CreativeFuture
Creativity. Innovation. Tomorrow.

19 January 2021

The Honorable Lindsey Graham
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Thom Tillis
Chairman, Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Chris Coons
Ranking Member, Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Graham, Chairman Tillis, and Ranking Member Coons:

Thank you for your December 22 letter containing additional questions for the record related to the December 15 Subcommittee on Intellectual Property hearing entitled *Can Private Agreements and Existing Technology Provide a Solution to Online Piracy?*

Following are my answers to the questions from both Senator Coons and Senator Tillis. I have done my best to answer your questions, in the hope that they provide additional ways that we can work toward voluntary initiatives. With your continued oversight and encouragement, we look forward to meaningful progress in the effort to reduce piracy.

I look forward to remaining engaged with this Committee as you continue this important work.

In the meantime, I wish you all the best of health. And I thank you for helping to steer our country through this incredibly difficult time.

Respectfully,

Ruth Vitale
Chief Executive Officer

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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?*
    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?*

CF: Senator Coons, thank you for the opportunity to address the need for effective voluntary measures to combat piracy. As you know, the Copyright Office released a report last year on Section 512 of the DMCA. Its report recognized that the balance struck by the DMCA – including but not limited to – its notice and takedown system, has been "tilted askew" in favor of the largest internet platforms. Because of this imbalance, those internet platforms have less incentive to cooperate on voluntary measures with copyright holders.

Despite persistent attempts by copyright holders to engage Silicon Valley companies in discussions about voluntary initiatives, with varied results, there remains too little in the way of meaningful progress. Voluntary measures may take many forms, including unilateral steps to combat piracy, bilateral and multi-lateral engagement, best practices or codes of conduct, the adoption of formally adopted or de facto standards, and other kinds of standard technical measures. The DMCA itself is an example of the constructive role of government in encouraging such measures, and there is certainly a role for government oversight in some of these areas.

Congress, the Copyright Office, and the Patent and Trademark Office, for example, have all served as convenors of various stakeholders in an attempt to make further progress on voluntary efforts. Congress and the Office of the Intellectual Property Enforcement Coordinator (IPEC) also played an important part in driving an agreement on payment processor best practices in the past. Experience shows that, absent such encouragement and oversight, there is little reason to hope that meaningful voluntary measures can be realized and succeed.

There is also room, as you suggest, for non-governmental entities to be part of the solution. For instance, with adequate funding from the largest and most successful internet companies, a nonprofit or a for-profit company, such as Adrev (whose CEO Noah Becker testified before you on December 15), could administer the online enforcement of copyrights for smaller, independent creatives. An entity such as this could verify copyrights for smaller copyright holders and then monitor the internet for infringement of those copyrights.

YouTube offers automated tools for policing infringement to large copyright owners for free but denies access to such tools to most individual copyright owners entirely. Adrev, whose business is set up to monitor the internet for infringements for its clients, cannot afford to offer its services for free because

they are a for-profit business. We need to find a way to shift the burden and cost of curbing infringement from innocent copyright owners – whose works are infringed repeatedly and predictably – elsewhere.

CreativeFuture has repeatedly called on YouTube to allow for greater access to its automated content protection tools. YouTube has claimed that opening access to more users will cause too many false infringement claims. As one, ready-made solution, YouTube could allocate funds (a modest amount in the context of its corporate profits) to allow a company or organization like Adrev to manage copyrights for individuals who have been locked out of YouTube's automated tools and who prefer to keep their copyrighted material off YouTube entirely.

We welcome the encouragement of Congress and the help of other government agencies and officials to achieve successful voluntary initiatives. If the incentives do not currently exist for Silicon Valley to come to the table to negotiate these initiatives, perhaps Congress, the Copyright Office, or the IPEC can help.

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?*

CF: Let me begin by correcting some misleading and incorrect statements made at the December 15 hearing by representatives of the digital platform providers about their anti-piracy efforts.

