

Answers to Chairman Tillis' Questions for Keith Kupferschmid

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?

The legislative history associated with the DMCA's enactment makes clear that Congress intended "for service providers and copyright owners to cooperate to detect and deal with copyright infringements."¹ Unfortunately, courts have improperly interpreted the law to impose a disproportionate and inappropriate burden on copyright owners.

Under the current system, service providers have little risk of liability and need only do the absolute minimum required under the DMCA to avoid liability. Consequently, the objective of most service providers is to preserve the status quo and they have no interest in working with Congress or stakeholders to restore balance to the online ecosystem. This is why there has been a dearth of recent voluntary agreements that would better apportion the burden of online copyright enforcement.

If Congress were to more equitably reallocate the enforcement burden between service providers and copyright owners, service providers may have more risk of liability and therefore be more willing to work cooperatively with copyright owners in the future, which may result in more voluntary agreements. In effect, by re-balancing the DMCA, Congress may be able to accomplish its original goal of fostering cooperation between service providers and copyright owners to detect and combat online copyright infringements.

2. What is the future role of voluntary measures in combating online piracy?

As noted in the response to Question 1, under the status quo, there is little hope of achieving real progress through voluntary agreements between service providers and copyright owners. This is unfortunate, because voluntary agreements in theory could benefit the entire ecosystem, ranging from service providers and large copyright owners to individual creators and users. Voluntary agreements provide a degree of flexibility that doesn't exist with a legislative approach, allowing stakeholders flexibility to respond and adopt as the digital ecosystem continues to grow and change and methods of infringement adapt and shift.

Where possible, the Copyright Alliance would prefer to address section 512 issues through voluntary agreements between stakeholders and we believe that, if service providers were willing to negotiate voluntary agreements with the copyright community, many of our concerns with section 512 could be addressed without the need for legislation. However, because service providers have been unwilling to work cooperatively with the copyright community in any

¹ S. Rep. No. 105-190 at 1-2 (1998).

meaningful way, it may be necessary to reform the DMCA in a way that apportions the burden of enforcement more equitably between copyright owners and service providers.

3. 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?

The lack of mandatory STMs that protect copyrighted works under section 512(i) is one of the most significant failings in terms of the effective application of the notice-and-takedown process, as it undermines a provision that was designed to facilitate cooperation between service providers and copyright owners. That such STMs have not been adopted reflects that the balance intended by Congress in enacting the DMCA has not come to pass. This has occurred because service providers currently have no incentive to come to the table to negotiate. There are existing technologies capable of identifying and removing unauthorized copyrighted material posted by their users, as well as several off-the-shelf technologies that are easy to implement and affordable for user generated-content (UGC) sites of all sizes. Some of the larger UGC services have already implemented technologies like these, but the technologies are not made available to all copyright owners and are not implemented with the input of copyright owner stakeholders as required by section 512(i).

Given that OSPs have no incentive to come to the table on their own, Congress should give the U.S. Copyright Office regulatory authority to adopt STMs and promulgate related regulations. A standard-setting body like the National Institute of Standards and Technology (NIST) could be brought in as an advisor to the Copyright Office to assist the Office with the technological aspects of this duty (e.g. assessing which technical classes of service provider could reasonably accommodate a proposed STM), but regulatory authority should rest solely with the Copyright Office.

In addition, the language of section 512(i) should be amended to clarify that “accommodate and not interfere” means that service providers must *adopt* the STM. The language could also be amended to clarify that a “broad consensus” does not require consensus from all stakeholders across every industry to meet the statutory requirements of a STM and that there can be significant flexibility in agreeing to STMs across different types and sizes of copyright owners, OSPs, users and services. These two changes should not be necessary because Congress intended the terms to be interpreted in this manner when it enacted section 512(i). However, these changes may be necessary to prevent service providers from purposely misinterpreting these terms (as they have tried to do in other areas of the DMCA, such as the repeat infringer provisions in Section 512(i) or the “representative list” and knowledge standard language in 512(c)) to avoid the application or effectiveness of any STM-related regulations by the Copyright Office.

4. 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?

