow up letter](#) to your office on their 512 Study. The arguments are many and need not be repeated yet again. Allegations of copyright infringement, even if borne out to be true, cannot lead to the complete economic, social, societal and educational disenfranchisement of all members of a household that occurs with termination of access, especially given the lack of competition in broadband marketplaces for so many Americans and the weeks it would take to get reconnected if another provider was available in a market.

Conclusion

There are many, many other challenges with the DCA that are not discussed here because they are specific issues rather than structural flaws. They include but are not limited to:

- 1) codifying the flawed subjective good faith standard of the *Lenz* decision;
- 2) moving the Copyright Office out of the Library of Congress and empowering it with significant new regulatory authorities around UX design, technological mandates, privacy and other issues that go far beyond its expertise or mission;
- 3) creating a five-year Copyright Office review outside the legislative process;
- 4) making incremental changes to Section 1201 that don't get at the ultimate problem that needs to be solved: the lack of a nexus to infringement requirement.

As you know, Re:Create always engages with you and your staff in good faith with a goal towards resolution. I am very thankful that I was invited as a witness to one of the hearings leading to the draft, and all the hard work of the team over the last year. Over the last five years, Re:Create and its members have engaged in good faith with real solutions to improving the Music Modernization Act, Felony Streaming, and the CASE Act.

In the end, for both the Music Modernization Act and Felony Streaming, Congress addressed our concerns in a way that worked for rights holders despite their attacks, and legislation was passed in the spirit of compromise. For CASE Act, we tried to negotiate in good faith around real solutions for a workable solution to deal with smaller claims. While ultimately that did not occur, all of these efforts have been made with an eye towards finding common ground and compromise to move forward.

Re:Create and our members have approached the attempts to refine the DMCA and the great work of the legislation's drafters and their vision with an eye towards action. We want to continue to do so. However, as drafted the DCA repeals the DMCA and replaces it with a structurally unworkable solution that cannot be fixed.

While we appreciate the efforts of staff and Senator Tillis to create a comprehensive proposal to "reform" the DMCA, unfortunately, this draft is far from a workable starting point. However, we understand the concerns of the Office and will continue to work in good faith to ensure internet users, consumers, and creators are adequately represented.

Re:Create is hopeful that you will take this opportunity, listen to our concerns and produce a new framework that can be the basis for getting to a compromise.

Sincerely,

Joshua Lamel
Executive Director
Re:Create

Cc: Senator Patrick Leahy
Senator Dick Durbin
Senator Charles Grassley