First, Senator Coons, you asked Facebook's Probir Mehta whether its Digital Rights Manager, which Mr. Mehta spoke about in his opening remarks, was available to all copyright owners. Mr. Mehta answered by saying: "We open Rights Manager to creators of all sizes, whether small emerging ones or larger ones."

Mr. Mehta appears to have artfully dodged the question. While Facebook may claim creators of various sizes have access to its Rights Manager, it is certainly not available to all copyright owners. As I pointed out at the hearing, a member of the creative community was recently denied access to Facebook's Rights Manager *twice* in under four minutes. From all anecdotal evidence, access to its Rights Manager is unavailable to all but the largest copyright holders. Additionally, even if it were made more widely available, many believe that its Rights Manager tool is far less effective than YouTube's tools.

Second, YouTube's Katie Oyama claimed that Copyright Match, one of YouTube's content protection tools, is a solution open to all copyright owners. That is incorrect. Noah Becker of Adrev pointed out that, in fact, the tool is only available to YouTube Partners, which are defined by YouTube as accounts with an active YouTube channel, over 1,000 subscribers, over 4,000 watch hours in the last year, and an AdSense account. Ms. Oyama then claimed that Mr. Becker was incorrect, and he pointed out that he had simply read those requirements from YouTube's website.

By midday the following day, the YouTube website had been changed to remove those requirements. (I have attached screen grabs of the pages following this document.)

In the hope that perhaps Ms. Oyama's testimony was correct and that the change to YouTube website reflected a true change in policy (albeit done after the hearing), we informed our member Mitchell Block, a film distributor and director, and encouraged him to apply for Copyright Match in light of his longstanding attempts (explained below) to obtain YouTube's cooperation on anti-piracy matters.

Mr. Block distributes primarily educational and documentary films, sold directly to universities and educational organizations. Piracy of his work on YouTube effectively destroyed his business model. He once had access to one of YouTube's content protection tools – and spoke very highly of its effectiveness.

That tool gave his company, Direct Cinema Ltd., a special administrative login to YouTube from which Mr. Block could search for infringements, tick a box next to those infringements, and easily and quickly have them removed. He was locked out of this system several years ago with no explanation. Despite attempts to reach YouTube by email (the only method given to him to communicate with them), he never heard from them, and was never given an explanation for the loss of this tool.

Mr. Block traveled with me to Washington, D.C., for the roundtable with YouTube and Ms. Oyama in December 2019. At the time, Mr. Block pleaded with YouTube to allow him access to one of its automated content protection tools. Despite assurances in that Senate Hearing room from Ms. Oyama that YouTube would work with the creatives present to provide them with the tools needed, no further communication from YouTube ever materialized.

Mr. Block has since taken a job at a university in Oregon, but he continues to own many copyrights that need to be protected. With hope that a change had occurred based upon Ms. Oyama's testimony at the most recent hearing, Mr. Block applied for Copyright Match on December 18. On December 30, he received a response from YouTube denying him access, and suggesting that he use their webform to manually submit instances of infringement and re-apply again in 90 days – with no guarantee that the result would be any different.

Ninety days of manually policing a global platform like YouTube is not a real solution for any individual copyright owner like Mitchell Block. He simply cannot spend the time that it would take to comply with this suggestion while also doing his day jobs. Additionally, the amount of infringement that can arise and proliferate for any of Mitchell's films, unnoticed in any 90-day period, is enough to destroy the commercial value of those films.

In light of this evidence, I remain baffled by Ms. Oyama's testimony and her repeated assertions that Copyright Match is available to anyone who wishes to use it given what we have learned from Mr. Block. On January 13, I emailed Ms. Oyama directly and copied Mr. Block, asking for her help in rectifying the situation and expressing my desire to engage in a constructive conversation on this topic.

