

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

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Via Email

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Re: Recommendations on Reforms to Section 512 of the Copyright Act

Introduction

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.

Question 1: Accommodating Smaller Entities

The Copyright Act need not be revised to impose lesser obligations on smaller OSPs to curb unauthorized dissemination of copyrighted content. The Copyright Act should be amended, however, to create a small claims process as an additional option to resolve copyright disputes.¹

Combating online piracy has become an enormous challenge for copyright holders. As currently construed by the courts, the Copyright Act requires copyright holders to scour the entire Internet and send Section 512 takedown notices for unauthorized versions of their copyrighted content if they wish to keep unauthorized online dissemination of their works in check. This process must be repeated ad infinitum as additional versions quickly go back up.

Ferretting out unauthorized dissemination is thus extraordinarily taxing for any copyright holder, but even more burdensome for smaller copyright holders, who typically have no separate “enforcement division” and fewer resources. The daily effort by smaller copyright holders to

¹ ICLE has previously endorsed the idea of small claims adjudication for copyright claims in comments to the House Judiciary Committee. See Geoffrey A. Manne, *Response to First Proposal on Copyright Reform – Comments to the United States House of Representatives Committee on the Judiciary*, Jan. 31, 2017, available at https://laweconcenter.org/wp-content/uploads/2017/09/icle-cr_office_reform_proposal_comments.pdf

discover unauthorized versions of their works and send notices consumes resources they cannot spend creating new works to earn a living.

Adding injury to insult, once the content has been disseminated without authorization, much of the damage has already been done, such that takedown offers little consolation. Copyright law gives an owner the exclusive right to determine whether and how the work is distributed, displayed, or performed, so infringement occurs the moment the content is disseminated without authorization. In addition, the content is typically consumed and monetized upon, or shortly after, dissemination—without compensation to the copyright holder. This not only denies the copyright holder revenue from that specific instance of consumption, but also skews the market going forward.

Moreover, the burdens on and harms caused to the copyright holder are not necessarily related to the size of an online service.² Some smaller sites are dedicated almost exclusively to infringing material. Search functionality also means that even one infringing version of a work on any site can become readily discoverable to the world. Given the size and scope of the Internet, its decentralized architecture, its often-anonymous nature, and the ease and speed with which digital content can be disseminated, one unauthorized version of digital content can quickly become thousands of unauthorized versions available from thousands of sources across the globe. For all these reasons, it would be incorrect to assume that online services with fewer staff, a smaller user base, or less revenue necessarily pose less harm to copyright holders. Consequently, it would be a mistake to categorically reduce the obligations of smaller providers to combat use of their services for copyright infringement.

By contrast, the burden for OSPs is likely proportional to their size. OSPs of whatever size need to respond to takedown requests only for their corner of the Internet. Although smaller OSPs may have fewer resources, they also likely receive fewer takedown notices. The exceptions would be those that have built businesses around mass infringement, in which case no accommodation would be warranted. Because they control the design and operation of their services, they are also positioned to curb their users' attempts to disseminate copyrighted content without permission. Some level of automation and outsourcing may also be available to reduce the administrative burdens of antipiracy efforts without sacrificing effectiveness. Moreover, once antipiracy measures are in place, there will likely be efficiencies to gain as they scale. We therefore do not believe—absent compelling empirical evidence that the harm to copyright holders from smaller online services providers will be consistently smaller, while the cost of mitigation to smaller providers will be consistently and disproportionately larger—that the Copyright Act needs to be

² Cf. Brett Danaher, Jonathan Hersh, Michael D. Smith, Rahul Telang, *The Effect of Piracy Website Blocking on Consumer Behavior*, MIS Quarterly Vol. 44 No. 2 pp. 631-659 (June 2020) (observing that blocking a single, popular piracy site can be insufficient to increase legal consumption because “the source piracy content still exists on the Internet”; blocking less popular sites, as well, however, is effective).

revised to provide lesser obligations on smaller OSPs to curb unauthorized dissemination of copyrighted content.

