COPYRIGHT AND THE INTERNET IN 2020: REACTIONS TO THE COPYRIGHT OFFICE'S REPORT ON THE EFFICACY OF 17 U.S.C. 512 AFTER TWO DECADES

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

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C O N T E N T S

SEPTEMBER 30, 2020

QUESTIONS AND RESPONSES FOR THE RECORD

COPYRIGHT AND THE INTERNET IN 2020: REACTIONS TO THE COPYRIGHT OFFICE'S REPORT ON THE EFFICACY OF 17 U.S.C. 512 AFTER TWO DECADES

Wednesday, September 30, 2020

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to call, at 12:07 p.m., in Room 2141, Rayburn Office Building, Hon. Jerrold Nadler [Chair of the Committee] presiding.

Present: Representatives Nadler, Lofgren, Johnson of Georgia, Deutch, Cicilline, Swalwell, Raskin, Jayapal, Demings, Correa, Scanlon, Garcia, McBath, Stanton, Dean, Murcarsel-Powell, Escobar, Jordan, Chabot, Gohmert, Roby, Biggs, Reschenthaler, Cline, Armstrong, Steube, and Tiffany.

Staff present: David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Anthony Valdez, Clerk and Professional Staff Member; Moh Sharma, Member Services and Outreach Advisor; Cierra Fontenot, Staff Assistant; John Williams, Parliamentarian; Jamie Simpson, Chief Counsel, Courts, Intellectual Property, and the Internet Subcommittee; Rosalind Jackson, Professional Staff Member, Courts, Intellectual Property, and the Internet Subcommittee; Chris Hixon, Minority Staff Director; Tyler Grimm, Minority Chief Counsel for Policy and Strategy; Ella Yates, Minority Director of Member Services and Coalitions; Kiley Bidelman, Minority Clerk; and John Lee, Minority USPTO Detainee.

Chair NADLER. [Presiding.] The Committee on the Judiciary will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to this afternoon's hearing on Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. 512 After Two Decades.

Before we begin, I would like to remind the Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you

would like to submit materials, please send them to the email address that has been previously distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I would also remind all Members that guidance from the Office of Attending Physician states that face coverings are required for all meetings in an enclosed space, such as Committee hearings. Everybody attending this hearing is required to follow this guidance, and I will not recognize Members to speak who are not in compliance with these rules. If you do not wish to put on a mask, you have the option to participate in this hearing remotely.

Finally, I would ask all Members, both those in person and those appearing remotely, to mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself at any time that you seek recognition.

I will now recognize myself for an opening statement.

Today's hearing will examine how a key provision of copyright law that guides how copyright and parts of the internet interact with each other has fared in today's digital age. This provision, section 512 of title 17, was enacted in 1998 as part of the Digital Millennium Copyright Act. Back then, internet activity was in its nascency. Many of the online platforms that we consider universal today had yet to be formed. eBay had been around for just 3 years, Google was founded that same year, and Facebook's birth was still 6 years away. With the burgeoning ways for people to share and distribute content through the internet, in enacting section 512, Congress sought to balance two goals: On the one hand, promoting the growth and innovation of online networks, and, on the other hand, protecting intellectual property rights and the incentive system for promoting the creation of new expressive works.

At the heart of section 512 is the notice and takedown system. Broadly, under notice and takedown, a copyright owner can send a notice to an online service provider when a third party has used allegedly infringing material through or on the provider's services. The online service provider must then take that material down. If the online service provider complies with the notice and takedown process, its liability for infringement is limited. Twenty years have passed since section 512's enactment, and it would be an understatement to say that the internet has changed rapidly during that time.

The internet has gotten faster and more accessible, and the number of ways to share and view copyrighted content has increased dramatically. In tandem with these increases, we have also seen a dramatic increase in the volume of infringing materials being shared and viewed online. Our copyright laws must keep up. Today we seek perspectives on whether section 512 is working efficiently and effectively for this new internet landscape and whether the balance that Congress sought in 1998 is still being achieved in 2020. Our discussion is guided by the Copyright Office's recent report that studied this very question.

I want to applaud the Copyright Office for the care and diligence with which it undertook this study. Their work began two Congresses ago when this Committee requested that it study section

512 in light of all the changes the internet had undergone. The Office's review is exhaustive. They reviewed more than 90,000 comments, held public roundtables in Washington, New York, and San Francisco, and conducted an extensive review of case law on this issue.

Turning to the report's substance, the office concluded that the balance that Congress originally sought in enacting section 512 is now askew. The Office found that online service providers and user groups were generally satisfied with section 512's operation, but copyright owners typically disagreed, finding section 512 ineffective in the face of the current scale of infringement. To address this imbalance, the Copyright Office includes recommendations in areas that Congress may wish to fine tune or clarify, as well as voluntary measures that the Office considers valuable for increasing the efficacy of section 512.

To better understand the Copyright Office's recommendations, staff of the Committee held a series of 11 listening sessions over the summer, hearing directly from over 90 panelists, including creators, and artists, and representatives of public interest groups, libraries, online service providers, internet service providers, legal practitioners, and the sports, live entertainment, music, film, television, software, newsprint, and photography industries. I want to thank the many people who participated and all those who followed up with written statements for this hearing. Without objection, I will place those statements into the record.

[The information follows:]

CHAIR NADER FOR THE RECORD

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Statement of Emily R. Florio
President of the American Association of Law Libraries
For the Hearing Record

"Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades"

Hearing before the U.S. House of Representatives Judiciary Committee

September 30, 2020

Dear Chairman Nadler, Ranking Member Jordan, and Members of the Committee:

On behalf of the American Association of Law Libraries (AALL), a national organization representing 4,000 law librarians and legal information professionals, we would like to share AALL's position on the U.S. Copyright Office's Section 512 Report (May 2020). This statement supplements the comments AALL provided at the House Judiciary Committee's section 512 listening session on libraries on August 11, 2020. I respectfully request that this statement be part of the hearing record.

AALL believes that section 512 is working well for law librarians, legal information professionals, and law library users. We also agree with the Copyright Office that several elements of section 512 are worthy of further examination by Congress. AALL advocates for the Committee to consider the impact of repeat infringer policies on libraries and library users, as well as fair use considerations under the notice-and-takedown system.

AALL concurs with the Copyright Office's assessment that colleges and universities may require an alternative approach to repeat infringer policies that terminate user accounts. As the Copyright Office noted in its report, the internet access and network services provided by colleges and universities are used for many essential purposes. This includes academic work, as well as library and research services. Cutting off access to the internet for on-campus students will have significant consequences for a student's academic and social life. This is especially true in circumstances where the college or university is the only practical broadband provider for students. For these reasons, repeat infringer policies for colleges and universities should be carefully considered.

AALL believes that repeat infringer policies may be problematic for those outside the college or university setting as well, including individuals using the internet at public libraries or public law libraries to conduct legal research or to participate in virtual judicial hearings. During the COVID-19 pandemic, public law libraries have partnered with public libraries to provide the public with access to civil legal resources. Not

allowing these users to have access to the internet will negatively impact their access to justice. Therefore, AALL supports broader efforts to clarify repeat infringer policies.

AALL welcomed the decision in *Lenz v. Universal Music Group Corp.*[1], which asserted that when making a takedown request, a rightsholder must consider fair use before asserting the required good faith belief of infringement. The importance of considering fair use in the notice-and-takedown process is particularly apparent during the current pandemic. Law libraries rely on fair use in remote learning environments for activities such as embedding videos into educational materials. AALL encourages Congress to affirm the holding of *Lenz* to ensure that claimants consider fair use.

Finally, AALL agrees with the Copyright Office about the importance of educational initiatives as an effective non-statutory approach to mitigating section 512 limitations. Law libraries have produced many excellent research guides on copyright law to help their users understand their obligations under the law. These research guides contribute to a greater understanding of section 512. We strongly support the Copyright Office's proposal to produce educational materials to inform all participants in the section 512 system of their rights and responsibilities. We also appreciate the Copyright Office's plan to engage stakeholders in the development of those resources.

Thank you for the opportunity to provide AALL's views on the Copyright Office's section 512 report. We hope our comments assist the Committee in its consideration of the efficacy of section 512.

[1] 815 F.3d 1145 (9th Cir. 2016)

AIPLA

American Intellectual Property Law Association

October 9, 2020

The Honorable Jerry Nadler
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
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The Honorable Hank C. Johnson
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The Honorable Martha Roby
Ranking Member
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
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Re: AIPLA Comments to House Judiciary Committee on Copyright Office's Section 512 Report

Dear Chairman Nadler and Ranking Member Jordan; Chairman Johnson and Ranking Member Roby:

AIPLA wishes to thank the House Judiciary Committee again for the opportunity to provide input on its hearing regarding the Copyright Office's study entitled *Section 512 of Title 17* (the "Report") and would respectfully ask that this letter be included in the September 30th hearing record on this topic. The organization is also deeply appreciative of the Copyright Office's efforts in compiling its Report, and as a general matter, we support many of the Copyright Office's conclusions.

Founded in 1897, the American Intellectual Property Law Association is a national bar association of approximately 8,500 members who are engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

The issues raised in the Report are of tremendous importance to AIPLA's constituent members. AIPLA's diverse membership falls at times on both sides of the debates surrounding the overall efficacy of 512 and how that might be improved. We urge the House Judiciary Committee, and Congress more broadly, to consider these issues holistically and objectively, and to thoroughly

vet proposed amendments to the statute from diverse perspectives. Even minor changes are likely to have far-reaching consequences.

AIPLA believes that Section 512 does not adequately deter infringement, particularly repeat infringement. To address this, AIPLA supports a greater role for the Copyright Office in the notice-and-takedown system. This does not imply a desire to transform the system into a completely regulatory role. To the contrary, such a transformation could impose administrative and budgetary challenges on the Office that should be borne primarily by the entities using the system. Nonetheless, allowing the Office and the public more direct and visible participation in the notice-and-takedown process would encourage compliance with statutory norms.

For example, AIPLA sees great benefit in establishing a centralized, publicly accessible repository of all takedown notices and counter-notices. We envision a standardized online takedown form with uniform data fields. Upon submission of the form, a copy would be sent to the OSP's Registered Agent and another copy to the Copyright Office database. This database would provide a resource to identify repeat filers and accused infringers. Standardized forms would also ensure consistency and compliance with DMCA requirements. Making such notices publicly accessible might deter both infringement and frivolous or harassing takedowns. Moreover, common understandings gleaned from such data could inform meaningful repeat infringer policies for OSPs. Our constituents have witnessed a wide range of practices and formats for takedown notices and an equally wide range of responses by OSPs and accused infringers upon receipt of such notices. Uniformity and consistency across platforms and providers should be encouraged.

AIPLA strongly supports the Office's intention to develop educational materials surrounding the DMCA and Section 512, and about copyright and fair use more generally. We are particularly appreciative of the materials posted at https://www.copyright.gov/512/. Such materials may go a long way in improving the quality of takedown notices.

AIPLA supports enhanced access to penalties for abusive notice-and-takedown practices, whether in notices or in counter-notices. While attention has been paid to the cost of improper notices, improper counter-notices may have an even greater cost in the current system, because the system requires that the rightsholder initiate a federal lawsuit to remove the allegedly infringing work following issuance of a counter-notice. One potential solution would involve the small claims process proposed by the CASE Act, which creates a mechanism for enforcement where litigation may be cost-prohibitive. This system would provide an opportunity to pursue both 512(f) claims and copyright infringement claims in a cost-controlled (and damages-controlled) environment before a panel of copyright experts—making the possibility of legal action for abuse of the notice-and-takedown system real.

AIPLA is optimistic about the promise of technology in streamlining and improving the notice and takedown system. That said, consideration of whether a particular use constitutes copyright infringement is nuanced and requires consideration of, *inter alia*, fair use. This analysis is qualitative, and not simply quantitative. We are doubtful that today's artificial intelligence can adequately substitute for human judgment in this regard. We continue to encourage further study of issues surround efficacy and ethics of automated takedowns and development of best practices.

In closing, AIPLA would like to extend our appreciation to the Committee's hearing on this matter and continued consideration of the many issues from the Office's Report. AIPLA would be happy to provide further feedback and commentary if helpful.

Thank you for your consideration of these views.

Sincerely,

Barbara A. Fiacco
President
American Intellectual Property Law Association

United States House of Representatives

Committee on the Judiciary

Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades

September 30, 2020, 12:00 p.m.

Statement of
Mary Rasenberger
Executive Director
The Authors Guild, Inc.

Chairman Nadler, Vice Chair Scanlon, Ranking Member Jordan, and Members of the Committee, thank you for giving me the opportunity to submit these comments on behalf of the Authors Guild in connection with the hearing titled *Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades*.

The Authors Guild is a national non-profit association of almost 10,000 professional writers, many of whom struggle daily to combat the unauthorized online distribution of their works. Founded in 1912, the Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, contracts, and taxation. As an organization whose members earn their livelihoods through their writing, the Guild has a fundamental interest in ensuring that works of authorship and the rights of authors are protected online, and that the hard work and talents of our nation's authors may be rewarded so that they can keep writing, as intended by the Framers of the Constitution.

The Authors Guild welcomed the Copyright Office's report "Section 512 of Title 17" (hereafter "Copyright Office Report" or the "512 Report") when it was released in May, viewing it as one of the most thorough and clear analyses of the statute in the context of the prevailing piracy epidemic. We wholeheartedly agree with the Copyright Office's call to realign section 512 with Congress' intent. During the course of the Office's multi-year 512 study, the Authors Guild submitted comments to the Office and participated in several hearings. We are satisfied that our concerns were heard, along with the concerns of other participants. We believe the report is a balanced and fair representation of how the law is functioning today and what needs to be fixed. We especially appreciated the attention devoted to the plight of individual creators, who

lack the financial and technological resources to create their own technical solutions to piracy and who are rarely eligible for the technical solutions provided by some internet platforms to large notice senders and businesses.

As the United States Copyright Office concluded in its 512 Report, section 512 is not working as Congress intended. When enacting section 512 with the DMCA in 1998, Congress stated two goals for the law: 1) to protect copyright owners against internet piracy; and 2) to limit internet platforms' liability for the infringements of their users. Congress sought to achieve these goals through a bargain between copyright owners and service providers: in exchange for protection from financial liability for the infringement of their users, the ISPs were to cooperate with copyright owners in protecting against copyright infringement on their services.[1]

The unabated growth of online piracy since section 512's enactment in 1998 evinces the law's failure to achieve its first goal of protecting copyright owners in the online environment. This failure can be attributed to the extremely narrow way in which the courts have construed the qualifications for section 512's safe harbors, effectively eliminating several prerequisites. As the Copyright Office noted in the 512 Report, courts have interpreted ISPs' "obligations and limitations…quite narrowly, resulting in broader application of the safe harbors than Congress likely anticipated."[2]

We believe that only legislative action can reset the intended balance of section 512. In this statement we offer some background on how we view the problem of online piracy and

[1] Rep. Goodlatte underscored this two-pronged approach when deliberating the bill, saying that "[i]f America's creators do not believe that their works will be protected when they put them on-line, then the Internet will lack the creative content it needs to reach its true potential; and if America's service providers are subject to litigation for the acts of third parties at the drop of a hat, they will lack the incentive to provide quick and sufficient access to the Internet." 144 Cong. Rec. 18774 (1998) (statement of Rep. Goodlatte).

[2] U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 85-86 (2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf (hereafter "512 Report").

provide recommendations for amending section 512 to help ebb the flow of pirated copies on the internet, which are severely hurting authors.

For a more thorough discussion of our practical experiences with piracy and our position on section 512, we invite you to read the written testimony that we submitted to the Senate Judiciary Committee's IP Subcommittee in June 2020 in connection with Authors Guild president Doug Preston's testimony at the hearing titled *Is the DMCA's Notice-and-Takedown System Working in the 21st Century*, as well as the responses submitted to the follow-up questions (QFRs).[3]

I. The Piracy Epidemic

From authors' perspective, ebook piracy is out of control and authors feel helpless to do anything. In the last decade, the number of piracy complaints handled by the Authors Guild has skyrocketed. A study by Nielsen and Digimarc in 2017 indicated that pirates were selling 315 million dollars' worth of stolen ebooks a year through illegal downloads,[4] with pirated ebooks depressing legitimate book sales by as much as 14%.[5] Since then, based on the amount of ebook piracy reported to the Authors Guild, that number has probably doubled. In the last couple of years, a new front in the piracy battle has opened with the rise of pirated commercial ebooks sold

[4] NIELSEN AND DIGIMARC, INSIDE THE MIND OF A BOOK PIRATE 4 (2017), https://www.digimarc.com/docs/default-source/default-document-library/inside-the-mind-of-a-book-pirate.pdf. The study also found that "convenience" was the most common reason users gave for choosing an illegal download over acquisition of a legitimate copy. 69% of study participants said that they would have acquired the book legally (by buying a legal ebook or print copy or checking one out from the library) if pirated copies were not conveniently available.

[4] NIELSEN AND DIGIMARC, INSIDE THE MIND OF A BOOK PIRATE 4 (2017), https://www.digimarc.com/docs/default-source/default-document-library/inside-the-mind-of-a-book-pirate.pdf. The study also found that "convenience" was the most common reason users gave for choosing an illegal download over acquisition of a legitimate copy. 69% of study participants said that they would have acquired the book legally (by buying a legal ebook or print copy or checking one out from the library) if pirated copies were not conveniently available.

[5] Imke Reimers, *Can Private Copyright Protection Be Effective? Evidence from Book Publishing* (2016), 59 J. L. & ECON. (2016): 411, 414, https://doi.org/10.1086/687521 ("While physical formats are not affected by piracy protection, closer substitutes for online piracy such as legally distributed ebooks see a mean differential protection-related increase in sales of at least 14 percent.").

at low cost on the same platforms as legitimate copies, leading to readers buying illegal copies, thinking they are just getting a good deal. All of this is taking place concomitant to a historic decline in writing income: in 2018, mean writing incomes for full-time professional authors went down to $20,300, a 42% reduction in real dollars from a decade prior.

In order to defeat this swell of piracy and mass copyright infringement, two main problems require Congress' urgent attention:

1. **The whack-a mole problem on third-party platforms**

The courts have, as a practical matter, reduced section 512 to a notice-and-takedown statue and eliminated the knowledge, awareness, and vicarious liability standards. The resulting law requires copyright owners to notify platforms of each individual infringing copy on the service by URL before triggering any obligation to cooperate on the part of the ISP and excusing them from removing any other infringing copies at other URLs—including those inevitably reposted by the same infringers. This system is ineffective at reducing piracy and that imposes enormous costs and burdens on creators, copyright owners and ISPs alike. For authors, who send countless notices only to see the books they spent hours trying to take down reappear almost instantly, the system creates an absurdist, Sisyphean ordeal. The "whack-a-mole" metaphor in the context of online piracy captures the diffuse and ephemeral nature of pirate activities as well as to the absurd manner in which section 512 is applied today due to judicial decisions of the last 25 years that have expanded ISP safe harbors while reading burdensome requirements for copyright owners into the DMCA.

2. **Easy access to criminal pirate sites**

Studies have shown that the vast majority of illegal book downloads occur because they are so easy to find and acquire, and that users who acquire ebooks illegally would have acquired the

book legally (by buying a legal ebook or print copy or checking one out from the library) if the "search costs" of pirated ebooks were higher—in the other words, if illegal ebooks were more than a few clicks away.[6] Yet most notorious and well-known pirate sites, even those, like Libgen/Sci-Hub, that have faced lawsuits and have been previously enjoined by U.S. courts, can be found through a simple search if you type in a close approximation to the name.

The Authors Guild tracks a number of the well-known pirate websites that authors frequently complain about. These sites, many of which earn money from advertising, are accessible through Google and other search engines and show up in search results for book-related queries. Google, which controls more than 90% of the search market, will demote (meaning that in a search for a book by book title, for instance, the pirate site will appear much further down in the list of results) such sites in their search results after a certain number of takedown notices have been received for the site—usually, it seems, in the thousands or tens of thousands. They do not disable or take the links down, however, so that anyone who knows the name of the site can easily find it by typing in the name. Even if an ebook pirate's domain is taken down or their account suspended—in which case they often simply move to an address with a similar name—the search engines still link to them.

II. Recommendations

We support all the twelve substantive recommendations to realign section 512 with the Congress' intended goals in the Copyright Office Report, and have made our own suggestions, including those provided to the Senate in connection with Doug Preston's testimony. While our suggestions in this statement are focused on three areas of priority for us, we encourage this

[6] *Id.* at 11.

subcommittee to consider all of the recommendations made by the Copyright Office, and those made in our submission on record in the Senate.

1. **Clarify Knowledge Standards**

Congress should clarify that the knowledge and awareness provisions refer to the common law (and common sense) meanings of "actual knowledge" and "awareness," including general awareness. The current standard, as interpreted by the courts, has removed the obligation on platforms to take down any infringing copies at other URLs not specified in the copyright owner's complaint—including those copies that have been reposted by the same infringer—resulting in an absurd whack-a-mole ordeal for copyright owners who must constantly send notices with new URLs that pop up as soon as one is taken down. "Red flag" awareness would have an independent meaning and effect and should include awareness of the *general nature* of a pirate site; not just specific instances of infringement. As the Copyright Office notes in its 512 Report, "a standard that requires an OSP to have knowledge of a specific infringement in order to be charged with red flag knowledge has created outcomes that Congress likely did not anticipate."

This clarification can be achieved by amending sections 512(c)(1)(A)(ii) and 512(d)(1)(B) to disqualify an ISP from safe harbor if it has "a general awareness that there is pervasive infringing material on the system or network, whether or not it is aware of the specific location of the infringement or the specific infringing material." This is consistent with a plain reading of the statute, as noted in the Copyright Office's 512 Report, because the statute uses the definite article when describing actual knowledge but not when describing red flags knowledge, leading a group of copyright scholars to conclude that "[i]n Congress's view, the critical

distinction between the two knowledge standards was this: actual knowledge turns on specifics, while red flag knowledge turns on generalities."[7]

Further sections 512(c)(1)(A)(ii) and (d)(1)(B) should be amended to create a presumption of red flag awareness when an ISP knows its service is hosting or linking to a significant amount of infringing content. For instance, red flag awareness should be presumed if the service provider has received over a fixed number of takedown notices within a month or year—whatever figure demonstrates that the ISP has clear knowledge that its service is being used regularly for piracy. Such awareness would not mean the ISP is automatically liable, but it would trigger the obligation to take steps, such as filtering, to take down infringing content or disable access to it generally—without the need for the copyright owner to send a notice. The statute could expressly require ISPs that receive over the fixed number of notices and that have revenue of over, say, $10,000,000 per year to implement filtering, fingerprinting, and other "standard technical measures" (as redefined per the recommendation below) to screen out full-length, identical infringing copies. It is only fair that these ISPs that profit from infringement at the expense of copyright owners should assume the cost of weeding it out. A natural reading of the statute bears out that this is the result that Congress intended.

We also endorse the 512 Report's suggestion that Congress may want to direct courts to consider additional factors when determining whether as ISP qualifies for one of the safe harbors, such as an evaluation of intent and of the severity and frequency with which it ignored red flags awareness, because "a personal blog to which users occasionally paste the contents of a newspaper article in the comment section is not, and should not be treated, the same as a website

[7] 512 Report, *supra* note 4, at 118 (quoting Copyright Law Scholars Initial Comments at 3–5).

whose business model is premised on distributing primarily infringing content."[8] Similarly, we agree with the Copyright Office that "a reasonableness standard that accounts for each ISP's relevant characteristics would be appropriate for right-sizing section 512, and necessary to continue section 512's promotion of a diverse internet ecosystem."[9]

2. **Standard Technical Measures**

In the more than 20 year since the passage of section 512, no process has yet been put in motion to develop a "standard technical measure" as defined in the law. Congress had the foresight to understand that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age;" and it "strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals."[10] This has not occurred as Congress envisioned, however, because section 512, as interpreted by the courts, provides no incentives for ISPs to work with copyright owners to develop effective technical measures. Moreover, the definition of "standard technical measures" sets too high a bar of "broad consensus" by an entire industry, and assumes that copyright owners not ISPs should implement them, envisioning technologies such as DRM, not the types of fingerprinting and filtering technologies that have proven to be most effective technical measures for keeping infringing content off of internet platforms.

The failure to develop "standard technical measures" can also be attributed to the fact that many major ISPs *benefit* from user-posted or user-distributed infringing content and thus lack effective legal incentives for adopting piracy-prevention measures. Many user-posted content

[8] 512 Report, *supra* note 4, at 112, n. 593.
[9] Id. at 124.
[10] S. Rept. 105-190, at 49 (1998).

platforms earn revenue through advertising, and that revenue is directly related to the number of eyeballs or clicks they can attract. Infringing content is often a draw for users, especially if provided for free. And with the case law interpreting section 512 so staunchly in their favor, ISPs have no incentive to participate in a multi-industry process or concede the need for standard technical measures.

There are two ways to amend section 512(i) to address the lack of incentives for ISPs to engage in a formal multi-industry standards process. First, we suggest removing the requirement for "a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." Numerous technological solutions already exist, independently developed by platforms and third parties, and are commonly in use. Instead, "standard technical measures" could be defined to include all effective technical measures that are generally accepted in the pertinent industry (i.e., that are commonly used and readily available), regardless of whether they are developed from a multi-industry process. This would encompass the technical measures that are already available and provide the flexibility necessary to cover new technical measures adopted in an industry. It would also encourage the development and licensing of standards that are available on reasonable and non-discriminatory terms, and that do not impose substantial costs.

A standard-setting process could be useful, however, in placing consistent requirements for the implementation and effectiveness of the various existing and future technologies. This can be achieved by establishing a standard-setting regulatory body, tasked with articulating the standards *for* technical measures.