On January 15, we received an email response from Ms. Oyama, in which she explained: "Upon review of Mitchell's application, our team identified that the channel he applied from had no uploaded content. As a result, our team responded with messaging that directed him to continue using our webform because based on this and his history with the webform we felt that the Copyright Match Tool may not be best suited for his needs. The Copyright Match Tool works for users who have content uploaded to their channel (though it can be uploaded as private)." Ms. Oyama offered, however, to give Mr. Block the Copyright Match tool if he were to upload all of his titles to a private YouTube channel.

In Mr. Block's response, he explained why even with the offer of Copyright Match, this solution would be cumbersome and ineffective. His email, in its entirety, follows:

- *I don't have a channel on YouTube, and I don't want to have a channel on YouTube. Let me explain why.*

  The vast majority of our films have never been made available for public distribution online, because we do not want them online. These are educational films, which have a small and specialized market (colleges, universities, schools, etc.), whose value would be seriously undermined if there was "free" access to them digitally. These are sometimes hours-long, in-depth documentaries used in university teaching, for instance. We charge considerable fees for these projects, and there is no digital marketplace in existence in which we can be compensated fairly. You can understand how my films being illegally uploaded to your platform by others destroys our ability to make a living. No business can compete with "free."

  Ideally, I would like the tool that I used previously to be reinstated for me. Direct Cinema Ltd. had a YouTube account that provided a simple tick box next to the video title. It allowed me to tick a box indicating that those videos were infringing on our rights, and they came down.

  This allowed us to quickly identify and take down many of our titles when they were illegally uploaded to YouTube. In about 10 minutes, I could check on 50 or so titles and get them removed.

  I have not had this tool in over five years. One day, I was simply no longer able to log in to my account using my email, mwblock@aol.com. I emailed copyright@youtube.com at least a half dozen times and never received a response.

  I am willing to try the Copyright Match tool, but it is still imperfect. The requirement that I upload all of the films in my library is more than onerous – it would be a full-time job, particularly since we do not want to make the videos available on YouTube. I could use Copyright Match in a more targeted way, uploading the films that are currently illegally on YouTube to test the tool's usefulness to me.

  Interestingly, the simple tool that I have described above and used happily over five years ago – the tick box to indicate an infringing video – is the best tool you have offered. Is there any reason it cannot be reinstated?

We will keep the Committee apprised of our ongoing dialogue with YouTube and Ms. Oyama as it pertains to the Copyright Match tool and Mr. Block. But, as you can surmise from the exchange between Mr. Block and YouTube, individuals like him simply are not given effective tools to monitor platforms for infringement.

Importantly, there have been examples of successful voluntary efforts that we should highlight here. For example, the advertising and credit card industries have worked with copyright stakeholders to implement successful voluntary efforts to combat piracy. In some cases, there was government encouragement, and, in other cases, both parties chose to implement changes without the need for government involvement.

One such example of the latter, a voluntary cross-industry cooperation, is the efforts of the Trustworthy Accountability Group (TAG) and CreativeFuture's Follow the Money campaign that began in 2015 – an effort to reduce legitimate advertisements running on pirate websites.

We worked with TAG to directly reduce the presence of 76 major brands' advertising on pirate sites. By working with leading advertising agencies to revise their digital media practices to promote brand safety, this effort had a significant impact far beyond just those brands that we contacted, affecting both the advertising ecosystem as a whole and the profitability of ad-supported infringing sites.

Today, major brands have virtually *eliminated* their ad presence on infringing websites, stopping the flow of significant revenue to those criminal enterprises. Some of those sites replaced the legitimate ads with less profitable, unseemly ads, which removes the aura of legitimacy from their illicit sites.

In 2016, there were 20 billion ad impressions on the top pirate websites. In 2016 and 2017, at least 60 brands or agencies were placing large volumes of ads on pirate sites, some brands placing between 5 and 25 million impressions per month. By 2018, *no* premium advertisers could be identified at high volumes on pirate sites in the U.S. This was an incredible success. And all we did was educate the advertisers and agencies about the problem – and point out how it was in their interest to fix it. Surely, this tactic can work elsewhere.

