

DMCA Reform Bill  
Questions from Senator Tillis for Stakeholders

I believe American copyright law needs to be modernized to be more responsive to current technologies, copyright markets, and business practices. To this end, I have conducted an extensive study this year of the state of copyright law and particularly how well the Digital Millennium Copyright Act (DMCA) functions more than two decades after enactment. I have found that the universe governed by copyright law has changed dramatically and that laws that may have worked well at the end of the previous millennium are not working as well today.

Rather, than tinker around the edges of existing provisions, I believe Congress should reform copyright law's framework to better encourage the creation of copyrightable works and to protect users and consumers making lawful uses of copyrighted goods and software-enabled products, respectively. I believe the key provisions of copyright law ripe for reform are sections 512, 1201, and 1202—all of which were added to title 17 by the DMCA. Additionally, other aspects of title 17 could be revised to better tailor copyright law for the digital age.

To this end, I am seeking public input from all interested stakeholders on a number of issues. For each of the questions below, please provide explicit recommendations for solutions, including draft legislative text, to achieve the goals identified in each question. So that recommendations can be incorporated into my draft legislative text that will be released on December 18, please email responses to my Judiciary staff--Chief Counsel Brad Watts <brad\_watts@tillis.senate.gov> and Counsel-Detailee Brad Greenberg <brad\_greenberg@tillis.senate.gov>—by no later than December 1, 2020.

1. The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.
2. OSPs eligible for the safe harbor under section 512 are divided into four categories (conduits, caching services, hosting services, and web location tools) that can be both under-inclusive and over-inclusive. First, what types of OSPs should be covered to account for technological advances and business practice changes that have occurred during the past twenty-two years? Second, how should the categories be revised to better cover the types of OSPs that need—rather than just appreciate—the safe harbor's benefit? Among the possibilities would be to either increase the number of statutory categories to more explicitly cover specific types of service providers or to reduce the number of

statutory categories, possibly to only one, and delegate authority to the Copyright Office to identify, by regulation, the covered types of service providers. If Congress were to take the latter approach, would this raise concerns about such authority being delegated to a non-presidentially-appointed Register?

3. Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?
4. Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?
5. The injunctions available under section 512(j) have been narrowly interpreted by courts and thus little-used by copyright owners. Is it worthwhile for Congress to consider revising this provision to make injunctions more readily available for website-blocking in special circumstances (with an eye toward article 8(3) of the Information Society Directive)? Such injunctions could be issued by a special tribunal and appealed to federal district court, or, out of concern for user protections, the law could require that injunction orders come from the district court alone. If warranted, what would be the best way to enact limited website-blocking via such injunctions? Again, please provide suggested legislative text. If you do not think the law should be amended to expand the availability of injunctions, please be specific about any ways you think section 512(j) could be improved.
6. It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress might consider improving dispute

resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?

7. More generally, the notice- and counter-notice sending process have many shortcomings. These could be improved by clarifying when automation is appropriate and that OSPs cannot erect requirements beyond those in section 512(c)(3); by authorizing the Copyright Office to develop standardized web forms for notices and counter-notices and to set regulations for the communications that OSPs must deliver to a user when their content is taken down or had access disabled (including offering information about the fair use doctrine as codified in section 107 and as illustrated in the Copyright Office's Fair Use Index); and by increasing privacy protections for notice and counter-notice senders by masking certain personally identifiable information, including address and phone number. How could this best be done? Please provide specific provisions for accomplishing these goals.
8. At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?
9. Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?
10. One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP's monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?

11. Section 1201 currently allows for temporary exemptions to be granted from the circumvention prohibition, but those exemptions do not extend to third-party assistance. This means that when the Librarian of Congress grants an exemption for circumvention of technological protection measures (TPMs) over software for a tractor to allow for repair, the tractor owner must perform the software repair themselves. The Copyright Office has recommended amending the statute to grant the Librarian authority to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user, and this may be the right way to address this problem. Do you agree with the Copyright Office? If so, how should this provision be drafted to avoid unintended consequences, and to what extent is the Unlocking Consumer Choice and Wireless Competition Act a helpful model? If not, please explain why you do not agree and provide specific recommendations as to how you think this problem should be addressed?
12. The Copyright Office has recommended revising some of the permanent exemptions so that they are better tailored to the types of uses sought today. In particular, the exemptions for security testing and encryption research should be revised to expand the types of activities permitted, ease the requirements to seek authorization from the owner of the relevant system or technology, and eliminate or clarify the multifactor tests for eligibility. What thoughts do you have about revising these existing permanent exemptions, and how would you recommend that be done?
13. Congress should adopt new permanent exemptions for noninfringing activities that have repeatedly received exemptions in recent triennial rulemakings, or where there is a particularly broad-based need, including to enable blind or visually impaired persons to utilize assistive technologies and to allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls. What other temporary exemptions should be made permanent?
14. There are various ways that the triennial rulemaking process could be streamlined to be more efficient and so that section 1201 better accounts for user concerns. These include establishing presumptive renewal of exemptions adopted in the previous rulemaking cycle, shifting the burden to those who want to oppose an exemption from the previous rulemaking, and authorizing the Librarian, upon recommendation of the Register, to make permanent a temporary exemption that has been renewed twice without opposition and without modification. How ought section 1201 be revised to reflect the stakeholder desire for a less burdensome triennial rulemaking process and consumer interests, and what other means should be adopted to make the rulemaking process more efficient?
15. Though it did not receive as much attention during my hearings as sections 512 and 1201, section 1202 is another important part of copyright law added to title 17 by the DMCA, and it too is in need of modernizing. For example, Congress could amend section 1202 to drop the double-intent standard and only require a copyright owner to prove that a defendant removed or altered rights management information (knowingly or not) with the knowledge that it would encourage infringement. And Congress could adopt the Copyright Office’s recommendation to enact a new section 1202A to provide the author

of a copyrighted work—rather than just the copyright owner—with a right of action when someone removes or alters rights management information with the intent to conceal an author’s attribution information. Do you think that the proposed legislative text that appears on page 98 of *Authors, Attribution, and Integrity: Examining Moral Rights in the United States* is the best way to add a right for the copyright owner, or would you recommend different text? And what are your thoughts on revising section 1202’s double-intent standard?