We do believe, however, that it is appropriate to create an alternative dispute resolution mechanism for smaller OSPs and copyright holders. Even though smaller OSPs will likely be subject to proportionally fewer disputes than larger providers for the reasons discussed above, litigation can still be expensive and time consuming. Because smaller OSPs and copyright holders will both likely have fewer resources than their larger counterparts, both would benefit from a small claims process. For that reason, we support the enactment of the CASE Act or similar legislation that creates such a process.

Question 2: Addressing the Categories of OSPs

The problem with the categories of OSPs laid out in Section 512 is not necessarily their number or type, but that they are highly technical, amenable to inconsistent application by courts, and can become challenging to apply as online technologies and business models evolve. Any changes to Section 512 safe harbors should de-emphasize the significance of an OSP's technical characteristics and maintain focus on its behavior.

Any OSP that *willfully* engages in or facilitates the unauthorized dissemination of copyrighted content should be ineligible for safe harbor. Congress meant for the Section 512 safe harbors to protect OSPs that may have unintentionally facilitated infringement in the process of carrying user-generated content. Indeed, as the Supreme Court stated in *MGM v. Grokster*, “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”³ Thus, OSPs that have *intentionally* designed their systems to attract infringement should not have the benefit of the safe harbors, even though it is their users, rather than they, that are directly engaged in the infringing activity. By contrast, as further explained in response to question 3, OSPs that do not willfully engage in or facilitate the unauthorized dissemination of copyrighted content should be eligible for the safe harbors, but should lose their protection in a particular instance if they failed *either*: 1) to take reasonable, proactive measures to curb unauthorized dissemination of the copyrighted content, or 2) to take reasonable steps, upon notification of prior infringement, to stop the unauthorized dissemination of copyrighted content. Loss of the safe harbor would not automatically confer liability. It would simply preclude reliance on the safe harbors, requiring analysis under the ordinary standards of primary and secondary copyright liability.

³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 913 (2005) [hereinafter “*Grokster*”] (noting that evidence suggested that Grokster and StreamCast were not “merely passive recipients of information about infringing use” but engaged in inducement, and observing that there was “no evidence that either company made an effort to filter copyrighted material from users’ downloads or otherwise impede the sharing of copyrighted files.”).

Question 3: Moving to a Less Burdensome and More Effective Takedown System

Despite Congress’s best intentions, Section 512 of the Copyright Act has been applied in a way that places too much of the burden on copyright holders and creates too little of the desired incentive for OSPs to curb unlawful dissemination.⁴ As interpreted by the courts, Section 512 essentially imposes no obligation on OSPs to take down—or remove links to—unauthorized, copyrighted content posted by others until the copyright holder sends a notice for that content.

We suggest, therefore, that Section 512 be revised to require that all OSPs—regardless of type and size—take certain proactive measures if they wish to enjoy the benefit of the safe harbors from liability for intermediary copyright liability.

Property rights are essential to establishing markets.⁵ As Richard Epstein put it: “What really matters is that we develop a system of secure property rights that allows people to transact at low cost and high reliability.”⁶ Ordinarily, individuals are not entitled to benefit from someone else’s good unless they compensate the owner based on the value the good provides. The property rights system at the foundation of American society encourages investment in the creation of a good in proportion to its social value. If individuals inappropriately benefit from a good without paying the required compensation, they ordinarily are subject to liability, which is designed to return the value to the property-right holder—or to deter the violation in the first place.

By shielding OSPs from liability even when they benefit directly or indirectly from the unauthorized use of copyright holders’ works, today’s Section 512 safe harbors preempt ordinary intermediary liability.⁷ This could be appropriate, so long as the regime is properly designed to minimize administrative costs while still generally maintaining the ability of rightsholders to receive value for their work and allowing new businesses and business models to thrive.