Another example of a partnership that succeeded because of the encouragement of government is the one between copyright holders and payment processors. In 2011, following increased attention to the issue of the role of payment processors in facilitating piracy, the U.S. Intellectual Property Coordinator announced an agreement by major payment processors on best practices for withholding payment processing services to sites selling infringing goods. [See here.] Shortly thereafter, the International Anti-Counterfeiting Coalition launched its Rogue Block initiative, with the support and encouragement of the IPEC, partnering with major payment processors to facilitate information sharing and implementation of the payment processor best practices. See https://www.iacc.org/online-initiatives/rogueblock.

Addressing the use of payment processing services by infringing cyberlockers became a heightened concern following the January 2012 criminal indictment of the notorious piracy cyberlocker Megaupload, when it became clear that PayPal had processed financial transactions for the criminal operation. Although PayPal was not subject to the indictment, the company was named repeatedly (35 times) in the indictment. As a result, PayPal began cooperating with organizations like the Motion Picture Association (MPA) to develop criteria to identify cyberlockers trafficking in copyright infringement.

Two years later, Senator Patrick Leahy, then Chairman of the Judiciary Committee, wrote to the CEOs of MasterCard and Visa urging them to stop processing payments to cyberlockers involved in copyright infringement. In his letters, Sen. Leahy urged MasterCard and Visa "to swiftly review the complaints against those cyberlockers and to ensure that payment processing services offered by [MasterCard/Visa] to those sites, or any others dedicated to infringing activity, cease."

"I also urge you to continue working with copyright owners and their representatives," he said, "to develop methods and practices for the efficient investigation of sites alleged to engage in infringement. Voluntary agreements, developed and refined over time between the relevant stakeholders, hold great promise for addressing the problem of infringement online."

As a result of those letters and follow-up by the IPEC, MasterCard, Visa, and other payment processors worked with copyright owners to develop processes for identifying such websites. They began to terminate payment services to these sites and started refusing services to new piracy sites.

Through this work, an ongoing relationship was established that could adapt to changes in the marketplace. As online piracy has evolved and become dominated by streaming rather than peer-to-peer and torrent downloads, copyright owners and payment processors have worked together to put in place voluntary measures to terminate services to criminal streaming services and apps.

Another path is for the government to exercise its convening influence to bring copyright owners and service providers to the table and actively encourage them to work out solutions to online piracy. But convening meetings and generating reports isn't sufficient. Rather, the government needs to demonstrate a commitment to overseeing the process and driving it to a successful conclusion: the creation of pragmatic and effective solutions.

Perhaps one of the most successful recent examples of this "convening and encouraging" government approach is the United Kingdom's work in bringing to fruition the Voluntary Code of Practice on Search and Copyright ("Voluntary Code") – the product of nearly three years of roundtable discussions between search engines and copyright holders that were initiated by the UK Intellectual Property Office.

The oversight and active involvement of the UK government was crucial to pushing the parties towards consensus and achieving concrete commitments to demote infringing websites in search results and preventing autocomplete suggestions that would lead to infringing sites.

Although the Voluntary Code was negotiated in the UK, the search engines have applied it on a global basis. Moreover, the effort established a foundation for ongoing cooperation between copyright owners and the search engines.

Companies like YouTube, Google, and Facebook, who have business models that profit from traffic driven to their sites by piracy, have little financial incentive to completely eradicate piracy on their sites. As a result, these companies have shown reluctance to take steps that could radically alter the piracy ecosystem. They have, though, made some constructive progress following years of encouragement from copyright holders. But there is much more that could be done by companies with such incomparable technology and financial resources.

At the time of Viacom's landmark copyright infringement lawsuit against YouTube, YouTube developed a suite of content protection tools that have effectively curbed some piracy on its platform. However, its tools are only available to the copyright holders that they deem worthy of their use.

Unfortunately, as we have explained, most individual creatives are not given access to these tools, nor are they given an explanation for why they are denied. For those people, YouTube offers instead a handful of increasingly unappealing options.