When an OSP develops a technology beneficial for combating piracy, there is no “obligation” for other OSPs to develop, or acquire, similarly effective technology, unless that technology is recognized as a Standard Technical Measure (STM) under section 512(i). Where a technological measure is recognized as an STM by satisfying the three criteria in the section 512(i)(2), service providers who want to avail themselves of a DMCA safe harbor must “accommodate” *and* “not interfere” with the STM. It is not sufficient for an OSP to merely not interfere with the STM; they must also adopt and implement it. But that does not mean all OSPs must necessarily do so. During the standard-setting process under section 512(i), the stakeholders, in conjunction with the government, can set standards for when an OSP must accommodate the STM.

The STM process envisioned by section 512(i) does not necessarily require the creation of new technologies. There are numerous technologies that have been implemented over the years by OSPs and others to fight online infringement. The process envisioned by section 512(i) merely takes that existing knowledge and standardizes it to the benefit of all OSPs and copyright owners. Doing this could make the takedown process significantly easier for both OSPs and copyright owners.

The fact that a growing number of service providers are voluntarily implementing content filtering technology does not displace the importance of adopting STMs in a collaborative manner pursuant to section 512(i). When OSPs implement these voluntary measures as a substitute for developing and implementing STMs while simultaneously impeding the adopting and deployment of STMs—which is the case now—that suggests a desire by service providers to subvert the intent of Congress in calling for the development and application of a standardized set of technical measures. When OSPs unilaterally implement their technological solutions without input from copyright owners, their implementation often falls well short and does not work effectively (see response to question 5 for more about this).

There is enormous potential under section 512(i) for STMs to incentivize new technologies and encourage stakeholder collaboration. However, to satisfy the requirements of the statute, stakeholders would need to come together “in an open, fair, voluntary, multi-industry standards process.”² And that is not happening, thereby making the STM provision in section 512(i) irrelevant. That is clearly not what Congress intended. Congress did not include section 512(i) in the DMCA to see it go unused for twenty-two years. Reviving section 512(i) may be the easiest and most important achievement that could result from the Subcommittee’s series of hearings.

5. 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?

Twitter’s unwillingness to testify at the Senate Judiciary IP Subcommittee’s DMCA hearing on December 15, along with its perfunctory response (dated December 11, 2020) to Chairman

² 17 U.S.C. § 512(i)(2)(A).

Tillis' DMCA questions demonstrates Twitter's minimalist approach and trifling attitude on issues of online infringement and the DMCA. In short, Twitter is the poster child for what is wrong with the DMCA.

Like many service providers, Twitter places an inordinate burden on copyright owners. For example, in its answer to Chairman Tillis' first question regarding Twitter's policy on the use of copyrighted works on its site, Twitter responded that its sole approach to copyright infringement on its site is that it "responds to copyright complaints" and "will respond to reports of alleged copyright infringement." In response, to Chairman Tillis' question 12, which asks Twitter about what technology, if any, it uses to fight piracy, Twitter responded that it doesn't and that it solely "relies on rightsholders." Although Twitter proactively utilizes tools and human moderators to review and remove other types of content, when it comes to copyrighted content Twitter purposefully casts a blind eye and will only remove infringing material when expressly notified by a rightsholder under the DMCA—a position it no doubt feels it can take due in part to courts' misinterpretation section 512(c)'s knowledge standards—thereby placing the entire burden of policing copyright enforcement on Twitter's site on copyright owners. A good example of this can be found in the testimony of Mitch Glazier of RIAA, in which he states that over a 10-month period RIAA had to notice nearly 9000 infringements of the same track on Twitter.

Twitter is a multibillion-dollar company. Like other large, well-established platforms, such as YouTube, Facebook, and Amazon, they can and should be doing more to prevent online copyright infringements on their site, and should not be solely relying on individual creators, small businesses and other copyright owners to constantly search for infringements on Twitter themselves, without ready access to tools for doing so efficiently and effectively.