But the trade-off for administrative efficiency is not worthwhile if it entails an excessively distorted liability regime that insufficiently protects creators’ property rights. This is especially true of a regime that encourages intermediaries to adopt business practices that *exacerbate* the

⁴ See, e.g., T. Randolph Beard, George S. Ford, and Michael Stern, Phoenix Center Policy Paper No. 52, *Fixing Safe Harbor: An Economic Analysis* (2017) (concluding that by providing overbroad immunity, the safe harbors advantage irresponsible online service providers over responsible ones).

⁵ See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (describing a regime of well-defined property rights and low transaction costs as foundational to more efficient outcomes and, therefore, the establishment of markets); Armen A. Alchian & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16 (1973).

⁶ Richard A. Epstein, *The Property Rights Movement and Intellectual Property*, REGULATION 58, 63 (Winter 2008).

⁷ *Grokster*, 545 U.S. at 914 (“One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”) (citations omitted).

problem by removing their incentives to license works and establish effective content-protection mechanisms. Arguably, the current functioning of Section 512 creates both problems.

Ordinarily, after-the-fact intermediary liability not only provides redress for harm, but also encourages entities to take reasonable proactive steps to avoid liability. As discussed in response to Question 1, however, notice and takedown occurs only after infringement, when the harm has already occurred. The goal of the safe harbors should be to remove the litigation risk that the OSP might face if it failed to prevent *all* infringement from user-generated content. Given the volume of user-generated content on the Internet, that would be virtually impossible without dramatically curtailing the production and availability of non-infringing content. But, for much the same reason, some intermediary copyright liability is essential to ensure effective copyright protection when direct liability is impractical. As the Supreme Court put it:

When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.⁸

Thus, it is equally inappropriate for the safe harbors to remove the litigation risk of failing to take *reasonable* steps to prevent infringement or license content.

Eliminating litigation risk so long as an OSP responds to notices only *after infringement occurs* means that the provider cannot be held culpable when it negligently, recklessly, or knowingly fails to *prevent* infringement. This not only diminishes the legal incentive to take preventative measures, but it may also create economic incentive to refrain from even reasonable preventative steps in order to minimize costs. At the same time, the OSP may continue to generate revenue in connection with unauthorized dissemination.

It also reduces the incentive OSPs might have to license content. Indeed, in many instances, the ideal solution is for OSPs to license content itself in order to avoid not only liability but also the costs of adjudication, both for itself and its users. In the modern age, the transaction costs of licensing are very low for an enormous range of content. Arguably, there is no reason to have safe harbors at all in cases where contracting costs are sufficiently low to enable market transactions. Intermediaries exist, in part, precisely to lower such costs and can profit from licensing by enhancing the ability of their users to disseminate content. Yet the lack of potential liability means there is little to be gained from acquiring authorization. Even where an OSP chooses to enter a license negotiation, it is unlikely to agree to market-based rates. Both the OSP and the copyright

⁸ *Id.*

holder know that it could continue to monetize content even without a license and allow unauthorized dissemination by its users to continue.⁹

Because the safe harbors short circuit the way intermediary liability would ordinarily provide redress, encourage proactive measures, and incentivize licensing, they inherently skew the market for copyrighted works. The original bargain embodied in Section 512 was to encourage OSPs to continue monitoring their services for infringement and to cooperate with copyright holders to prevent infringement in the first place, while also providing OSPs a certain amount of protection from liability risk.¹⁰ The dramatic prevalence of piracy online, however, suggests that this initial vision has not been adequately realized. The safe harbor provisions of Section 512 should be updated to reflect current technological, cultural, and other realities that have likely shifted the intended balance of Section 512 too much away from the licensing and protection of property rights.

To address this problem, the safe harbors should provide protection only when the shielded entity takes reasonable, proactive steps to prevent unauthorized use. This would continue to address the litigation risk OSPs would face if they were expected to stop all unauthorized dissemination of copyrighted works among the vast amount of user generated content they carry. At the same time, the requirement to take reasonable, proactive steps would ensure that copyright holders receive some semblance of the protection they would have under the ordinary standards of intermediary liability.

