Questions for Joshua Lamel (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?

As a general matter, rewriting Section 512 to move toward a notice and staydown system or to lower standards for duty to monitor are dangerous to the future of user generated content on the Internet. I am strongly opposed to any attempt to rewrite Section 512 in this way. Voluntary agreements regarding the use of copyrighted works online would become a minor issue if this rewrite happened. This is because it would force the adoption of mandatory filtering technologies, which would censor most content that uses copyrighted works, even if they are legally permissible uses.

2. How do voluntary measures affect the folks you represent? What experiences have users had with filtering technologies like Facebook's Rights Manager and YouTube's Content ID?

Please see my answer to question 3.

3. How do counter-notices work with Content ID, where copyright owners often choose to "monetize" rather than take down videos they say infringe? What options do users have if the copyright owner chooses to block?

YouTube has a better understanding of this process and I encourage you to speak directly with its experts on staff.

For creators, there is a lot of misinformation around how responding to a Content ID notice will impact getting a strike. Additionally, especially for creators that depend on fair use, invoking the ire of a company using Content ID by responding can create huge problems. With the ability to notice everything a creator does, it can lead to delays in work posted online, loss of income, and more strikes. This gives great power to rightsholders monetizing or blocking content through Content ID.

In speaking to Internet creators over the course of the last couple years, many of them just chalk up improper monetization and blocking as a cost of doing business. While it frustrates them when someone is making money off of their works improperly, the risk-reward analysis of doing something about it leads to ignoring it most of the time.

Where this gets very complicated is in the business of reviews and criticism of content. That is not just a bedrock of fair use, but a bedrock of the 1st Amendment as well. Because of Content ID and the behavior of music rightsholders, music reviewers have mostly given up trying to make a living on YouTube. While some critics are able to make a living, they still face the same roadblocks of improper monetization and blocking requests, just on a much larger scale. However, if they can grow their channel through all of these hurdles, by this time they have amassed a large support team to field improper strikes on their behalf. Small and upcoming creators do not have this advantage.

This highlights the broader problem of voluntary agreements. Platforms, like YouTube, receive a lot of pressure from the rightsholder community and some members of Congress to remove more content faster.This voluntary agreement has worked for some – but for music reviewers and other critics it has been a disaster. They were not involved in creating it, it is allowing the music the recipients of the reviews to shut down reviews, and it is putting them out of business.

This also has had a similar impact on musicologists and other academics creating online materials. They need these works to be able to do their jobs, most of these uses are fair uses, and yet they are constantly dealing with improper monetization attempts.

Joshua Lamel –

The Role of Private Agreements and Existing

Technology in Curbing Online Piracy

Questions for the Record

Submitted December 22, 2020

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?

The federal government should not play a role if these arrangements are to be considered voluntary. As soon as the power of the government is behind a process, it is no longer a voluntary process but rather a quasi-regulatory process.

In my written testimony, I mentioned the story of how the Intellectual Property Enforcement Coordinator (IPEC) convened meetings in an attempt to create voluntary measures around graduated response for internet access providers. As mentioned, this led to a deal, which most internet access providers did not support and felt forced into by the power of the government. What I did not talk about in my testimony was how upset the internet access providers were.

At the time, I was the head of policy at the trade association, TechAmerica. The Association had many internet access providers in its membership. And I was asked to reach out to IPEC to request tech and public interest group participation, relevant stakeholders that were not at the

table. Unfortunately, IPEC not only did not honor the request, going so far as denying the meetings were even happening.

This story is an example of failed intervention by the government for two important reasons. If the government is to be involved in voluntary measure negotiations, it needs to make sure all relevant stakeholders are consulted, which IPEC failed to do. Additionally, negotiations over standards and voluntary measures need to be conducted without the eye of the public on them, like any private negotiation. As a reminder, the government is not a party to these private negotiations like it is in trade agreement or cybersecurity standard making. Simply put, when the government intervenes in a private negotiation, it creates not only transparency issues between the parties, but concerns over trust.

Furthermore, having spent many years consulting with relevant government officials, I have become frustrated with their lack of technical expertise. Many do not understand what a standard technical measure is as compared to a voluntary agreement, as well as the legal force best practices can have in a court of law. They are not daily practitioners. And this has only deepened my belief that government involvement is fraught with problems will lead to negative results, which hamper our innovation economy.

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?

There is no governmental entity that is positioned to play a role on these issues. The National Institute of Standards and Technology (NIST) has trust and experience in setting standards, but lacks any background in deep expertise of copyright law. The Copyright Office is focused on copyright law and policy, but standards or any other type of voluntary agreement invokes other areas of importance that go far beyond the expertise or mission of the Office, including antitrust law, broadband access and technical considerations. The Office wisely decided to avoid getting involved in issues like filtering systems and notice and staydown because of the implications beyond copyright – the same is true here. The Department of Commerce likewise lacks the background in these areas to be involved themselves.

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?

The market has incentivized the creation of many voluntary agreements. Every major platform has implemented solutions tailored to the specific needs of its technology, users, and the types of content on their platforms. I respectfully disagree that this is an issue that needs further incentives.

Rather, I would focus on the fact that there are “voluntary” measures that currently exist for providing internet access, which includes cutting off internet access. Internet access is essential

and losing has profound impacts on participation in society economically. The punishment does not come close to meeting the alleged crime here.

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?

I am not versed on the intricacies of every industry and their efforts.

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

Not to my knowledge.

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?

At the end of the day, I do not think you can. Each platform has unique elements, which will require custom solutions, and different types of creators need different types of solutions. Content ID is a tool that requires massive investment in time and resources – while it makes sense for a big record label and a huge platform, it does not for a small independent creator or small internet company.

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?

I think the government getting involved makes that less likely than more likely. For standards setting, the objective would fall on the hands of the standard setting body. For true voluntary measures, as much as I think it is important that consumer groups and others have a seat at the

table, at the end of the day these are voluntary agreements between private actors, and they have the right to make those contracts. We need to make sure that all creator interests have a seat at the table, not just the powerful. Specifically, representatives who can negotiate on behalf of Internet creators will be important.

Additionally, Congress might want to consider creating and empowering a tort action against attempts to improperly takedown or monetize content, which would prevent abusive use of voluntary measures.