Alternatively, or in addition, we recommend requiring the adoption and implementation of standard technical measures, rather than the requirement to just "accommodate" and "not

interfere with" those implemented by the copyright owners. Many effective standard technical measures are developed and implemented by the ISP, not the copyright owner, so it is not a matter of merely accommodating them. To this effect, we recommend deleting "by the copyright owners" from the preamble to the definition of standard technical measures in section 512 (i)(2), as ISPs are the ones that implement—and in a position to implement—the most effective technical measures like fingerprinting and filtering.

As noted above, Congress should also consider requiring ISPs of a certain scale and revenue to implement filtering, fingerprinting, and other prophylactic technical measures. Ideally, large ISPs would be required to implement technical measures to vet and remove infringing material. Section 512(i)(1)(B) could be modified to stipulate that an ISP that has received more than, say, 10,000 takedown notices in the last month or year, or an ISP with annual revenue of over, say, $10,000,000 must implement reasonably available standard technical measures. Mechanisms could also be placed in the statute to facilitate cooperation between the ISPs and copyright owners to submit digital files and other information necessary for effective implementation of these standard technical measures.

3. Website Blocking

The Authors Guild believes that website blocking by ISPs that provide internet access or search services is necessary to prevent the enormous amount of piracy that occurs today through rogue websites dedicated entirely to distributing pirated material. As long as they are easy to find and access, standalone websites devoted to piracy will continue unabated. Most often, they are operated by criminal enterprises and located in pirate-friendly jurisdictions, where jurisdiction or enforcement is difficult to obtain. As a policy matter, it makes no sense that the U.S. laws do not provide U.S. copyright owners with an effective remedy to stop these criminals from stealing

from them and harming U.S. economic interests. Doing so would require taking down those sites or at least disabling access in the U.S. with the participation of search engines.

Both the Copyright Office's 512 Report and evidence from the E.U., where website blocking is more widely implemented than in the U.S., dispel misperceptions about its efficacy and the potential for abuse.[11] The Authors Guild strongly supports the use of website blocking by search engines (also called "delinking" in the search engine context) after a certain number of takedown notices have been issued against a particular site and it is clear that the site is devoted to piracy. Currently, Google, for instance, only demotes such piracy websites, and does not delink or block them. By allowing these foreign piracy sites to continue appearing in search results, Google and other U.S. search engine companies facilitate and direct millions of user searches to them. If U.S. search engine companies did not direct users to notorious piracy sites overseas, those sites would quickly cease to exist.

III. Conclusion

The largest ISPs have gotten extraordinarily rich in recent years because they provide access to vast quantities of copyrighted content for free. The access they provide has transformed our world: information about almost anything is at our fingertips. It is nothing short of extraordinary. But the way that many courts have interpreted section 512 has allowed those for-profit companies to grow and prosper to an obscene measure and to drain wealth out of the creative community, leaving individual creators poorer than ever. We are a nation built on the inspiration and creative work of individual creators. That's why we need legislative reform to section 512.

[11] Copyright Office's Section 512 Report, *supra* note 1, at 58 (noting that "[r]ecent studies have shown that website blocking has operated as an effective tool in addressing digital piracy, despite the familiar misperceptions about its efficacy and alleged potential for abuse.").

Statement of
Cloudflare Inc.

"Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades"

Committee on the Judiciary, U.S. House of Representatives

September 30, 2020

Thank you for the opportunity to submit a written statement on the Copyright Office's recent report on the Digital Millennium Copyright Act, 17 U.S.C. § 512. Cloudflare offers web security, performance and reliability services to more than 25 million Internet properties, services that fall under 512(a) and 512(b) of the DMCA. As a result, we have experience with how the system functions for providers who do not host content.

Although the Copyright Office's report goes into impressive depth on some issues, it gives little attention to other considerations that should factor into any examination of this topic by Congress. In particular, Congress should take into account important differences among types of online services and the challenges posed by the abuse of copyright infringement reporting systems, especially as they relate to when a service provider should be expected to terminate services to a user. Cloudflare has a unique perspective on these topics and the DMCA more generally, which we believe will aid your future efforts in this area.

A. Additional background on Cloudflare

To further its mission to "help build a better Internet," Cloudflare makes its cybersecurity, performance, and reliability services widely available: it protects more than 25 million web applications, many of those for free. Cloudflare uses its 200 data centers in more than 100 countries to screen traffic for cybersecurity risks and to cache content at the network edge to improve website performance. Cloudflare's system relies on the collective intelligence of Cloudflare's entire network to provide cybersecurity services that have become increasingly necessary to simply staying online.

As part of our efforts to help build a better, more secure Internet, Cloudflare provides a variety of cybersecurity services particularly useful to rightsholders. Broad access to these services—including encryption of both web traffic and web addressing information, protection from Distributed Denial of Service (DDoS) attack, and protection from cross-site scripting, SQL injection or other vulnerabilities—helps prevent data theft, redirection of web requests, and other tampering. Cloudflare's services also protect our customers from malicious bots and crawlers attempting to scrape or alter the content of their sites.

Cloudflare strives to make Internet security and performance services affordable, easy to use, and broadly available. Our model allows different users to pick the level of services that is right for their needs and budget, ranging from basic security and optimization plans for free, to plans for smaller entities at fixed prices, to individually negotiated contracts for those who want fine-grained control over access to their sites and significant functionality. All of our plans offer simple, fixed costs, rather than metered costs based on usage. The combination of ease of use and good service is at the heart of why more than 25 million domains, websites, and applications worldwide use our services. Indeed, more than 16% of Fortune 1000 companies and 14.5% of the top 10 million websites use our services.[1] The broad use of our services across the Internet, in turn, gives Cloudflare unique insight into online threats that allows us to provide the best possible security services.

B. Addressing infringement complaints at the conduit and caching levels

Reflecting online service providers' different abilities to address infringement, the DMCA distinguishes between caching, conduit, and hosting providers in how they are expected to respond to allegedly infringing content. Importably, as the DMCA recognizes, only hosting providers can actually remove such content from the Internet. That distinction, which is also reflected in other laws like the European Union's e-Commerce Directive, remains fundamentally important today. As a provider of a range of conduit and caching services addressed under subsections 512(a) and 512(b) of the DMCA, Cloudflare has extensive experience with the challenges and opportunities such service providers face in helping rightsholders address copyright infringement.

Although conduit and caching service providers cannot remove infringing content from the Internet, Cloudflare has found that such providers can work to assist rightsholders in other ways. Beyond providing technical services, such service providers can ensure that rightsholders have the information necessary to direct their complaints to the parties best positioned to act upon them. Also, in appropriate circumstances as specified by the DMCA, caching providers can clear content from temporary storage that has been permanently removed by hosting providers.

In our case, because Cloudflare sits between visitors to a website and the hosting provider for that website in order to protect the site from cyberattack, publicly available information may lead rightsholders to mistakenly believe that Cloudflare in fact provides hosting services to such websites. Cloudflare's abuse reporting system[2] is designed to address this confusion and put complainants in the same position they would be if the websites at issue did not use our services, by ensuring that rightsholders have a way to

[1] https://blog.cloudflare.com/a-letter-from-cloudflares-founders-2020/
[2] https://www.cloudflare.com/abuse/

report alleged infringement to those with the capability to remove the content from the web. Cloudflare's automated abuse system passes on complaints of copyright violations to the website owner and hosting provider, enabling them to take appropriate action. At the same time, Cloudflare also responds to complaints with information about the hosting provider so that complainants can follow up directly as necessary.

Through its Trusted Reporter program, Cloudflare also provides origin host IP address information in response to valid complaints from those entities that have demonstrated both a genuine need for such information and the ability to appropriately secure that sensitive data. As discussed further below, such information cannot be made generally available to the public without compromising our security services. Along with law enforcement agencies, a number of industry groups representing copyright holders participate in our Trusted Reporter program. Requests through this program are generally responded to in a matter of hours, and almost always within a business day. Our Trusted Reporter network allows all parties to build trust and to work collaboratively together, with the understanding that IP origin information is sensitive and can be used by bad actors in order to attack Cloudflare's security protection layer. Cloudflare leverages automation to facilitate its processes when appropriate, and looks forward to continuing to innovate in this space.

C. Different types of Internet services require different treatment under copyright law.

While we were pleased to see the Copyright Office recognize that the DMCA should continue to distinguish among different types of Internet services, its report did not fully explore the implications of those differences. The report focuses on the different burdens in compliance faced by online service providers of different sizes, but the technical nature of the services provided and the types of customers served are equally if not more important considerations. Any discussion of the DMCA should take into account the ability of service providers to identify and address infringement, and the unintended consequences likely to result from their attempts to do so, particularly in light of the dramatic changes to the Internet ecosystem that have occurred since the DMCA's enactment in 1998.

Conduit and caching services like the security and content delivery network (CDN) services provided by Cloudflare, for example, have become central to the efficiency, security, and reliability of the Internet since the DMCA's passage. Security services like those provided by Cloudflare have become essential to keeping websites online as DDOS and other cyber attacks have grown in size and frequency across the Internet. Similarly, caching services like those provided by Cloudflare also have been vital to the performance and resiliency of the Internet in the face of recent increases in traffic, as further explained in the attached study recently prepared by Analysys Mason.

Despite their importance to the Internet, these security and CDN services are often misunderstood and misrepresented in debates about how to address copyright infringement. Because Cloudflare does not host content for websites using our security and CDN services, we are unable to remove those websites' content when it is flagged. Even terminating our services altogether would not remove a website from the Internet, but only make it vulnerable to cyberattack.

Moreover, it is integral to Cloudflare's security services that websites change their DNS records to place Cloudflare's global network between the web properties and Internet users. This architecture protects websites by channelling Internet inquiries through Cloudflare's network rather than directly to the websites' hosting providers, thus allowing Cloudflare to prevent threats, including DDOS attacks. Making information publicly available about the exact location of the website origin host would facilitate circumvention of our security protection layer and allow websites to be attacked directly. Many CDNs, security providers and Virtual Private Networks (VPNs) follow a similar model of also routing Internet queries to locations other than the origin host in order to improve security and privacy.

Because of this configuration, Cloudflare's IP addresses may appear in public records for websites using our services, sometimes causing confusion as to the services we provide. While the Copyright Office's report (at page 34 & footnote 156) mistakenly suggests that our security services therefore "tip the balance away from copyright owners," our abuse reporting system ensures that complainants have the necessary hosting provider information and that infringement complaints are forwarded to those parties who can actually remove infringing content. Cloudflare thus goes beyond the procedures specified in the DMCA to assist rightsholders as much as possible consistent with the nature of the specific services at issue.

A clear understanding of the role that such services play in the Internet, and how service providers can best assist in addressing copyright infringement, will be critical to any future deliberations by Congress in this area.

D. In designing systems for addressing copyright infringement, online service providers must account for potential abuse of those systems through unfounded infringement complaints.

Another important consideration not addressed by the Copyright Office's report is the misuse of copyright laws through inaccurate or even fraudulent complaints of infringement, resulting in the unnecessary removal of non-infringing content from the Internet. While the Copyright Office apparently concluded that those problems were outside the scope of its report, such abuse of online service providers' abuse-reporting systems has serious implications for other aspects of copyright law that cannot be ignored in any future deliberations by Congress on this topic. Indeed, every aspect of any system

for addressing online infringement must account for the inevitable misuse of that system by bad actors.

The problems caused by the abuse of abuse-reporting systems are now well documented. The Wall Street Journal, for example, "identified hundreds of instances in which individuals or companies, often using apparently fake identities, caused the Alphabet Inc. unit to remove links to unfavorable articles and blog posts that alleged wrongdoing by convicted criminals, foreign officials and businesspeople in the U.S. and abroad."[3] And illegitimate complaints of infringement are not only submitted by malicious actors. Numerous stories have detailed instances in which broadcasts of political speech, artistic performances, and historic events have been removed or blocked from the Internet based on unfounded complaints of infringement, often submitted by automated systems established by rightsholders.[4]

While descriptions of abuses have thus far largely focused on the removal of non-infringing content by hosting providers, such abuses have the potential to undermine the security and reliability of the Internet more generally. When Cloudflare first launched its services in 2010, our practice was to provide complainants with the IP address of the site's hosting provider. As soon as attackers realized that the abuse system was a way of obtaining information that could be used to circumvent our protections, however, we saw a flood of what turned out to be illegitimate DMCA complaints, submitted with the intention of attacking the website. Cloudflare implemented our current approach shortly thereafter, to ensure that complainants had an avenue to submit their complaints while still protecting our customers from cyberattack.

Similarly, if Cloudflare were to terminate its cybersecurity services to websites based on false claims of infringement, those websites would be opened up to attack and the entire Internet would be less secure. Cloudflare takes such concerns particularly seriously because of the range of organizations it protects, including civil society and independent

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[3] *Google Erases Thousands of Links, Tricked by Phony Complaints*, Wall Street Journal (May 15, 2020), https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001;
[4]For example, see *Copyright Blocks Interview of Protesters Because Marvin Gaye's 'Let's Get It On' Was Playing In the Background*, techdirt (June 3, 2020), https://www.techdirt.com/articles/20200602/21391944634/copyright-blocks-interview-protesters-becau-marvin-gayes-lets-get-it-was-playing-background.shtml; *Copyright bots and classical musicians are fighting online. The bots are winning*, The Washington Post (May 25, 2020), https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html; *Just as The Copyright Office Tries to Ignore the Problem of Bad Takedowns, NBC & Disney Take Down NASA's Public Domain Space Launch*, techdirt (June 3, 2020), https://www.techdirt.com/articles/20200531/02061544613/just-as-copyright-office-tries-to-ignore-problem-bad-takedowns-nbc-disney-take-down-nasas-public-domain-space-launch.shtml;

journalism organizations,[5] election infrastructure,[6] and political campaigns,[7] which are often targeted for attack. The DMCA helps service providers like Cloudflare act responsibly in addressing potentially erroneous infringement claims by shielding them from potential liability, and any deliberations in this area should seriously consider the unintended consequences that would result from a different approach.

E. Approaches to the termination of repeat copyright infringers should reflect differences in service providers and the problems of abuse.

Finally, the Copyright Office's report did not adequately factor the above considerations into its discussion of the DMCA's condition on its safe harbor from liability that service providers "ha[ve] adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers . . . who are repeat infringers." 17 U.S.C. § 512(i)(1)(A).

Just as copyright law more generally should account for differences among online service providers, repeat infringer policies must appreciate the practical realities and complexities of that diversity. Repeat infringer determinations, particularly outside the hosting context, may require difficult assessments, such as whether an entity that uses the service that itself hosts user-generated content is secondarily infringing and whether that possible secondary infringement should be a basis for concluding the entity is a repeat infringer. This challenge is exacerbated for intermediaries that cannot see how such a provider responds to complaints of infringement. The report did not fully convey the magnitude of the challenge. Importantly, the response of the Copyright Office to Senator Tillis' letter assumed that an online service provider knows whether its customer hosts user-generated content or generates content itself. But even that fact can be difficult to discern for an infrastructure provider like Cloudflare that provides services to more than 26 million different Internet properties.

Online service providers also must account for the different consequences of terminating specific services on the basis of claimed infringement. As the Copyright Office recognized in its letter to Senator Tillis, an Internet access provider's termination of an individual's access to the Internet has far different implications than a hosting provider's termination of a website. Similarly, termination of CDN and security services like those provided by Cloudflare would do nothing to remove infringing content from the Internet, while suggesting that the right approach for addressing infringing content is a cyberattack. Termination of such services raises particular concerns when based on things like unverified infringement complaints that are easily subject to abuse.

[5] https://www.cloudflare.com/galileo/
[6] https://www.cloudflare.com/athenian/
[7] https://www.cloudflare.com/campaigns/

In light of these difficulties and the well-documented abuse of abuse reporting systems discussed above, we were concerned by the report's suggestion that online service providers should publish their repeat infringer policies and that repeat infringement determinations should be based solely on complaints, particularly the volume of such complaints. Such practices would invite further manipulation of abuse reporting systems, particularly where the termination of security or Internet access services would have significant consequences for the Internet's security and operation. While those practices might be appropriate for some types of online service providers, we believe this topic, like other areas of copyright law, should account for meaningful differences among service providers.

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Cloudflare appreciates the opportunity to share our perspective with you on this topic. We would be happy to provide any additional information, respond to any specific questions, or make ourselves available for a meeting to discuss any of the issues raised in our written statement, or indeed the statements of others.

Consumer Technology Association (CTA)® is the trade association representing the $401 billion U.S. consumer technology industry, which supports more than 18 million U.S. jobs. CTA's more than 2,000 member companies, of which 80% are small businesses, lead the technology industry in the development of on-line products and services, and the hosting of user-generated content, through CTA's manufacturer, OSP, and ISP members.

CTA has participated as an *amicus* in cases interpreting both Section 512 and the copyright law, and has participated in Office proceedings as to both Sections 512 and 1201 of the DMCA.

CTA suggests that the roundtable could usefully focus on these Copyright Office discussions and recommendations:

1. Red flag knowledge, including "right and ability to control" (110 – 136)
2. Repeat infringer / imputed knowledge to ISPs (95 – 109)
3. Notice and takedown / fair use (138 – 152)

While it is useful for the Office to have cabined its recommendations according to specific elements of the statute, CTA believes that these recommendations cannot be discussed in isolation from each other *and* from other areas of copyright law, especially secondary liability and the statutory damages provisions of Section 504. CTA's priority concerns over the Office recommendations can be thus summarized:

- Rejection of case law pertaining to "red flag" knowledge heightens the *in terrorem* effect on innovation of the out-of-scale statutory damages provisions, and threatens to degrade substantive law as to secondary liability.

- Interpreting the "repeat infringer" test to require only an *allegation* of infringement threatens users and furthers the dangers, to good-faith ISPs, from case law that (in CTA's view, wrongly) has imputed knowledge of user conduct to an ISP.

- The wait-and-see approach to *Lenz* epitomizes the Report's failure to give adequate weight to users as interested parties, and to fair use generally.

Digital Media
ASSOCIATION

September 29, 2020

The Honorable Jerrold Nadler
Chairman, House Judiciary Committee

The Honorable Jim Jordan
Ranking Member, House Judiciary Committee

Dear Chairman Nadler and Ranking Member Jordan,

We write to express our appreciation for your attention to the Copyright Office's long-awaited report on Section 512 of Title 17, United States Code. As the organization representing the major music streaming services, DiMA participated in the Copyright Office's roundtables during the development of the report, and in the roundtables held by your offices over the summer. We are grateful for your commitment to hearing the voices of all stakeholders and taking their positions into account as you continue to review the Office's report.

The Digital Millennium Copyright Act, and Section 512 in particular, provides a conceptual framework that allows internet companies to respect copyright while also enabling creators of all types to develop, distribute, and monetize their works in a variety of ways. As technology and businesses have evolved with the existing, settled law, stakeholders from all sides have been able to collaborate and drive revenues back into the arts industries.

The legal certainty created by the passage of Section 512 and the courts' interpretation of the law in the twenty-plus years since then has fostered innovation. DiMA members have been able to build different business models to bring digital music to consumers based in part on this settled law. Changes to the legal landscape could have broad impact on existing businesses and the next innovations, which is why we urge particular caution when reviewing this law.

While we recognize the work the Copyright Office put into developing the Section 512 report, we are concerned by the Office's statements that seem to call into question existing case law, including on repeat infringer policies and the Section 512(c) safe harbor. For example, courts have provided significant insight into the specific contours of the law's repeat infringer requirements. Technology companies have long relied on those insights and decisions. Specific to the Section 512(c) safe harbor, the Copyright Office concluded that it has been interpreted too broadly and that services that modify content or promote consumption of certain content may not be eligible. That conclusion runs directly in opposition to relevant case law.

Furthermore, the Copyright Office's Section 512 report discusses "Knowing Misrepresentation" and the abuse of notice and takedown. Abuse of notice and takedown plagues the entire ecosystem, from rightsholders to online service providers (OSPs). Section 512, as currently written, allows OSPs the flexibility to develop tools that make sense for their products and systems, and OSPs have worked collaboratively with rightsholders to minimize abuse. However, problems do remain in this area, requiring diversion of resources from legitimate takedown requests. DiMA remains committed to engaging with stakeholders to work towards solutions to this challenge.

As you continue your review of the current law and the Copyright Office's report, we firmly believe any changes to the current legal regime must be approached with caution, input from all stakeholders, and due consideration of the existing business models and technology that benefit all stakeholders (including internet platforms, rightsholders, and users) today.

Once again, we thank you for your commitment to ensuring all voices are heard and for the open process in which you are reviewing the existing law.

Sincerely,

Digital Media Association

House Judiciary Committee Hearing

Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades

September 30, 2020

Corynne McSherry, Ph.D

Legal Director

Electronic Frontier Foundation

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With more than 30,000 dues-paying members, and well over 1 million social network followers, we work to ensure that the use of technology enhances justice and creativity.

As part of that work, we have participated—as party counsel or amicus—in virtually every major case interpreting the Digital Millennium Copyright Act. As a legal service organization, we also field regular inquiries from users who have been targeted by improper takedown notices, helping them respond when we can.

We thank the Committee for providing us an opportunity to share our findings on Section 512 of the Digital Millennium Copyright Act, and the Copyright Office's report.

Notice and Takedown

One guidepost for EFF's work is the knowledge that Section 512 of the DMCA is meant to balance the interests of online service providers, rightsholders, *and* users. Congress knew that Section 512's powerful incentives could result in lawful material being censored from the Internet, without prior judicial scrutiny, much less advance notice to the person who posted the material, or an opportunity to contest the removal.

Accordingly, Congress made sure that the DMCA included a series of checks and balances. First, it included Section 512(g), which creates a counter-notice process that allows for restoration after a two-week waiting period. Second, it included Section 512(c)(3), which sets out clear rules for asserting infringement under the DMCA. Third, it included Section 512(f), which gives users the ability to hold rightsholders accountable if they send a DMCA notice in bad faith.

As the Senate Report on Section 512(f) explained,

> The Committee was acutely concerned that it provide all end-users . . . with appropriate procedural protections to ensure that material is not disabled without proper justification. The provisions in the bill balance the need for rapid response to potential infringement with the end-users['] legitimate interests in not having material removed without recourse.

S. REP. NO. 105-190 at 21 (1998).

Specifically, Section 512(f) creates a cause of action against "[a]ny person who knowingly materially misrepresents under this section [i.e., under Section 512] – (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification." By its clear language, Section 512(f) refers back to Section 512(c)(3), which outlines the specific affirmations required to allege infringement under the DMCA. *See id.* § 512(c)(3)(A); *see also id.* § 512(b)(2)(E) & (d)(3). A mere statement that material is "infringing" does not suffice; to allege infringement under the DMCA the complaining party must state that it "has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, *or the law*." *Id.* § 512(c)(3)(A)(v) (emphasis

added). As the district court explained in this case, "both [the statute and the applicable case law] frame the [Section 512(f)] inquiry in terms of whether the party that issued the takedown notice had a 'good faith belief' that use of the copyrighted work was unauthorized." Pet. App. 46a (citations omitted). Taken together, Sections 512(c) and (f) deter improper notices: 512(c) by requiring a notice sender to properly consider whether her notice targets actual infringement; 512(f) by imposing a penalty if she fails to do so.

Takedown Abuse Is Common

Unfortunately, those provisions have not curbed abuse. Section 512 gives intermediaries powerful incentives to take offline any content flagged in a DMCA notice. Thanks to those incentives, as a practical matter they will take down virtually any content identified in a compliant notice. That means Section 512 also gives purported rightsholders the ability to shut down lawful expression—videos, blog posts, criticism, political advertising, even news articles that contain snippets or quotes from other sources—without far too little accountability.

The problem of false and abusive takedown notices is well documented. Service providers have confirmed that unfounded DMCA notices are common and significantly burdensome.[1] Indeed, one study revealed that, in a sample of automated takedown notices, 4.2% (nearly 4.5 million takedown requests), "targeted content that clearly did not match the identified infringed work" and 7.3% involved potential lawful expression.[2] For example, Automattic Inc. reported that "about 10% of the notices of claimed infringement we received contained the elements of notification required by section 512(c)(3), but were directed at clear fair uses, clearly uncopyrightable content, or contained clear misrepresentations regarding copyright ownership."[3]

And the collateral damage gets worse when takedown notices target, not specific user-uploads, but upstream network providers. In one case, for example, a takedown notice targeted at silencing a parody website, sent to the site's upstream network provider, resulted in the removal of 38,000 websites from the Internet.[4]

Here are just a few of many examples:

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[1] Brief of Amici Curiae Automattic, Inc., Google, Inc., Twitter, Inc., and Tumblr, Inc., Supporting Petition for Rehearing En Banc, *available at* https://www.eff.org/document/amicus-brief-automattic-google-twitter-tumblr-iso-petition-rehearing (giving numerous examples and describing the resulting burden).

[2] Jennifer Urban et al., *Notice and Takedown in Everyday Practice* (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628

[3] Comments of Automattic, Inc., *In the Matter of Section 512 Study*, U.S. Copyright Office Docket No. 2015-7, March 31, 2015.

