February 26, 2021

<u>**VIA EMAIL**</u>
Senator Thom Tillis
Ranking Member
Senate Judiciary Subcommittee on Intellectual Property
113 Dirksen Senate Office Building
Washington, DC 20510

Re: Draft Legislation to Reform the Digital Millennium Copyright Act

Dear Chairman Tillis:

NTCA–The Rural Broadband Association ("NTCA"), appreciates this opportunity to comment on the discussion draft of legislation to reform the Digital Millennium Copyright Act ("DMCA") released December 22, 2020. By way of background, NTCA represents approximately 850 small, locally-operated rural broadband service providers that provide broadband, voice and video services across 45 states.

As you noted when introducing this draft legislation, the DMCA was intended to strike a careful balance between the rights of copyright holders and emerging technologies. As you also noted, technology has advanced in ways that could not have been foreseen when the DMCA was enacted, resulting in efforts by the courts to interpret the DMCA on a case-by-case basis. This has resulted in uncertainty among many Internet service providers.

NTCA welcomes your draft of updated DMCA legislation as an opportunity to clarify ISPs' roles and liability with respect to allegations of copyright infringement by those using their networks. Such clarification is critical given some courts' findings that an ISP can be held liable for copyright infringement for failing to disconnect subscribers that were the subject of repeated DMCA notices,[1] findings exacerbated by the U.S. Supreme Court's decision in *Packingham v. North Carolina* where the Court found that an individual who had been convicted of a felony *could not lawfully be blocked* from accessing social media sites because such sites "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square [and] provide an important tool for job seeking and even communicating with friends and family."[2] In the case of DMCA notices, subscribers have not

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[1] *See, e.g.*, *UMG Recordings, Inc. et. al. v. RCN Telecom Services, LLC et al*., Civil Action No. 19-17272 (D.N.J. Aug. 31, 2020); *Sony Music Entertainment v. Cox Communications, Inc.*, No. 1:18-cv-00950 (E.D. Va. June 2, 2020); *Warner Bros. Records Inc. v. Charter Communications, Inc.*, 1:19-cv-00874-RBJ-MEH (D. Colo. Oct. 21, 2019); *UMG Recordings, Inc. v. Grande Communications Networks, LLC*, 2018 WL 1096871 (W.D. Tex. Feb. 28, 2018); *BMG Rights Management v. Cox Communications*, 149 F. Supp. 3d 634 (E.D. Va. Dec. 1, 2015).

[2] 137 S. Ct. (2017).

even been found guilty of copyright infringement prior to receiving such notices. Furthermore, Congress and the Federal Communications Commission have repeatedly emphasized the "essential" nature of Internet service and that every U.S. household should have access to such service for jobs, education, and health care.[3]

NTCA is hopeful that updated legislation will provide much needed clarity on these conflicting expectations. Accordingly, NTCA offers the following feedback on the draft legislation as a first step toward updating and clarifying online copyright infringement rules.

1. Sec. 2(a)(2)(B)(ii)-(iii) of the draft would exempt service providers from liability for copyright infringement if they are not "willfully blind" of the alleged infringing activity and do not receive a financial benefit "directly attributable to the infringing activity." Courts have concluded in the past that ISPs did not meet criteria like these even though the ISP was acting as a conduit for the alleged infringing activity and the only financial benefit obtained by the ISP was the subscriber's standard monthly service subscription. **Accordingly, to be clear, NTCA requests that the legislation include definitions for these terms or, ideally at least for the "directly attributable" component, language specifically excluding ISPs when they only provide Internet service and they are neither the content provider nor have any control over what the subscriber chooses to do with that service**.

2. Sec. 2(a)(2)(C)(i) requires a "service provider" seeking to avoid liability for a subscriber's alleged infringing activity to "remove, or disable access to, the material that is claimed to be infringing or the subject of infringing activity." However, an ISP that is only "transmitting, routing, or providing connections for, material through a system or network" cannot remove or disable access to material; rather, their only option is to disconnect the subscriber alleged to have engaged in the infringing activity. Such disconnection not only risks running afoul of the U.S. Supreme Court's decision in *Packingham* but also Congress and the FCC's emphasis on ensuring all Americans have access to Internet service. **Accordingly, any new legislation needs to specify that service providers who serve as a mere conduit as defined in (a)(1)(A) of the draft are not required to undertake the actions identified in Sec. 2(a)(2)(C)(i) in order to be eligible for liability protection.**

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[3] *See, e.g.*, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fourteenth Broadband Deployment Report, GN Docket 20-269 (rel. Jan. 19, 2021), ¶ 1 ("Over the last four years, the Commission's top priority has been closing the digital divide, in recognition that high-speed broadband and the digital opportunity it brings are increasingly essential to innovation, economic opportunity, healthcare, and civic engagement in today's modern society."). *See also* Opening Statement as Prepared for Delivery of Subcommittee on Communications and Technology Chairman Michael F. Doyle Hearing on "Connecting America: Broadband Solutions to Pandemic Problems" (Feb. 17, 2021), available at https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2021.2.17.%20Doyle%20Opening%20Statement.CAT__0.pdf ("As we have all become far too aware over the last year - universal broadband connectivity is critical to our economy, to the education of our youth, and to keeping our communities safe and connected during this unprecedented crisis.").

3. Sec. 2(a)(2)(C)(ii) of the draft allows for a copyright owner or representative to provide a notice of infringement to an ISP claiming infringement of multiple works; however, the draft provides that the notice need only list one copyrighted material and one web location. **NTCA recommends the legislation specify that the ISP can rely on information provided by the notice and will not be expected to search for other appearances of possible infringement of the same material or by the same subscriber. Furthermore, the legislation should specify that such notice would count as a single notice for purposes of ISPs' obligation to notify subscribers of alleged infringing activity, regardless of whether more than one instance of infringement of the identified work was included in the notice.**

4. **NTCA requests that the legislation clarify that service providers are not required to contact the complaining party pursuant to Section 2(a)(2)(D).**

5. Page 6, lines 33-36 of the draft legislation propose to require ISPs to make a "counter notice" form that contains "information regarding the fair use doctrine" available to subscribers to use when challenging any claims that they engaged in copyright infringement. **ISPs, especially smaller ones, cannot be expected to have knowledge of the fair use doctrine or be expected to hire an attorney to create a form that addresses the fair use doctrine**. **Accordingly, the legislation should direct the Copyright Office to create a standard, or model, form that ISPs can use to meet this requirement. Such a model form would also ensure consistency among all ISPs and other providers.**

Thank you for the opportunity to provide feedback on this important piece of legislation. We look forward to continuing to work with your office on this issue.

Sincerely,

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