Thus, in order to be eligible for the safe harbors, OSPs should be obligated to engage in the following proactive measures. Service providers that prefer not to meet such requirements may decline to do so, but then they would not be eligible for the safe harbors and would be subject to ordinary intermediary liability. We do not mean to suggest that these are the only adjustments that should be considered, or that even for these additional details will not need to be worked out. But we believe they represent the fundamental elements of a sensible set of requirements to properly take account of the trade-offs between promoting intermediary services and protecting copyrighted works.

⁹ See, e.g., T. Randolph Beard, George S. Ford and Michael Stern, *Safe Harbors and the Evolution of Music Retailing*, PHOENIX CENTER POLICY BULLETIN No. 41 (2017) (concluding that the safe harbors distort license negotiations because services can offer access to music without paying royalties and still claim safe harbor protection for infringement, resulting in royalty rates eight times smaller than the prevailing rate).

¹⁰ See H.R. Rep. No. 105-796, at 72, 73 (1998) (Conf. Rep.) (stating that the safe harbors were intended to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment” and that “[t]his legislation is not intended to discourage the service provider from monitoring its service for infringing material”). See also 17 U.S.C. § 512(i)(1)(B), (i)(2) (requiring online service providers to accommodate any standard technical measures that have been developed through a voluntary and consensus process).

A. Authentication of Identities

To be eligible for the safe harbors, OSPs should be required to take reasonable steps to authenticate the identities of their users. (Such identities need not be divulged to others unless and until a problem occurs, and even then, only as necessary.) The authentication measures should not be so burdensome as to hinder subscriber enrollment but need to provide a reliable mechanism to prevent fake identities and re-enrollment by repeat infringers. Authentication would make it easier to approach a user to correct inadvertent, unauthorized dissemination; to deter intentional, unauthorized dissemination by users; to provide redress when unauthorized dissemination by users occurs; and to prevent further unauthorized dissemination by the user.

B. Education Measures

Much unauthorized dissemination of copyrighted content might be avoided if OSPs were required to periodically provide educational materials to their users about copyright and fair use, as well as to ask users to certify their answers to specific questions about the content they wish to disseminate each time they seek to do so. Such questions would include, at a minimum, whether the users hold the copyrights in any works they are seeking to disseminate and whether the content includes a substantial amount of a copyrighted work in which they do not hold the copyright.

C. Filtering and Staydown

As discussed in the response to Question 1, once a copyright holder is in the position of having to request a takedown, the damage has typically already been done. OSPs seeking to be eligible for the safe harbors should be required to implement filtering technology that allows copyright holders to provide “fingerprints” of their copyrighted content to proactively prevent unauthorized upload and dissemination in the first place. Such filtering would also help prevent further dissemination of copyrighted content that may already have occurred and for which notice has been sent. It would thus facilitate what is referred to as “notice-and-staydown.” Such filtering requirements have already been adopted to some degree in the European Union.¹¹ This requirement would also help create a market for filtering solutions. Although currently there are a few software packages either commercially available or developed in-house by OSPs, such as the ContentID tool that Google offers (although only to larger, “approved” copyright holders), the market for such technology and its components has not developed adequately in the last twenty years. Nonetheless, the few solutions currently available demonstrate that this technology is currently possible and can be distributed more widely if demand exists.

¹¹ See Article 17, Directive (Eu) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN>.

The likely effect of a “staydown” requirement would thus be to increase the availability of commercial solutions and to reduce costs for OSPs that wish to implement third-party solutions rather than develop their own. It would thus address concerns about the cost and burden on smaller OSPs of creating and maintaining a filtering solution. To make sure such technologies meet a minimum level of proficiency, the Copyright Office could award certifications to filtering systems based on a set of best practices. A staydown requirement would also likely encourage the licensing of content by intermediaries when the cost of doing so is less than that of filtering or the incremental cost of added processing of notices.

D. Prompt Takedown

OSP's wishing to be eligible for the safe harbors should be required to take down unauthorized content promptly after receiving a notice, and, in appropriate circumstances, to enable copyright holders themselves to discover unauthorized versions of their copyrighted works on the service using the OSP's automated filtering tools. The Copyright Office could be tasked with setting out procedures and policies that would be deemed in compliance with the takedown requirement.