Despite this issue of access, I still would like to point to these tools as examples of potentially successful voluntary initiatives. I believe there could be far greater cooperation between YouTube and the creative community – at a minimal cost of time and effort. If tools like these were more widely available to

individual copyright owners, for example, that would be a *huge* success for voluntary initiatives. And there is already progress toward this goal – thanks to Congress.

In December 2019, Members of Congress called upon Google and YouTube to convene a meeting with members of the creative community to discuss the limitations of YouTube's copyright infringement monitoring tools, as well as the lack of access to these tools. For that roundtable, my organization, CreativeFuture, brought four of our members to participate – two of whom had been denied access to *any* of YouTube's tools and one of whom, the aforementioned Mitchell Block, had been given one of its tools years ago and then was suddenly denied access to any tool, without explanation.

That day, we proposed that YouTube provide access to these tools to a far greater number of creatives. We asked that the criteria used to determine whether a copyright owner is eligible to use its tools be transparent. And, in those cases when someone is denied, YouTube should make a human available for a simple appeals process.

Since the meeting in December 2019, one of the creatives in attendance who had previously been denied access twice was finally granted access in February 2020. He was given access to the Content Verification Program or CVP. The other two creatives, however, were never even contacted by YouTube, despite YouTube's verbal commitment that day in the hearing room. As detailed above, Mr. Block pleaded for help from YouTube and remains without a tool to this day.

In February 2020, twelve Members of Congress sent a letter to YouTube, following up on that December 6, 2019 roundtable with further questions. On March 6, 2020, YouTube responded and outlined its content protection tools, although, notably, did not answer any of the Members' questions directly.

In its letter, YouTube touted Copyright Match as a tool that could be a good solution for "creators and rightsholders" who "experienced a higher amount of reposting of their copyrighted content and needed to submit more regular claims."

But, upon further research on YouTube's own website, it became clear at the time that Copyright Match was only "available to channels in the YouTube Partner Program." While YouTube claimed that Copyright Match could technically be used for a "private" upload, its website still listed the requirements of an active YouTube channel with significant subscribership *and* an AdSense account.

Further, Copyright Match works only for video content. This tool cannot help the countless musicians whose music is routinely uploaded to YouTube without their permission – not just as standalone streaming audio files, but, in most cases, as background music (also known as underscore). Most users upload video with music that they have neither licensed nor paid for – and most music on YouTube falls into this category.

Television broadcasters and streaming platforms actually license the music used in their video content (programs, commercials, and promos). Why should YouTube not require its users to do the same, or enter into license agreements that would effectively cover their uploaders' content?

As music composer Kerry Muzzey testified to your Subcommittee in June 2020, it was only because of his rare access to YouTube's flagship content protection tool, Content ID, that he found the tens of thousands of infringements on YouTube that he never knew existed. Individuals are rarely given access to Content

ID. Muzzey was given access before YouTube stopped granting Content ID to anyone but the largest copyright holders, and he was shocked by what he discovered.

Indeed, his music was being used as underscore in more than 100,000 commercial videos without his knowledge - and Content ID was the singular reason he discovered those uses. Without this sort of digital fingerprinting, musicians have a near impossible task finding infringements on the platform.

Clearly, with YouTube presenting these "solutions" as our best option, our hopes of a cooperative solution were quickly dashed.

We find ourselves at an impasse again, with the same issues plaguing our creative communities' members when attempting to keep their content off YouTube. As detailed above, it remains unclear if YouTube has lowered the barriers to entry for Copyright Match.

However, even if YouTube is willing to offer Copyright Match to all who wish to use it, it is still not the best solution for every copyright holder. As we have seen from Mitchell's Block's explanation to Katie Oyama, requiring film distributors to upload hundreds of films (or composers thousands of compositions) is an onerous burden for self-employed copyright holders.

