Mitch Glazier
The Role of Private Agreements and Existing Technology in Curbing Online Piracy
Questions for the Record
Responses Submitted January 19, 2021

QUESTIONS FROM SENATOR TILLIS

1. I've heard that the current notice-and-takedown system in section 512 casts a shadow over most interactions between copyright owners and online service providers – including any negotiations. If section 512 is re-written, how do you think that would change the pervasiveness of voluntary agreements and the types of voluntary agreements that copyright owners and service providers are willing to enter into?

Section 512, as distorted by courts over the past two decades, has skewed engagement in meaningful efforts to combat piracy that would otherwise take place in an interdependent market ecosystem. Under the current interpretation of Section 512, online service providers (OSPs) often act with relative impunity and resist negotiating agreements that might require them to do more or actively engage on this issue – or even to bind themselves to keep doing what they already are doing. Voluntary agreements will not make the gains that one would expect in a properly functioning digital marketplace without sufficient incentives for OSPs to team up with creators and strive to keep their sites clean.

It all comes down to incentives. If section 512 were re-written to reflect its originally intended meaning and OSPs were subject to normal market incentives and pressure, as other distributors are in the normal course, voluntary agreements would increase dramatically in volume and scope. Under the current interpretation of section 512, OSPs don't feel pressure to employ technologies to reduce piracy on their sites that they already have and use for other purposes. Some don't feel pressure to address widespread infringement on their site for the same recognized material; rather they will only respond to a takedown notice for a specific file or URL. Some don't feel pressure to be transparent about, and strictly enforce, repeat infringer policies. Without their overbroad liability shield, the dynamics that produce inaction and reduce pressure would dissolve and the market would solve problems the way it is supposed to.

2. Section 512 contains a requirement that OSPs accommodate and not interfere with standard technical measures (or STMs). Why is it that after 22 years, industry still has not identified a single STM?

Widely adopted technical measures to identify and/or protect copyrighted works already exist in the marketplace. The problem is a lack of market incentives based on the overbroad shield tech companies receive under Section 512 as interpreted by the courts and the cooperation needed to formally recognize those measures and as standards. The DMCA calls for the development of standard technical measures "pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." OSPs can stymie that process simply by choosing not to participate. Right now, they do not have the incentive or requirement to participate in a meaningful way.

3. When an OSP develops a technology beneficial for combating piracy, what obligation is there – or should there be – for other OSPs to develop, or acquire, similarly effective tech?

OSPs are not all the same and do not necessarily need to apply the same technologies to achieve the same result. Regardless of size, however, an OSP should be obligated to address any infringing activity on its system or network at no less than the same scale and speed with which the OSP ingests content and makes it available or surfaces that content to its users. Likewise, where an OSP hosts infringing and pirated content, it should be required to employ available technologies consistent with the amount of problematic content to reduce the incidence of such materials and address any broader problems. Many effective, affordable, non-proprietary, and scalable content protection measures are widely available today and using them is literally the normal cost of doing business in this area.

4. Can you please describe your experiences working with Twitter on copyright piracy? Do they take copyright piracy seriously? Does Twitter actively work with copyright owners and creatives to address issues on their platform, or are they as evasive and nonresponsive with you and your members as they were with members of this Subcommittee?

Right now, I do not consider Twitter a proactive, cooperative partner in terms of copyright enforcement. It takes those actions it views as legally necessary to retain its safe harbor protections, but along the way it erects unnecessary hurdles by making searching for infringement on its platform at scale difficult, limiting the number of infringements that can be included in a notice on its webform and then prioritizing processing of webform DMCA notices over other DMCA notices, and responding erratically to DMCA notices with some infringements coming down in hours and others in days on a platform where tweets go viral in seconds. While pirated material can be virally distributed at a massive rate in seconds on its platform, at this point Twitter shows little concern. Although we are discouraged, we hope Twitter takes more interest in providing creators and users a fairer, more secure platform in the new year.

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QUESTIONS FROM SENATOR COONS

1. **Testimony at last week's hearing suggests that voluntary measures have not sufficed to combat widespread digital piracy. Some have suggested that the federal government should play a role in establishing, regulating, mediating, or otherwise overseeing standard technical measures, best practices, or other currently voluntary arrangements designed to prevent the unauthorized distribution of copyrighted works.**
    a. **Should the federal government serve a role in connection with such standard technical measures, best practices, or other currently voluntary arrangements?**

When it comes to standard technical measures (STMs), I do believe the federal government has a role to play in creating incentives, promoting engagement, and resolving the impasse. More specifically, the Copyright Office should be given the non-exclusive authority to formally adopt and recognize STMs under the statute. Because technology is constantly evolving and these measures are likely to shift over time, this authority could be modeled on the triennial rule-making process under Section 1201. Such an arrangement would keep self-interested online service providers (OSPs) from frustrating the process and would encourage broad participation and eventual progress of the kind envisioned by Congress in drafting the DMCA.

