

BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY COMMITTEE ON
THE JUDICIARY UNITED STATES SENATE

The Role of Private Agreements and Existing Technology in Curbing Online Piracy
Testimony of Joshua S. Lamel, Executive Director, Re:Create
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Chairman Tillis, Ranking Member Coons, Members of the Committee, thank you for giving me the opportunity to testify today about voluntary agreements. This is an issue that Re:Create's members care deeply about. Re:Create is a coalition that represents a diverse set of creators, innovators and internet users -- groups that overlap with each other more and more over the last 25 years. Today, everyone can be a creator and distribute their creations globally, whether a music video, short film, artisan creations, books, art or any other form of creative output. Internet users are creators, and internet creators are users. The internet has allowed for the arts and sciences to blossom. Re:Create's membership stands strong for these principles.

These "new creators" are everywhere. Many have been able to turn media creation into a full time business, some of these businesses are big enough to hire employees. One example is the Philadelphia based photographer, Jared Polin. He grew his business from just himself to a team of employees. Mr. Polin has testified extensively on how the internet has enabled his craft. We need to encourage this type of small business creation. He is not alone. While some have launched full time businesses online, others are doing it to create an additional line of income. And right now, when COVID-19 is decimating our economy, we need to help small business owners seek reliable forms of income. The online marketplace is just that: it does not shut down due to a pandemic. These businesses can make their own hours and they can create goods, which consumers want and need, without ever leaving their home. The internet also allows hobbyists, who create for fun, to sometimes make a little money themselves. Not everyone is creating to make a profit, or sees themselves as a professional creator. For many, this is merely an outlet to meet fellow hobbyists and show off their work. I cannot express enough, this in no way makes their creations any less valuable to culture, or any less important as we look at copyright, which has the constitutional purpose of incentivizing creativity. Community is equally important as profit, especially now.

A recent study commissioned by Re:Create estimated that at least 17 million Americans are “internet creators” on nine popular platforms.¹ The study’s results are conservative, not accounting for the millions of creators on quickly growing platforms like TikTok, Parler, Teespring and Society 6 or on music streaming platforms like Spotify and Bandcamp. It did not include Patreon, Substack, OnlyFans and other sites that many creators are now using to make money. It is a mere snapshot of 2017, and it is safe to say that over the last three years the numbers have grown, especially during COVID.

The total revenues from these creative works was estimated to be at least \$6.8 billion -- income going directly into the hands of American creators. We believe that number is now exponentially higher. A recent estimate valued the social media influencer market alone to be approaching \$15 billion by 2022, compared to just \$800 million in 2017.²

Looking at the home states of the Chairman and Ranking Member, our study found at least 423,100 North Carolinians made money as online creators. In Delaware, at least 32,076 people made money as online creators. Put in a better way, 3% of Delaware’s residents and 4.1% of North Carolina’s earned revenues as an Internet creator in 2017 on just nine platforms.³ They have grown since then and their voices are essential as a part of this conversation.

As mentioned, beyond those making money, there are countless others creating noncommercial works on platforms. Re: Create member, the Organization for Transformative Works is a nonprofit website hosting transformative noncommercial works. It’s main database is the Archive of Our Own, which has over 2.5 million registered users, hosts over 6 million unique works, and receives almost 350 million page views per week. It does all this with a volunteer staff of seven people, all of whom have full time jobs. These works are shared with a purely noncommercial motive.

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<https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf>

² <https://www.businessinsider.com/influencer-marketing-report>

³ Kindle Publishing, YouTube, Instagram, eBay, Twitch, Wordpress, Shapeways, Tumblr and Etsy.

I am here today to try and represent all these voices.

I have divided my testimony into three main sections: 1) The DMCA, how it contemplates voluntary agreements, and if it is doing as Congress intended; 2) The importance of voluntary measures being voluntary; and 3) the importance of all stakeholders having a say about voluntary agreements.

The Statute And Its Purpose

Before getting into a conversation on voluntary measures today, it is important to look at the statutory language around voluntary measures and its history. Voluntary measures are contemplated by the Digital Millennium Copyright Act under U.S.C. 512(i). In this section, the law states that one of the conditions for eligibility for the liability shield is that service providers accommodate and do not interfere with standard technical measures.⁴ A standard technical measure is one used by copyright holders to identify or protect copyrighted works.⁵ However, the law than specifically limits what is a standard technological measure requiring: (1) it has been developed by a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (2) are available any person on reasonable and nondiscriminatory terms; and (3) it does not impose substantial costs on service providers or substantial burdens on their systems or networks.⁶

The language of 512(i) is important. Congress wanted to encourage the adoption of voluntary agreements around adoption of standard technical measures, however, they specifically wanted to make sure there was broad consensus across stakeholders and that it is truly voluntary. Additionally, Congress wanted to make sure they were available to everyone on reasonable terms and would not impose substantial costs on service providers or their systems/networks. Congress rightfully sought balance in this

⁴ 512 (i)(1)(b)

⁵ 512 (i)(2)

⁶ 512 (i)(2)(a)-(c)

provision - it wanted to encourage development of voluntary agreements, but it wanted to make sure that these agreements were truly voluntary, not dominated by certain industry players or rightsholders and affordable for smaller and nonprofit service providers to implement.