Like other service providers, Twitter often talks about a willingness to cooperate with copyright owners, but in reality all it is talk—there is no meaningful action or cooperation by Twitter or the trade associations that represent them. For example, in Twitter's response to Question 7 they say that they have many discussions with industry, but when asked about existing voluntary agreements the best they came up with was only a beta test. The Copyright Alliance represents the copyright interests of thousands of organizations and individuals, and yet we are unaware of Twitter having voluntary agreements with any of our full members. Even if we take as true Twitter's statements that they "have had an ongoing dialogue and working relationships with the content industry to protect copyrighted material," they seem to have nothing to show for it.

Like other service providers, Twitter is doing the absolute minimum to qualify for the DMCA safe harbor. For example, as noted above, it only removes infringements when a copyright owner notifies them under the DMCA. It takes no proactive steps to combat infringement, even when it knows or should know about it. As stated in their answer to Question 8, Twitter has a repeat infringer policy as required to qualify for a DMCA safe harbor, but it "does not publish the details of [the] DMCA repeat infringer policy" or reveal any details about the enforcement about such policy. How is anyone supposed to know whether they actually have a repeat infringer policy, as they say, if they are unwilling to disclose it? And even if they disclose it, how is anyone supposed to know whether they are actually enforcing it as required by the DMCA? Are we expected to simply take their word for it? Unfortunately, this type of smarmy, minimalist, and

opaque approach to the DMCA is not unique to Twitter. Most service providers take the same approach because the courts have misinterpreted the DMCA in a way that allows them to do so.

There are a host of other concerns with the way that Twitter and other service providers, like Facebook, Amazon and YouTube, implement the DMCA. For example:

Inaccessibility to Technological Measures: While Twitter does not use technological measures to monitor and remove infringing material other service providers do. Many of these service providers will tell you that these technologies are available to all or most copyright owners, just like YouTube and Facebook did in their testimonies. In reality, nothing could be further from the truth. We can provide numerous examples of individual creators and small businesses who applied to use these technologies and were rejected—in many cases these rejections took place mere minutes after the application was submitted. Both YouTube and Facebook limit access to their technology tools to businesses that operate a page on the site or are part of partner programs, and routinely reject applicants who do not. In essence, they are using copyright infringement as a pressure point to drum up business.

Imposition of Requirements Beyond Those Required by the DMCA: Another significant problem facing copyright owners is the practice by some service providers of imposing requirements beyond those prescribed under section 512(c)(3). In the Copyright Office’s section 512 study, the Office notes that “the proliferation of new web-based submission forms and OSP-imposed requirements for substantiation of takedown notices in order to ensure the efficiency of the process has had the effect of increasing the time and effort that smaller rightsholders must expend to send takedown notices.”³ Some examples of the additional requirements that creators have reported include:

- Service providers requiring a rightsholder to submit a registration certificate to demonstrate proof that they are the copyright owner before the infringing material is taken down;⁴
- Service providers asking rightsholders to provide a link to their website to prove that they are the copyright owner of the work;⁵
- YouTube requiring rightsholders to provide a time stamp to indicate where in a video the infringement appears;⁶

³ See United States Copyright Office, Section 512 of Title 17: A Report of the Register of Copyrights at 5 (May 21, 2020) (“USCO Report”), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

⁴ See *id.* at 154 (citing Tr. at 57:14–19 (May 2, 2016) (Lisa Shaftel, Graphic Artists Guild (“GAG”)) (“Creators have found that they can’t satisfy the requirements from a lot of the ISPs in their takedown notices. In particular, artists have said that many ISPs have required that they prove copyright registration as part of their takedown notice or other means of proving ownership of the image.”)).

⁵ See B. Brown, Additional Comments Submitted in Response to Copyright Alliance’s *Section 512 Survey* (2017) (“CA 512 Survey”) (unpublished 6086669995_Copyright-Survey-2017) (on file with author).

⁶ See Julian Bill, More Information and Better Tools to Resolve Manual Content ID Claims, YouTube Official Blog (Jul. 9, 2019), <https://blog.youtube/news-and-events/better-tools-to-resolve-manual-Content-ID-claims>.

- Service providers (such as Google) “requiring the rightsholder confirm whether they are the subject of a photograph, combined with “warnings” if they answer affirmatively;”⁷ and following up with creators to request that they explain how they are the copyright owner;⁸
- Service providers requiring the copyright owner to affirmatively acknowledge the provisions of section 512(f); and
- Service providers (like Twitter) rejecting compliant takedown notices sent via email to the designated agent and re-directing the copyright owner to the service provider’s DMCA webform.

