



May 1, 2023

The Honorable Dick Durbin
Chair
Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Senate Committee on the Judiciary
Washington, DC 20510

Re: Senate Judiciary Committee Markup

Dear Chair Durbin and Ranking Member Graham:

On behalf of the Computer & Communications Industry Association (CCIA)¹, I write to express concerns with the bills recently held over at markup: S. 1207, S. 1199, and S. 1080.

We appreciate your work to ensure the safety of children and teens online and your efforts to hold bad actors responsible. The abuse of children demands a consolidated and cooperative approach to eliminate these terrible crimes. The technology industry takes seriously the shared responsibility to ensure that dangerous content like child sexual abuse material (CSAM) is detected and removed. These companies work extensively and collaboratively with law enforcement to report criminal activity and in 2020 alone more than 29 million CSAM reports were submitted.²

As overdoses have risen with the increased threat of fentanyl, too many American families have mourned losses during this ongoing epidemic. The responsible companies my association represents work hard to innovate tools that help identify and prevent the illegal distribution of controlled substances.

The bills scheduled for markup this week are the product of good intentions but will instead exacerbate these problems by punishing technology companies that are trying to assist and discourage companies from continuing to invest in new technologies to combat these crimes.

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² National Center for Missing & Exploited Children, CyberTipline 2021 Report, <https://www.missingkids.org/gethelpnow/cybertipline/cybertiplinedata>.

1. S. 1207, EARNIT Act of 2023

As civil society³ and industry⁴ have detailed in multiple joint letters over the years, including this week,⁵ this bill would hinder law enforcement’s efforts against online child exploitation, disincentivize companies to continue to detect and block CSAM, impair lawful speech and conduct, limit technological innovation, and discourage the use of end-to-end encryption and thereby threaten the privacy of law-abiding citizens.

2. S. 1199, STOP CSAM Act of 2023

The technology sector already stands as an essential partner in the effort to stop the online spread of CSAM. Companies have already invested in new technology and deployed tools that have delivered millions of reports of CSAM to the U.S. Government. Unfortunately the vast majority of these reports go unprosecuted.⁶ The technology industry is an ally in the fight against CSAM and supports increased enforcement. It is counterproductive, however, to create new federal criminal and civil liability for the same dedicated trust and safety professionals who are working hard to beat back the bad actors who the government has been unwilling or unable to prosecute.

Industry is actively researching methods and interventions to stop grooming and prevent the creation of new CSAM. The fact that CSAM reports and removals are increasing demonstrates that industry is already investing in technology that finds, removes, and reports this material — not the opposite.⁷ Rather than punish stakeholders with significantly expanded liability, which like with the EARNIT Act will discourage the use of end-to-end encryption, Congress should increase funding for law enforcement to ensure more of the criminals who are actually

³ See, e.g., CDT Leads Broad Human Rights Coalition Urging Senate to Drop EARN IT Act (Feb. 9, 2022), <https://cdt.org/insights/2022-earn-it-act-coalition-letter/>; AFP, ACLU Slam Anti-Privacy EARN IT Act (Feb. 3, 2022), <https://americansforprosperity.org/afp-aclu-slam-anti-privacy-earn-it-act/>.

⁴ See Letter from CCIA, CTA, IA, i2Coalition, NetChoice, Re: Concerns with Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (Mar. 5, 2020), <https://www.ccianet.org/wp-content/uploads/2020/03/Tech-Assn-EARNIT-Letter.pdf>; Letter from CCIA, CTA, i2Coalition, and NetChoice, Re: Requesting Delay of Markup of S. 3398 (July 1, 2020), <https://www.ccianet.org/wp-content/uploads/2020/07/Tech-Assn-3398-Letter.pdf>; Letter from CCIA, CTA, Engine, IA, i2Coalition, NetChoice, Re: Industry Concerns with S. 3398 (Sept. 18, 2020), <https://www.ccianet.org/wp-content/uploads/2020/09/2020-09-18-Industry-Letter-on-S.-3398.pdf>; Letter from CCIA, ACT, Chamber of Progress, CTA, Developers Alliance, Engine, i2Coalition, Mailfence, NetChoice, SIIA, Tor Project, Re: Industry Concerns with S. 3538 (Feb. 9, 2022), <https://ccianet.org/wp-content/uploads/2022/02/Industry-Joint-Letter-on-S.-3538.pdf>.

⁵ Letter from ACT, CCIA, Chamber of Progress, CTA, Developers Alliance, Engine, i2Coalition, NetChoice, Patreon, SIIA, TechNet, Re: Industry Concerns with S. 1207 (May 1, 2023), <https://ccianet.org/wp-content/uploads/2023/04/EARN-IT-industry-joint-letter.pdf>.

⁶ While industry makes tens of millions of CSAM reports to authorities every year, fewer than 1500 prosecutions have occurred annually. See Table D-2—U.S. District Courts—Criminal Federal Judicial Caseload Statistics (Mar. 31, 2022), <https://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2022/03/31>.

⁷ Thorn, New Report Shows an Increased Effort by Tech Companies to Detect CSAM on the Internet (Mar. 18, 2022), <https://www.thorn.org/blog/new-report-shows-an-increased-effort-by-tech-companies-to-detect-csam-on-the-internet/> (NCMEC’s recent CyberTipline report is “encouraging . . . The report shows that 230 companies across the globe are now deploying tools to detect child sexual abuse material. That’s a remarkable 21% increase since 2020. The significant uptick in the number of platforms that detect child sexual abuse material has led to more reports being filed and more CSAM hashes created, helping make the fight against the viral spread of abuse material ever more effective.”).



circulating CSAM are prosecuted, as alternative proposals have recognized.⁸ It should also support industry as it researches new methods and interventions to stop abuse before it happens.

Finally, S. 1199 also includes a notice and takedown/staydown regime that raises compliance and constitutional concerns. The bill contains language aimed at making it easier for victims to ask websites to remove not just CSAM, but also “related exploitive visual depictions” (REVD). However, the prohibition on recidivist hosting effectively mandates scanning which will not only put user privacy at risk, but also risks turning service providers into instruments or agents of the government, resulting in procedural contamination of reported CSAM evidence as a violation of the Fourth Amendment. Additionally, because the government cannot mandate the removal of legal content, the fines associated with failure to remove REVD content could violate the First Amendment. Also, since automated filtering is never 100% accurate, fines for recidivist hosting may be levied against companies already taking all technically feasible steps to block such content.

3. S. 1080, Cooper Davis Act

Fentanyl and methamphetamine and other illegal drugs have ravaged too many families and communities in recent years. Responsible services take seriously the threat of dangerous and illegal narcotics, especially with regards to minors. However, the language of S. 1080 fails to recognize that determinations about the unlawful sale of controlled substances are context-dependent and often difficult to determine, and thus reporting from companies may include over-reporting, false positives, and a diversion of resources toward cases that are not the target of the legislation.

In addition, S. 1080 contains serious constitutional infirmities. As written, the legislation violates state actor concerns that would trigger Fourth Amendment protections for search and seizure.

While we have concerns about these bills, we are committed to combating online child exploitation and illegal drug sales and look forward to working with members of the Committee on these serious issues.

Sincerely,

Matt Schruers
President
Computer & Communications Industry Association (CCIA)

Cc: Members of the Senate Judiciary Committee

⁸ *E.g.*, Invest in Child Safety Act, <https://www.wyden.senate.gov/news/press-releases/wyden-gillibrand-brown-hirono-and-eshoo-reintroduce-invest-in-child-safety-act-to-protect-children-from-online-exploitation>.