E. Repeat Infringer Policies

To be eligible for the safe harbors, OSPs should be required to have *effective* repeat infringer policies terminating service for recalcitrant users and to reasonably implement them. Until recently, the existing repeat infringer policy requirement in the statute was interpreted loosely and lacked serious enforcement. The Copyright Office could be tasked with developing a model repeat infringer policy, compliance with which would satisfy the repeat infringer requirement.

F. No-Fault Injunctions and Site Blocking

Section 512 should also be amended to provide for no-fault injunctions requiring intermediaries to block access not only to individual pieces of infringing content, but, in appropriate cases, to entire sites. It is accepted practice that courts need and have authority to issue no-fault injunctions to third parties where necessary to effectuate their decisions. The need for such orders can be acute in certain copyright infringement cases, such as where foreign websites have been found by a court to predominantly traffic in pirated material. The assistance of OSPs may be the only way to prevent infringing dissemination of such content from continuing in the United States. Such site blocking orders would be issued by courts following judicial determinations that the content in question is being made available in violation of U.S. copyright law and otherwise not effectively redressable. These types of orders are already available in Europe, without “breaking the Internet.”

Question 4: Revisions to the Knowledge Standard

The implementation of filtering solutions as described above should reduce the frequency with which OSPs will themselves need to identify unauthorized dissemination of copyrighted content. Nonetheless, as also discussed above, we believe it is appropriate to require OSPs to engage in

more proactive anti-piracy efforts in exchange for the protection of the safe harbors, even in cases when they have not been specifically notified of a particular instance of infringement by a copyright holder.

We therefore agree with the Copyright Office that OSPs should be required to remove infringing content once such infringement is apparent to an OSP. Indeed, this was the very reason Congress included separate language in Section 512 pertaining to “red flag” knowledge, as distinct from “actual knowledge.”¹² Courts, however, have all but read red flag knowledge out of the statute.

Moreover, in cases in which copyright holders do notify OSPs of infringement, OSPs should not necessarily be required to provide specific URLs for each instance of infringement. Rather, it should be sufficient for copyright holders to provide representative lists of the infringing content on the service, at which point the service provider should be obligated to address all reasonably discoverable instances of the infringement. While the statute already provides for notification by such representative lists, OSPs today often impose administrative requirements that have the effect of preventing copyright holders from making efficient and effective use of them. The Copyright Office could be tasked with identifying what information is both necessary and sufficient for such lists.

Question 5: Injunctive Relief

As discussed in response to Question 3, Section 512 should be amended to provide clear authority for courts to issue injunctive orders to effectuate infringement decisions not only to remedy the current infringement by the adjudicated infringer, but also, in appropriate circumstances, to prevent likely future infringements by the adjudicated infringer. Such injunctions should include the possibility of limited, third-party site blocking orders in cases in which the infringer has been found to have willfully engaged in a substantial amount of piracy.

Question 6: Ameliorating Burdens of Litigation to Resolve Contested Takedown Notices

We agree that requiring a copyright holder to file a federal lawsuit to contest the reposting of content after a disputed takedown notice is overly burdensome. As we noted in our answer to Question 1, above, the alternative dispute resolution mechanism created by the CASE Act might have the additional benefit of offering a less burdensome venue for addressing contested takedown notices.

¹² See 17 U.S.C. § 512(c)(1)(A) (Providing safe harbor on the condition that the online service provider “(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing [or] (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent”).

Question 7: Improving the Notice and Takedown Process

We agree that poor practices can frustrate the takedown process. We therefore also agree that it makes sense for the Copyright Office to issue sample forms, as well as guidance on practices that would be deemed to comply (or not comply, under penalty of losing the safe harbor) with the Section 512 notice and takedown requirements. This would include guidance on the information and materials OSPs should make available to copyright holders for purposes of submitting a takedown notice, as well as guidance on what practices would be considered impermissible obfuscation. The focus should be on clarity and faithful administration of the notice requirements, rather than any *per se* prohibition of particular mechanisms, such as automated notice sending.