These practices create significant barriers to the effective use of the notice-and-takedown process, particularly for individual creators and small businesses who are less knowledgeable about the intricacies of the notice-and-takedown procedure, and rely on the forms and guidance provided by online intermediaries. And while creators endure the undue delay caused by this superfluous correspondence, the infringing material continues to draw an audience and earn revenue both for the infringer and the platform itself. These examples of service providers creating additional hurdles for sending a takedown notice go well beyond the requirements of the law, and cause some creators to question whether these additional hurdles are intentionally designed to discourage use of the notice-and-takedown process.⁹

If Congress thought it necessary for rightsholders to provide more information in a takedown notice it could have easily expanded the list of requirements. For example, Congress could have added a requirement that a rightsholder include a copyright registration certificate or a registration number in a takedown notice. Instead, Congress chose to require a statement under penalty of perjury that the notice sender is the rightsholder or is authorized to send the notice by the rightsholder.¹⁰

⁷ See USCO Report at 154 (May 21, 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (citing Google Inc., Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 8, 2016, Notice of Inquiry at 9–10 (Feb. 21, 2017) (“Google Additional Comments”) (“The commenter also pointed out that we explain at the appropriate step in our form that merely being the subject of a photo does not give one a copyright interest in the photo. In our experience, this warning dramatically cut down on the number of misguided notices. This, in turn, streamlined the removal process for meritorious notices and decreased our turnaround time for removal of images.”) (internal citation omitted)).

⁸ See The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Additional Comments on Section 512 Study at (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92439>.

⁹ See Anonymous, Additional Comments Submitted in Response to CA 512 Survey (unpublished . 6064677435_Copyright Alliance DMCA survey) (on file with author) (stating that Google, Amazon, etc. “often seem to make sending takedowns or dealing with infringements as time consuming as possible and I get the impression they have no real interest in stopping it”).

¹⁰ In addition, the notice and takedown process was intended to render expeditious removal of infringing content to combat the speed with which infringing material can be disseminated online. And since a copyright owner’s rights

If a service provider wants to impose additional requirements and ignore the policy decisions made by Congress, there is nothing stopping it from doing so. But a service provider that chooses to do so and does not take properly noticed infringing material down expeditiously (regardless of whether the service provider receives the additional information requested from the notice sender) must not be permitted to avail itself of the DMCA safe harbors.

These problems are just the tip of the iceberg. There are numerous other issues with the way service providers, like Twitter, implement their DMCA requirements. It should come as no surprise that they have no incentive or interest in working with us to solve these problems. As I testified at the hearing, if they are willing to ignore the requests of a U.S. Senator, one who is Chairman of the Subcommittee, what chance do we have that they will work cooperatively with us or with an individual songwriters, artist, author or photographer.

exist from the moment a work is created, regardless of whether the work is ever registered with the Copyright Office, it would only exacerbate the harm caused to the rightsholder to allow infringing content to remain accessible online while the rightsholder waits for the Copyright Office to issue the registration, which could take months.

**Keith Kupferschmid –
The Role of Private Agreements and Existing
Technology in Curbing Online Piracy
Questions for the Record
Submitted December 22, 2020**

ANSWERS TO 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?*
 - 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?*
 - 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?*

There are various types of voluntary agreements: (1) purely private agreements and technological solutions between parties; (2) cross-industry voluntary agreements (such as the Payment Processor Agreement or the Trustworthy Accountability Group (TAG) agreements); and (3) Standard Technical Measures, such as those envisioned by Congress when it enacted section 512(i). Whether the federal government should be involved in the “establishing, regulating, mediating, or otherwise overseeing” voluntary agreements largely depends on the type of voluntary agreement at issue.

Private Agreements: It is not appropriate or prudent to involve the federal government in purely private agreements and technologies. These types of private agreements result from private negotiations between the parties and by their nature should involve only the parties to the agreement. The willingness of parties to participate in the development of these private voluntary agreements is largely based upon the private nature of the process and having a government agency involved is both unnecessary and completely inappropriate.