[4] Rashmi Rangnath, *U.S. Chamber of Commerce uses the DMCA to silence critic*, Public Knowledge (Oct. 27, 2019), *available at* https://www.publicknowledge.org/blog/u-s-chamber-of-commerce-uses-the-dmca-to-silence-critic/

- An unknown copyright holder claimed the Trump campaign had infringed copyright with a video addressing the unjustified killing of George Floyd, and demanded Twitter take the video down.[5]
- Baseless copyright claims caused a service provider to disable access to a political debate.[6]
- A Wall Street Journal investigation revealed that Google had been tricked into deleting links to critical articles;[7]
- Media personality and addiction specialist Dr. Drew Pinsky asserted copyright to remove a video which compiled a number of clips of the doctor's incorrect or misleading statements about COVID-19, despite the video being a clear example of criticism.[8]
- Journalists uncovered a well-funded and sustained campaign by the government of Ecuador to abuse the DMCA to silence criticism of President Rafael Correa.[9]
- BMG Rights Management sent a takedown targeting an official Romney campaign ad that showed President Obama singing a line from the Al Green song "Let's Stay Together."[10]
- Artist Jonathan McIntosh found his remix video Buffy vs. Edward: Twilight Remixed — which was mentioned by name in official recommendations from the Copyright Office regarding DMCA exemptions for transformative noncommercial video works —subject to a DMCA takedown notice.[11] It took three months of intense legal wrangling before Lionsgate finally relinquished its claim.
- An Australian music publisher used YouTube's automated takedown process, Content ID, and the DMCA to force the takedown of an entire lecture delivered and posted by

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[5] Matt Schruers, *Claims Against Trump Campaign Video Call for Revisiting Intersection of Speech and Copyright*, Disruptive Competition Project (June 6, 2020), *available at* https://www.project-disco.org/intellectual-property/060620-claims-against-trump-campaign-video-call-for-revisiting-intersection-of-speech-and-copyright

[6] Charlie Hall, *Report: Phony DMCA claims nuked Twitch streams of the Democratic debate*, Polygon (Feb 28, 2020), *available at* https://www.polygon.com/2020/2/28/21155955/twitch-streamers-banned-democratic-debate-phony-dmca

[7] Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), *available at* https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001

[8] Mike Masnick, *Dr. Drew Pinsky Played Down COVID-19, Then Tries To DMCA Away The Evidence*, Techdirt (April 6, 2020), available at https://www.techdirt.com/articles/20200404/23222044237/dr-drew-pinsky-played-down-covid-19-then-tries-to-dmca-away-evidence.shtml

[9] James Ball & Paul Hamilos, *Ecuador's President Used Millions of Dollars of Public Funds to Censor Critical Online Videos*, BuzzFeedNews (Sept. 24, 2015), available at www.buzzfeed.com/jamesball/ecuadors-president-used-millions-of-dollars-of-public-funds

[10] Timothy B. Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, Ars Technica (July 16, 2012), *available at* http://arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/

[11] See Jonathan McIntosh, *Buffy vs. Edward Remix Unfairly Removed by Lionsgate* (Jan. 9, 2013), *available at* http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate

Professor Lawrence Lessig because it included illustrative clips of a number of videos set to a piece of music in which the company held copyright. When Professor Lessig counter-noticed pursuant to Section 512(g), the publisher, Liberation Music, threatened to take legal action within 72 hours if Professor Lessig did not withdraw his counter-notice.[12]

- Similarly, in early 2020, an NYU Law School panel about how one proves similarity in music in infringement cases was removed from YouTube because the music triggered the filter. Not even the copyright law experts could figure out what would happen to their account if they disputed the filter match—if it would count as a DMCA takedown, how many "strikes" the account would get, etc.—and the account was only restored through backchanneling.[13]
- Musician James Rhodes put a video of himself playing Bach on Facebook. Sony Music Entertainment claimed that 47 seconds of that performance belonged to them, and rejected Rhodes' disputation of the claim.[14]

We included more in our comments to the Copyright Office for the 512 study[15] and collect even more in our Takedown Hall of Shame.[16] The majority of DMCA notices appear to target infringing content. But when they don't, they cause enormous collateral damage to free expression. Such a powerful tool requires equally powerful mechanisms for accountability, which are sadly lacking in the United States.

Counternotifications Are Not a Meaningful Check on Abuse

The counter-notification process is rarely used, even when a user is relatively confident they have not infringed copyright.[17] Counter-notices are confusing and intimidating for the average user, requiring a lot of information and making clear the chance of a lawsuit that a regular person cannot hope to afford.

The amount of personal information required by a counter notice is of particular note. Just last

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[12] *See,* e.g., Michael B. Farrell, *Online Lecture Prompts Legal Fight on Copyright*, BOSTON GLOBE (Aug. 26,2013), *available at* http://www.bostonglobe.com/business/2013/08/26/harvard-law-professor-sues-record-company-over-phoenix-lisztomania/jqYkgFaXSgGpd2hL2zsXsK/story.html

[13] Engelberg Center on Innovation Law & Policy, *How Explaining Copyright Broke the YouTube Copyright System*, NYU School of Law, *available at* https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown?fbclid=IwAR1ruv0KnYwVawITN1uEv9J5FCxzVkPEUySSVEEZ7S78eeKFRmOX2tefnNA

[14] *See*, EFF, *Sony Finally Admits It Doesn't Own Bach and It Only Took a Bunch of Public Pressure*, *available at* https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure

[15] Corynne McSherry and Kit Walsh, *Comments of the Electronic Frontier Foundation*, EFF (April 1, 2016), *available at* https://www.eff.org/document/eff-512-study-comments

[16] *Takedown Hall of Shame,* Electronic Frontier Foundation, *available at* https://www.eff.org/takedowns.

[17] *See* Jennifer Urban, Joe Karaganis and Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628, at 44.

month, journalist Luke O'Neil received a takedown notice from Ryan Hintze, a self-described Twitter troll whom O'Neil had interviewed for a Vice.com article in 2018. The takedown was for a link to that article in a tweet. When O'Neil shared a screenshot of the DMCA takedown he had received on Twitter, Hintze sent a takedown for that as well.[18]

O'Neil explained that he didn't want to send a counter notice because he'd have to "send the guy harassing me my full name and address."[19]

YouTube recently sued Christopher Brady under section 512(f) of the DMCA. Brady was allegedly abusing the notice and takedown regime and YouTube's repeat infringer policy to extort creators. When one creator correctly used a counter-notice to challenge the false takedowns, Brady allegedly used the information in the counter-notice to swat the creator. (Swatting is harassment technique that consists of calling in a fake emergency to 911, resulting in a large number of police officers, often with guns drawn, showing up to the target's home.) Brady and YouTube settled, with Brady apologizing and admitting to sending false takedowns. The amount of identifying information required by counter-notices is a strong disincentive for users to send them, even when the takedowns are illegitimate. And, as the Brady case and cases where abusive spouses used the DMCA to find their victims[20] show, that fear is not unwarranted.

Finally, even if a user sends a counter notice, they could end up waiting far too long for their content to be restored. The Copyright Office noted in both the report and its subsequent letter to Senators Tillis and Leahy that users suffer from the 10-to-14-day window for works to be restored[21]. The Letter points out that, in the context of the Internet, the timeframe "does not sufficiently reflect the time-sensitive nature of content on the internet or comport with current business models."[22]

We agree.

Section 512(f) Has Been Misinterpreted by the Courts

The Copyright Office report expressed reservations about the Ninth Circuit's interpretation of Section 512(f) in *Lenz v Universal,* 815 F.3d 1145 (9th Cir. 2016). We also have reservations – but they are quite different in nature.

As a cause of action enacted to protect users' speech, Section 512(f) should be construed broadly to ensure that it provides users with the recourse Congress intended. *See Tcherepnin v. Knight*,

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[18] EFF, *Self-Described Twitter Troll Ryan Hintze Discovers New Way to Troll Twitter: the DMCA*, EFF Takedown Hall of Shame, *available at* https://www.eff.org/takedowns/self-described-twitter-troll-ryan-hintze-discovers-new-way-troll-twitter-dmca

[19] Tweet from Luke O'Neil *available at* https://twitter.com/lukeoneil47/status/1278062014661828608.

[20] *See* Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown in Everyday Practice* 44 UC Berkeley Public Law Research Paper No. 2755628, (Mar. 29, 2016), *available at* https://ssrn.com/abstract=2755628

[21] Copyright Office Report at 159.

[22] U.S. Copyright Office Responses to Additional Questions Regarding Section 512 (June 29, 2020) at 4-5

389 U.S. 332, 336 (1967); 3 Norman J. Singer, Sutherland Statutory Construction § 60.02 (7th ed. 2014). The Ninth Circuit Court of Appeals did not do so. Instead, it held that a jury could find—as a factual matter—that the defendant's procedures were "sufficient to form a subjective good faith belief about the video's fair use or lack thereof." *Lenz*, 814 F.3d 1154. In holding that a purely subjective good faith belief would suffice, the circuit court relied on its prior mistaken conclusion, in *Rossi v. Motion Picture Association of America, Inc.*, that "the 'good faith belief' requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard." 391 F.3d 1000, 1004 (9th Cir. 2004).

In *Rossi,* the Ninth Circuit relied on three cases interpreting the bare phase "good faith." *Rossi,* 391 F.3d at 1004. But Section 512(c)(3)(A)(v) does not use the bare phrase "good faith"—it requires a good faith *belief.* The word "belief," on its own, already requires a subjective state of mind; if *any* subjectively held viewpoint is a "good faith belief," the words "good faith" become superfluous. Instead, context demands that the phrase "good faith belief" requires a subjectively held viewpoint (a "belief") that is also *reasonably* held (in "good faith"), even if it is wrong. This means that a representation of a good faith belief is a "knowing misrepresentation" actionable under Section 512(f) if it is *either* not subjectively held (there is no "belief") *or* unreasonably held (the belief is not held in "good faith"). *See Cooper v. Schlesinger,* 111 U.S. 148, 155 (1884) ("a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule").

In addition, a reasonable belief requirement helps reconcile the DMCA and the First Amendment. The Supreme Court has repeatedly affirmed that while Congress has broad latitude to exercise its power under Article I, section 8, it goes too far when it alters the traditional contours of copyright. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *see also Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). Mindful of this balance, courts hesitate to restrain speech where a party has raised a colorable fair use defense. In *Suntrust v. Houghton-Mifflin*, 268 F.3d 1257 (11th Cir. 2001), for example, the court explicitly recognized fair use's "constitutional significance as a guarantor to access and use for First Amendment purposes." *Id.* at 1260. Because a viable fair use defense was available, the court concluded that "the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech . . . ." *Id.* at 1276-77.

In *Suntrust*, of course, the defendant had an opportunity to plead her fair use case. The DMCA contemplates a scheme where by the secondary user has no opportunity to even raise a fair uses defense before her speech is restrained. A law that grants a private actor the power to do what even a court cannot—cause the prior restraint of speech based on a purely ex parte review—alters not only the traditional contours of copyright protection but of our fundamental free speech doctrines. *See Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 184-85 (1968) (holding that ex parte review offers "insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication").

The Ninth Circuit has placed the burden on the person whose speech was taken down to prove to a jury the subjective belief of the censor—a standard that will be all but impossible for most to meet, particularly if they lack the deep pockets necessary to litigate the question. As one

commentator has noted, requiring a plaintiff to "demonstrate[e] the subjective belief of the copyright owner not only is inconsistent with the statutory language, but . . . would thwart the purpose of including the misrepresentation claim within the statutory scheme." Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 774 (2011).

It gets worse: If the sender of an improper takedown cannot suffer liability under Section 512(f) no matter how unreasonable its belief, the decision below effectively eliminates Section 512(f) protections for even classic fair uses upon which creators rely. *Lenz*, 815 F.3d at 1160 (M. Smith, J., dissenting) (concluding that the Ninth Circuit's "construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices"). For example, some rightsholders unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to make sure such beliefs don't thwart new creativity. Allowing a copyright owner to hide behind unreasonable beliefs undermines this crucial protection for online expression.

By contrast, requiring a rightsholder to form a reasonable good faith belief as to whether the use she is targeting is unlawful or not comports perfectly with Congress' intent to "ensure that material is not disabled without proper justification." S. REP. NO. 105-190 at 21 (1998). To be clear, in many instances this task will not be difficult. In many cases, a reviewer will be confronted with facts that make the legal conclusion of infringement simple. In other instances, a reviewer will be confronted with facts that make the legal conclusion of non-infringement equally simple. As for the edge cases, where it is not immediately clear whether the uses is lawful for not, the reviewer is obligated only to form a reasonable belief—one that is defensible, even if it turns out to be incorrect. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (a good faith belief "need not be correct," but it must "be defensible").

A subjective standard also hurts law-abiding rightsholders by forcing service providers to devote resources to addressing improper notices. As some of the largest intermediaries in the U.S., including Google and Twitter, explained in their amicus brief in support of Lenz's Petition ofr certiorari, those resources could be devoted instead to efficiently processing valid notices. *See* Brief of Amici Curiae Automattic Inc., Google Inc., Twitter Inc., & Tumblr, Inc. in Support of the Petitioner at 6-11. Wordpress, for example, reported that 10% of the notices it receives are abusive. Google and Twitter also offered a host of examples of abuse. Nonetheless, they must respond. Indeed, in comments filed before the Copyright Office, the Computer and Communications Industry Association noted that "99% of DMCA response resources are spent on 1% of the takedowns," and that part of the problem is that "penalties for incompetence and malicious takedowns are trivial."[23]

Ultimately, as a White House Report observed, the "misidentification of non-infringing content as infringing risks affecting the integrity of the notice-and-takedown regime for rights holders,

[23] *See* Comments of the Computer & Communications Industry Association at 10-11, 512 Study, Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C., http://www.ccianet.org/wp-content/uploads/2016/04/CCIA-Section-512-NoI-Comments-2016.pdf

Internet intermediaries, and users."[24]

Threats to Anonymous Speech

The ability to speak anonymously is protected under U.S. and international human rights standards because many people may hesitate to speak and share information if they fear exposure and retaliation.

The DMCA includes a specific provision allowing purported rightsholders to obtain a subpoena for the identity of an alleged infringer, without meaningful judicial supervision or a determination that the claim is legitimate. At EFF, we have repeatedly seen rightsholders use baseless copyright allegations to unmask critics or target people for harassment. For example, we recently defended the anonymity of a member of a religious community who questioned a religious organization, when the organization sought to abuse copyright law to learn their identity.[25] But not every speaker has the opportunity or ability to protect themselves.

The Report Recommends Cutting Off Internet Access Based on Mere Allegations of Infringement, While Recognizing the Danger of Such a Policy in Other Contexts

In order to take advantage of the safe harbor included in section 512, companies must have a "repeat infringer" policy. This requirement is fairly flexible, since different companies offer different products and services, but in all cases, the service provider must have procedures in place to terminate users who have repeatedly infringed. Perhaps the most famous iteration of this requirement is YouTube's "Three Strikes" policy: If a user gets three copyright strikes in ninety days on YouTube, their account is deleted, all videos are removed, and they cannot create new channels.[26] Fear of getting to three strikes has not only made YouTubers very cautious; it has also created a landscape where extortion can flourish.[27] And that is just the landscape for YouTube.

The Report suggests that the real problem of repeat infringer policies is that courts are not requiring service providers to create and enforce stricter ones, kicking more people off the Internet entirely.[28] Many millions of Americans use the Internet for work, career building, education, communication, and personal purposes.[29] The Internet is vital to people's everyday

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[24] U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017-2018 at 71, https://www.whitehouse.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf

[25] *Redditor Wins Fight to Stay Anonymous*, EFF Press Release (March 3, 2020), *available at* https://www.eff.org/press/releases/redditor-wins-fight-stay-anonymous

[26] Copyright Strike Basics, YouTube, https://support.google.com/youtube/answer/2814000?hl=en

[27] Jack Hauen, *A Scammer Used YouTube's Copyright System to Ransom Creator*, Vice.com (Feb. 7, 2019), https://www.vice.com/en_us/article/evevdk/scammer-used-youtube-copyright-system-to-ransom-creators

[28] Copyright Office Report at 100-09.

[29] Ernesto Falcon, *New FCC Data Indicates Future Broadband Access for Most Americans Will Be a Monopoly*, EFF (Dec. 12, 2018), https://www.eff.org/deeplinks/2018/12/new-fcc-data-indicates-future-broadband-access-most-americans-will-be-monopoly

lives. To lose access because of an unproven accusation of copyright infringement would be, as the Copyright Office briefly acknowledges, "excessively punitive."[30]

The Office does suggest that a different approach might be needed for students and universities, because students need the Internet for "academic work, career searching and networking, and personal purposes, such as watching television and listening to music," and students living in campus housing would have no other choice for Internet access if they were kicked off the school's network.[31] However, these uses do not meaningfully distinguish the populations of universities from the general population.

Conclusion

Section 512 has played an essential role in the development of the Internet as a platform for expression and innovation. Without Section 512, the risk of crippling liability for the acts of users would have prevented the emergence of most of the social media outlets we use today. Instead, the Internet has become the most revolutionary platform for the creation and dissemination of speech that the world has ever known.

But that growth has come at a high price, because it also gave notice-senders the effective power of a temporary injunction. In any other area of law, we would require a judge to determine whether speech should be silenced. When we allow one category of speech to sidestep traditional safeguards, we need meaningful mechanisms to protect against abuse, beginning with requiring notice senders their obligations seriously and learn the tool that they are using, and helping users fight back when that tool is abused.

[30] Copyright Office Report at 98.

[31] *Id.* at 109-10.

September 28, 2020

Dear Members of the House Committee on the Judiciary,

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. We appreciate the opportunity to submit these comments regarding the Report of the Register of Copyrights on Section 512 of Title 17.[1]

Section 512 of the Digital Millennium Copyright Act ("DMCA") is a critical area of the law for U.S. startups. It allows startups to host user-generated content, and provides essential certainty they will not face crippling litigation or liability for alleged infringement they have no knowledge of or involvement in. Any changes to the current statute, or the notice-and-takedown and safe harbor system it embodies, might not have a significant impact on large companies that can accommodate adjustments in policy. But such changes could have an outsized, negative impact on startups and smaller online service providers ("OSPs"). Those changes would, in turn, have a negative impact on the users and creators who rely on these startups and smaller OSPs.

Indeed, twenty years after the DMCA passed, the evidence of its success is apparent. The U.S. has demonstrated its leadership in the global Internet ecosystem, a critical catalyst for job creation.[2] And the technology and business of running an Internet company are increasingly accessible.[3] There is also a large and growing creative class that has come into existence thanks to a diversity of Internet platforms and online technology.[4] Technology has democratized creativity, and created entirely new ways for

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[1] *Section 512 of Title 17: A Report of the Register of Copyrights*, United States Copyright Office (May 2020), *available at* https://www.copyright.gov/policy/section512/section-512-full-report.pdf [hereinafter "Copyright Office's report"].

[2] *See, e.g.*, McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity*, McKinsey & Company (May 2011), https://www.mckinsey.com/~/media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_exec_summary.ashx (study showing Internet consumption and expenditure contributing significantly to the economy, including that the U.S. captured more than 30% of global Internet revenues and more than 40% of net income).

[3] For example, the cost of running a basic Internet application fell from $150,000 per month in 2000—two years after the DMCA passed—to $1,500 per month in 2011. Marc Andreessen, *Why Software Is Eating The World*, Wall St. J. (Aug. 20, 2011), http://on.wsj.com/1gt4wRH.

[4] *See, e.g.*, Colin Sullivan, *Creators and Tech Companies Can Be Friends*, Medium (Jan. 19, 2017), https://patreonhq.com/creators-and-tech-companies-can-be-friends-c18a8508c60d ("It is the best time to be a creator

independent creators to reach fans and customers. Overall, robust technical, creative, and economic sectors have emerged that were not possible before the DMCA.

While the Copyright Office did not recommend any specific legislative changes, its report appears critical of the current state of § 512 based on the incorrect perception that OSPs uniformly see the law as a success and rightsholders have concerns, which the Office interprets as requiring recalibration. This theme is unfortunately consistent with rhetoric over § 512 which creates a false dichotomy of "tech stakeholders" and "copyright stakeholders." But this characterization leaves out a large and very important group of stakeholders: Internet users. And this third category of stakeholders is a large and diverse group that includes numerous small, Internet-enabled creators who are rightsholders themselves. Internet users, copyright owners, and OSPs have long recognized problems with the DMCA and related copyright laws—just different ones.[5] If any stakeholder group were to rewrite the rules governing online copyright liability from scratch themselves, they would not craft identical proposals and neither would replicate every aspect of § 512. This is the mark of a compromise—a compromise that remains relevant and successful today.

Against this backdrop, the Copyright Office's report raises a constellation of concerns. Briefly:

- *The current safe harbors and definitions of service providers are appropriate, and Congress must preserve flexibility and breadth in those definitions.* The Copyright Office's report expresses some concern with how courts interpret the statutory language regarding OSPs eligibility for the safe harbors.[6] To the contrary: In defining which service providers would be eligible for safe harbors, Congress successfully wrote a law that is broad and flexible. Indeed, Congress wanted to create safe harbors that "ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand."[7] And it did. Congress should not constrict those definitions.

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in human history, and that is largely due to the internet."); Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy*, Re:Create 2 (Feb. 2019), https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative- Economy-Study.pdf (reporting $6.8 billion in earnings for 17 million U.S. creators from these platforms: Amazon Publishing, eBay, Etsy, Instagram, Shapeways, Tumblr, Twitch, WordPress, and YouTube).

[5] Likewise, focusing narrowly on § 512 offers a limited perspective on the DMCA and fails to account for the broader copyright law, which many OSPs, Internet users, and Internet-enabled creators would argue only works for certain traditional rightsholder communities. Section 512 is only one fraction of the DMCA, and the DMCA is one statute in a much broader body of copyright law. In that broader context, some rightsholders wield disproportionate leverage under the law, and have been able to sue or threaten startups out of existence and stifle non-infringing speech and creativity. Merely by way of example, in 1998 and 1999, Congress passed many laws that considered certain rightsholders' interests over those of, e.g., OSPs and users. For example, § 1201 of the DMCA expressly supplemented preexisting rights of copyright owners; in 1998, Congress extended copyright term another 20 years; and in 1999, Congress increased statutory damages by 50%.

[6] Copyright Office's report at 85-86. While it is beyond the scope of these comments, we have some concern with the role of the Copyright Office engaging in statutory interpretation which directly conflicts with a well-reasoned body of case law where courts—the branch of government traditionally responsible for statutory interpretation—have engaged in careful and thorough analysis of the statute while interpreting it and applying it in the context of several actual disputes.

[7] S. REP. 105-190, 8.

- *The DMCA's current knowledge standards are well tailored, and changes in this area of the law would put startups and their users at a significant disadvantage.* Imposing a duty to monitor or modifying the "red flag" standard even slightly would undermine the certainty of safe harbors. Specifically, the Copyright Office's report unfortunately recommends incorporating "reasonableness" into § 512's knowledge standards.[8] This is particularly fraught from a startup perspective. Conditioning safe harbor protections on a startup adopting a "reasonable" approach to affirmative monitoring would be unworkable. It would be a fact-specific inquiry,[9] have to be defined case-by-case (which could exceed $500,000/case),[10] and it could easily cost more than a startup has to prove its practices are reasonable. Such a safe harbor would have little practical value.[11]

  Likewise, the reasonableness standard is intentionally flexible, meaning that what is reasonable one month might not be reasonable the next—as technology changes, as a company grows, or as the type of infringement it encounters shifts. All of those are unpredictable occurrences, but considering the fast pace at which new technology emerges and how quickly startups can (and do) grow, the problem of a shifting reasonableness standard makes it a very poor fit to this context, since a startup could never know in advance whether or not a court would find its practices reasonable.[12]

- *Any changes to the knowledge standards implicate filtering tools—tools which are inadequate, expensive, and/or non-existent.* Any changes to § 512, namely changes to the knowledge standard or imposing some duty to monitor, could easily amount to a *de facto* requirement that platforms filter all user-generated content. But automated tools have many inherent limitations which make them incapable of fully addressing copyright infringement. Even complex, existing technologies are limited in their capacity to accurately identify the content they are designed to identify.[13] In addition, even the most sophisticated tools (which are still imperfect) are so expensive they would not be obtainable for startups.[14]

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[8] Copyright Office's report at 124.

[9] *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (reasonableness of repeat infringer policy a question of fact); *see also Tran v. State Farm Mut. Auto. Ins. Co.*, 999 F. Supp. 1369, 1372 (D. Haw. 1998) ("An analysis of what is reasonable is almost always de facto a question for the jury.").

[10] Evan Engstrom, *Primer: Value of Section 230*, Engine (Jan. 31, 2019), https://www.engine.is/news/primer/section230costs.

[11] *See, e.g.*, Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 25 (Mar. 2017), https://www.engine.is/the-limits-of-filtering.

[12] *Id.* at 24.

[13] *See, e.g.*, Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 Colum. L. Rev. Sidebar 83, 102-03 (2012) (describing how "[f]iltering is notoriously prone to mistakes and shortcomings and constantly risks being both over- and under-inclusive"); *see also, e.g., Is the DMCA's Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress 21-22 (2020) (testimony of Abigail A. Rives), *available at* https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf; *see generally* Engstrom *supra* note 11.

[14] *Id.*

- *OSPs should retain flexibility in defining and implementing repeat infringer policies.* Judicial conceptions of a "repeat infringer" are problematic, because some courts have started to treat repeat *accused* infringers as repeat *actual* infringers,[15] despite the fact that the statute uses different language to refer to claims of infringement and repeated acts of infringement.[16] The Copyright Office's report is concerning to the extent it is read to endorse that *mere accusations* of infringement should be enough to remove users from the Internet or deprive small, independent creators of their ability to post their own creations.[17] Mere (and often improper) allegations of infringement should not be enough to remove someone from a platform. And OSPs should not be forced to expel their customers, users, and creators based on mere allegations of infringement. Instead, OSPs need flexibility to develop and apply repeat infringer policies, to collect and review facts of individual cases and remove those users deemed to be actual repeat infringers. Binding them to rigid frameworks, and necessarily tying these decisions to allegations of infringement, will just make it easier for abusers to know what accusations to make to stifle competitors, other creators, critics, or Internet users.