There certainly must be a way for YouTube to grant any legitimate copyright holder the ability to simply decide whether they want their work on YouTube or not. We know YouTube has the technology to police its platform. By its own admission, thousands of rightsholders have access to its content protection tools today. Effective technological tools should be available to all copyright holders to make decisions about their work.

We asked in December 2019, in December 2020, and are asking again now for a commitment from Google and YouTube to work with us, under the continuing oversight of Members of Congress, to make its content protection tools more widely available to our communities and to make those tools even more effective on YouTube.

We also ask for transparency, as well as access to YouTube employees who can speak to members of our creative communities about applying for these tools and teaching them how to use them. This is a crucial step in avoiding what YouTube always cites when explaining why these tools are so well-guarded – that they will be abused.

But the only proof of this abuse that we could find is from an infographic put out by Re:Create, another Google-funded group, that has criticized the entire premise of these DMCA hearings. In its "infographic," it also claims that abuse is rampant, and bases this claim on a sample of just 1,826 notices over a six-month period from about seven years ago. The Google-funded report, *Notice and Takedown in Everyday Practice*, concludes that 4.2% of the sampled takedown notices were "fundamentally flawed," or about … 77 requests. Given the volume of notices sampled, and the importance of combatting the widespread harm from piracy, that percentage (even if true) shows that the system has not been widely abused.

I think we all know that the best way to prevent abuse is through education. And the best way to educate users is customer service. This is not a moonshot. If the parent company can make driverless cars, then making meaningful, easy-to-use content protection a reality for small creatives on YouTube should be a walk in the park.

Looking beyond YouTube, what else can be done?

Facebook, the world's largest social media company, is rife with piracy. It has significant work to do to adequately protect creatives' works on its platforms, which include Instagram.

When Facebook removed video length restrictions in 2016, allowing users to add full movies and television shows, it should have anticipated and been prepared for the inevitable flood of infringing content. Instead, while they have developed *some* tools to address piracy, those tools are not nearly effective enough – especially given Facebook's engineering and financial resources. Put simply, Facebook has not prioritized addressing this problem.

Creatives have tried for years to work cooperatively with Facebook to improve these tools but too often have been met with polite disengagement. It has shown little interest in being responsive to the needs of content creators both big and small. As a result, Facebook provides a daily stream of infringing content to its 2.7 billion viewers around the world.

As with YouTube, we welcome a cooperative dialogue with Facebook to address these problems.

Google has recently made changes to its Search algorithm that has resulted in many piracy sites being purged from the first pages of results. This move is commendable, even if long overdue. However, it is still the case that Google Search returns results to piracy sites – not to mention illegal pharmaceuticals, COVID misinformation, and black-market gun sales. Google Search shows no results for child pornography. So why does it serve up so much other illegal material?

There are other companies that have simply turned a blind eye to the problem of criminal infringement, even after years of efforts to bring that piracy to their attention. I will point to one in particular: Cloudflare. This is not a household brand, but anyone well-versed in the internet knows what it does. It provides, among other products, a "reverse proxy" service that masks the true IP address of websites. In other words, when you run a website, Cloudflare hides who you are.

While this lends much-needed protection to companies and individuals, it also means that no one, not even law enforcement, is able to ascertain the identity of the website owner without Cloudflare's cooperation. This obviously creates problems for civil enforcement efforts aimed at piracy sites globally.

The problem with Cloudflare is not the services it provides, but the fact that it indiscriminately offers those services to all – regardless of whether they are legitimate organizations or notorious criminals involved in trafficking, drug dealing, radicalization, or other nefarious activities. This willful blindness has made Cloudflare the "service of choice" for bad actors.

Cloudflare was in the news in connection with the deadly shootings in El Paso and in Christchurch, New Zealand in 2019. One of Cloudflare's clients was 8chan – an online message board home to the radicalization of both the El Paso shooter and the one at Christchurch.