Cross-Industry Voluntary Agreements: The federal government’s involvement in cross-industry voluntary agreements should be fairly minimal. To the extent there is any role for the federal government to play, it is to spur the creation, not implementation, of these types of voluntary agreements. For example, government officials may participate as moderators or liaisons, as in the case of the involvement of the Intellectual Property Enforcement Coordinator (IPEC) in the payment processor agreement. Perhaps the best result is for the government to oversee and/or facilitate an ongoing dialogue and to ensure the discussions are progressing by requiring the negotiators to regularly report back to the government agency or Congress. In these cases it is

important not only that the government bring stakeholders together, but also incentivize them to work together until they agree on a workable solution. In other cases, however, government participation has not been necessary to find workable solutions; or where incentives were not aligned, government participation has just prolonged a process that was bound for failure. And after voluntary agreements are implemented, the government could play a role in monitoring the effectiveness of existing initiatives. The government should have no role in drafting or scrutinizing such agreements.

Standard Technical Measures: Unlike other voluntary agreements, the process for identifying Standard Technical Measures (STMs) under 17 U.S.C. 512(i) should be developed with the involvement and support of the federal government. The U.S. Copyright Office is best positioned to take the lead in facilitating these discussions, as well as recognizing existing STMs that have been developed in the marketplace. Other government agencies that have expertise in this area, like the National Institute of Standards and Technology (NIST), could be brought in as advisors to the Copyright Office to assist the Office with the technological aspects of this duty (e.g. assessing which technical classes of service provider could reasonably accommodate a proposed STM), but regulatory authority should rest solely with the Copyright Office.

In September 2020, the Copyright Office took its first steps towards facilitating the development of STMs under section 512(i). We strongly support their ongoing efforts. But if service providers do not support and participate in the Copyright Office's section 512(i) process, then Congress should vest the Copyright Office with the regulatory authority to proceed without them by adopting new STMs and recognizing existing STMs and promulgating related regulations, as necessary.

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

Over the years, stakeholders have developed cross-industry voluntary agreements to further mutual objectives. Many of these initiatives have been successful because they equitably apportion the burden of reducing infringement, remove profit from infringement, and/or educate users about legal alternatives. In addition, these voluntary agreements provide a degree of flexibility that allows stakeholders to readily respond as the digital ecosystem continues to grow and change, and methods of infringement adapt and shift.

Unfortunately, most of the cross-industry voluntary agreements that exist were agreed to several years ago, and even those do not directly address the most pressing piracy problems that creators face. More recently, there has been a dearth of these type of voluntary agreements, largely because service providers have been unwilling to seriously consider them. We hope in the

coming years to engender the spirit of cooperation between the copyright community and service providers that Congress intended when it enacted the DMCA and that contributed to the success of existing voluntary agreements, such as:

- The Trustworthy Accountability Group (TAG) initiative, which validates tools and services that take measures to prevent advertisements from running on pirate sites. According to Ernst & Young, in 2017, through the help of TAG, revenue to piracy sites had been reduced by 48 to 61 percent in the U.S. (an estimated \$102 million to \$177 million in losses). In 2019, a study done by TAG and CreativeFuture approximated that TAG had reduced the presence of 76 major brands advertisers on these sites. For more information about TAG, please refer to their written statement submitted for the record of this hearing.
- The Payment Processor Agreement, which is a collaboration between copyright owners and payment processors like Visa, Mastercard, and PayPal—encouraged by the IPEC—to create a process to prevent known infringing sites from accessing payment networks. In 2012, under the umbrella of this agreement, the International Anti-Counterfeiting Coalition (IACC) launched the RogueBlock Initiative aimed at targeting the online sale of counterfeit or pirated goods in the United States. The program has been successful in terminating thousands of infringing merchant accounts across hundreds of thousands of websites.