- *The Copyright Office has correctly identified education as an opportunity, and plans to launch educational efforts relevant to the DMCA.*[18] The burden imposed by improper notice senders and some volume of infringement claims could be alleviated by better education for Internet users and rightsholders about what is (and is not) infringement, how to send a proper notice, and which individuals possess rights to enforce a copyright.

- *The notice & takedown system is essentially working, and working well, but there is abuse of the system and no meaningful opportunities to curtail it.* Unfortunately, the Copyright Office's report does not recommend increased penalties for misrepresentation in abusive notices or counter-notices, nor does the report contain any other suggestions for resolving the problem of abuse of the notice-and-takedown system. Instead, the Copyright Office noted that many people raise concerns about abuse.[19]

  Improper takedown notices are a significant problem and the current DMCA fails to meaningfully combat that problem.[20] Sections 512(f) and (g) should be mechanisms for users to push back against improper notices, but those provisions have proven ineffective at combating the problem.[21] Indeed, since issuing its report, the Copyright Office has further stated:

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[15] *E.g.*, *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns Inc.*, 881 F.3d 293 (4th Cir. 2018).

[16] *E.g.*, *compare* 17 U.S.C. § 512(c)(3)(A) *with* § 512(i)(1)(A) (referring separately to "notification[s] of *claimed* infringement" versus "repeat infringers") (emphasis added).

[17] *See* Copyright Office's report at 103.

[18] Copyright Office's report at 6, 171-73.

[19] Copyright Office's report at 145-46.

[20] Rives *supra* note 13 at 11-17.

[21] *See, e.g.*, Jennifer M. Urban *et al.*, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc'y U.S.A. 371 (2017) (recommending that notice-and-takedown "needs better mechanisms for ensuring that infringement is actually likely before material comes down and stays down, and better due process mechanisms for targets).

> The Office recommends that Congress consider not only reforms to section 512(f), but also broader solutions outside of section 512 to address abuse practices generally, including the filing of abusive complaints in court or the sending of abusive cease and desist letters. The issue of abusive allegations of copyright infringement is serious, and congressional attention to the broader question of how to best discourage such uses of the copyright system could provide more effective mechanisms to address the problem.[22]

* * *

Thank you again for the opportunity to provide these comments. We remain committed to engaging with Members on how the DMCA works for startups and smaller OSPs, and what any changes to the current framework would mean for them. And, as in all policy areas, Engine strives to seek solutions and work with lawmakers whenever possible to find compromise that ensures clarity for startups.

[22] Letter from Maria Strong, Acting Register of Copyrights and Director, to Senators Thom Tillis and Patrick Leahy 4 (June 29, 2020), *available at* https://www.copyright.gov/laws/hearings/response-to-may-29-2020-letter.pdf.

Independent Film & Television Alliance®

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September 24, 2020

The Honorable Jerrold Nadler
Chairman, Judiciary Committee
U.S. House of Representatives
Washington D.C. 20515

The Honorable Jim Jordan
Ranking Member, Judiciary Committee
US House of Representatives
Washington, DC 20515

Re: IFTA Comments in connection with the House Judiciary Committee's Hearing on **"Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades"** on Sept. 30, 2020

Dear Chairman Nadler and Ranking Member Jordan,

The Independent Film & Television Alliance (IFTA) represents over 120 companies, the majority of which are small to medium-sized, U.S.-based businesses which have financed, produced and distributed many of the world's most prominent films, including 80% of the Academy Award® winners for "Best Picture" since the Association was formed in 1980. Collectively, the independent sector accounts for over 70% of all films produced in the U.S. each year. Section 512 is not an effective tool for independent film producers to enforce their copyrights online.

IFTA actively participated in the Copyright Office's Section 512 Public Study including hearings, roundtables, and listening sessions and its comments and statements are cited in the 2020 USCO Report (*See Addendum*). IFTA appreciates this opportunity to re-iterate the independent film industry's need to enforce their content online against massive streaming piracy and the urgent need to update and improve Section 512.

IFTA's specific recommendations with respect to the Copyright Office's report are as follows: 1) today's system under Section 512 of repeated notices-and-individual takedowns of illegal copies must be updated by a system in which further uploads of the same content are blocked by the ISPs ("notice and staydown"); 2) legislation is needed to ensure that all content owners, including small independents, have access to effective tools to fight theft of their copyrighted works; 3) voluntary industry measures alone are not an adequate answer as smaller businesses and creators are routinely excluded either in fact or by cost from such agreements.

These concerns go to the heart of why Section 512 falls short for the independents as they continue to face massive online infringement of their copyrighted works with no way under current law to stop the repeated introduction and rapid proliferation of illegal copies across the internet. The current statutory framework that requires the identification and notification of every instance of infringement of the same work on an ongoing basis cannot deter today's scourge of online piracy.

IFTA has long been on the record calling for a rebalanced approach to the Section 512 "safe harbors," through updated legislation providing a notice-and-staydown framework that incentivizes all stakeholders in the digital ecosystem to take effective and rapid action against online piracy, especially pre-release theft. While

IFTA recognizes the importance of cooperative efforts, voluntary measures to supplement the current Section 512 framework have not been widely embraced by ISPs, they routinely exclude or price-out independents from participation, and they are unenforceable in the absence of a legislative framework that articulates clear requirements in the area of copyright enforcement.

IFTA was pleased with the USCO Report's **conclusion that the balance between rightsholders and ISPs that Congress originally intended has "tilted askew"**. Along with the observation that, "*the shift in the balance ... has resulted in an increasing burden on rightsholders to ... monitor and enforce their rights online, while providing enhanced protections for ISPs...,*" the Office also correctly noted that the system currently imposes a greater burden on small rightsholders.

We continue to urge a legislative update to the DMCA safe harbor standards to provide for "**notice-and-staydown.**" In contrast to concerns in the past, today's now-common technology allows copyright owners to clearly and accurately identify every film and TV program through digital fingerprints or watermarks and to enable platforms and ISPs to rapidly remove and/or block all copies as they appear and re-appear online. This technology is in routine use in the industry and the search and block ability is available to the platforms and ISPs today.

IFTA calls attention particularly to the Report's acknowledgement that this facility already is being deployed by certain ISPs to manage infringements ("DMCA+ tools) but only to certain rightsholders. The leading example is Google's Content ID System, which allows its participants to quickly remove and prospectively block uploads of infringing works to the YouTube platform. To date, most IFTA Members have been summarily rejected from accessing Google's Content ID System and shifted to a system that would allow Google to place and share its revenues from advertising on the film.

While the USCO Report sets out plans to facilitate discussion among stakeholders on voluntary solutions, the Office also acknowledges the inherent limitations of these measures due to their voluntary nature. IFTA's members and other independents consistently have found that wholly voluntary solutions are generally restricted to the needs and budgets of the largest industry players. While IFTA would support ongoing discussions amongst stakeholders to identify best practices and technologies, we believe that a legislative mandate by which to measure the effectiveness of the results of such discussions is a necessary first step.

Independent film producers urge Congress to update the Digital Millennium Copyright Act enacted 22 years ago, including a full-scale rework of Sec. 512, to enable independents to protect their films and enforce their copyrights online.

Thank you very much.

Sincerely,

Jean M. Prewitt, President & CEO

Susan Cleary, Vice President & General Counsel

Addendum

IFTA has submitted Written Comments in relevant proceedings with IPEC's Joint Strategic Plan, and USCO's Section 512 Study

IFTA Submission on November 13, 2018 to U.S. Intellectual Property Enforcement Coordinator on Joint Strategic Plan. file:///C:/Users/susan/Downloads/OMB-2018-0009-0016_attachment_1.pdf.

IFTA's Initial Comments dated April 1, 2016 to U.S. Copyright Office's Dec. 31, 2015, Notice of Inquiry for Section 512 Study.

IFTA's Additional Comments dated November 8, 2016 to U.S. Copyright Office's, Notice of Inquiry for Additional Comments on Section 512 Study.

USCO 2020 Report on Section 512 References IFTA Comments and advocacy in order of appearance in the Report.

Page 14 – Copyright owners were concerned, however, that the internet, combined with the smaller file sizes enabled by the newly rediscovered MP3 format, would enable ordinary users to easily spread unauthorized near-perfect digital copies of copyrighted works to other users across the globe, at a pace limited only by download speeds, creating new opportunities for infringement that were not available before the digital age.46

Footnote 46
Independent Film & Television Alliance ("IFTA"), Comments Submitted in Response to the U.S. Copyright Office's Dec. 31, 2015, Notice of Inquiry at 2 (Apr. 1, 2016) ("IFTA Initial Comments") ("Congress[] recogni[zed] that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement.")

Page 40 – Voluntary Agreements - Footnote
In July 2011, the Recording Industry Association of America ("RIAA"), the Motion Picture Association of America ("MPAA"), and several ISPs signed a voluntary memorandum of understanding creating a graduated response system known as the Copyright Alert System ("CAS"), which was administered by a new entity called the Center for Copyright Information ("CCI").194

Footnote 194 See CNTR. FOR COPYRIGHT INFO., Memorandum of Understanding (2011) ("CCI Memorandum of Understanding"), reposted at https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/DMR/ifpi_digital-music-report2011.pdf. Participants in the system were AT&T, Comcast, Cablevision, Verizon, Time Warner Cable, RIAA, A2IM, MPAA, and IFTA. Id. at 21–23.

Page 41 – Voluntary Agreements -
Some rightsholders lament that the CAS was "nothing more than a[n] educational effort, with no real consequences suffered by any of [the ISP's] infringing customers."202

Footnote 202 CEG, Comments Submitted in Response to U.S. Copyright Office's Dec. 31, 2015, Notice of Inquiry at 9–10 (Apr. 1, 2016); see also IFTA Initial Comments at 10 ("Existing voluntary initiatives such as the Copyright Alert System to address peer-to-peer piracy . . . are useful to set the table for an improved digital environment in which copyright is respected. However, in practice, such voluntary measures do not mitigate the damage from specific illegal acts or offer any immediate mechanism to stop the instant proliferation of infringing material online.") (emphasis omitted).

Pages 43 and 44 – Content ID
Some commenters complain that this policy unfairly excludes smaller copyright owners; in their view, "every artist should be entitled to this service, to register their music once and for all."220

Footnote 220
IFTA Initial Comments at 7 ("Use of updated technology should not be optional for online service providers and they should not be allowed to continue to offer new solutions only to large or preferred rights holders.")

Page 49 – IPEC's Joint Strategic Plan
Comments submitted in response to the development of the next JSP have addressed similar topics, including the use of technology to address online piracy258 and the challenges faced by creators to license content to large internet platforms.259

Footnote 258 IFTA, Comments Submitted in Response to IPEC's Sept. 13, 2018, Notice of Inquiry at 4–6 (Nov. 13, 2018), https://www.regulations.gov/document?D=OMB-2018-0009-0016. The IPEC solicited comments for the next JSP in September 2018. As of the date of this Report, the JSP for FY 2020–2022 has not yet been released. See Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 83 Fed. Reg. 46,522 (Sept. 13, 2018).

Page 62 - DSM
Footnote 329 DSM Copyright Directive, recital 61. See also Tr. at 286:2–7 (Apr. 8, 2019) (Eric Cady, IFTA) ("In terms of developments, we are encouraged by the European Parliament's recent approval of the Copyright Directive, to the extent that it recognizes the serious need to rebalance the notice and takedown framework with respect to online content sharing service providers.").

Pages 73 and 74 – Advancements on online services
Several commenters highlight the rapid advancement of online services and digital products that have transformed the economy and the technological landscape388—developments that they attribute in large part to the ability of companies to build internet-based businesses without facing uncertain exposure to secondary liability.389

Footnote 388 - IFTA Initial Comments at 3 ("Technology and Internet bandwidth have increased exponentially since [1998] with the rise of decentralized file sharing systems becoming a common online activity, along with the ability for Internet users to immediately stream programming.").

Page 77 Copyright owners from a range of creative industry sectors offer evidence indicating that online piracy remains pervasive despite section 512. The MPAA cites a 2013 study that found that "432 million unique users worldwide explicitly sought infringing content during one month alone."406

Footnote 406
MPAA Initial Comments at 11 (citing DAVID PRICE, NETNAMES, SIZING THE PIRACY UNIVERSE 3 (2013), reposted at ILLUSION OF MORE, https://illusionofmore.com/wp-content/uploads/2013/09/NetNames-Sizing_Piracy_Universe-Report2.5.pdf); see also IFTA Initial Comments at 3 (reporting that in 2009 there were 5.4 billion instances of pirated content online with that number increasing to more than 14 billion in 2010).

Pages 168 and 169 injunctive relief not realistic for smaller rightsholders
Smaller rightsholders also note that the cost of pursing an injunction is too high for most individual creators. 904 As a result, rightsholders argue, section 512(j) provides an insufficient remedy for fighting copyright infringement both domestically and abroad. 905

Footnote 904 IFTA Initial Comments at 13 ("Such limited injunctive relief may be too expensive for small companies to justify or pursue, especially in light of the flood of infringements that rights holders face in the online environment. Additionally, it is unclear as to whether a court would require a rights holder to establish a service provider's liability for copyright infringement before issuing injunctive relief under section 512(j).").

Page 174 – voluntary agreements
The IFTA notes in its comments that "voluntary initiatives can create the potential for . . . disadvantaging those who are not involved in the relevant discussions or parties to the ultimate agreement, including the public, creators and providers of innovative new services."929

Footnote 929 IFTA Initial Comments at 11.

Page 182 – International Standards EU Copyright Directive

"During the course of the Study, many rightsholders encouraged the Office to look to elements of international models—such as notice-and-staydown systems" 972

Footnote 972 See, e.g., SONA Initial Comments at 3–4; Tr. at 286:2–10 (Apr. 8, 2019) (Eric Cady, IFTA) ("[W]e are encouraged by the European Parliament's recent approval of the Copyright Directive, to the extent that it recognizes the serious need to rebalance the notice and takedown framework with respect to online content sharing service providers, which to date have had no incentive to discourage users from further uploading infringing content, because that content drives revenue to the platform.").

Page 186 - "Some form of staydown requirement was endorsed by rightsholders both big and small."986

Footnote 986 See, e.g., Don Henley, Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 8, 2016, Notice of Inquiry at 2 (Feb. 21, 2017) ("I ask the Copyright Office and Congress to require that online providers prevent the reposting of content for which they have [] received a takedown notice as a condition of safe harbor protection–that is, to require not just 'notice and takedown,' but 'notice and staydown.'"); Tr. at 115:17–116:5 (May 12, 2016) (Eric Cady, IFTA) ("IFTA members are primarily small-to medium-size companies that produce and sell motion pictures and television programs around the world . . . . We advocate for a notice and staydown provision."); Tr. at 172:4–8 (May 3, 2016) (Alisa Coleman, ABKCO Music & Records); Tr. at 39:7–9 (May 2, 2016) (David Kaplan, Warner Brothers Entertainment Inc.); Tr. at 30:11–16 (May 2, 2016) (Deborah Robinson, Viacom).

Page 189 – In response to these concerns, some rightsholders sought to narrow the focus to content that is identical to the noticed content, or to full-length content.1003

Footnote 1003 See, e.g., Tr. at 116:12–18 (May 12, 2016) (Eric Cady, IFTA) ("IFTA's position is that we advocate for staydown after the ISP is notified of [full-length] content, particularly in the pre-release stage when a pirated film is made available online without authorization in that pre-release period, which can devastate the member company's business."); Tr. at 92:6–9 (May 2, 2016) (Kathy Garmezy, DGA); Tr. at 91:18–22 (May 2, 2016) (David Kaplan, Warner Brothers Entertainment Inc.). Cf. Urban et al. Empirical Study at 60 (describing the views of a rightsholder respondent, who "favors systems that put up barriers to reposting content identical—i.e., identified through traditional hash matching rather than looser fingerprinting algorithms—to what has already been taken down").

"A Warning from a Small Business Owner"

Statement by Jared Polin for Hearing on
"Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades"

September 24, 2020

As a small business owner, I don't have much time to keep on top of policy issues that will impact my photography and YouTube business. But, when I hear that policymakers in Washington are considering significant changes to copyright policies that will drastically disrupt my ability to make a living doing what I love as a creator, I can't afford to sit back and be silent.

The crux of my business as a photographer and YouTube creator is to create fun and informative content for my more than one million followers to help them build skills to start their own businesses. Section 512 of the Digital Millennium Copyright Act (DMCA) is a law that helps enable my work along with the work of the millions of other independent creators in America. It's also a law that is threatened by new policies that will harm my ability to earn a living and provide jobs for my employees.

The DMCA was set in place by Congress to help our nation's copyright laws meet the needs of the digital age by guiding how content creators and internet platforms manage copyright infringement online. The current notice and takedown provisions of section 512 establish a process where a copyright holder can report a case of infringement and the platform or internet service provider will remove the content and alert the person it has been done. If the original poster believes their content was posted legally, like in a case of fair use, they can then file a counter notification and the content is then restored online unless a court orders it be removed.

What the entertainment and its army of lobbyists propose instead is a "notice and staydown" system where online platforms would be forced to censor user generated content like photos, blogs or TikTok videos to avoid liability. This system is based on a presumption of guilt where the mere allegation of infringement could force content to be removed permanently.

Leaders in the entertainment industry have long served as the gatekeepers of culture and creativity. Their business model is increasingly threatened by the innovative ways creators are reaching new markets online and growing fan bases by engaging with them directly through platforms like Facebook, Instagram, Twitch and others. Many new creators and artists who are just getting their start often even share their content for free on these platforms as a way to grow their base of fans who will then pay for your work.

The idea that a mere allegation of infringement could result in my website or YouTube channel being blocked is disturbing. I have been the recipient of erroneous DMCA takedown notices that were issued over music I had secured a license to use. There are many other cases of takedown notices being abused to censor free speech or issued in cases of fair use. With a notice and staydown system, cases of abuse or error could unfairly end someone's business or silence their opinions.

As a photographer and a creator of educational courses, I've had my content infringed upon and understand the concerns that arise over piracy. In fact, I've been able to use the current system of notify and takedown to quickly handle and manage any infringements that arise. But are lawmakers really considering a policy that makes it more difficult for honest online creators to innovate and grow a business in order to stop a few bad actors?

In 2019, I had the opportunity to travel to Washington, DC to participate in a roundtable hosted by the U.S. Copyright Office as they sought input for a study on Section 512. That study was recently released and has come under attack for its failure to include the concerns of online creators and users. We need lawmakers, like Delaware's Senator Chris Coons who is the lead Democrat on the committee holding hearings on the DMCA, to hear the concerns of creators like me and give us a seat at the table. America has thrived on innovation and creativity and my story is just one of many.

Jared Polin is a photographer/YouTuber based in Philadelphia and the CEFRO of FroKnowsPhoto.com

MUSIC WORKERS ALLIANCE

September 30, 2020

The Honorable
Jerrold Nadler
Chairman
U.S. House Committee on the Judiciary

The Honorable
Jim Jordan
Ranking Member
U.S. House Committee on the Judiciary

To the attention of:
The U.S. House Committee on the Judiciary

We'd like to submit the enclosed material for the record of the September 30, 2020 hearing: "Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades"

This report relates to the Music Workers Alliance's Economic Justice in the Digital Domain (EJDD) petition, launched on April 10th, 2020. **With over 5,000 signatures, this petition represents the largest ever unified expression of musical artists across genres demanding economic justice in the digital domain.**

While other industries have been able to move employment online during the Covid-19 shutdowns, ours has not: recorded work is not a viable income alternative due to the mass copyright infringement enabled by section 512. **The petition calls for these corporations to put an end to infringement by adopting Standard Technical Measures.**

The failure to adopt STMs has produced an environment overly reliant on Notice & Takedown. Notice and Takedown only gets triggered once harm has already occurred. We should improve N&T but simultaneously implement technologies that address the broader context and reduce reliance on what was supposed to be just one part of the broader response to online infringement.

Our petition coincides with the long-awaited release of the US Copyright Office report on section 512. **MWA calls on Congress to provide the Copyright Office with regulatory authority to oversee the development of STMs, and ensure that artists have a seat at the table.**

Furthermore, in order to address online infringement, MWA also urges Congress to:

1. Legislate improvements in the DMCA Notice and Takedown process to prevent the whac-a-mole situation that has made the current process essentially irrelevant for rights holders.
2. Address misrepresentations in Notice & Takedown that undermine trust in the framework—both with respect to notices and counter-notices. No other group values rights of free expression as much as artists. But the greatest threat to free expression in our times has been its devaluation due to mass online copyright infringement.

With live performance shut down, music workers' ongoing call to address online infringement by adopting STMs carries new urgency. Section 512's safe harbor system enables mass copyright infringement online. 60% of musical artists who signed the MWA petition claim that their copyright has been infringed online. At the same time 38% of online music listeners consume their music through copyright infringement. With the live music industry shut down indefinitely, it is even more urgent that Congress acts to achieve economic justice for the creators of recorded music.

Thank you,

Olympia Kazi, Phillip Golub, and Marc Ribot
Music Workers Alliance

MUSIC WORKERS ALLIANCE

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Economic Justice in the Digital Domain (EJDD) Petition

A CALL BY MUSICAL ARTISTS FOR BASIC FAIRNESS IN THE DIGITAL MARKETPLACE

TO: SUSAN WOJCICKI, CEO, YOUTUBE; SUNDAR PICHAI, CEO, GOOGLE; MARK ZUCKERBERG, CEO, FACEBOOK

The Covid-19 pandemic has exposed many weaknesses in our social safety net and labor laws. The predicament of musical artists — the original gig workers — is particularly poignant. With live performance shut down, the vast majority of the music sector has lost the economic means for basic survival. Most, if not all, of the income forfeited is never coming back. Not long ago, many musicians, DJs, and sound performers could have made it through this period by relying on the sales of recorded music. Today, online corporations, YouTube above all, have distorted that market by enabling near-limitless unauthorized distribution of recordings without the artists' consent or compensation, while Google and Facebook profit from linking to such content.

Nearly half of music listened to online is heard on YouTube, where third-party users can illegally upload copyrighted material with near impunity.

At the same time YouTube pockets ad revenue on this infringing content without any repercussion, because the Digital Millennium Copyright Act establishes "safe harbors" protecting corporations from lawsuits in the case of illegal activity by third-party users of their platforms. Ad revenue based on illegal uploads of musical artists' content will continue through this extended period in which live music is entirely shut down.

In this moment of crisis, musical artists' ongoing call for basic fairness in the digital marketplace takes on a new urgency.

In the name of economic justice for the creators of recorded musical products, we make the following demands:

1. Immediate Disaster Relief Fund for Music Workers:

We call on all major corporations profiting from the distribution of music to contribute 1% of their ad revenue during each month that live performance remains shut down into an emergency fund to be administered by artist relief organizations with long-track records of assistance to performing artist communities, such as MusicCares, The Actors Fund, Sweet Relief, and The Jazz Foundation. We applaud both Sony and Netflix for already having donated $100 million each towards Covid-19 relief efforts.

2. Reduce Copyright Infringement by Establishing "Standard Technical Measures":

We call on Google, YouTube, Facebook, and other major online corporations, in coordination with a wide net of music industry organizations – including representatives of independent labels and content creators – to immediately establish and empower a working group tasked with examining steps, including standard technical measures, that could address infringement in order to create a more sustainable online music ecosystem that sustains culturally diverse production and promotes economic development and small and medium-size enterprises.

Many people across the world are turning to music to get through these unprecedented times. If we want the people who create that music to survive in this pandemic and the economic fallout that will follow, we need to fix an untenable situation: **music workers need economic justice in the digital domain now.**

Statements by Prominent Musical Artists in Response to EJDD Campaign

"With so much financial destabilisation for musicians it is more important than ever for digital profit sharing to be equitable and fair." **Beth Orton**

"Online streaming and illegal uploading of recordings has decimated our professional income. This needs to change." **Charles Lloyd**

"YouTube is one of the worst things that has happened to musicians!" **Ahmad Jamal**

"The musicians are the originators of the art, and always the last to get paid. We are told "play for free, for the exposure". People die from exposure. Auto mechanics, plumbers and electricians don't work for free. Pay the musicians." **David Lynch**

"...Who would even look at digital platforms without our content which at this point is essentially stolen by multi-billion dollar tech companies? Pay people! Pay the musicians, the artists, the writers. Also pay the delivery guys, the rideshare drivers and everyone else who gets screwed in the digital economy and pay them right!" **Sally Timms, Mekons**

"I think it's atrocious that the owners of YouTube have gained billions in wealth since COVID while most musicians have lost virtually all of their performing income. COVID has illuminated just how damaging YouTube's abuse of the safe harbor is. YouTube stole one half of our livelihood, and COVID stole the other. How ironic that YouTube and Google have capitalized on both." **Maria Schneider**

"This crisis continues to underscore the immense creativity of today's musicians, which is simply appropriated by tech platforms for their own profit. While musicians continue to imagine a cultural response to our current climate their work is taken without payment. We need a new model of artist pay that matches the realities of the way artists create today. If tech companies want the content that drives mass viewership to their platforms they need to pay for it." **Austin Wulliman, JACK Quartet**

"All my work is shut down through June, with more cancellations expected. If we don't deal—NOW—with the mass online infringement that has destroyed our ability to make money from recording, then soon WE'RE going to be shut down." **Marc Ribot**

EJDD Campaign Information and Prominent Signatories

On May 31st, 2020 the Economic Justice in the Digital Domain petition had **5,042 signatories**, it was launched on Aptil 10th, 2020 and participants were asked to indicate whether they were (1) musical artists whose work has been infringed online; (2) musical artists whose work has not been infringed online; (3) representatives/owners of a label that has had its music infringed online; (4) other music industry persons who supports these demands; or (5) concerned music fans and allies of musical artists. More than half of the signatories identified as musical artists; 1,438 of them claimed infringement. Another 226 identified as owners/representatives of labels claiming infringement on online platforms.