It is true that Cloudflare "fired" 8Chan after the shootings and did the same for The Daily Stormer – the website used to inflame the violence in Charlottesville, Virginia in 2017. But why does it only respond to tragedies rather than take responsible action on its own? It is not like 8chan and The Daily Stormer were a couple of bad apples that slipped through Cloudflare's net – at least seven terrorist organizations and

other entities well-known for engaging in illegal activities use Cloudflare's services. In short, Cloudflare has no safety net.

In a company blog, Cloudflare's CEO Matthew Prince said that they "feel incredibly uncomfortable about playing the role of content arbiter and do not plan to exercise it often." While it may be complicated to decide which websites are spouting hate speech or to decide which speech they find objectionable, it is abundantly clear which websites are dedicated to obviously illegal activities. In addition, enforcement organizations, like the Alliance for Creativity in Entertainment (ACE), regularly alert Cloudflare about the illegal piracy sites that are its customers. Nevertheless, Cloudflare continues to service those customers.

Which brings me to my simple request for voluntary action from all stakeholders in the internet ecosystem: Do not do business with illegal entities. Do not link to illegal websites in search. Do not advertise on pirate websites. Simply block unauthorized uploads of copyrighted content that has been explicitly designated as such by the bona fide copyright holder. And do not give piracy sites safe harbor behind your reverse proxy service when they are clearly illegal sites.

Companies like Cloudflare or Google are not public utilities obligated to serve anyone willing to pay for their services, nor are they governments required to protect speech at all costs. They are companies that should understand by now that mature American industries can only operate successfully if they are good corporate citizens, not by looking the other way. The DMCA was not intended to waive good citizenship.

Facebook has no obligation to allow demonstrably false and malicious information to be distributed over its platform. YouTube is not required to distribute anything anyone wants to upload around the world in seconds, with no concern for who created it; nor does the First Amendment require Google to return illegal websites in its search results. And Cloudflare has the right to deny service to any website trafficking in illegal activity – simply because it wishes to be an ethical corporate citizen.

In fact, most platforms have Terms of Service that enumerate these rights to deny service or remove content as they see fit. It is time we hold these companies to their own Terms of Service. And above and beyond that, it is time that we expect these companies to behave as responsible corporate citizens.

As you can see from these examples, there is a role – and a need – for government in urging voluntary measures and, in some cases, overseeing those discussions.

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?*

CF: Requiring platforms to filter user-uploaded content for infringing material is not something that advantages large companies at the expense of start-ups. It is a matter of corporate responsibility. No matter how small the platform is, if it does not screen for copyrighted content, it is capable of inflicting tremendous damage on creatives. The issue should not be the size or revenue of the company, but its business model. If it relies on exploiting unauthorized copyrighted content to grow, it should be required to use effective means of filtering infringing content on its platform. A small platform may not need to

employ as sophisticated a tool as Content ID to effectively address infringement on its platform. But the test must be what is effective. Small or upstart platforms should not get a pass on preventing piracy.

To the extent that YouTube, Facebook, and others develop such software tools that are proprietary, it is a fair discussion to determine whether such tools can and should be made available to other platforms, and on what terms and conditions. Mandating use of these specific technologies by other platforms may not even be necessary.

This is a conversation that would be better informed by a roundtable on the specific technologies at issue. Of course, as I and others have stressed in Congressional testimony, the platforms that have developed these tools have not in all cases deployed them optimally to the benefit of smaller copyright owners. The better immediate focus would be on improving the practices of the dominant platforms – particularly Google, YouTube, and Facebook – in broadening the use and effectiveness of their tools on their own platforms.

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?*

CF: CreativeFuture represents large numbers of "everyday Americans" who happen to work in our nation's creative industries – creative people from all 50 states, over 260,000 individuals, and over 560 businesses and organizations – most of them employing fewer than 10 people. We have pressed for voluntary agreements that would benefit our members and have been asked to participate in conversations about voluntary agreements that would benefit individuals and companies, large and small.

Nevertheless, the organizations and individuals who claim to represent "users" often say that voluntary agreements exclude "everyday Americans" like my members. Some of those purported "internet user" representatives actually exist to defend the financial and policy interests of the largest internet platforms. In other words, not every group claiming to speak for "internet users" does so, and therefore not every such group deserves a seat at the table and can be expected to act in good faith.