As discussed above in response to Question 3, we agree that OSPs should be required to provide certain educational materials to their users in connection with the notice and takedown process, including about how the process works and the scope of copyright and fair use. The Copyright Office could also provide guidance on privacy practices to protect sensitive, personally identifiable information about notice senders and respondents, subject to tailored disclosure in the event the information is necessary to fully resolve a dispute.

Question 8: Volume of Notice Sending

Because piracy is rampant, it should be no surprise that the volume of takedown notices is large. But because notice sending is one of the main options—and often the *only* option—copyright holders have to try to combat theft of their intellectual property, it would be inappropriate to place an artificial cap on the number of notices that copyright holders may send or that OSPs must process. Concerns about the sending of unjustified notices can and should be addressed by effective enforcement of the current language of Section 512(f), which provides for a damages award against anyone who knowingly makes a material misrepresentation in a notice. The best way to reduce the administrative burden of sending and processing notices would be to reduce the unauthorized dissemination of copyrighted content. Toward that end, the filtering requirement suggested in response to Question 3 as a condition of receiving the safe harbors should reduce the need for notice sending and processing by limiting the number of unauthorized disseminations that occur in the first place. Better still, licensing by intermediaries would avoid the need for—and thus the cost of—filtering and notice sending at all.

Question 9: Adoption of Standard Technical Measures

One of Congress's goals in adopting Section 512 was to encourage voluntary collaboration between copyright holders and OSPs to develop *proactive*, technical mechanisms in the marketplace that would prevent content from being disseminated without authorization in the first

place.¹³ Courts have interpreted Section 512 in a way that provides OSPs near complete immunity from liability, however, so long as they address unauthorized dissemination *after the fact* upon receiving notice. As a result, online service providers have little legal incentive to collaborate in the creation of such mechanisms, or to adopt technologies that have already been developed.

Filtering is one such technology. The filtering requirement suggested in response to Question 3 as a condition of receiving the safe harbors would help rectify this lack of legal incentive. Moreover, the requirement would create a market incentive for entities to develop additional filtering solutions, either for their own use or to make commercially available for others to use.

Congress could encourage the creation of standard technical measures by authorizing the Copyright Office to certify, or even commission creation of, additional measures, and to require OSPs to adopt solutions from among a menu of such measures to be eligible for the safe harbors.

Question 10: Oversight of Voluntary Agreements

Voluntary agreements between a copyright holder and an OSP to combat unauthorized dissemination of copyrighted content should not be subjected to government review. The whole purpose of Section 512 was to encourage these sorts of voluntary initiatives. There is no evidence that such agreements are causing significant problems, and their bilateral nature means that each agreement applies only in particular circumstances, to particular content, on particular services. Any restriction on such agreements would interfere with the right of copyright holders to protect their intellectual property, as well as both parties' right to contract.

Neither copyright holders nor OSPs are obligated to make all content and services available to all comers. Copyright owners and OSPs do, however, have market incentives to ensure people have positive experiences interacting with content and services, and that they are not unreasonably prevented from engaging in such interactions. Any concern that a particular voluntary agreement creates antitrust problems or runs afoul of other areas of law can be adjudicated under the applicable jurisprudence.

To the extent that there is concern that the bilateral nature of voluntary agreements does not provide the opportunity for input from third parties, such third-party input could be accommodated in the broader adoption of industry-wide standard technical measures in the process proposed in response to Question 9. Moreover, the filtering requirement suggested in response to Question 3 and the

¹³ See H.R. Rep. No. 105-796, at 72, 73 (1998) (Conf. Rep.) (stating that the safe harbors were intended to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment” and that “[t]his legislation is not intended to discourage the service provider from monitoring its service for infringing material.”). See also 17 U.S.C. § 512(i)(1)(B), (i)(2) (requiring online service providers to accommodate any standard technical measures that have been developed through a voluntary and consensus process).

standard technical measures suggested in response to Question 9 may reduce the need for bilateral voluntary initiatives.