Prominent signatories include **Bela Fleck, Bill Frisell, David Lynch, Dee Dee Bridgewater, Elvis Costello, Esperanza Spalding, John Zorn, Kronos Quartet, Laurie Anderson, Nora Jones, Rhiannon Giddens, Roger Daltrey, Rosanne Cash, and Wayne Shorter**.

Below is a short list of prominent signatories. The full list is at the end of this report.

Ahmad Jamal
Alec Ounsworth (Clap Your Hands Say Yeah)
Andy Stack (Wye Oak)
Ariana Paoletti (Volvox)
Austin Wulliman (JACK Quartet)
Bela Fleck
Beth Orton
Bill Frisell
Billy Martin (Medeski, Martin, Wood)
Boots Riley (The Coup)
Brendan Canty (Fugazi/The Messthetics)
Cait O'Riordann (The Pogues)
Carter Burwell
Catherine Irwin (Freakwater)
Charles Lloyd
Claire Chase (Founder: International Contemporary Ensemble)
David Lowery (The Trichordist)
David Lynch
Dee Dee Bridgewater
Delia Beatriz (Debit)
Elvis Costello
Emma Burgess-Olson (UMFANG)
Esperanza Spalding
Four Lost Souls (Bethany Thomas, Jon Langford, Tawny Newsome, John Szymanski)
Fred Wesley (Fred Wesley & the New JBs, Parliament Funkadelic, James Brown)
Harry Gregson-Williams
Henry Threadgill
Honeychild Coleman (The 1865, Death Comet Crew)
James Newton Howard
Jason Moran
Jesse Harris
John McCrea (Cake)
John Medeski (Medeski Martin & Wood)
John Zorn
Julian Lage
Karriem Riggins
Kronos Quartet (John Sherba, Sunny Yang, Hank Dutt, David Harrington)
Laurie Anderson
Luciana Souza
Marea Stamper (The Black Madonna)
Matana Roberts
Matt Aucoin
Mekons (Jon Langford, Sally Timms)
Merrill Garbus (Tune-Yards)
Michelle Shocked
Mike Servito
Nels Cline (Wilco)
Nick DeSimone (Nickodemus)
Norah Jones
Osvaldo Golijov
Rhiannon Giddens
Roberto Carlos Lange (Helado Negro)
Roger Daltrey (The Who)
Rosanne Cash
Sam Amidon
Sasha Frere-Jones
Steve Coleman
Terri Lyne Carrington
Timothy Snyder
Wayne Shorter
Wendy Oxenhorn (Jazz Foundation of America)
William Basinski
Vijay Iyer
Yuka Honda (Cibo Matto)

Background Data Research

QUICK NUMBERS ABOUT THE ARTS/MUSIC INDUSTRY

The value of arts and cultural production in America is significant. In 2015 it was **$763.6 billion**, amounting to 4.2% of gross domestic product, contributing more to the national economy than construction, mining, utilities, insurance, and accommodation and food services industries. In 2015, 66% the country's adult population attended a live visual or performing arts activity.

Source: https://nasaa-arts.org/nasaa_research/facts-figures-on-the-creative-economy/

Music, a subset of the larger arts and cultural production, is a **$43 billion** industry, and live performance accounts for about half of it.

Sources: https://soundcharts.com/blog/us-music-market-overview
https://ir.citi.com/NhxmHW7xb0tkWiqOOG0NuPDM3pVGJpVzXMw7n+Zg4AfFFX+eFqDYNfND+0hUxxXA

There are hundreds of thousands of musicians in the USA. In places like New York City and Los Angeles, artists (a larger group that includes musicians) make up a significant part of the workforce — at least 4% to 8%.

Sources: https://qz.com/1113019/the-us-cities-with-the-highest-concentrations-of-working-artists/
https://www.bls.gov/ooh/entertainment-and-sports/musicians-and-singers.htm
https://www.bls.gov/ooh/entertainment-and-sports/music-directors-and-composers.htm
http://money.futureofmusic.org/how-many-musicians-are-there/

COVID-19 IMPACT ON THE MUSIC INDUSTRY AND RELIEF RESPONSE

The music industry has been devastated. Since mid March, all live performance in the US has come to a standstill. Experts are saying that this might last through fall 2021.

> *"Larger gatherings — conferences, concerts, sporting events — when people say they're going to reschedule this conference or graduation event for October 2020, I have no idea how they think that's a plausible possibility. I think those things will be the last to return. Realistically we're talking fall 2021 at the earliest."*
>
> — Zeke Emanuel, vice provost for global initiatives and director of the Healthcare Transformation Institute at the University of Pennsylvania

Source: https://www.nytimes.com/2020/04/10/magazine/coronavirus-economy-debate.html

95% of artists have experienced income loss as a result of COVID-19, with an average decline in estimated income for the year amounting to **$27,000.**

Source: https://artdaily.com/news/123006/62--artists-unemployed--says-survey-from-Artist-Relief---Americans-for-the-Arts#.XqRcwGjYqyI

The average musician (and actor) in the US earns around **$30,000** a year from their artistic work.

Sources: https://www.arts.gov/sites/default/files/105.pdf
http://money.futureofmusic.org/cmw-on-the-money/

The aid offered by the US federal government for artists is inadequate so far. $**300 million** in aid to arts organizations in the CARES ACT is **less than 7%** of the demonstrated short-term need documented by Americans for the Arts that amounts to $4.5 billion.

Sources: https://www.americansforthearts.org/by-topic/disaster-preparedness/the-economic-impact-of-coronavirus-on-the-arts-and-culture-sector
https://news.artnet.com/the-art-angle/art-angle-podcast-germany-covid-1829214

Germany is allocating 180X MORE than the US so far for artists, freelancers, and others in the same situation (50 billion Euros ≈ 54 billion Dollars).

"Our democratic society needs its unique and diverse cultural and media landscape in this historical situation, which was unimaginable until recently. The creative courage of creative people can help to overcome the crisis. We should seize every opportunity to create good things for the future. That is why the following applies: artists are not only indispensable, but also vital, especially now."

— German culture minister Monika Grütters

Source: https://news.artnet.com/art-world/german-bailout-50-billion-1815396

Quick Numbers about Music, Streaming, and Social Networks

Only 36% of music consumers worldwide attend concerts, gigs, or festivals. Most (86%) music consumers listen through on-demand streaming (audio and video).

Half of the time spent listening to on-demand music happens on YouTube.
Source: https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf

Globally, social networks are used to share and talk about music.
23% of Instagram users talk about music on the service;
30% of Facebook users share links to music using the Facebook app;
35% of WhatsApp users share links to music using the app
Source: https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf

38% of music listeners consume music through copyright infringement, with 17% using search engines to locate infringing content.
Source: https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2018.pdf

Value and Compensation

As musician Paul McCartney mentions in a letter of support for the Copyright Directive, there is a "value gap" in which media platform companies are able to profit from copyrighted material without adequately compensating the artist.

"The value gap is that gulf between the value these platforms derive from music and the value they pay creators."

— Sir Paul McCartney

Sources: https://www.forbes.com/sites/masonsands/2018/12/30/why-copyright-will-be-the-biggest-issue-for-youtube-in-2019/#567bb1f21c12
https://www.musicbusinessworldwide.com/sir-paul-mccartney-tells-european-parliament-vote-through-article-13-to-ensure-a-sustainable-future-for-music/

The average musician (and actor) in the US earns around $30k a year from their artistic work.
Sources: https://www.arts.gov/sites/default/files/105.pdf
http://money.futureofmusic.org/cmw-on-the-money/

Average YouTube Worker Salary: $88k plus benefits
Source: https://www.payscale.com/research/US/Employer=Youtube/Salary

Average Google Worker Salary: $115k plus benefits
Source: https://www.payscale.com/research/US/Employer=Google%2C_Inc./Salary

Average Facebook Worker Salary: $120k plus benefits
Source: https://www.payscale.com/research/US/Employer=Facebook_Inc/Salary

PUBLIC SENTIMENT AND GOVERNMENT RESPONSE TO INTERNET PLATFORMS

77% of Americans say major internet and technology companies like Facebook, Google, Amazon and Apple have too much power. 59% of Americans believe elected officials and political candidates are paying "too little" attention to issues dealing with technology and technology companies.
Source: https://knightfoundation.org/reports/techlash-americas-growing-concern-with-major-technology-companies/

Australia just announced they want to force Facebook and Google to share a portion of their ad revenue with news organizations.

> *"Hard-working journalists across the country are generating content all the time and the social media giants are using that content to get traffic to their websites - but not paying for it."*
>
> — Josh Frydenberg, Australia's Treasurer and deputy leader of the Australian Liberal Party

Source: https://7news.com.au/sunrise/on-the-show/government-to-force-google-and-facebook-to-pay-for-news-content-c-986078

YouTube Ad Revenue: $15.1B in 2019
Source: https://www.hollywoodreporter.com/news/youtube-revenue-revealed-video-site-did-151b-2019-ad-revenue-1276004

Google Ad Revenue: $134.81B in 2019
Source: https://www.statista.com/statistics/266249/advertising-revenue-of-google/

Facebook Ad Revenue: $69.66B in 2019
Source: https://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/

Google cash COVID Relief Spending to date: unknown
Source: https://www.vox.com/recode/2020/3/31/21197652/coronavirus-philanthrophy-donations-google-cisco

Google cash reserve: $100B
Source: https://www.cnn.com/2019/02/04/investing/google-alphabet-cash-dividend/index.html

Facebook cash COVID Relief Spending includes $25M in cash grants to journalism
Source: https://www.theverge.com/2020/3/30/21199358/facebook-investment-journalism-grants-100-million-dollars-advertising-spend

Facebook cash reserve: $52B
Source: https://marketrealist.com/2019/11/facebooks-cash-reserve-swells-why-big-deal/

DMCA AND STANDARD TECHNICAL MEASURES

The ultimate burden of policing copyright infringement on major platforms such as YouTube falls on the artist and the copyright owner, as set out by the Digital Millennium Copyright Act (DMCA)

> *"[t]he DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site—an endless whack-a-mole game."*
>
> — Maria Schneider

Source: https://www.regulations.gov/document?D=COLC-2015-0013-89806

> *"if our music was taken down, it would almost immediately return on another site or even the same site. We were spending more and more resources on the take down notices, and we*

were consistently getting less and less in return. Eventually, we decided to stop sending the notices altogether. It was simply an exercise of throwing good money after bad. So time and again, we released product realizing more and more that we had no real way to stop its unauthorized use and the erosion of its commercial viability."

— Eric Hilton, Thievery Corporation

Source: https://www.regulations.gov/document?D=COLC-2015-0013-89806

"Why does Google make it so damn difficult to send a DMCA notice? Google has designed cutting edge online tech, but its DMCA procedures are something out of the Dark Ages. That's no accident."

— Ellen Seidler, filmmaker

Source: https://www.regulations.gov/document?D=COLC-2015-0013-89806

STMs are defined as "technical measures that are used by copyright owners to identify or protect copyrighted works and have been developed pursuant to a broad consensus of copyright owners and service providers (...) This provision is arguably one of the most important parts of the DMCA, but, to date, it has had zero impact. The reason? Online corporations reaping ad based and data mining profits have failed to participate in a process to form consensus on measures that should qualify as STMs.

https://copyrightalliance.org/ca_post/twenty-years-dmca-notice-and-takedown/

With our petition for **Economic Justice in the Digital Domain**, the **Music Workers Alliance** calls on all stakeholders to come together to draft these urgently needed protections, as advocated in the **Digital Millenium Copyright Act** over 20 years ago. Should the stalling continue, we will call for congressional oversight to ensure respect for artists' rights.

The DMCA was written in 1998, when AOL was still the largest corporation online and neither YouTube nor Facebook existed. In addition to **Standard Technical Measures**, other parts of the law — for example the antiquated and ineffective **Notice-and-Takedown** process — need to be reformed. Most of the needed reforms are contained in the "Music Community Response to the U.S. Copyright Office Inquiry on Section 512 of the DMCA". In addition to being supported by Major Labels (RIAA), Indie Labels (A2IM), and publishers (NYMPA), it is supported by ASCAP, BMI, SESAC, the AFM, SAG-AFTRA, and nearly every major other membership-based organization in music. We support it too and look forward to achieving the goal of **economic justice for indie musicians and DJs in the digital domain**.

Press Coverage

"There's No Such Thing as Independent Music in the Age of Coronavirus"
Vice
April 23, 2020
https://www.vice.com/en_us/article/v749p3/theres-no-such-thing-s-independent-music-in-the-age-of-coronavirus

"John Zorn, Laurie Anderson, Beth Orton, Mekons, More Sign Petition for Basic Fairness in the Digital Marketplace"
Brooklyn Vegan
April 27, 2020
http://www.brooklynvegan.com/john-zorn-laurie-anderson-beth-orton-mekons-more-sign-petition-for-basic-fairness-in-the-digital-marketplace/

"Bandcamp Will Again Waive Fees To Support Artists"
NPR
April 28, 2020
https://www.npr.org/2020/04/28/847300964/bandcamp-will-again-waive-fees-to-support-artists

"A Revolution During Uncertain Times: The Music Workers Alliance in NYC Fights Against Economic Injustice"
Electronic Beats
May 1st, 2020
https://www.electronicbeats.net/music-workers-alliance-nyc-feature/

"Pandemic Spurs Marc Ribot, Music Workers Alliance To Demand Economic Fairness"
Downbeat Magazine
May 4th, 2020
https://downbeat.com/news/detail/pandemic-spurs-ribot-mwa-to-demand-economic-fairness

"Coronavirus Forced Musicians Into a Crisis. Now They're Calling for Economic Justice"
Mic
May 5th, 2020
https://www.mic.com/p/coronavirus-forced-musicians-into-a-crisis-now-theyre-calling-for-economic-justice-22873950?utm_campaign=mic&utm_content=1588700633&utm_medium=owned&utm_source=facebook,twitter

About the Music Workers Alliance

Music Workers Alliance is an organization of, by, and for independent musicians and DJs. Our mission is to further Musician/DJ empowerment through collective economic and political action.

We came together because we are fed up with unfair treatment and lack of benefits, contracts, and representation. We're launching this alliance to improve our working conditions and amplify our voices in the political and economic decisions that affect our lives. We call on all independent musicians and DJs to organize, speak up and take action.

We're close allies of the NYC Artist Coalition, the action group that advocates for the safety and preservation of grassroots cultural spaces. MWA's members work in many genres — Jazz, Rock, Funk, Hip Hop, Dance, etc. Our musician/DJ activists are affiliated with Arts for Art, Building Beats, Discwoman, Indie Musicians Caucus and the Jazz Committee of Local 802 AFM, MOMENT NYC, Musicians for Musicians, Sound Mind Collective, Underground Producers Alliance, and many other organizations.

In the past year our group has been active. We met with City reps and asked for a Music Census. We went to Albany and educated decision makers about the unintended consequences of gig-worker legislation. At the outbreak of Covid-19 we asked for much needed government relief for ALL gig economy workers and we are now calling for economic justice for content creators in the digital marketplace.

Steering Committee: Selwa Abd, Emma Burgess-Olson, Jean Cook, Alvester Garnett, Phillip Golub, Jerome Harris, Jeannie Hopper, Olympia Kazi, Patricia Nicholson Parker, Marc Ribot, Maxime Robillard, Sohrab Saadat Ladjevardi, Jay Rodriguez, Genji Siraisi, Kathleen Tagg.

musicworkersalliance.org

Complete List of EJDD Signatories as of May 31, 2020

Dave A
Maria A
Peter Aaron
Alessandro Abbate
Becca Abbe
Michael Abbey
Julian Abbott
Mike Abbott
Selwa Abd
Rania Abdellatif
Deena Abdelwahed
Mina Abdollahian
Saint Abdullah
Anna Abelians
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Ruanne Abou-Rahme
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Gabriel Acevedo
Graciela Aceves
David Acker
John Acosta
Amaury Acosta
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Joseph Adams
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Can Aksan
Simon Aksenfeld
Maani Akuira
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Cianci Alain
Sylvia Alamo-Nelson
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Eleonora Alberto
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Kristi Alexander
Frank Alkyer
Ben Alleman
Gordon Allen
Ethan Allen
Eddie Allen
Nate Allen
Karin Allerding
John Almanza
Donis Almanzar
Muriel Almeida
Moises Almendarez
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Pietro Alosi
Max Alper
Nathaniel Alpin
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Uhmar Alston
Brian Alter
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David Ambrosio
Marcelle Amelia
Scott Amendola
Drew Amendola
Eliane Amherd
Samuel Amidob
Sahba Aminikia
Théo Amoretti
Therisse Amunatigui
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Matthew Andersen
Thomas Winther Andersen
Laurie Anderson
Marco Anderson
Andrea Anderson
Ethan Anderson
Vailyn Anderson
Brian Anderson
Christopher Anderson
Ken Anderson
Randy Andos
Raquel Andrade
Victor Andrango
Church, Andrew
Tré Andrews
Alex Andrews
Lili Anel
Jj Ang
Kenneth Angell
Lelandais Annie
Nezih Antakli
Maria Soledad Antelo
Leo Antonino
Teresa Anzilotti
Charlie Apicella
Conor Apperson
Roja Rani Applanaidu
Ana Arango
Madhumitha Aravanan
Hulda Arce
Timothy Archibald
Ray Archie
Nilo Arcilla
Max Ardito
Jorge Ariza
Jeremy Arizmendi
Daniel Arlein
Robert Armaline
Sergio Armenta
Ian Armstrong
Tom Armstrong
Kathryn Arnett
Alice Arnold
Sam Arnold
Daniel Arnow
Nicole Arrage
Darrin Arremony
Lynne Arriale
Andrew Arrieta
Paul Asbell
Salome Asega
Mohammad Asgari
Byron Asher
Ben Askren
Glenn Astarita
Victor Atkins
Michael Atkinson
Michael Attias
Andrew Atwill
Tom Atwood
Matthew Aucoin
Alison Auerbach
Robert Auld
Edward Aureli
Natalie Aurelia
Vittorio Auteri
Ourielle Auvé
Alyssa Auvinen
Michael Averch
Julie Averill
Koko Avila
Sean Awuku
Neddal Ayad
John Ayala
Isaac Ben Ayala
Jose Ayala
Rob Ayling
Sebastian Aymanns
Morgane Aymoz
Rana Ayoub
Todd Ayoung
Marc Ayza Deu
Michael Azerrad
Kinan Azmeh
Baile B
Amy B
Jonathan Babcock
Aidan Babson
Brian Bacchus
Marie Bach
Max Bach

Clemens Bacher
Andrew Backer
Patrik Backvall
Gina Bacon Mann
Michael Badillo
Don Baer
James Baer
Richard Baggett
Thomas Bahler
Nathalie Bähler Hynek
Salenta Baisden
Estelle Bajou
Elijah Bak
Newman Taylor Baker
Sean Baker
John Baker
Lynn Baker
Stanley Baker
Gregory Baker
Martin Bakhoff
Gabbriel Bakker
Irene Bakker
Angelica Balderas
Brent Baldwin
James Baldwin
Paul Balistreri
Jason Ball
Malachi Ballesteros
Francois Balmelle
Lauren Balthrop
Lucian Ban
Chandrani Banerjee
Vikramjit Banerjee
Adrian Bang
James Bangura
Mirra Bank
Kevin Bannon
Agnese Banti
Cyro Baptista
Liran Bar-El
Alan Baratz
Anton Barbeau
Noelle Barbera
Stacey Barbetta
Caterina Barbieri
Murilo Barbosa
Andre Barcelon
Sam Bardfeld
James Barefoot
Eden Bareket
Steve Bargonetti
Ed Barguiarena
Ivy Barkakati
Keith Barker
Benjamin Barker
Sam Barna
Alan Barnes
Gary Barnes
Stephen Barnes
Drew Barnet
Saul Barnett
Ian Barnhart
Fred Barnhill
Richard Barone
Guillaume Baronnet
Isaiah Barr
Andrew Barragan
Ramon Barraza
Martin Barrera
Branon Barrett
Jain Barrett
Nicholas Barrett
Simon Barrow
Rico Barsacchi
Petri Barten
Lauren Bartfai
Jack Bashkow
William Basinski
Claudia Basso
Alan Batek
Amy Bateman
James Bates
Christopher Bates
Emily Bates
Michael Bates
Keshav Batish
Daniel Batista
Flip Batista
Camilla Battaglia
Coby Batty
Jamie Baum
Ana Bautista
Jonathan Beall
Janet Bean
Robin Beanland
Olivier Becam
Jona Bechtolt
Ashley Beck
Noah Becker
Claus Becker
Leo Becker
Chris Becker
Joanna Becker
Thomas Beckett
Paul Bedal
Emma Beddingfield
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Dylan Begin
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Daro Behroozi
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Benoit Bel
Marc Beland
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Mike Bell
Joy Bell
Noah Bellamy
Jay Bellerose
Bob Bellerue
Michael Bellomo
David Belmont
Bill Bender
Sandy Beneyt
Matt Benham
Rodolfo Benitez
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Kevin Benjamin
Anila Benjamin
Elizabeth Benkert
Emilie Bennett
Yorrick Benoist
Brad Benson
Cherie Benson
Taron Benson
Hannah Benson
Adrienne Benson
Kurt Berchtold
Michael Berg
Marc Joseph Berg
Bob Berger
Ali Berger
Bond Bergland
Jerry Bergonzi
Ric Bergstrom
Joe Berinato
Elaine Berk
Charles Berkhouse
Bulent Berktas
Giuseppe Berlanda
Will Bernard
Tim Berne
Allison Bernhard
Joel Bernier
Susan Bernofsky
Ridge Bernosky
Harry Bernstein
Steven Bernstein
Jonathon Bernstein
Charles Bernstein
Sarah Bernstein
Morritz Beroes
Teresa Berra
Ryan Berry
Gus Berry
Valdemar Bertelsen
Barbara Bertisch
Nick Bertling
Giacomo Bertocchi
Kieran Berton
Neal Bessen
Max Bessesen
Brian Betancourt
Holly Bethers
Carl Bettendorf
Keith Betti
Chuck Bettis
Claudia Beyer
Paul Bezilla
Gabriela Bharatlall
Valeria Biagosch
Cary Bialac
Marta Bida
Benjamin Bierman
Jason Bigelow
Rayse Biggs
Lucien Bigois
Dan Bilawsky
Hakan Bildirir
Billy Bileca
Matthieu Billen
Nur Bahrul Ihsan Bin Jaafar
Zach Bines
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Sam Birch
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Jim Black
Manchildblack Black
Lee Blackstone
Victor Blagoev
Michael Blair
Tyler Blake
Emory Blake
Johnathan Blake
Roger Blanc
Angélique Blanc
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Camilo Blanco
Steven Blander
Jorg Blankenstein
Tyler Blanton
Microsoft Bledsoe
Noah Bless
Erik Blicker
Daniel Blinderman
Alexandra Blixt
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Larry Blood
Steve Bloom
Cole Blouin
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Joel Bluestein
Sophia Blume
Daniel Blumenfeld
Michael Blumenfeld
Larry Blumenfeld
Janis Blumgart
Tracy Boachie
Jacob Boarman
Hannah Boaz
Christina Bobrowsky
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Pier-Luc Boivin
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Tyler Boley
Erick Bolivar
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Josh Bonati
Graeme Bond
Mike Bond
Barrin Bonet
David Bonham
Andrea Bonino
James Bonjorno
Ryan Bonner
Richard Bonsaint
Annie Bonsignore
Michael Boone
Moa Boot
Douglas Booth
Pete Booth
Sheilah Boothby
Steve Bopp
Dekel Bor
Renaud Bordes
David Borgo
Sylvia Borgo
Suzanne Borgo
David Borough
Rebecca Borrer
Robert Bose
Milos Bosnic
Andrew Bossard
Maria Alexandra Bota Cabrita
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Éliot Boucher-Rioux
Stephanie Bouldin
Michael Bourgeois
George Boutilier
Joyce Bowden
Hubert Bowers
Tania Bowers
Michael Bowes
Marti Bowley
Alec Bowman
Dougie Bowne
Patti Bowne
Gail Boyd
Frederick Boyd
Nick Boyd
Joe Boyd Vigil
Emilio Bracho
Bob Bracket
Kenneth Bradburd
Don Braden
Francis Bradley
Matt Brandau
Lilac Brandes
Kim Brandon
Craig Brann
Douglas Brase
James Brashear
Noel Brass Jr
Karsten Michael Bratus
Matt Bravmann
Andrea Breda
Declan Brennan
Aaron Brent
Isabelle Brethaut
Sarah Brett-Smith
Jeremy Brewer
Zoe Brezsny
Laurie Brickey
Martin Brideau
Alastair Bridges
Dee Dee Bridgewater
Dawn Bridson
Darren Brierton
Rahshon Bright
Daniela Brill
Dominique Brillon
Tessa Brinckman
Susan Brink
Khaila Brinkley
Sam Bristow
Matthew Bristow
Loren Broaddus
Mike Brobeck
Federico Broccoli
Rebecca Broderick
Max Brody
Chris Brokaw
Judith Brookes
Albert Brooks
Keith Brooks
Nancy Brooks
Ashley Brooks
Josh Brough
Sophia Brous
Paloma Broussal
Brandon Broussard
Griffin Brown
Ryan Brown
Deforrest Brown
Landon Brown
Travahn Brown
William Brown
Shannon Brown
Barra Brown
Garrett Brown
Cameron Brown
Timo Brown
Matthew Brown
Lauren Brownstone
Bruce Brubaker
Manfred Brüggenkamp
William Bruno
Willie Bruno
Pat Bruns
Blake Brunton
Carsten Bryant
Julia Bryant
Freddie Bryant
David Bryant
Sander Bryce
Karen Bryce
Kash Bryce
Sloane Bryce
Nicola Buccolieri
Craig Buchanan
Victoria Buchanan
Silvio Buchmeier
Michael Buckley
Thomas Buckner
Richard Buckner
Vadim Budman
Nate Budroe
Benedikt Buechel
Johannes Buff
Catalina Bulgach
Jerome Bunel