Another semi-successful cross-industry voluntary agreement has been the Trusted Notifier Agreements. Some copyright owners have entered into voluntary agreements with domain name registrars Donuts and Radix, where they act as “trusted notifiers” for flagging sites engaged in infringing activities. Although a few groups raised initial concerns that these agreements represented a “slippery slope” toward “inappropriate content control,” that has clearly not proven to be the case as the only domain names impacted are those that are “clearly devoted to illegal activity.”¹

The reason I classify these agreements as only “semi-successful” is not because the agreements themselves have fallen short in some way, but instead because other major domain name registries have not followed suit. It is particularly disappointing that Verisign, which is the registry for top level domains .com and .net (and others) and hosts numerous major pirate websites,² has resisted signing onto a trusted notifier agreement.

Another company that should be doing more voluntarily is Cloudflare, which provides a “reverse proxy” service that conceals the IP addresses of websites, thereby preventing rightsholders and law enforcement from discerning the identity of the owner of the illicit website. The Alliance for Creativity in Entertainment (ACE) and other enforcement organizations regularly alert

¹ *One Year Later: Trusted Notifier Program Proves Effective*, Motion Picture Association (Mar 6, 2020) <https://www.motionpictures.org/press/one-year-later-trusted-notifier-program-proves-effective/>.

² Of the 23 pirate websites identified in the U.S. Trade Representative’s 2019 Review of Notorious Markets for Counterfeiting and Piracy, 13 were located on domains administered by Verisign. See 2019 Notorious Markets Report https://ustr.gov/sites/default/files/2019_Review_of_Notorious_Markets_for_Counterfeiting_and_Piracy.pdf, pages 13-32.

Cloudflare to its customers piratical activities, but Cloudflare does nothing. Why is it too much for them to agree not to do business with pirate sites and not facilitate their illicit activities by forbidding them to use Cloudflare's reverse proxy service.

Additional cross-industry voluntary agreements would also be helpful in areas relating to the protection of images on search engines and social media platforms, like YouTube, Twitter and Facebook. It is much too easy for users to copy an image directly from one of these sites without any inkling that what they are doing may be a copyright infringement. Clearly, these search engines and social media platforms can be doing more to prevent such copying, through educating users and implementing technologies that would make such copying more difficult. These sites could also be doing more to prevent the stripping of copyright ownership metadata and other copyright management information (CMI) from images, video and music found on the sites. The removal or alteration of CMI occurs across a wide range of websites and services. For example, in order to reduce file sizes and decrease transmission and storage costs during the caching process, metadata (including CMI) is often stripped from locally generated copies of an uploaded work. While some services employ technologies that re-insert the metadata back into a file after it is resized, most websites and caching services do not. Another example is the CMI removal that takes place on YouTube. When someone uploads an MP3 file onto YouTube the file is converted into a MOV file, which strips the CMI metadata associated with the MP3. As a result, when a copyright owner searches YouTube for infringing files these infringements may not show up in the search results. It would be relatively simple to address these problems through voluntary agreements between the copyright community and these platforms and search engines, but there is no incentive for these service providers to come to the table and discuss them.

- 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 are existing technologies capable of identifying and removing unauthorized copyrighted material posted by their users, as well as several off the shelf technologies that are easy to implement and affordable for user-generated content (UGC) sites of all sizes. Some of the larger UGC services have already implemented technologies like these, but they are not made available to all copyright owners as is required under section 512(i). This is one of the most significant failings of the DMCA, as it effectively nullifies a provision that Congress explicitly designed to facilitate cooperation between service providers and copyright owners.

The fact that a particular service provider is not a large, more-established platform does *not* mean that they should have any lesser degree of responsibility to combat infringement on their site or service. Copyright law applies to all service providers, and the DMCA was always intended to condition its protections on a service provider taking steps necessary to deal effectively with the infringement occurring on its site or service. It would be wrong to assume that there is some sort of inverse relationship between tolerance of infringement and size or financial wherewithal.

Smaller, less established service providers must not get a “free pass”; otherwise they may use that limitation as an excuse to grow their business on the back of infringement – something that has become all too common as a result of the unintended overbreadth of the DMCA’s safe harbors. In short, any service provider riddled with infringement needs to fix that problem regardless of size.