Question 11: Section 1201 Anticircumvention Exemptions for Third-Party Assistance

The Section 1201 provisions governing circumvention of technological protection measures have been instrumental in fostering today's dynamic marketplace for digital content and services.

Technological protection measures enable copyright holders and service providers to offer consumers a variety of flexible options for enjoying content beyond the outright acquisition of a copy. Because technological protection measures make it possible for copyright holders and service providers to allow conditional access to content, they can enable a consumer to enjoy content for shorter or longer periods of time, over one device or multiple devices, and within the home or in multiple locations—all at different price points. This flexibility has enabled the development of digital pay-per-view, digital rentals, subscription-based services, mobile and cloud services, and family sharing plans, among others.

If copyright holders and service providers cannot prevent circumvention of technological protection measures, all conditional access ultimately becomes unconditional access. This would likely force copyright holders and service providers to forgo offering flexible consumption options and revert solely to acquisition-based models.

For that reason, we recommend Congress err on the side of caution when considering changes to the Section 1201 anti-circumvention provisions. We would thus counsel against amending the statute to create exemptions (akin to the Unlocking Consumer Choice and Wireless Competition Act¹⁴) that allow third-party assistance in circumventing technological protection measures, even where the circumvention would be permissible for the first-party consumer based on an exemption. Doing so would only create a potential loophole that might inadvertently exacerbate piracy or, worse, allow parties to intentionally exploit such a loophole.

Question 12: Anticircumvention Exemptions for Security and Encryption Research

We are unaware of significant problems with the current, permanent Section 1201 anti-circumvention exemptions for security testing and encryption research. Moreover, the flexible triennial review process provides an avenue for addition exemptions, should a party be able to demonstrate a necessity. We therefore counsel against revising the statutory provisions regarding security testing and encryption research. Doing so would only create a potential loophole that

¹⁴ Public Law 113-144.

might inadvertently exacerbate piracy or, worse, allow parties to intentionally exploit such a loophole.

Question 13: Making Temporary Anticircumvention Exemptions Permanent

We caution against making any temporary circumvention exemptions granted by the Copyright Office permanent. The triennial review process offers a flexible means for granting, and sunseting, anti-circumvention exemptions as technology, business models, the needs of consumers, and the risks to copyright holders change over time. The Copyright Office has already streamlined the process for granting unopposed exemptions and renewing prior ones. Moreover, the Copyright Office and copyright holders are likely more confident in the exemptions that have been granted precisely because they can be revisited if circumstances change. This flexibility also benefits petitioners for exemptions, since they are not themselves stuck with exemptions that may lose utility over time. Because the process of statutory change is more arduous for all parties concerned, continued reliance on the current triennial review process is a better path.

Question 14: Process Revisions to the Section 1201 Triennial Review Process

As discussed in response to Question 13, the Copyright Office has already adopted procedures to streamline the process for anticircumvention exemption renewals and grants of unopposed exemption petitions. The current reforms appear to be working well but, if necessary, the Copyright Office could adopt additional process reforms upon a demonstrated need. We therefore recommend against adopting statutory revisions to the triennial review process.

Question 15: Section 1202 and Rights Management Information

Rights management information in copyrighted works is essential to protecting copyright holders' property rights. When such information is removed or altered, it becomes considerably more difficult for copyright holders to find unauthorized dissemination of their works through automated searches and to take corrective measures. The absence or alteration of rights management information may also increase the likelihood that someone inadvertently disseminates copyrighted content without the necessary authorizations and hinder their ability to track down a rights holder for purposes of obtaining copyright permissions. All of this skews the market for copyrighted works.

Rightsholders should therefore be required to show only that rights management information has been negligently, recklessly, or knowingly removed. They should not be required, as is currently the case, to also demonstrate that the information was removed with the intent to facilitate infringement. OSPs should thus have an obligation to ensure that rights management information included with content by a copyright holder remains intact and accurate.