Catherine Bunyan
Dana Buoniconti
Barbara Burch
Molly Burch
Thomas Burdette
Emma Burge
John Burger
Robin Burgess
Emily Burian
Gregory Burk
Brian Burke
Art Burke
Patrick Burke
Roy Burkhart
Dave Burn
Charlie Burnham
Eric Burns
Vicki Burns
Aaron Burns
Kristopher Burns
Marc Buronfosse
Ronnie Burrage
Jeffery Burrell
Sam Burtis
George Burton
Daryl Burtzos
Carter Burwell
Mark Busching
Davina Bussey
Rachel Butler
Raymond Butler
Chris Butler
Russell Butler
Rob Butterfield
Rob Butterworth
Rosalie Byard
Angela Byars
Thomas Byers
Joseph Byers
Diana Byrd
Greg C
Lil C
Myles C
Martin Caberlin
Luisa Cabrini
Nicolas Cadena
Dayal Cadien
Uri Caine
Kevin Calabro
Thomas Calahan
Jill Calderon
Andy Callen
Cesar Calvo
Luke Calzonetti
Simon Camatta
Jasmine Camba
Christoph Camenzind
Ellisa Cameron
Joshua Camp
Bill Campbell
Peter Campbell
Michael Campbell
Cole Campbell
Jay Campbell
Joseph Canady
James Candela
Nora Canellakis
Elenna Canlas
Andrea Canter Canter
Celeste Cantor-Stephens
Christian Capet
Cataldo Capozza
Thomas Cappel
Marco Cappelli
Philip Capuzzi
Antonio Carallo
Sofia Carbonara
Grady Cardeiro
Steve Cardenas
Pat Cardenas
Eduardo Cardinho
Jessica Cardona
Andrea Cardone
Joana Cardozo
Peter Carey
Francis Carignan
Mairead Carlin
Brendan Carlson
David Carlton
Craig Carmichael
Simone Carmignani
Cheryl Carney
Dominic Carnival
Fabio Carosella
Henry Carpender
Scott Carpenter
Christian Carpenter
Amy Carrigan
Matt Carrillo
Michael Carrillo
Terri Lyne Carrington
Mario Carrión
Christopher Carroll
Ava Carrow
Lucio Carta
Lutie Carter
Brooks Carter
Regina Carter-Garnett
Tristan Carter-Jones
Ivan Carvalho
Alexandra Carvalho
Igor Carvalho
Laura Carvalho Sebben
Enrique Carvallo
Raffaele Casarano
Ian Case
Mirko Caserta
Paulina Casey
Randy Casey
Jonathan Casey
Rosanne Cash
Gabriele Casiraghi
Harrison Cass
Pablo Cassina
Michael Cassinari
Carmen Castaldi
Maria Castellano-Usery
Stefania Castellari
Michelle Castillo
Rudolph Castle
Matthew Castro
Pietro Castronovo
Richard Caswell
Bradley Cates
Alessandro Cau
Janet Cawley
Florence Cayron
Debbie Caysons
Giovanni Ceccarelli
Robert Cecchini
Amy Ceccoli
Maria Celis
Rachael Cerni
Michelle Cernuto
Kamala Cesar
Marissa Cetin
John Chacona
Layale Chaker
Mary Chamberlain
Dawson Chamberlain
Marlynn Chambers
Thomas Chambers
Jessica Chambers
Don Chambers
Bill Chambless
Rami Chami
Cory Champion
Sam Chandler
Dawanna Chandler
Chia Wei Chang
Chris Chang
Jim Chapdelaine
Ken Chapin
Barbara Chapman
Cyril Chapman
Oliver Chapoy
Jacob Charkey
De Jesus Charlotte
Claire Chase
Conner Chase
Jarred Chase
Peter Chase
Stephen Chastain
Maria Chavez
Guadalupe Chavez
Vaibhav Chawla
Jerome Cheatham
Simonetta Checchia
Vinson Chee
Carla Chellew
Marco Chelo
Kenton Chen
Gina Chen
Alexandra Chen
Jarrett Cherner
Christopher Cherney
Kathy Cherniak
Chris Cheveyo
Pranay Chhetri
Gilles Chiasson
Harold Chichester
Matt Chick
David Chick
Cristian Chie
Dan Chien

Mara Chin
Nate Chinen
Silas Chinsen
Brian Cho
David Chodor
Yoon Choi
Kenny Chong
John Christensen
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Oral Statement of Don Henley
before the
Committee on the Judiciary, United States Senate
Subcommittee on Intellectual Property
on
Section 512 of the
Digital Millennium Copyright Act
June 2, 2020

Chairman Tillis, Senator Coons, and Members of the Subcommittee:

Thank you for inviting me to participate in today's hearing. My name is Don Henley.

I come here, today, with a heavy heart, mindful of the chaos and pain that has engulfed this nation. I am aware that many in my industry have chosen this date to observe a day of inactivity and quiet contemplation. In being present, here, I mean no disrespect to those who have chosen to set aside this day. I wish to state, for the record, that I stand in solidarity with my brothers and sisters in the creative community, and with all my fellow citizens who seek a better, more just world, for everyone.

As a 55-year veteran of the music industry, I was asked, by the chairman of this Senate subcommittee, to come here and testify, today on behalf of the creative community – songwriters, musicians, music publishers – also known, in today's digital world, as *"content providers."* I am present, today, not to be contrary, not to advance a personal agenda (at age 73, and indefinitely homebound by the Covid-19 pandemic, I am in the final chapter of my career), but I come here out of a sense of duty and obligation to those artists, those creators who paved the road for me and my contemporaries, and for those who will travel this road after us. It is truly unfortunate – and patently unfair – that the music industry is perceived only in terms of its most successful and wealthy celebrities, when in fact there are millions of people working in the industry, struggling in relative obscurity; people whose voices would never be heard were it not for hearings such as this one being held, today. So, I am compelled to seize this rare opportunity to discuss aspects of the fundamental issues that are foremost in the national conversation, at this anxious moment – fairness, rights, mutual respect and ... in this case, economic justice and equal opportunity.

But, the smear campaign has already begun. I have been targeted by the digital gatekeepers and their many shills and surrogates. It began last Friday in the newspaper that belongs to Mr. Bezos, and it continues, today. Big Tech was probably hoping that this hearing would be canceled, or that I would be intimidated to the extent that I would not testify. But, I will not be silent on this issue. I want to do everything in my power to strengthen the property rights of music creators of all ages, races and creeds; all styles, from hip-hop to honky-tonk, from rock, to rap, to rhythm & blues. From jazz to folk, to heavy metal. To change or improve outdated laws and regulations that have been abused for over 20 years by Big Tech ... the enormous digital platforms that facilitate millions of copyright infringements, monthly.

So, let me directly answer the question at hand: the notice and takedown system of the DMCA does not work for artists and songwriters.

- When a simple online search for a song returns an endless list of sites that never asked the copyright owner for permission, never received a license and never passed on a penny to the artist for use of their music – the system is not working.

- Today, when the marketplace has matured, and digital platforms continue to use section 512 as a negotiating leverage to pay license fees which are well below market – the system is not working.

- When the burden of policing copyright infringements on global platforms lies with the artists instead of the massive technology companies who own and operate the platforms – the system is not working.

The system is antiquated and badly broken. And the creative community is paying a very steep price. I have worked hard to establish my career and reputation, and I have enjoyed success. For me, this is a matter of principle. I am speaking out for those songwriters and recording artists who are struggling to make a living. Particularly now, as our industry has been decimated by the pandemic, we need equitable compensation for the rights guaranteed to authors under the Constitution. Given the current ban on large social gatherings and the indefinite pause in live performances, income from licensed digital music services may be the only real source of revenue music creators can rely on the foreseeable future. So, it is imperative that the devaluation of music - which is a direct result of the DMCA - ceases. And, as a result, creators be paid a market rate for their music across all platforms.

At the dawn of the Internet age, the DMCA was supposed to provide digital platforms with safe harbor from liability in exchange for cooperation in protecting creators' works. It was meant to provide a proper balance and symbiotic relationship that benefitted all participants and strengthened the legitimate online marketplace.

Two decades later, the balance is decidedly off.

In a world where more than 500 hours of video are uploaded to YouTube every minute, more than 1 billion videos are viewed on TikTok per day, and there are over 500 million daily active users on Instagram, it is clear that the massive online services are flourishing while artists have no ability to combat the rampant infringement that occurs on these platforms. As the U.S. Copyright Office said in its recent Report, "the balance Congress intended when it established the section 512 safe harbor system is askew."

Content owners send hundreds of millions of takedown notices annually. And often, for each infringing link or file taken down, a dozen more pop up in its place. But even worse, due to the antiquated procedures dictated by the DMCA, internet services with clear oversight and control

of content posted on their websites are continuing to monetize and collect advertising revenue on videos containing music, even after that music has been flagged by the music creator as infringing. How is that a fair bargain?

The astronomical number of infringement notices sent by creators is not a sign that the system is working – as some defenders of the DMCA suggest. That would be akin to measuring our country's success in fighting wildfires by measuring the number of attempts to extinguish them; instead, we need to seek out the root causes of those fires, implement preventive measures, and ensure that they don't reignite. Many of the enormous tech companies who benefit from the "safe harbor" provisions of the DMCA have the tools to do just that: they have the capability to monitor infringements on their platforms and provide enhanced tools for content owners. They just choose not to. They are capable of understanding and tracking the individual likes and dislikes of the fans who visit the platform with frightening accuracy, and yet we are supposed to believe that putting in place a meaningful barrier to infringement is beyond their capabilities?!? More accurately, it's beyond their desire. These tech giants are afraid that blocking infringing content will reduce traffic, and reducing traffic decreases their ad revenue. Instead of focusing on platform improvements that drive consumer satisfaction, they rely on copyrighted material – whether licensed or not – to keep consumers engaged. With the DMCA as cover, these companies simply have no incentive to improve technological protection measures.

The courts have facilitated this worldview, broadening application of the safe harbor provision, watering down obligations of online services, and eliminating consequences. The result is an anemic notice and takedown system that still allows Big Tech to rake in revenue by monetizing access to our unlicensed works, despite being notified of the infringements, even repeat infringements.

We simply cannot continue like this.

I applaud and I thank this Subcommittee for shining a light on the damage caused by the unfulfilled promise of a meaningful and effective notice and takedown system. Creators need recourse for the unlicensed, illicit use of their valuable works online. The DMCA is not providing that to them.

Like a classic song, album, or band, some creations stand the test of time, resonating across generations. Other products of the past are best left there – or updated to reflect the modern era. The DMCA has shown its age – it is a relic of a MySpace era in a TikTok world. Our nation's countless creators, most of them small businesses, deserve a system that recognizes the needs of online participants, a procedure that properly applies the rules, and implements today's technology with an eye toward tomorrow. Only then can we truly achieve the proper balance and the thriving legitimate online marketplace this institution envisioned so many years ago. Thank you.

Statement of Elizabeth (Betsy) Rosenblatt and the Organization for Transformative Works on Section 512 and the Copyright Office Section 512 Report

I. Introduction

I am Elizabeth (Betsy) Rosenblatt, a Professor of Law at the University of Tulsa College of Law. I teach intellectual property courses, including Copyright Law, and my scholarly publications focus on intellectual property law, norms, theory, and practice.

In addition, I volunteer as the Legal Chair of the 501(c)(3) nonprofit Organization for Transformative Works (OTW). I make this statement on my own behalf and on behalf of the OTW, which was established in 2007 to protect and defend fans and fanworks from commercial

exploitation and legal challenge. The OTW represents artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the "villain," to using storytelling to explore racial dynamics in media, to retelling the story as if a woman, instead of a man, were the hero. It represents readers who turn to those fanworks to see themselves represented in stories when popular entertainment all too often overlooks diverse characters and storylines. It represents individuals who find community and common ground in shared affection for and criticism of media in a world that is all too often divided and isolating. The OTW has over 13,000 donating members, more than 8,500 of whom are U.S. nationals. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 2.5 million registered users, hosts over 6 million unique works, and receives almost 350 million page views per week. The OTW therefore represents the vast community of Internet *users*.

We submit this comment to present new empirical data and emphasize the importance of user interests in any consideration of the Digital Millennium Copyright Act. We also write to highlight ways in which the Copyright Office's May 2020 Report of the Register of Copyrights on Section 512 of Title 17 (the "Report"), in framing 17 U.S.C. § 512 ("section 512") as balancing the opposed interests of copyright holders and OSPs, overlooked the crucial interests of users.

As the above facts make clear, internet users are not merely passive consumers of content. Instead, they are passionate and valuable creators and copyright holders in their own right. The interests of internet users as both consumers and rightsholders themselves illustrate exactly how diverse and complex the internet's creative ecosystem is, and why user interests should not be undervalued in any discussion of 512 and its impact.

Discussions of section 512 tend to presume that all "creators" are dissatisfied with section 512 and want to make it easier to have material taken down from the Internet. We write to explain why that is not true. Users--including the hundreds of thousands of user-creators we serve-- are harmed by narrow interpretations of section 512's safe harbors, invalid Internet take-downs, and automated content filtering and removal. Critiques of the DMCA often focus on its age, and claim that updates in the law would serve the new generation of Internet creators. But that new generation is exactly who the OTW serves, and our experience demonstrates that broadly applicable DMCA safe harbors that discourage invalid takedowns and encourage fair use are crucial to those user-creators.

In other words, for all of section 512's seeming imperfections, it fundamentally serves the complex needs of Internet users well--especially the new generation of Internet users who create and consume content. In considering any potential changes to the operation of section 512 or the framework of Internet regulations in which it resides, it is essential to take into account the

benefits that section 512 provides to the hundreds of millions of users who consume, interpret, and create Internet content.

II. Lawmakers should Consider the Copyright Office Report in Context

In May 2020, the Copyright Office released a report on the operation of section 512. That report contained some valuable information, but it is important to recognize what the Report is and what it is not. By its stated terms, the Report is not a set of prescriptions or policy recommendations. It is a set of observations. This framing is particularly important when observing the Report's discussions of court opinions. The Report was not focused on whether court opinions were "good" or "bad" from a policy standpoint; rather, it was constrained by its stated focus on whether judicial applications of section 512 align with what the Copyright Office believed to be Congress's intent in 1998 statutory drafting.[1] Thus, to the extent that the report critiques judicial interpretation of section 512, the report reflects those constraints. It says little about whether those judicial interpretations serve valuable policy functions.

While the Copyright Office interpreted the statute by 1998 standards, courts interpret statutes based on the state of technology and society at the time they encounter those statutes. As a result, to the extent that Congress agrees with the Copyright Office's assessment that court opinions have diverged from statutory intent, the current state of technology and society may call for conforming statute to caselaw, rather than the opposite. In the years since the DMCA went into effect, we have learned that the blossoming of the Internet ecosystem enabled by flexible interpretations of section 512 has been a boon to creativity, speech, access to knowledge, and (yes, even) the prosperity of the entertainment industry. The Report did not focus on these benefits because the Report's goal was backward-looking observation rather than forward-looking policymaking. For lawmakers, however, the benefits to society of the Internet ecosystem of creation, recreation, and communication that 512 has permitted—especially now, as users rely more than ever on OSPs to attend school, conduct business, express themselves, and connect with fellow humans— cannot and should not be overlooked.

The OTW agrees with the Report's observations that:

- The online ecosystem is not one size fits all. In assessing section 512, policymakers must take into account differences not only among stakeholder classes, but also among them.[2]
- Voluntary initiatives do not substitute for balanced legislation.[3]

[1] Report, p. 84.
[2] Report, p. 72.
[3] *Id.*

- Lawmakers should reject proposals to enact radical changes such as "notice and staydown," other upload filtering mandates, or site blocking.[4]
- It is a mistake to look to notice-and-takedown systems as a way to prevent piracy.[5]

However, the Report also disregards the interests of Internet users, overlooks important evidence, and undervalues copyright fair use. In addition, in its effort to reconstruct Congress's original intent as to section 512 specifically, the Report overlooks its role as part of a web of Internet regulations that balance each other.

III. In Assessing the DMCA, Lawmakers Should Re-Center Internet Users

Section 512 is not concerned solely with OSPs and rights-holders. It is also, and perhaps foremostly, concerned with Internet users. This is borne out in the statute's legislative history.[6] In the decades that have passed since the DMCA was enacted, Internet use has grown and changed dramatically. Users rely on the Internet for learning, communication, entertainment, and community. At no time is the importance of the Internet for users more obvious than now, in the age of COVID-19 social distancing.

One of the most significant changes of the past two decades has been the explosion of user creativity on the Internet. From simple blogs to complex social media phenomena, users are creating content at an impressive rate. Online fan communities provide one example. There have always been fans, but the Internet has allowed them to find an audience with shared affinities and express themselves in unprecedented ways. The millions of works on the Archive of Our Own--which hosts text works, and thus does not even include the enormous bodies of fan creativity in audiovisual, musical, visual art, games, crafts, and other media--is ample evidence of this creative explosion. Through creating and consuming fanworks, fans build community, refine their skills, find their own creative voices, and build personal strength.[7] This empowering creative output should not be caught in the crossfire of a perceived rivalry between copyright holders and technology providers.

Nevertheless, the Report tended to accept copyright owners' representations (without supporting evidence) that users' counter-notifications are largely wrong, while simultaneously discounting specific examples and extensive quantitative analyses of flawed takedown notices as unreliable or unrepresentative.[8] The Report relegated to a footnote extensive and well-documented research establishing the malicious use of DMCA takedown notices to harm competitors or

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[4] Report pp. 71 (filtering proposals would be "overkill" and anti-competitive), 193, 196.

[5] Report pp. 72.

[6] *See e.g.*, H.R. Rep. No. 105-551, pt. 2 at 21 (1998) (listing "information users" as part of a triad of balanced interests, along with content owners and service providers).

[7] NAT'L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, COMMENTS OF ORGANIZATION FOR TRANSFORMATIVE WORKS (Nov. 13, 2013), available at http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf.

[8] Report, pp. 146-48.

silence criticism.[9] As just one significant example, the *Wall Street Journal* reported on over 52,000 improper takedown notices apparently sent to suppress non-infringing content.[10] The Copyright Office Report's dismissal of such detailed evidence as "individual anecdotes" obscures the very real and harmful user impact of viewpoint-based takedown notices. As a practical matter, it is irrelevant to users what percentage of takedown notices are invalid--what matters is that the evidence objectively proves that invalid and abusive takedown notices exist, and harm users, usually by removing the only instance of protected speech online. Any assessment of section 512 must acknowledge that real harm.

A. "Repeat Infringers" and User Interests

While the Copyright Office's Report considered the interests of OSPs and rightsholders in developing recommendations, the Report's analysis and recommendations overwhelmingly either ignore user interests or work against them. The report's treatment of judicial opinions is particularly telling: when courts interpret section 512 as imposing the penalty of Internet termination on users accused of (unproven) repeat infringement, the Report advances the court's interpretation, stating that "repeat infringer" should be defined as repeat *accused* infringer rather than repeat *adjudicated* infringer.[11] In contrast, when courts interpret section 512 as safeguarding the ability of users to engage in free expression via fair use by requiring rightsholders to consider fair use before issuing a takedown notice, the Report argues that the court's interpretation was broader than the statutory language allowed.[12]

Considering the interests of users leads to the opposite conclusions: Terminating the service of users who are merely accused of infringement as "repeat infringers" invites viewpoint censorship, ignores the possibility that users may be accused of infringement when engaged in First Amendment-protected fair use, and punishes non-infringing users as if they were infringers. By the same token, requiring rightsholders to consider fair use before issuing a takedown notice is a straightforward and simple protection both against indiscriminate (typically automated) removal of their expression and against assessing "repeat infringer" penalties against legitimate fair users.

Recent events have further proved the folly of a one-sided approach to takedowns. For example, President Trump's Twitter and Facebook accounts were recently subject to a takedown because a video he posted contained an image or video clip claimed to be infringing.[13] Even though the tweet in question was almost certainly a fair use, it was removed. The Copyright Office Report

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[9] Report, p. 148 n 790.

[10] *Id.*

[11] Report, pp. 98-103 (agreeing with BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc., 881 F.3d 293 (4th Cir. 2018)).

[12] Report, pp. 148-152 (disagreeing with Lenz v. Universal Music Corp., 815 F.3d 1145, 1154–55 (9th Cir. 2016)).

[13] See Theodore Schleifer, Facebook and Twitter took down a Trump campaign video over copyright concerns, Vox, Jun 5, 2020, https://www.vox.com/recode/2020/6/5/21281787/twitter-trump-george-floyd-campaign-video-copyright.

criticizes any attempt to screen properly-formatted notices for facial invalidity no matter how clear it is that the sender is targeting noninfringing material--but this event demonstrates the user harms inherent in such an approach. Notably, President Trump's account has accrued other copyright "strikes" in the past,[14] and if OSPs aren't allowed to exercise their informed judgment about abusive notices, then he (along with other political figures) is at risk of being banned from Twitter and every other service as a repeat infringer. Even if he counter-notifies--which has not happened, in the past--the mandatory waiting period to restore content under the counter-notice system leaves important political speech suppressed for weeks. Failing to account for invalid, improperly motivated notices is not good policy.

It would be unrealistic to assume that all takedown notices reflect infringement; even setting aside malicious notices issued for the purposes of silencing a viewpoint or hampering competition, many notices--especially automated ones--seek removal of non-infringing works. Despite the large number of works housed in the Archive of Our Own, The OTW receives a small handful of takedown requests annually. The majority of those takedown notices come from posters who have disassociated themselves from their accounts and want to remove material that they, themselves created and posted and now want removed. The next largest category of takedown requests do not reflect infringement--instead, they reflect a trademark user seeking to restrict expressive mention of their trademark (a misuse of the DMCA), or they reflect the mistaken identification of a different work with the same title as a rightsholder's work. We receive virtually no takedown notices for actual infringing works. Labeling individuals as "repeat infringers" for having posted works that they later want to remove, for making non-infringing expressive mentions of trademarks, or for posting non-infringing works with similar titles as rightsholders' works, would be manifestly unfair and harmful to users.

The OTW also routinely receives queries from fan-creators who make noncommercial, transformative fanworks works such as "fanvids" that use short clips of audiovisual works to comment on media works. Fanvid creators have sought guidance from the OTW after having their works removed from other sites based on takedown notices that have not accounted for fair use, and they fear having their accounts on those sites terminated based on "repeat infringer" policies. Punishing these users is likewise unfair and harmful.

Accordingly, user interests demand flexible definitions of "repeat infringer," and flexibility in adopting and implementing such policies, that does not require mechanical punishment of users who have been accused of infringement.

[14] See, e.g., Alex Hern, Trump's video taken off Twitter after band Nickelback complains, Guardian, Oct. 3, 2019, https://www.theguardian.com/us-news/2019/oct/03/donald-trump-video-taken-off-twitter-copyright-nickelback.

B. User Interests Concerning the Meaning of "Storage"

In addition, the Copyright Office Report suggests clarification of language surrounding the definitions of "storage" at the direction of a user. Courts have interpreted this language to include activities "related to" storage, such as automated recommendation and curation.[15] The Report suggests a contrary interpretation, arguing that the legislative history of section 512 "makes no mention of . . . user experience."[16] But in 1998, multiple services already engaged in extensive selection and targeting to improve user experience. AOL and other services offered curated and moderated environments, such as chatrooms focused on specific topics, and Congress specifically intended to protect them.[17]

The sorts of services that OSPs provide in connection with storage at the direction of a user--such as allowing users to find content of interest from among a vast sea of irrelevant content; optimizing retrieval of content for different devices and bandwidth; or helping users identify content they wish to avoid--are precisely what make OSPs *useful to users*, and for that reason courts have correctly held them to be within the activities permitted for OSPs taking advantage of section 512's safe harbors.

C. User Interests Concerning "Actual" and "Red Flag" Knowledge

Likewise, lawmakers should consider user interests in considering the definitions of OSP "actual" and "red flag" knowledge of infringement. The OTW appreciates the Copyright Office Report's acknowledgement that the DMCA maintains a strict rule that OSPs have no obligation to monitor their services, as well as the Report's support for a "reasonableness" approach to knowledge that would take into account the size and resources of an OSP.[18]

However, user interests dictate one major principle that the Report fell short of recognizing. OSPs should be allowed to engage in content moderation without being charged with "knowledge" (whether deemed actual or "red flag") regarding whether or not that content infringes. Content moderation is of crucial value to users.[19] To the extent any rule equates awareness of content residing on a network with knowledge of whether or not that content infringes, that rule undermines the value of the Internet for users.

It is also important to recognize that content moderation is very different from copyright filtering or monitoring. Users often play major roles in content moderation--users are able to flag and

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[15] *See* Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010), aff'd in part, rev'd in part, and vacated, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir 2012).

[16] Report, p. 90.

[17] *See* H.R. Rep. 105-551(II), 1998 WL 414916 , at *53 (explicitly including chatrooms as among protected services); *28 (identifying AOL as among testifying participants).

[18] Report, pp. 123-24.

[19] *See, e.g.*, Tarleton Gillespie, Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media (2018) (explaining how content moderation is necessary for websites to remain useful to users, albeit imperfect and evolving).

report content that violates a platform's terms of service, and many OSPs rely on users to identify such content for purposes of moderation.[20] In contrast, users *cannot* flag and identify content that infringes copyright, because users who did not themselves post the content, like the OSPs themselves, simply lack the information required to determine whether a particular copyrighted work was posted with or without the authorization of the copyright holder. Because copyright owners possess unique knowledge regarding whether they have themselves authorized particular uses, definitions of "actual" and "red flag" knowledge cannot presume that either OSPs or users are capable of independently determining whether material is infringing.