Beyond voluntary agreements on standard technical measures, the DMCA does not contemplate voluntary agreements. Service providers have no duty to implement non-standard voluntary measures. They also have no duty to make anti-piracy tools available to everyone if they choose to develop them. This was intentional on Congress' part, they realized that in most cases "one size fits all" solutions would not work and wanted to ensure that if they were implemented they went through a real standards setting process similar to what we find in the patent world. This means there are competition protecting requirements of reasonable and nondiscriminatory terms on licensing if there is intellectual property involved in the standard. Additionally, they wanted to make sure that any standards adopted would not leave behind those platforms that could not afford to implement them and thus exempted them from it.

Non-standard voluntary measures are purposely not contemplated by the DMCA, leaving room for service providers to implement them as they see fit. And as Congress hoped, they can be found throughout the online platform landscape. Most major for-profit internet providers go above and beyond what is required under the DMCA to stop piracy and help creators in so called DMCA+ agreements. They are not perfect, for sure, but Congress never intended them to be perfect. They did not expect all piracy to stop, and many of the complaints we hear from a subset of creators today were being made back in the 1990s when the DMCA was being debated. The solutions that have been developed by platforms are usually available to creators for whom they will work, and allow rightsholders a choice whether to participate or not as long as they meet the eligibility standards.

The most known of these voluntary solutions is YouTube's Content ID system. This is the perfect example of a non-standard based voluntary system as contemplated by the DMCA. Like most DMCA+ solutions, it employs the use of filtering technologies.

Unfortunately, despite Content ID being the most cutting edge solution available, it has created serious challenges for online creators and users, as it does not have the ability to take into account if the use of a copyrighted work is a permitted use. It allows creators to have content removed, or to monetize content, even if it is not violating copyright.

Critics of the DMCA point out that there has been very little adoption of voluntary standard technical measures. Despite these critics using this as an example of where the DMCA is failing, this criticism is misguided. Often, this criticism is levied with calls for ending consensus for the standard. These calls misunderstand what a standard means. For it to work it has to be voluntarily entered into after a consensus building process. Lack of consensus would mean it cannot be a standard.

Another criticism is that there has not been the development of filtering standards. This is not a failure of the DMCA, it is actually a success of it. Filtering technology, by its very nature, is not one size fits all. Proprietary solutions are often the most workable solutions and many platforms have implemented some form of filtering voluntarily. There is a burgeoning competitive market for filtering technologies that do not need to be a part of a standard to succeed. The market here is working.

When it came to standards and the DMCA, Congress did focus on implementation of digital rights management software (DRM). However, again, the market succeeded and obviated the need for DRM standards. When DRM is used, it works. Yes it can get broken. But Section 1201 was created to deal with the situations where it is broken. DRM is widely used as a tool spread across a myriad of technologies. No one is begging for DRM standards. Some who have testified before this committee have argued it is too widely used, and has gone beyond its purpose of stopping copyright infringement, and has instead become a tool exploited for profit and vertical restraints are trade. The automobile repair marketplace is a perfect example of this. But that is a 1201 problem, not a 512 problem.

Voluntary Measures Need to be Voluntary

It may seem obvious, but voluntary measures need to be just that - voluntary - otherwise there is no incentive to make them work. Any type of requirements around voluntary measures should be avoided, including government agency participation in developing them or liability shields being conditioned on adopting them. They are not voluntary when those things happen.

There are some commentators who have suggested that the Copyright Office should oversee the creation and adoption of voluntary measures. However, doing so would cause real harm. Attempts to create “voluntary” policies by the Intellectual Property Enforcement Coordinator (“IPEC”) during the Obama administration are perfect examples of how government involvement is a terrible idea.⁷ Internet access providers felt forced to participate or be subject to consequences, and many stakeholders were purposely left out of the conversation, including online service providers, advocacy groups for access to broadband, and consumer representatives. Consumer reps were brought in at the end, but only as a courtesy and without any influence on the final product. Key internet companies and the tech industry writ large were not included in the negotiations despite requests to participate. Groups working on the importance of broadband access were left out, even though voluntary agreement contemplated cutting off internet service. The end result was a “voluntary agreement” that angered many key constituencies, was not voluntary, and forced onto internet access providers. Additionally, it created distrust of IPEC as a fair arbiter that continues to this day.

