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Comments to Senator Tillis, Request for Recommendations on Reforms to Section 512 of the Copyright Act

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We thank Senator Tillis and his staff for undertaking this important examination of the operation of the Digital Millennium Copyright Act (DMCA). As we note in more detail below, copyright law is overdue for review in light of the evolution of the online ecosystem over the last two decades.

The Constitution recognizes that copyright provides incentive for the creation and wide dissemination of works to the public's benefit by granting copyright holders the exclusive right to determine whether and how to make their works available. The ease with which content can be disseminated online without authorization, however, cuts at the core of the exclusive rights, and thus also at the engine that drives investment in content.

Section 512 was meant to secure for copyright holders better protection for their works online, while at the same time provide online service providers ("OSPs") more certainty that they would not face unreasonable litigation risk when facilitating socially valuable dissemination of user-generated content, which might contain copyrighted material. The idea was to grant OSPs a safe harbor from liability in exchange for collaborating with copyright holders to curb unauthorized dissemination. The hope was that by sharing the burden to combat online piracy between copyright holders and OSPs, their mutual interests in creating a lawful market for online consumption of content would align.

Yet Section 512, as applied today, puts a greater burden on copyright holders than is optimal. As a result, the law enables excessive proliferation of illegal content. Under the current regime, the onus is on copyright holders to discover and flag unauthorized dissemination of their works; OSPs have little obligation to preempt sharing of unauthorized content and are generally obligated only to take down unauthorized content once notified by the copyright holder. The problem is that, at that point, dissemination has already occurred and much of the harm has already been done. Even one unauthorized digital copy of a copyrighted work that slips onto the Internet can quickly become thousands.

We believe that Section 512 revisions should create greater incentives for online service providers to prevent unauthorized dissemination in the first place. Ideally, service providers should license the content so that copyright holders, Internet users, and OSPs themselves can all benefit from a healthier online ecosystem.

Toward that end, we propose statutory changes that could improve the ability of rights

holders to defend their property rights without undermining the ability of OSPs to operate efficiently. These ideas will undoubtedly require further elaboration as you continue your DMCA reform process in the new year, and we welcome the opportunity to participate in the ongoing discussion.

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