D. Users Interests Require OSPs To Be Permitted To Evaluate Takedown Notices

In addition, the Report failed to consider user interests in its discussion of "Extra-Section 512 Processes and Requirements," especially its discussion of actions OSPs take to verify the validity of a takedown notice before taking down material.[21] Although the Report framed the issue as about OSPs favoring review of takedown notices, in fact the issue has much more to do with users. As a matter of logic, practices such as reviewing takedown notices to confirm that they correspond to the claimed material, that they were actually issued by copyright holders, that they are based in copyright law, or that they do not seek to remove instances of manifest fair use, represents extra work for OSPs. OSPs therefore do this work not for themselves, but for users.

The OTW, for example, receives takedown notices by e-mail and hand-reviews every notice we receive. Automatically removing every work for which we receive a takedown notice would surely be easier than reviewing those notices for validity and following up with requesters whose notices appear invalid. In our experience, however, taking that easier route would result in the removal of obviously non-infringing material and the punishment of users who have done nothing wrong. Any interpretation of section 512 that would force OSPs to blindly follow notices—no matter how flawed they may be--would invite viewpoint censorship, harassment, and unfair competition; and would harm users.

Therefore, we urge lawmakers to consider users' interests regarding this topic. OSPs must be permitted to "weed out" and fail to take down material based on improper notices without losing their safe harbors.

E. Fair Use Is Crucial to Users

By shortchanging the interests of users, the Copyright Office Report seriously undervalued the doctrine of fair use. Fair use is fundamentally about users' ability to become creators in their own right. The fair use doctrine enables user/creators to critique and comment upon copyrighted

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[20] *See* Gillespie, *supra*, at 87-97 (identifying various types and uses of user flagging).
[21] Report, pp. 153-59.

works in ways that are demonstrably beneficial to society--including political critique, educational use and analysis of copyrighted works, and parody by protecting such uses from copyright liability. By definition, because the competitive market impact of a particular use is among the factors considered in the fair use analysis, fair uses are unlikely to harm the owners of copyrighted works.[22] As a matter of logic, therefore, removing fair uses creates meaningful harm to society without meaningful benefit to copyright holders. Notice-and-takedown systems that burden fair use, allow fair uses to be taken down without analysis, or discourage OSPs from evaluating whether uses are fair invite viewpoint discrimination and are harmful to free expression.

These principles are reflected in the case of *Lenz v. Universal Music Corp.,* which interprets section 512(f) as requiring copyright holders to engage in a good faith consideration of fair use before issuing a takedown notice.[23] Yet the Copyright Office Report expressed concern that the case places too much responsibility on rightsholders.[24] The OTW's experience operating the Archive of Our Own demonstrates the contrary: even after *Lenz*, the OTW has routinely received DMCA takedown notices about which there is no reasonable conclusion other than that the sender failed to consider fair use. These include, for example, notices for works that have the same title as a copyrighted work but contain wholly different substance; and works that contain a short word or phrase from a copyrighted work. Our presumption is that these requests were triggered by automated searches and never reviewed for fair use before being sent. When we have responded to such notices with an inquiry concerning whether the requester considered fair use, the requester has typically failed to respond. In other words, *Lenz* has not proven an impediment to rightsholders' sending notices with (at best) cursory consideration of fair use.

The OTW's experience provides two crucial principles for incorporating user interests into assessments of section 512. First, as discussed above, OSPs must be permitted to evaluate takedown notices. Second, to the extent that lawmakers believe that the law contains any ambiguity regarding whether the section 512 notice-and-takedown framework requires consideration of fair use, it should explicitly add such a requirement that goes beyond the requirement of a "good faith" consideration of fair use to require takedown senders to engage in a *reasonable* good faith consideration of fair use.

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[22] 17 U.S.C. § 107.

[23] 815 F.3d 1145, 1154–55 (9th Cir. 2016).

[24] Report pp. 150-52. The Report also indicated that there may be ways other than Section 512(f), such as unfair competition law, to address the problem of takedown notices that fail to consider fair use. While it is possible that such other mechanisms may *also* exist, section 512(f) is specifically designed to address the problem of improper takedown notice. The Copyright Office's implication that consideration of fair use should not be required because it poses a burden to rightsholders is a rejection of the very purpose of 512(f).

IV. Section 512 is Not, and Should Not Be, About Piracy

Section 512 is about safe harbors for legitimate sites. There are also rogue sites dedicated to copyright infringement online, and, as testimony previously established, they are already subject to liability under the current system.[25] They do not comply with §512. They do not care about notice-and-takedown (or staydown, or filtering) because they are not interested in safe harbors.

Making safe harbors more difficult to obtain or maintain will not curb pirate sites; it will only stifle legitimate sites and hurt users, and may even drive more people to pirate sites if non-dominant but legitimate sites are eliminated by onerous technological requirements.

Many disagreements about the effectiveness of 512 likely trace back to rightsholders' assertions that the failure to solve piracy is a failing of 512, when in fact 512 is simply not about piracy. Rather, 512 is about making it possible to distinguish piracy sites, who fall outside its safe harbors, from those that foster a healthy Internet by facilitating (for example) user expression, information location, and communication, who fall within those safe harbors.

V. Rules Designed Primarily for Massive Sites Like Google and YouTube Would Harm Countless Smaller OSPs and Their Users

As the Copyright Office Report pointed out, the online ecosystem is not one-size-fits-all. Although it is tempting to focus on a few of the behemoth OSPs, the experiences of those OSPs are not typical in any way. They may, for example, have resources to engage in voluntary copyright and monetization programs like YouTube's Content ID program--but the countless smaller OSPs that users rely on do not, and would be crushed by the imposition of more stringent responsibilities in connection with safe harbors.

Crucially, "small" does not mean low-traffic or unimportant. The OTW's website hosting transformative noncommercial works, the Archive of Our Own, has over 2.5 million registered users, hosts over 6 million unique works, and receives almost 350 million page views per week. During this time of quarantine, one especially cannot deny the importance of Internet connectivity and sites like the Archive of Our Own, Wikipedia, Kickstarter, videoconferencing services, public library sites, and distance education services. The Archive of Our Own, for example, experienced an unprecedented rise in users when COVID-19 lockdowns began, and that user rise has persisted.[26]

Notwithstanding this importance, small sites, especially nonprofit ones like the OTW's Archive of Our Own, have very limited resources, both in terms of financial and human capacity. The OTW's entire legal team, for example, consists of seven volunteers who also have other full-time

[25] See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); Columbia Pictures Industries v. Fung, 710 F.3d 1020 (9th Cir. 2013); UMG Recordings, Inc. v. Escape Media Group, Inc., 2015 WL 1873098 (S.D.N.Y. Apr. 23, 2015).

[26] *See* AO3 Statistics 2020: A Look Behind the Scenes, May 9, 2020, https://archiveofourown.org/admin_posts/15931.

responsibilities. Under the current system, these sites are capable of fulfilling the responsibilities of the DMCA's safe harbor; evidence shows that among the more demanding of these responsibilities is distinguishing between valid and invalid takedown notices.[27] Any system that treats small sites as if they had the resources of large ones--whether by requiring "staydown," forcing adoption of technological filtering mechanisms, or imposing more stringent "red flag" knowledge requirements--would not do anything to improve matters for rightsholders, considering the low volume of takedown notices received by small sites. But it would be disastrous for the users who rely on small platforms, and would serve mostly to strengthen the behemoths by putting the survival of small OSPs and new market entrants at risk.

VI. Rules Designed Primarily for Large-Scale Copyright Owners Would Harm Countless Individual Users Who Create Transformative Works

Just as assessment of section 512 should take into account the experiences and needs of small OSPs, it should also take into account the experiences and needs of small-scale creators. The experiences of user-creators who make transformative works such as fanworks are instructive.

Fanworks and other forms of transformative creation (often described as "remix") are important for myriad reasons. Substantial percentages of Americans online create remix, and millions more enjoy the results.[28] Remix empowers new speakers and allows them to develop skills and build creative communities.[29] It provides a particularly valuable tool for underrepresented speakers to provide political and cultural insights,[30] and enables speakers to engage in compelling political and personal expression.[31] The value in fanwork creation, in particular, is personal rather than commercial. The fanworks on the Archive of Our Own are available for free. However, the non-commerciality of these fanworks does not diminish their importance. Through creating and consuming fanworks, fans create community, refine their skills, find their

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[27] See Statement of Professor Rebecca Tushnet, Harvard Law School Before the U.S. Senate, Committee on the Judiciary Subcommittee on Intellectual Property on "The Digital Millennium Copyright Act at 22: What is it, why was it enacted, and where are we now?" February 11, 2020, at 10 (citations omitted):

> Some very big sites, like [the OTW's site], Wikipedia, and the blogging site Medium, [receive] relatively few copyright claims and a relatively large proportion of invalid claims out of those few. Kickstarter, the crowdfunding portal, is another example: In 2015, it received copyright infringement claims targeting only 215 projects, despite having hosted hundreds of thousands of them. Of those, Kickstarter only disabled access to 78: 64 percent of the copyright infringement claims were invalid. Even [for] Amazon's large Kindle Direct program … half of the takedown requests it receives for Kindle Direct are from competitors trying to suppress another person's book.

[28] *See* Organization for Transformative Works, *Comments to the National Telecommunications and Information Administration and the U.S. Patent and Trademark Office*, Nov. 13, 2013, § II, http://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf.

[29] *See id.* at § III.B-C.

[30] *See id.*

[31] *See, e.g.*, St01en Collective, *"Fellowship of the Ring of Free Trade"* YouTube (March 27, 2011), https://www.youtube.com/watch?v=GNn54ctPwtQ (which adds subtitles to clips from the popular movie T*he Lord of the Rings* to comment on the recent history of international free trade agreements and the efforts to oppose them).

own creative voices, improve and maintain mental health, and build personal strength.[32] In these trying times of COVID-19 quarantine, fan communities and creative outlets are all the more important.

In addition to the fundamental user needs discussed in section III, empirical evidence establishes several important principles about the application of section 512 to transformative user/creators. First, section 512 is not only for large-scale copyright owners. It has been effective in helping transformative creators protect their works from unauthorized exploitation. Second, transformative creators need to be able to rely on notice-and-takedown systems that do not rely on "trusted system" extra-legal mechanisms like technological filtering and ContentID. Third, there is a need for notice-and-takedown systems that take fair use into account to avoid chilling transformative creation.

In 2017, OTW collaborated with academics to conduct a survey of fan creators that focused on experiences with and attitudes about copyright. In addition to two questions that asked specifically about knowledge of and experiences with section 512, a third question about general experiences with copyright also solicited a number of answers about takedown notices.[33] There were over 2,000 survey respondents, and our qualitative analysis of these answers reveals a number of salient points drawn from real-world experiences with DMCA takedowns.

A. Section 512 Has Been Effective in Helping Transformative Creators Protect Their Works From Infringing Distribution

Some survey respondents explained that they have successfully used takedown notices to protect their fanworks.[34] In particular, responses focused on "scraping sites," which repost fanfiction without the authors' permission and charge users for access to work originally made available for free. Participants cited broad success with sending takedown notices. Participants mentioned that

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[32] NAT'L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, COMMENTS OF ORGANIZATION FOR TRANSFORMATIVE WORKS (Nov. 13, 2013), available at http://www.ntia.doc.gov/files/ntia/Organization_for_transformative_works_comments.pdf; Hannah Krishna, *How Writing Fanfic Helped Me Work On My Mental Health*, A Series of Random Thoughts (blog), June 4, 2019, https://seriesofrandomthoughts.wordpress.com/2019/06/04/how-writing-fanfic-helped-me-work-on-my-mental-health/.

[33] Q34. Are you familiar with the Digital Millennium Copyright Act (DMCA)? 1. No, I have never heard of it; 2. I have heard of it, but I do not know what it is; 3. Yes, and I think the DMCA is: _____; Q35. Do you know what to do if your fanwork is the subject of a takedown notice on YouTube? 1. I do not know what a takedown notice is; 2. I have received a takedown notice and here is what I did do: ___; 3. I am familiar with takedown notices but would not know what to do; 4. Here is what I would do if I received a takedown notice_____; Q44. Have you ever experienced an issue with copyright related to your fanwork? (e.g., your work being taken down, or finding out that someone else copied your work) 1. No; 2. Yes (please explain what happened).

[34] "a friend alerted me that my work had been plagiarized and the names edited to another fandom. contacted the poster who plagiarized, asked them to remove it or i'd report the work/account. they did not remove it so i reported it and it was removed by the website." [Q44 P212]; "Somebody took my entire story and posted it word for word on ff.net. I reported it and many of my friends put in abuse notices, and the story was taken down." [Q44 P339]; "Found out that someone posted one of my stories under their name. I notified the website and they took the fic down and deleted the other account." [Q44 P391].

they were informed about the takedown process on social media by fan communities.[35] In most instances where participants reported successfully sending a takedown notice when their own works were infringed, the work was fanfiction.[36] Fan art was another context where participants successfully sent takedown notices.[37]

B. Transformative Creators Need Usable Notice-And-Takedown Systems that Do Not Rely On "Trusted Systems" Procedures.

Participants reported shared experiences demonstrating a power imbalance in platforms' application of the DMCA.[38] Most instances where participants reported that their works were accused of infringing another's copyright involved fanvids, generally on Youtube.[39] When responding to the question about what the participant did when they received a takedown notice, participants suggested that Youtube's application of Section 512 does not consider fair use and adversely impacts works that constitute fair use solely because its automated system flags content that contains any amount of copyrighted work found in its system.[40] When a video is

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[35] "There have been a few scams in fandom where a for-profit group scrapes AO3 or another archive and puts up the works for its own profit, and sometimes my work was involved in that. I never thought of that as a copyright issue though. As far as I know, those scammy websites were taken down. In one of the cases, I sent a notice myself, but I don't know how it works -- I was just following the instructions of the people who did." [Q44 P109]; "my fics have been changed into ebooks and distributed where I didn't want them. I submitted DMCA and they were taken down" [Q44 P53].

[36] "Someone posted some of my fic to a site where you had to pay to view fic (it was mined off AO3.) I got it taken down." [Q44 P769]; "Some of my fanfic got copied onto wattpad without my permission. I complained to wattpad and they took it down." [Q44 P850]; "I've had my fic copied and pasted to Wattpad without permission. I reported it to Wattpad and it was removed." [Q44 P856].

[37] "I've had the issue that people have reposted my fan art both on tumblr and Facebook. And on tumblr I just contacted the support team and they fixed it and removed the copy within 24 hours." [Q44 P56]; "I did once many years ago find someone claiming my art as their own, it was fan art of left 4 dead I believe. I resolved the issue with the website, giving them proof it was mine, and they deleted the fake account and made sure the person stopped using my and other peoples art." [Q44 P996].

[38] "The copyright-holder is supposed to first exclude "fair use" before sending a DMCA-notice, but many doesn't. And the sites often takes down content immediately after receiving a notice, without evaluating if it was/could be "fair use". Both sites and the copyright-holders may also run bots to flag and/or remove content automatically, which again take no consideration to fair-use." [Q34, P1509]; "I think the DCMA is an attempt to address the distribution and use of copyrighted works on digital platforms. I also think that it was poorly designed and attempted to curtail/amend/revoke rights previously avoided to the consumer, giving the power to the producer of the content rather than the purchaser." [Q34, P1521.]; "An American takedown system easily abused through automation, and by entities who are unaware of what they have the right to send a notice on." [Q34, P1220.]; "I've had problems with people stealing and selling my original artwork online. I'm pretty sure almost every artist has. I can usually get it taken down but it's a hassle and there's not really much you can do about it. Most of us don't have money for lawyers." [Q44 P310].

[39] "I posted copyrighted content on YouTube and it got deleted" [Q44 P448]; "it was just a youtube video with a song that was copyrighted. the video was blocked and that was that." [Q44 P511].

[40] "I know that I can contest a work, but I must swear that it is my own work, and since the images in my fan vids, do come from a TV show, they would still be denied by You Tube." [Q35, P821]; "I knew there was a chance I could contest it, but I thought even if my vids were legal YouTube might not know that and might just tell me they were illegal, so it wasn't worth bothering. Currently, my YouTube account bans uploads and has had a banner on it

taken down because a platform's automated system flags it, the burden shifts to users to have their work reinstated. At the same time, fan creators don't enjoy the benefits of the automated system because it generally does not include their works, imposing affirmative burdens on the creator to seek out instances where their works are infringed and send a takedown notice. Because fan creators' own works are apparently not protected by platforms' automated systems but are frequently flagged by those automated systems as infringing without considering fair uses of copyrighted material, fan creators don't benefit from automated systems.[41]

When a platform, typically Youtube, removed a video, many participants reported that they did not file counter-notices.[42] Some participants tried to educate themselves by searching for what to do online, but their confusion about whether they could file a counter-notice discouraged them from doing so.[43] Although most participants who received takedown notices expressed a sense that submitting a counter-notice would be futile, those who did send counter-notices were largely successful.[44] Some respondents were unsuccessful despite arguing that their work was a non-infringing use, but this appears to be more the exception than the norm.[45] Participants reported general success in using counter-notices to have their work reinstated,[46] suggesting that simply because a work was removed it was not necessarily infringing. Some participants filed more specific counter-notices including details about why the work constitutes a fair use.[47]

Since the counter-notices were filed by individual users and did not seem to involve much more analysis than what the platform could do itself if it analyzed whether the work constituted fair use itself, these responses suggest that platforms remove content without considering whether the work was a fair use or not. Furthermore, since users are often reluctant to file counter-notices in

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for months about how I need to attend "copyright school." I find that just plain condescending and humiliating, so I don't bother with them. If I start making vids again I'll just put them on tumblr instead." [Q35, P1563].

[41] "Youtube's notorious for taking down fanvids. I've had art being copied by others, and posted without permission but most sites have a system against such persons, which relies on the content creator's effort to take down the copies." [Q44 P603].

[42] "I had a YouTube video taken down once. I was too scared to do anything about it (except not use YouTube for fan vids)." [Q44 P519].

[43] "I googled stuff but was scared my appeal would fail so I did nothing."[Q35, P1165]; "i sent back a 'fair use' claim? something like that? the wording is very scary though because they make it sound like theyre going to take you down[.]" [Q35, P1238].

[44] "I appealed the claim and explained how my work fell under the fair use exception. I got the video back, but had to change the audio to a different song. (weird, bc the claim was for the video and came from the original network, but oh well)" [Q35, P65]; "I appealed Youtube's decision and explained that I believed the content was being used in the context of fair use law." [Q35, P1446].

[45] "i tried to explain that it's fair use in my country, they did not cooperate and i deleted my work[,]" [Q35, P105].

[46] "I've had issues with my fanwork being temporarily removed from YouTube and especially Soundcloud, attempts to take down song covers from my website, and issues where someone plagiarized my own work. In every DMCA case except the soundcloud issue I was able to argue successfully for reinstation / left alone. I've also been successful at getting my plagiarized works removed from the sites where they've been posted." [Q44 P778].

[47] "I file a counter-complaint specifying the ways in which I believe the file is a transformation or enhancement of the original work, and thus a fair use of the original work copyrighted to me and not the original rights-holder." [Q35, P778].

the first instance, one can reasonably conclude from these responses that platforms frequently remove non-infringing fanworks.

C. There is a Need for Processes that Do Not Chill Transformative Creation.

Our survey results indicate that fan creators are not motivated by a desire for economic gain: fans make their fanworks available for free and rely on takedown notices to prevent others from exploiting their works financially or taking credit for their works. This indicates that section 512 is capable of promoting fan creators' interests in self-expression and community. Overwhelmingly, however, participants viewed the lack of balance in takedown processes discussed above as hindering fanwork creation and stifling creativity.[48] Participants identified platforms' tendency to protect economic interests when implementing takedown systems as one possible reason for this hindrance.[49] Other participants discussed the chilling effect of shifting the burden from rights holders to fan creators;[50] and identified other reasons for declining to file a counter-notice, such as privacy.[51] The harm of failure to consider fair use was particularly powerful: Participants whose works were removed explained that they believed that their works constituted fair use, offered examples of uses that fit squarely within fair use by being noncommercial and being used for criticism and parody, and discussed how removal of those works stifled their creativity and communities.[52]

Respectfully submitted,
Betsy Rosenblatt
On behalf of myself and
Organization for Transformative Works
September 28, 2020

[48] "Someone can tell you to take your fanwork down from the internet." [Q34, P256].

[49] "Overblown with takedowns for time-consuming fan work. It mainly hurts fandom love, not the people who make monetary gains off of the product." [Q34, P1368].

[50] "I felt too unmotivated and busy to do anything but it was definitely unfair because the one taken down was a clip I modified into a parody which is perfectly legal for fair use." [Q35, P1374].

[51] "I've had a couple of podfic removed by MediaFire, presumably because I used pieces of music. I thought about fighting it, but then didn't feel like exposing my fannish identity too much, so I just used another download service." [Q44 P840].

[52] "Nothing. I think my video was fair use (a small handful of clips from a movie series rearranged to highlight the director's use of racism) but I was too scared to fight it." [Q35, P519]; "Therefore a take down means that the work is lost and can not be showed to the larger community. It takes work out of the commons and silences it." [Q35, P821].

THE SOCIETY OF COMPOSERS & LYRICISTS

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July 24th, 2020 (resubmitted September 28th, 2020)

Jamie L. Simpson
Chief Counsel
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives

Comments by the Society of Composers & Lyricists (SCL) in preparation for the Creator/Artist Roundtable regarding the USCO Section 512 report, scheduled for August 4th, 2020

THE SOCIETY OF COMPOSERS & LYRICISTS (SCL) is the primary organization for professional film, television, video game, and musical theatre composers and lyricists with a distinguished 75-year history in the fine art of creating music for visual media. With a membership numbering more than 1700, and through its affiliations with the Songwriters Guild of America (SGA), Music Creators North America (MCNA) of which SCL and SGA are both founding members, and the International Council of Music Creators (CIAM), of which MCNA is a key continental alliance member, SCL is part of a US and global coalition of music creators and heirs numbering in the millions.

SCL will be represented by its president **Ashley Irwin**. An Emmy® award-winning composer and arranger, Mr. Irwin currently serves as co-chair of Music Creators North America (MCNA) and is an official APRA AMCOS Ambassador. During his 8-year tenure as president, SCL has submitted comprehensive documents on copyright, licensing and distribution issues to USCO, DOJ and FFC. SCL holds a seat on the **National Film Preservation Board**, is a member of the **Berklee ICE/Open Music Initiative (OMI)**, a liaison organization to the **Digital Data Exchange (DDEX)** and is currently working closely with numerous creator organizations and the Copyright Alliance on the passage of the **CASE Act**.

Recommendations for Roundtable Focus Issues

At the Committee's invitation, SCL joins with SGA in recommending that the three following issues be included on the agenda to be discussed at the Roundtable:

1. Refinement of the "Safe Harbor" Exemptions

As noted in several past, formal submissions by SCL and SGA to the US Copyright Office, Congressional Committees and other US Governmental bodies, there have been profound marketplace changes since the enactment of the DMCA in the ways that digital service providers now expansively participate in the commercial distribution of music and other content to the public. A robust discussion concerning a potential refinement in scope of the "safe harbor" shield from copyright infringement liability currently provided under section 512, as addressed by the Copyright Office in its May 2020 Report, should be a key part of our discussions.

2. "Notice and Takedown" Reform

Another aspect of potential Section 512 reform frequently commented upon in the past concerns the Notice and Takedown provisions. The ineffective nature of the current system, which has turned the intensely difficult work of music creators in self-policing the Internet into a futile game of "whack-a-mole," is addressed at several points in the May 2020 Copyright Office Report and should result in an important exchange of facts, experiences and ideas for solutions within the roundtable framework.

3. The "Value Gap" Issue and the European Union Single Digital Market Copyright Directive

As the Copyright Office also pointed out in its May 2020 Report, several territories (including the European Union) have recently taken strides toward addressing the perplexing issue known as the "value gap," whereby those whose creative works form the essence of value on the Internet are also frequently the least-compensated parties in the entire value chain. This anomaly, favoring huge technology conglomerates over individual creators and small businesses, continues to result in devastating losses to the music community, inflicting financial hardship so significant that it is actually damaging cultural advancement in addition to commerce. Thousands of creators simply can no longer afford to practice their arts. As the Copyright Office seems to suggest by its Report, a discussion of how other nations are seeking to reverse this toxic trend is deserving of our attention as we discuss options for reforms through the roundtable process.

Finally, I have attached as Annexure A, my opening remarks from the Creators' Listening Session held on August 4th, 2020, to be included as part of the record.

Respectfully submitted,

Ashley Irwin
President
Society of Composers & Lyricists

ANNEXURE A

House Judiciary Committee Section 512 Listening Session – CREATORS
Opening Remarks by ASHLEY IRWIN, SCL President
(August 4, 2020)

The law has always lagged behind advances in technology, and it always will. Obviously, any ramifications cannot be adequately addressed until the widespread adoption of such technologies has been in place long enough to assess the impact on all parties, from supplier to consumer.

What we have seen repeatedly over the years, with respect to music licensing issues, is concern for those parties wishing to use our intellectual property (our music) and concern for those consuming it (the general public), with the very people responsible for making this connection possible, the creators, invariably considered as an afterthought or overlooked completely. This has to stop if we are to expect anyone to continue as professional artisans in creative industries.

Fortunately, the US Copyright Office has acknowledged this in its 2020 report concerning Section 512 concluding, "... that Congress' original intended balance has been tilted askew." It is now up to Congress to right the ship.

