

2 March 2020

The Honorable Thom Tillis
Chairman
Senate Judiciary Subcommittee on Intellectual
Property
226 Dirksen Senate Office Building
Washington, DC 20002

The Honorable Chris Coons
Ranking Member
Senate Judiciary Subcommittee on Intellectual
Property
226 Dirksen Senate Office Building
Washington, DC 20002

Dear Chairman Tillis and Ranking Member Coons:

We want to thank you for convening your recent Committee hearing on “The Digital Millennium Copyright Act at 22.” We look forward to your continuing series of hearings to reassess the functioning of the DMCA safe harbors and to determine what changes may be necessary to reflect the growth and maturity of the internet after two decades.

We noted that on February 10, the Electronic Frontier Foundation (EFF) submitted a letter for the record in which they represented that EFF “fought against efforts to rewrite copyright law to favor a few incumbent special interests and disadvantage regular Internet users, including independent authors, artists and musicians.”

We agree that EFF has fought against efforts to rewrite copyright law. However, we strongly disagree with their characterization of their own efforts as not favoring a few incumbent special interests, or that their efforts have benefitted the creative community, including the “independent authors, artists, and musicians” as well as creatives in other fields such as film and television.

We hope it is obvious that EFF has no credible claim to representing the voices of the creative communities in the entertainment industries. By contrast, our organization, CreativeFuture, gives voice to over 275,000 individuals and over 560 organizations and companies in those industries, people who understand how vital strong copyright protections are to their livelihoods and to America’s creative economy – protections which EFF and its powerful Silicon Valley backers regularly seek to reduce.

I present this response to EFF on their behalf.

Copyright is the Foundation of a Strong Creative Economy

Strong copyright protections give creatives the freedom to pursue their art as a career, not just as a hobby. These protections ensure that the many years of uncompensated work creative people dedicate to crafting films, creating songs, or coding programs can be rewarded with a meaningful return.

America's creative industries are a significant economic driver, contributing more than \$1.3 trillion to GDP and employing 5.7 million Americans. U.S. core copyright industries are a leading export, outpacing other major U.S. industries including aerospace, agriculture, and pharmaceuticals, according to the International Intellectual Property Alliance's most recent "Copyright Industries in the U.S. Economy" report. When consumers in other countries enjoy American-made creative products, job creation and economic growth occur here.

The creative economy is under siege by digital piracy and a legal framework that allows pirates and their enablers to profit from our work to the tune of billions of dollars. A recent study commissioned by the U.S. Chamber of Commerce estimates that global online video piracy costs the U.S. economy at least **\$29.2 billion** in lost revenue each year. This is a staggering loss for the creative industries, which now provide so many legitimate platforms on which to access authorized versions of audiovisual works. Thus, the difficulty in enforcing copyright protections in the U.S. and around the globe is the main source of the problem.

The DMCA Safe Harbors

The EFF claims that the DMCA's safe harbors "are the foundation for free expression and creativity that relies on open platforms." While we do not quarrel with the assertion that "safe harbors" have contributed to the growth of the internet, we strongly disagree with the implication that the safe harbor provisions as currently written and applied work as intended more than 20 years after they were adopted.

The DMCA's safe harbor provisions – as laid out in Section 512 of the Copyright Act – have been and continue to be exploited not only by large criminal piracy operations, but also by legitimate global internet companies that profit enormously from infringement. At the birth of the internet, Congress cannot possibly have contemplated the weakness in the system they created, the massive growth of global pirate traffic, and the impossibility for creatives, whatever their means and resources, to obtain effective relief from those who hide behind the lack of accountability provided by the safe harbor rules.

The notice-and-takedown system mandated by Section 512 of the DMCA requires many creatives to choose: either they give up and allow the piracy of their works to continue flood unchecked, or spend much of their time and resources trying to find and remove their works online, rather than making new works that would enrich our culture and contribute to the U.S. economy.

The DMCA's Section 512 safe harbor provisions are under tremendous strain in the face of new and widespread forms of piracy. As applied and watered down by courts over the last twenty years, they are overly broad and prevent effective enforcement of rights under copyright law. And they must not be exported to other nations in their current form through trade agreements.

Our view is shared by many others who value America's global leadership in the creative economy. American Conservative Union Chairman Matt Schlapp has described the DMCA as "a feeble tool for copyright holders that lacks the teeth required to effectively protect their works online."

And in 2017, in response to ongoing NAFTA negotiations, a coalition of almost 70 think tanks, scholars, and advocacy groups sent a letter to Congress stating: “The lure of access to the U.S. market should be used as an incentive to convince trading partners that they should increase their protection of IP rights. Therefore, strong IP protections are integral to all trade agreement negotiations.”

While organizations like EFF and associations representing global internet platforms such as Google and Facebook regularly work to undermine improvements in copyright law, we urge your Committee to listen to those who create for a living, as well as more moderate voices from Silicon Valley, and commit to doing what is necessary to ensure the DMCA’s safe harbor law lives up to its promise of creating an effective means of online enforcement.

With that in mind, we point to the recent success in Congress to update the original safe harbor laws, those granted to internet platforms by Section 230 of the Communications Decency Act (CDA) of 1996. That law specifically carved out copyright concerns, knowing they would be dealt with in the forthcoming DMCA, but Section 230 and Section 512 are close relatives.

The recent success in amending Section 230 came with the Stop Enabling Sex Trafficking Act (SESTA) and its House counterpart, FOSTA. These Bills created a carve-out to Section 230 that would allow for legal action to be taken against any website trafficking in minors. Similar to the unimaginable scale of today’s piracy ecosystem, no one could have anticipated that Section 230 would allow for the unfettered trafficking of minors over the internet and prevent courts from acting to protect them.

Industry groups like the Internet Association and a bipartisan group of lawmakers worked to find language that balanced concerns of open internet advocates and the very real harms being done to children online. Together, they ultimately achieved sweeping bipartisan passage of the Bills, which President Trump signed into law on April 11, 2018.

Creatives Are the True Faces of Creativity

Let me offer a brief personal perspective on the American creative community.

Before taking the helm of CreativeFuture, I produced and distributed independent films for three decades, including movies as diverse as *Dirty Dancing*, *Mad Hot Ballroom*, *Hustle & Flow*, and *Bloody Sunday*.

I have worked with America’s creative community. I know and have worked or have met many of them. And many of them have lent their voices and support to CreativeFuture’s efforts.

EFF repeatedly attempts to usurp the true voice of creatives, asserting that it is EFF that “champions innovation” and represents “30,000 dues-paying members.” We choose not to collect dues, but rather to give true creatives a voice, and to call out any organization such as EFF or the Internet Association whose true constituencies are the very companies whose lack of accountability is undermining American creatives.

Our creative communities span this country, and the world. We are artists, craftspeople, writers, producers, guilds and unions, talent agencies, studios, independents, music labels, and mostly small businesses. The creative process teaches us all to respect one another, especially when it comes to people's right to be fairly compensated for their creative work.

I sincerely thank the Committee for the opportunity to stand up for these communities. We will support your efforts to discuss thoughtful revisions to the DMCA that ensure protections for the rights of the creative community. Contrary to claims by EFF and its self-interested allies, such protections need not undermine the important value of freedom of expression, a value that creatives take seriously and rely upon in their daily work.

Thank you for your consideration.

Respectfully,

A handwritten signature in blue ink, appearing to read "Ruth Vitale". The signature is fluid and cursive, with the first name "Ruth" and the last name "Vitale" clearly distinguishable.

Ruth Vitale