The Copyright Office serves an important role in registering and administering our copyright system. Involving them, or any other government agency, in trying to facilitate or force voluntary agreements will inherently lead to distrust by key stakeholders. Over the last five years, the Copyright Office has worked hard to rebuild the trust it lost with all non-rightsholder stakeholders. Putting its thumb on the scale to create voluntary agreements that are not voluntary would undo all that hard work.

⁷ <https://arstechnica.com/tech-policy/2011/10/copyright-czar-cozied-up-to-big-content-e-mails-show/>

The Diverse Stakeholder Ecosystem Should Be Party to Voluntary Agreements

Throughout the hearings process, one of the key points Re:Create and many of our members have been making is around the diversity of stakeholders in the copyright ecosystem due to the growth of the Internet. Platforms are not monolithic -- what works for video content does not necessarily work for images, music, books, or artisan creations. What might work for one will definitely fail for another.

Creators are not monolithic either. What works for a large corporate music business will often not work for a small independent music label or a content creator posting their music on YouTube. Within the creative community we have seen this conflict play out over the last year at the IP Subcommittee, comparing the testimony of Jeremy Johnson to that of Kerry Muzzey or Don Henley. All three are important creators, and all three deserve to have their voices heard. There are countless others who have their own experiences that influence their views on copyright, often in conflict with each other. The 7 million American internet-first creators are the fastest growing part of our ecosystem and have a diversity of views themselves. But all 7 million depend on the platforms being available to them in a way that they can get their content out and make a living. And those that create to create, and do not seek economic benefit from their creative activity are also important, as their interests are often in conflict with our nation's copyright laws that assume a profit motive.

Voluntary measures already have a profound impact on these American new creators. Under the DMCA, they have the right to counter-notice content that was taken down for alleged copyright infringement. However, under voluntary agreements and DMCA+ implementations, they often lose this right as the content is either filtered out or monetized by someone. The risks of fighting this can lead to being suspended or de-platformed, which is career ending. This can have a profound impact. For example, over-enforcement by the music industry using Content ID on YouTube often makes it difficult for music critics to earn money from their works on the platform even though their videos are a clear fair use. This is because technology is just not capable of making

fair use determinations. Even Content ID, which is as cutting edge as filtering technology comes, cannot do that. Lawful uses are being improperly monetized by rightsholders.

A White Paper released last week by EFF highlights the challenges DMCA+ voluntary agreements, particularly Content ID, are creating for vidders.⁸ It tells the stories of a music critic, film critic and video essayist that are finding it hard to ply their trade because of a DMCA+ agreement and improper monetization of their videos by rightsholders. Anything that is done to make this the new normal on all platforms, whether through voluntary agreements or through notice and staydown legislation that forces mandatory filtering, will harm many creators.

Additionally, for many Americans that are not seeking to make money or get paid for their creations, monetization in DMCA+ regimes can allow noncommercial works to be used for commercial purposes without their permission. This can be devastating for these creators, who now have to deal with advertisements or other forms of revenue from creations that were never intended to be commercial. Imagine how embarrassing or frustrating it would be for someone else to be making money off of your video, even if it was not violating copyright law. That is what DMCA+ agreements can lead to.

That is why it is so essential that these new creators, noncommercial creators and folks like Re:Create, OTW, EFF, Public Knowledge and others that fight for their rights need to help craft any voluntary agreement before it is implemented. Otherwise, we run the risk of stifling creativity, which goes against the very purpose of our copyright system.

That is not the only situation where voluntary agreements can have an impact. The voluntary agreement talked about earlier between broadband access providers and major rightsholder organizations had a significant effect on consumers, who were not party to it. Two private companies basically got together and created an agreement on

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<https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online>

potentially suspending or kicking them off the internet, based on allegations of infringement. Even if there was infringement happening, it would impact all members of the household, not just the one who was infringing. The idea that someone could lose their job or not be able to attend school during COVID because of something someone else did or mere allegations of wrongdoing, is a draconian solution. That private parties could do this without consumers being involved in the process is something that should not be allowed to happen.

Conclusion

I want to thank you all again for the opportunity to testify today. I want to add a small note on today's hearing, and how it fits into the broader DMCA review the committee has undertaken this year. Voluntary agreements highlight that consumers and Internet creators are essential for a successful process. What got the DMCA across the finish line in 1998 was that it was a multi-stakeholder bipartisan process where Congress made sure that consumer voices were an important part of the process in crafting the final product.

I wanted to thank you for working hard to make sure internet creator and consumer representatives were present at the hearings. For our community, the DMCA certainly has its challenges. However, those challenges are far outweighed by all its benefits. Fixing some of the things we would like to see fixed would be great, but not at the expense of the broader compromise that has allowed user generated creative content to spark a revolution of creativity over the 22 years since it became law. Americans depend on this for their livelihoods, as a way to create, and as a way to access creative works. Our current creative world, where millions of works are being created from small towns to big cities, and distributed globally, is exactly why we have copyright law. We cannot forget this.