Multi-stakeholder agreements are a very common practice in the internet space. Not all such agreements require broad inclusiveness in their development; nevertheless, the internet generally works well under the governance of such agreements. As the internet becomes an increasingly complex and treacherous place, however, there will be circumstances when broader engagement in the development of voluntary agreements is advisable. An agreement that has the effect of binding or excluding those who were not party to developing the agreement should have some kind of fail-safe (whether in the form of disclosure, consultation, etc.) to avoid unintended consequences.

It is also possible for Congressional committees to play a convener or an advisory role in the development of such agreements, again depending on the circumstances, and there is considerable precedent for such engagement.

QUESTION 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?*

CF: Thank you, Senator Tillis, for taking the time to hold the DMCA hearings in 2020 and for your leadership on copyright issues. My members send their upmost gratitude and respect.

I speak to you today as someone who has worked, making and distributing films, for most of my professional life. We are not lawyers at CreativeFuture, but former filmmakers ourselves. With that in mind, I can only imagine that revising legislation as important and complex as Section 512 will take years of hard work and involve multiple stakeholders and many Members of Congress.

Any rewrite should continue to accommodate and encourage voluntary agreements, which are crucial to making progress. Indeed, efforts at voluntary agreements should proceed simultaneously with the consideration of new legislation and could help to inform the end product. The law should also provide more useful guidance on the role of such agreements in reducing copyright infringement.

It is our hope that, during the work to reimagine Section 512, "online service providers" (most notably companies like Google, Facebook, Cloudflare, and other dominant players who have the means and the ability to address the reduction of infringements through technical and other means) will continue to come to the table – under the aegis of relevant Congressional committees where appropriate – to expand the scope and effectiveness of voluntary agreements.

What effect any rewrite of Section 512 would have on the likelihood of future voluntary agreements will depend entirely on how those changes shape the incentives of those who benefit from the DMCA's broad shield against liability. The problem we have seen with the DMCA as it has been applied is that the balance has been tilted so far in favor of internet platforms that there is little incentive to engage in the sometimes-difficult work of cooperative engagement to fight piracy. And there is certainly no real risk for the failure to do so. A rewrite of Section 512 will only improve the viability of voluntary agreements if it effectively reworks that balance.

Screen Shot taken at 12.15.20 at 6:25pm PT

Copyright Match Tool

The Copyright Match Tool is only available to channels in the YouTube Partner Program. If you are not in the YouTube Partner Program, you won't see the Copyright section of YouTube Studio.

The Copyright Match Tool finds full reuploads of your original videos on other YouTube channels. Once a match has been identified, you can review it in YouTube Studio and choose which action you'd like to take.

It's important that you're the first to upload the content to YouTube (with public, private, or unlisted visibility). We scan videos that are uploaded after yours to look for a match. We use the video upload time to decide who should see matches. Be sure to check back regularly to keep an eye on any new matches we've found.

It's important to use the Copyright Match Tool responsibly. Misuse, including:

- Intentional or repeated abuse of the copyright removal process **or**
- attempted probing or reverse engineering of the match system

may result in loss of feature access or termination of your YouTube partnership. Just because we've found an upload that matches your video doesn't guarantee its copyright infringement. It's your responsibility to review each video and consider whether fair use , fair dealing, or a similar exception to copyright applies. After review,

Screen Shot taken at 12.16.20 at 12:55pm PT

Copyright Match Tool

The Copyright Match Tool finds full reuploads of your original videos on other YouTube channels. Once a match has been identified, you can review it in YouTube Studio and choose which action you'd like to take.

It's important that you're the first to upload the content to YouTube (with public, private, or unlisted visibility). We scan videos that are uploaded after yours to look for a match. We use the video upload time to decide who should see matches. Be sure to check back regularly to keep an eye on any new matches we've found.

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