While smaller, less established service providers should have technological measures in place to effectively remove infringing files when they become aware of the infringements, section 512(i) does not require and no stakeholders are posturing that a small platform needs to have a YouTube-sized Content ID program. When section 512(i) was enacted, Congress anticipated the variety and diversity of creators and platforms that would be required to use and implement STMs. That is why section 512(i) makes clear that these STMs would need to be made “available to any person on reasonable and nondiscriminatory terms” and in a way that does “not impose substantial costs or service providers or substantial[ly] burden [] their systems or networks.” This language ensures that STMs will be made available on fair terms and that no platform, regardless of size, will be required to undertake something that is not commercially reasonable. So, while section 512(i) requires all applicable platforms to implement a particular STM, the provision gives significant flexibility to the stakeholders to determine how that STM will be implemented and used by different platforms and copyright owners.

There is no basis to the concern that requiring all platforms to use STMs would “serve to entrench larger, more established platforms.” In fact, quite the opposite has been true. Since there are no STMs to protect copyrighted works at the present time, we are unable to study how they work in practice. Instead, we can examine the closest equivalent—cross-industry voluntary agreements. These agreements are often reached with smaller service providers, not the larger, more established ones. For example, the trusted notifier agreements that have been reached are with registries that are far from the dominant players. Verisign is the dominant player in the domain name space and still it has refused to cooperate which has stifled the expansion of the trusted notifier agreements in the domain name space. Similarly, the UGC Principles did not include the largest players in the UGC space, like YouTube and Facebook. Thus, our experience has been that it is the smaller, less-established platforms, not the larger, more-established ones, who are willing to enter into voluntary agreements. In fact, refusal of the dominant platforms to enter into meaningful voluntary agreements deters smaller platforms from doing the same, since they don’t want to put themselves at a competitive disadvantage. If the dominant players were to adopt the STMs, it would not further entrench them, but instead would actually open the door for smaller players to do the same and increase competition.

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?*

Before we answer the question of “how do we ensure that everyone has a seat at the table,” we need to first ask and answer the initial question “whether we should ensure that everyone has a seat at the table.” In our view, the answer to this question is that it is not appropriate for *everyone*

to have a seat at the table because these agreements are the result of private negotiations and do not involve every stakeholder or interested party. What is important is that the *relevant* stakeholders have a seat at the table, and that is what has happened in each of the existing agreements. For example, when the payment processor agreement was negotiated payment processors and copyright holders were at the table and when the trusted notifier agreements were negotiated the registries and the motion picture studios were at the table. It would have been wildly inappropriate and unnecessary for other groups to participate in the negotiations, just as it is inappropriate and unnecessary for me to be at the “negotiation table” when my local supermarket, where I buy apples, negotiates an agreement with their apple supplier. I may be directly or indirectly affected by the choice, quality and cost of the apples, but that doesn’t necessitate my participating in the negotiations between the supermarket and the supplier. Similarly, a voluntary agreement relating to online piracy may ultimately affect the type of content that is available on a site, but that doesn’t necessitate that *every* users gets a seat at the negotiating table simply because it may affect their ability to experience that content.

Even if we assume that everyone should have a seat the table, how would that even work? From a logistics standpoint, having all stakeholders at the table is not necessary, appropriate or prudent. The willingness of parties to participate in the development of these agreements is largely based upon the private or semi-private nature of the process. If these agreements are opened up to everyone with even the slightest interest, the whole process will fall apart.

More significantly, there is no evidence that the absence of certain groups from the negotiating table harms these groups in any way. Voluntary agreements can and do benefit smaller entities in the creative ecosystem just as they do for larger ones. With regard to smaller platforms, as I noted in the answer to question 3, many voluntary agreements that exist today are not with the larger, more established service providers. And in fact, it is the refusal of the dominant platforms to enter into meaningful voluntary agreements that harms smaller platforms—not the inverse. These smaller, less established platforms often are interested in these agreements but are deterred from joining them because they do not want to put themselves at a competitive disadvantage to the larger, more established service providers.

On the copyright owner side of the equation, it should be understood that when voluntary measures are put into place and negotiated by larger copyright owners, the benefits of these agreements also inure to independent creators. The infringements that appear on websites and services don’t just infringe the copyrights of the major industry players, they also often infringe the content of independent creators as well. So, if an agreement is reached that helps combat infringement taking place on these sites and services, that helps all copyright owners, regardless of size.