As for other voluntary agreements, I believe it would be inappropriate to impose or expand any government role (beyond legislative reform to restore the DMCA's intended balance of responsibilities and reinstituting incentives for OSPs to partner with creators in combating piracy). Freedom of contract, market-based solutions, and the ability of parties to experiment generally produce a more nimble ecosystem that evolves faster than the law can.

    b. **If Congress were to conclude that the federal government should play a role, what role should that be, and what entity is best-positioned to serve in that capacity?**

The Copyright Office should be given the non-exclusive authority to formally adopt and recognize STMs under the statute, based on the current triennial review rule-making process under Section 1201.

    c. **Are there non-governmental entities that would be equally or better situated to serve in this role? If so, how would you suggest that we incentivize them to do so?**

No. The Copyright Office is uniquely situated to participate in the STM process and can consult with other expert agencies, and I do not believe other non-stakeholder parties should have designated roles with regard to STMs or other voluntary agreements.

2. **Much of last week's testimony focused on the role of social media platforms and content owners in policing digital piracy. Some voluntary agreements designed to thwart online copyright infringement have also involved domain name registries, payment processors, and advertising networks.**
    a. **Among these industries, who do you believe has been most effective in voluntarily combating digital piracy, and who should do more?**

Advertising networks and ad agencies have adopted industry best practices to deter the flow of dollars to sites engaged in widespread and pervasive infringement. Similarly, payment processors have adopted industry best practices to deter sites that primarily deal in counterfeit and pirated goods.

The domain name industry, however, has consistently refused to even discuss industry best practices to address sites that engage in widespread, pervasive infringement. A couple of companies in that industry, namely Donuts and Radix, have entered into voluntary arrangements to address piracy, but the vast majority of companies in the domain name industry refuse to take any action whatsoever, whether it is suspension of a domain name or even providing true and accurate contact information for the registrant of the domain used for infringing activity, absent a court order. This industry must stop turning a blind eye to the rampant illegality occurring over domains they manage and start working more proactively and practically with rights holders and others to deter such illegality. Making money from the registration of domain names used for illegal purposes should not be allowed as a proper business strategy.

    b. **Are there additional entities that are playing or should be playing a role in voluntarily combating digital piracy?**

The Internet Coalition of Assigned Names and Numbers (ICANN), which is responsible for coordination of the domain name system (DNS), should be much more proactive in setting and enforcing policies to ensure that domains are not used for pervasive infringement and other illegality, and that legitimate stakeholders are provided with true and correct registrant information for domains alleged to engage in such illegality. Unfortunately, ICANN has failed to date to meaningfully address either of these issues, and in some instances, has served to perpetuate them by turning its back on the problems.

3. **We heard testimony about YouTube's Content ID, Facebook's Rights Manager, and other software tools available to match user-posted content against databases of copyrighted material. Some have expressed concerns that requiring all platforms to use such tools would be unduly burdensome and serve to entrench larger, more established platforms. How do you suggest that we make this type of anti-piracy technology available to all creators without stifling innovation?**

There already is a vibrant market for content protection tools, including Content ID, Rights Manager, Audible Magic, and several others. Some are proprietary and specific to a single OSP, and some are available to the public and customizable to fit the needs of a wide range of OSPs. I fully appreciate that all platforms should not be required to use the same exact tools, as different sites can have different needs and data profiles. But they all should be accountable for what

appears on their sites. If a small OSP hosts a significant amount of pirated content, it should be required to use correspondingly robust anti-piracy measures to remove that content at scale. If given the authority, the Copyright Office will be available to thoroughly assess these issues and accommodate them in a rule-making.

4. **Some witnesses warned that voluntary agreements can exclude and disadvantage smaller entities in the creative ecosystem, including creators and content owners, internet users, and internet platforms. If voluntary anti-piracy agreements are to remain truly voluntary, how do we ensure that everyone has a seat at the table?**

OSPs should ensure that everyone has a seat at the table. OSPs host infringing content of "large" and "small" creators alike and represent themselves as the ultimate problem solvers in the digital age. Some of these companies are training driverless cars, developing tools to help fight climate change, and mapping the Earth. They are omnipresent in people's homes and lives. As lauded innovators, the beneficiaries of safe harbor protections, and responsible digital citizens, they should take the lead in crafting solutions that take into account all of the relevant constituencies.