The original purpose of the Safe Harbor Provision was to protect "start up" companies from exposure to copyright infringement and liability for publicly posted content, without engagement in proactive or commercial interaction, but that business model has long gone in favor of active curation and exploitation of creators' works without adequate compensation. While the advertising revenues for Big Tech grow larger every year, creators such as composers and songwriters, on whose very backs this growth has been built, are left to fend for themselves in an environment that favors Goliath over David.

The Value Gap cannot be ignored. Today, when someone turns on a computer or a handheld device, they are immediately accessing the entire world. It is myopic to consider the consequences of the DMCA and Section 512 in terms of the US alone. Consideration must be given by Congress to acknowledge the legislative actions taken by other national entities, including the European Union, to close the Value Gap that has enriched the major tech companies at the expense of the creators, who often provide the only content that makes the DSP viable as a business enterprise.

As mentioned in the Copyright Office report, The European Union Digital Single Market (DSM) Copyright Directive (which was heavily supported by American music creator groups including SGA, SCL, MCNA and their international affiliates CIAM and the European Composers and Songwriters Alliance [ECSA]), is currently the prime example of utilizing a legislative approach to address this fair trade/value gap-based music issue.

Finally, the availability of a blanket mechanical license for Internet use via the Music Modernization Act provides limited liability for DSPs, and so begs the question as to whether Safe Harbor Provisions should be scaled back accordingly. We look to the Copyright Office for clarification on this issue.

Songwriters Guild of America

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Statement of Rick Carnes
President of the Songwriters Guild of America
before the HOUSE COMMITTEE ON THE JUDICIARY

Re: "Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades."

September 30, 2020

Good afternoon, Chairman Nadler, Ranking Member Jordan, Chairman Johnson, Ranking Member Roby and members of the House Judiciary Committee, and thank you for the invitation to submit testimony at today's hearing titled, "Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades."

These Comments are respectfully submitted for inclusion in the Hearing Record by the Songwriters Guild of America, Inc. ("SGA"), the longest established and largest music creator advocacy and copyright administrative organization in the United States run solely by and for songwriters, composers, and their heirs. Its positions are reasoned and formulated solely in the interests of music creators, without financial influence or other undue interference from parties whose interests vary from or are in conflict with those of songwriters, composers, and other authors of creative works. Established in 1931, SGA has for 89 years successfully operated with a two-word mission statement: "Protect Songwriters," and continues to do so throughout the United States and the world.

SGA's organizational membership stands at approximately 4500 members, and through its affiliations with both Music Creators North America, Inc. (MCNA) (of which it is a founding member) and the International Council of Music Creators (CIAM) (of which MCNA is a key Continental Alliance Member), SGA is part of a global coalition of music creators and heirs numbering in the millions. Of particular relevance to these comments, SGA is also a founding member of the international organization Fair Trade Music, which is the leading US and international advocacy group for the principles of transparency, equitable treatment, and financial sustainability for all songwriters and composers.

Comments

In the 2020 Report of the US Copyright Office prepared at the request of Congress concerning potential Section 512 reform, the key conclusion was as follows: "Based upon its own analysis of the present effectiveness of section 512, the Office has concluded that Congress' original intended balance has been tilted askew." As a result, the Copyright Office has endorsed a "rebuilding" of Section 512 to better reflect the intentions of Congress when it enacted the DMCA:

> The Office is not recommending any wholesale changes to section 512, instead electing to point out where Congress may wish to fine-tune section 512's current operation in order to better balance the rights and responsibilities of OSPs and rightsholders in the creative industries. Should Congress choose to continue to support the balance it devised [in] the DMCA and move forward on the issues identified in this Report, then the Office harbors some optimism that a path toward rebuilding the section 512 balance could be found.

SGA is in agreement with that approach, with the caveat that without such rebuilding and fine-tuning as the Copyright Office suggests, the American creative community will continue to find it challenging to merely survive, let alone to thrive. SGA therefore respectfully comments and urgently recommends as follows:

1. **A Need to Narrow the Safe Harbor Provisions**

One of the most important issues identified in the Copyright Office Report as urgently in need of Congressional review is the scope and intent of the "safe harbor" provisions. As noted in the Report, "the section 512(c) safe harbor [guidelines] are in tension with the original balance Congress sought to achieve."

The clear, original Congressional intent was to protect from copyright infringement exposure and liability those "start-up" companies who acted as mere temporary repositories of content posted by the public, without curation or engagement in other proactive commercial interactions. That business model has long since been abandoned by such companies in favor of active curation and content monetization. Those changes in circumstances and business models have resulted in the amassing of enormous wealth by the safe-harbor protected tech firms through their generation of huge advertising revenues --and their use of other monetization techniques including consumer data mining and sale- - that have made them some of the largest and most profitable enterprises *in history*.

Concurrently, creators such as songwriters and composers on whose content this wealth has been built, go begging for the crumbs that fall from Big Tech's tables. The recent Covid-19 pandemic has further worsened this brutally unbalanced playing field.

As the Copyright Office Report points out, there are several reforms that should be considered and potentially implemented by Congress to address the basic unfairness of this "new" reality. These include revising the statutory standards that companies must meet in

order to maintain safe harbor protections, including expansion of the definition of "red flag" knowledge of infringing activity by a company on its system.

The engagement by a company in acts of "willful blindness," as an example, should result in automatic disqualification for safe harbor protections. Moreover, as the Report states, "[o]ther eligibility questions have arisen that Congress may want to clarify, including the amount of time that qualifies as 'temporary' [storage] for the section 512(b) safe harbor, and whether technology services beyond providing internet infrastructure—such and peer-to-peer ("P2P") systems and payment processors should appropriately be included under section 512(a)."

And then there is the issue of just plain "fairness." At this stage in their development, do the most successful and wealthiest companies in the world really need an extraordinary legal shield from liability against individual creators whose content is illegally utilized by the customers of such companies? *Even as those companies look away, pretending not to see the pattern of massive infringement on their way to the bank?*

2. A Need to Amend the Cumbersome and Ineffective Notice & Takedown Provisions

SGA strongly agrees with the Copyright Office Report findings that the burdens being placed on creators and copyright owners to provide various detailed identifiers for the purposes of complying with the notice and takedown provision are way too stringent. For example, the Report notes that "Congress may wish to consider whether the 'information reasonably sufficient . . . to locate' provision is appropriately interpreted as requiring that a rightsholder must submit a unique, file-specific URL for every instance of infringing material on an OSP's service." In this regard, SGA strongly supports the idea of shifting to the Copyright Office the rulemaking authority to specify and limit the information required to be provided in notice and takedown complaints.

The game of "whack-a-mole" that music creators are forced to play is hard enough without having to jump needlessly through superfluous informational hoops. Moreover, Congress needs understand the urgent necessity of addressing the problem that "notice and takedown" rarely translates to "notice and stay down." The process of protecting musical compositions from unlicensed and uncompensated use is made infinitely more difficult by a system that requires endlessly repetitive notices to be sent to repeat infringers. As the Copyright Office Report points out, specific legal guidelines that delineate when a service must block a repeat infringer would have both immediate benefits and long-lasting deterrent effects on infringing activities, just as Congress intended when it enacted the DMCA.

SGA also agrees that in the wake of the controversial Lenz case[1] (regarding application of the fair use doctrine in notice and takedown situations), it makes great sense for Congress to specifically enumerate the specific fair use considerations that need to be taken into

[1] ***Lenz v. Universal Music Corp.***, 801 F.3d 1126 (9th Cir. 2015)

account by creators and copyright owners prior to sending notice and takedown demands. Requiring a full, unrestricted fair use analysis by complaining creators and copyright owners each time a notice and takedown demand is sent would be so onerous and expensive a standard to satisfy as to convert the entire system into a bar against rights enforcement. And that is certainly not what Congress intended.

3. **A Need to Address the "Value Gap" As Has Been Done Elsewhere**

It is crucially important for the US Congress to recognize that other national and regional legislative bodies, including the European Union, have taken firm legislative steps to address the gigantic value gap that has developed between the enormous profits generated by big tech companies from the digital delivery of content, as opposed to the miniscule remuneration paid to the creators whose musical, literary, artistic and other works form the basis of wealth creation on the Internet.

The current valuations of major internet tech companies and music content delivery services as determined by top, reputable business publications are approximately as follows: Microsoft ($1.5 trillion); Apple ($1.3 trillion including Apple Music stand-alone value of $20 billion); Amazon ($1.2 trillion including media streaming services combined valuation of up to $500 million); Alphabet/Google (1.1 trillion including YouTube stand-alone valuation of $300 billion); Facebook ($765 billion); Alibaba ($654 billion); Tencent Holdings ($583 billion); and Spotify ($50 billion).

In the meanwhile, the US and global music creator community has been decimated over the past two decades even as music content was utilized as a primary driver (and in some cases such as stand-alone music streaming services the sole driver) in amassing enormous wealth for the multi-national Big Tech industry. Total annual, global music content revenues earned by music creators, artists and copyright owners, --including income produced by every recording and musical composition in existence-- does not come close to equaling the valuations of even the smaller tech companies such as digital music delivery services.

As the Copyright Office Report points out,

> many rightsholders and academics argue that…a rebalancing is called for, noting that the internet is no longer the infant industry of 1998 and that, with maturity, the OSPs are now better positioned to accept some of the responsibility for the negative externalities of their services (particularly given the economic and cultural success of the internet services sector during the last twenty-plus years). This argument largely relies on an implicit (and often explicit) comparison between the resources available to the large OSPs as opposed to those available to small authors and creatives, supporting a conclusion that the OSPs are better situated to shoulder the burden of policing infringement by their users. The comparisons on which the argument relies include the economic success of the internet services industry with the economic precariousness of many small authors and creatives, as well as the technologies available to large OSPs versus the

> largely manual process used by small creators to search for and send notices regarding instances of infringement. In one rightsholder's view, it is particularly unfair for large OSPs whose 'business model is predicated on monetizing user-generated content (not vetted for copyright),' to place the burden of identifying infringements on the rightsholder, arguing instead that such 'OSP[s] should be required, by law, to implement some form of digital fingerprinting to prevent infringing material from being uploaded in the first place.'

The European Union Digital Single Market (DSM) Copyright Directive, which was heavily supported by American music creator groups including SGA, The Society of Composers & Lyricists ("SCL"), MCNA and their international affiliates CIAM and the European Composers and Songwriters Alliance ("ECSA"), is currently the prime example of utilizing a legislative approach to address this fair trade/value gap-based music issue. Again, according to the Copyright Office Report:

> Article 17 of the DSM Copyright Directive addresses the 'value gap' concept that online content sharing platforms obtain unreasonable value from enabling their users to make available copyrighted content, without guaranteeing that rightsholders receive their share of the value or remuneration from such exploitation of their works. In order to 'bridge the gap,' the DSM Copyright Directive seeks to ensure that rightsholders receive appropriate remuneration for the use of their works online by promoting a 'licensing market between rightsholders and online content-sharing service providers' which preserves a 'reasonable balance between both parties.' These provisions, however, do not affect the contractual freedom of rightsholders who are not obliged to give an authorization or to enter into licensing agreements.

It is SGA's view that the philosophical approach adopted by the EU, in attempting to level the playing field at least enough to permit the economic survival of creators and the encouragement of the continued cultural contributions, must be an essential consideration for the US Congress. The gross inequities being perpetuated under the current system must be addressed, before a further and even more profound deterioration of creative product becomes inevitable. And that degradation is an end result that would be damaging not only to the American economy, but to US creators, consumers, and culture.

4. A Need to Evaluate the Potential Effects of the Music Modernization Act (MMA) on Section 512

Finally, the US and global music creator communities are studying the potential effects that implementation of the MMA and the availability of a blanket mechanical rights license for Internet use may or should have on the safe harbor provisions of Section 512. The question of whether the safe harbor protections given to music distributors should be scaled back due to accommodations made under the MMA, including limitations on liability, is an issue that requires far greater scrutiny in the immediate future.

SGA thanks the Subcommittee for its careful concern regarding protection of the rights and interests of songwriters and composers under the US Copyright Act, and for the opportunity to submit these Comments.

Respectfully submitted,

Rick Carnes
President
Songwriters Guild of America

cc: The SGA Board of Directors
Charles J. Sanders, Outside Counsel

Before the
Committee on the Judiciary
United States House of Representatives

"Copyright and the Internet in 2020:
Reactions to the Copyright Office's Report on the
Efficacy of 17 U.S.C. § 512 After Two Decades"

September 30, 2020

Written Comments of Songwriters of North America

Chairman Nadler, Ranking Member Jordan, and Members of the Committee:

Songwriters of North America ("SONA") appreciates the opportunity to submit written comments for the record in connection with the Committee's September 30, 2020 hearing, "Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades" ("Hearing").

Songwriters of North America ("SONA") is a grassroots 501(c)(6) organization founded in 2015 by songwriters Michelle Lewis and Kay Hanley, along with attorney Dina LaPolt, to protect and advance the interests of songwriters. SONA advocates for songwriters in the courts, in regulatory proceedings, and before Congress. SONA seeks to ensure that copyright law is equitable to music creators and songwriters are compensated fairly for the works they create.

The May 2020 report of the U.S. Copyright Office, "Section 512 of Title 17" ("Report"), concluded that the notice and takedown provisions embodied in section 512 of the Copyright Act are out of balance and do not adequately address the needs of creators seeking to halt online infringement of their works. SONA could not agree more, and is heartened that the Committee is considering potential updates to section 512 to correct this imbalance.

At the Committee's request, SONA is pleased to attach (1) SONA's earlier submission in advance of the August 11, 2020 Committee listening session setting forth SONA's views on key findings of the Copyright Office in its Report, and (2) the statement of SONA member Michael Eames, presented at the August 11 session. SONA respectfully requests that these materials be added to the Hearing record, and thanks the Committee for its continuing efforts to improve the section 512 notice and takedown process for creators.

Respectfully submitted,

Michelle Lewis
Executive Director
Songwriters of North America

Songwriters of North America
Statement of Participation
House Judiciary Section 115 Roundtables

Songwriters of North America ("SONA") is a grassroots 501(c)(6) organization founded in 2015 by songwriters Michelle Lewis and Kay Hanley, along with attorney Dina LaPolt, to protect and advance the interests of songwriters. SONA advocates for songwriters in the courts, in regulatory proceedings, and before Congress. The existing section 512 system is not a fair, balanced or workable solution for songwriters to address online piracy of their works.

At the upcoming section 512 roundtable discussion, SONA would like to focus on the following three recommendations of the Copyright Office ("Office"):

Provide the Office with regulatory authority to adopt Standard Technical Measures ("STMs"): The Office should be empowered to conduct stakeholder meetings and establish STMs within the meaning of section 512(i). In this regard, SONA seeks to ensure that any such measures will address the needs of smaller creators. In particular, any automated takedown tools must be made available to all creators.

Clarify repeat infringer requirement: SONA supports the Office's recommendation to clarify 512(i)'s repeat infringer requirement. This may best be accomplished by providing the Office with regulatory authority to adopt relevant criteria. SONA agrees with the Office that an OSP's repeat infringer policy should be clear, documented and publicly available.

Notice and staydown approach: SONA supports the Office's recommendation that there be further study and consideration of a "staydown" requirement as a longer-term solution to the overwhelming issue of online infringement. Smaller creators, who often rely on manual takedown processes, are especially impacted by the "whack-a-mole" problem. The section 512 system needs to be rebalanced, as the Office notes. Realistically, this will only happen if there is widespread implementation of technologies to prevent reposting of infringing content.

Statement of Michael Eames
on behalf of
Songwriters of North America

Section 512 Roundtable

August 11, 2020

My name is Michael Eames and I am here representing the songwriter advocacy organization SONGWRITERS OF NORTH AMERICA (also known as SONA) in my capacity as a member of SONA's Steering Committee, a songwriter and composer as I started my career in the music business, to my current activities as an independent music publisher where we represent songwriters and composers and collect their income generated worldwide and pitch their material for use by third parties in all media.

The current Section 512 system has created an imbalance whereby the needs of the creators have been dwarfed by the power and resources of the technology companies (particularly the larger online service providers) who have essentially used their works as stepping stones to amass great market value – value that any individual creator could never achieve.

Individual creators and smaller, independent companies who represent creators do not have the time or the resources to devote to monitoring the prolific online infringement that exists today. Doing so would exemplify the saying that "the definition of insanity is doing the same thing over and over and expecting a different result". Monitoring online infringements is a game of "whack a mole" – once you might be successful in taking an infringement down it will re-surface somewhere else, sometimes minutes after the takedown. While engaging in this maddening process, the creator or smaller company is spending time and in some cases money (in the case of hiring employees) to pursue something that does not bring any direct monetary benefit. And the time that the process requires takes away from time that could be better spent elsewhere creating new works or in the case of a company representing creators, time better spent generating income for the creator to counter-balance the income the creator is losing via the online infringement.

Further to this, online infringement can also directly take money out of a creator's pocket when an unreleased song or demo recording gets leaked or stolen and as a result of the presence of that unreleased recording online, an artist who may have interest in recording that song for themselves loses interest in doing so. Or a potential user of that song in a commercial context may choose a different song that has not been "exposed" already on the internet.

SONA feels that the Copyright Office should be empowered with regulatory authority to establish Standard Technical Measures that benefit creators and the companies that represent them and most importantly any resulting tools from this process be made available to ALL individual creators. As just one example, YouTube's ContentID system is not available to all creators. Only entities of a certain size are granted access to the system so creators are left

with no other choice but to employ one of these entities to police their content but at a cost varying from 15-30% of any resulting income. We should be striving to lessen the burden on creators to police unlicensed uses of their own works and be providing them with effective technological tools on a non-discriminatory basis to control the online dissemination of their works without their permission.

SONA also feels that the Office should study the possibility of notice and staydown requirements for the larger online service providers. These OSPs have the resources to handle this type of process and given that the larger players attract the largest user base, it is only fair that once a use is determined to be unlicensed, it be made to stay down and not become part of the "whack a mole" problem.

The 22 year old DMCA could not have envisioned the capability of today's technology when it was drafted at a time when the majority of us were on AOL dial-up internet, before the iPod and iPhone were unveiled, and before technology could allow us to do this listening session today completely over the internet with all participants taking part from totally different locations. The DMCA of 22 years ago also could not have envisioned that it would be used by corporations who have seemingly unlimited resources in their billion dollar and trillion dollar market values as compared to the individual creator who is creating while living in a studio or one bedroom apartment. Let's re-balance the DMCA especially when it comes to the larger OSP's so that they are held accountable to the creators whose works enabled them to achieve their current record-breaking market values.

Thank you Jamie and all other Committee Staffers for organizing this.

September 28, 2020

On August 11, 2020, the House Judiciary Committee invited me to speak about the implications of potential amendments to 17 U.S.C. § 512 on law libraries. Below is an extension of my written and oral comments. Please note, I am writing in my individual capacity, not as a representative of either the University of Georgia School of Law or the American Association of Law Libraries.

I am the Research and Copyright Services Librarian for the University of Georgia School of Law. I have extensive experience in copyright law as an attorney, an educator, and a librarian in law libraries and in general academic libraries. I teach courses on intellectual property research; advanced legal research; and on the intersection of copyright law and technology, where I cover Section 512. Additionally, I have published on technology and law and have been on-brief in two United States Supreme court *amicus curiae* briefs on copyright law: First, with Deborah Merrit (counsel of record) in *Reed Elsevier v. Muchnick*; and second with Michael Carroll (counsel of record) in *Golan v. Holder*.

In this letter, I will briefly address two points: 1. The importance of user generated content and online tools in higher education; 2. The role that universities and libraries can play in non-statutory education/enforcement mechanisms.

First, user generated content and online tools are vitally important to modern higher education and they would not exist without 17 U.S.C. § 512's safe harbor provisions. Even before the COVID-19 pandemic and social distancing, faculty have been exploring new ways to improve student learning by embracing modern technology for many years. Now, however, after our rapid transition to distance learning/hybrid models, these tools are more important than ever before. Indeed, they are essential to our current learning environment. Educators at all levels, from elementary school to law school are rethinking how we can deliver education and evaluate our students in the most effective ways possible. And many of these new ideas involve students using online tools to generate and host content in ways that implicate section 512. As such, any amendments to the law should not jeopardize our students' education or overly burden educators by putting barriers up against user generated content. Instead, we should encourage the development of this kind of content, but we should do so in a way that is respectful of rightsholder's rights.

Moreover, access to the internet alone is essential to modern higher education. The Copyright Office's report on section 512 recognizes that Universities require special attention when considering regulations that restrict user access to the internet. As the

report notes, university students need online access to such an extent that restricting it would be like expelling the student. Indeed, our current distance/hybrid educational situation makes this especially clear. Accordingly, a delicate touch is required to maintain the balance between user and rightsholder rights that Congress envisioned in 1998 with the DMCA

Second, academic libraries can play a role in non-statutory compliance/enforcement mechanisms that Congress considers. The Copyright Office's report notes that one strategy to address the imbalances in section 512 may be to use educational initiatives to improve understanding about copyright, fair use, notice-and-takedown and how to create and use content within the bounds of the law. If Congress takes this approach, libraries like my own will play an important role. From my anecdotal experience teaching copyright in general and section 512 specifically, I have found that many students (and some faculty) are unaware of how the DMCA operates and what user's rights are vis-a-vis rightsholders' rights. In my experience, people frequently come to academic libraries with questions about their rights under copyright law. As universities employ more online tools and user generated content in their classes, I believe libraries will naturally play an increasingly large role in addressing questions about how to operate without violating the law. As such, libraries can play an important role in any non-statutory educational initiative.

Ultimately, while 17 U.S.C. § 512 could be updated to fit modern technology and user trends, its core seems to work as Congress originally intended in 1998. It has unquestionably enabled numerous online tools and forums to grow into what they are today, and it is hard to imagine the world wide web without them. On this note, it is important to remember that when we are talking about protecting user generated content, we are really talking about protecting the free expression that we value so highly in the United States. Congress was impressively prescient with the DMCA about the need for robust safe harbors to enable users to create content, and it is vital to protect the balance between users and rights holders under the law.

Sincerely,

Stephen M. Wolfson

Chair NADLER. Here with us today, we have six Witnesses to provide the Committee with a representative set of reactions to the Copyright Office's report and recommendations and ultimate conclusion that section 512 is out of balance. Today's Witnesses reflect the diverse interests at stake when copyright and the internet intersect, and their perspectives are invaluable. A lot has changed since 1998, and today's dialogue will mark an important step forward in ensuring that our copyright laws are keeping pace with reality. I thank our Witnesses for joining us today, and I look forward to their testimony.

I now recognize the Ranking Member of the Judiciary Committee, the gentleman from Ohio, Mr. Jordan for his opening statement.

Mr. JORDAN. Thank you, Mr. Chair. I, too, want to thank our Witnesses for being here today. The Digital Millennium Copyright Act, or DMCA, was a landmark piece of legislation when it was enacted in 1998. It provided needed certainty for stakeholders in the copyright system and a framework that contributed to more than 2 decades of explosive growth and innovation online. As important as the DMCA was and continues to be, 2 decades is an eternity when it comes to the internet, as you expressed in your opening comments as well.

Many of the ways in which Americans access content online today had not been invented or developed when the DMCA was enacted. For example, YouTube, Facebook, Twitter, Pandora, Spotify, and Hulu all started years after this legislation was passed two decades ago. Over the past decade, Congress has begun to look more closely at how the copyright system and the DMCA is interacting with this shifting landscape online. The stakes are critical to our economy and to our country. The creative industry contributes hundreds of billions of dollars to our economy each year and employs millions of Americans.

Today, creative content is primarily produced and distributed and consumed digitally over the internet. As a result, writers, musicians, filmmakers, photographers, and other artists depend on online service providers to reach their audiences and earn a living. They are not alone. Creative works also represent the talents and skills, engineers, researchers, editors, and countless others, all of whom depend on the economic success of those creative works online. This is why DMCA is important, and particularly section 512.

Section 512 protects online service providers but requires them to implement procedures intended to allow copyright holders to protect and control their creative work on those services. Over the past decade, though, many stakeholders have come to Congress to alert us they feel that this section is not working as it was intended. The problem facing many creators today is not a few dozen fake CDs or DVDs sold on the street, but instead illegal uploads on multiple websites where they are accessed or downloaded millions of times. The economic harm of millions of unauthorized downloads to a creator is obvious since each download is potentially a lost sale, but the true impact may be much wider. By some estimates, online piracy costs our economy around $30 billion a year and affects everyone in the creative industry.

For their part, service providers must advance the purpose of section 512 to protect copyrighted works online in order to benefit from its safe harbors, but they must also balance the rights of users, including freedom of expression. That can be a difficult task, particularly considering the vast amount of content uploaded to the internet each day. For example, YouTube alone sees 500 hours of video uploaded every minute. Every single minute. Fortunately, technology exists to help in that task, and additional advancements in years to come will help further. While the government should not become more involved than necessary, we must continue to monitor this area of law and play a constructive role by making any necessary adjustments to the section 512 framework and by incentivizing innovation to better address online copyright infringement. The system must do a better job protecting the rights of copyright holders while balancing the interests of the public. That is why I'm pleased the Committee has convened this hearing in exploring these issues that are vital to our economy and to our country.

I want to thank all our Witnesses for participating, as I said earlier, and assisting us in this hearing. Mr. Chair, I would yield back.

Chair NADLER. Thank you, Mr. Jordan. Without objection, all other opening statements will be included in the record.

I will now introduce today's Witnesses.

Jeffrey Sedlik has been a professional advertising photographer in Pasadena, California for 35 years. He has been a professor at the Art Center College of Design for 25 years, teaching courses on copyright law and licensing. Additionally, as the President of the nonprofit PLUS Coalition, he manages the successful development of multiple standard technical measures for visual arts. Meredith Rose is the policy council at Public Knowledge where she specializes in technology, telecommunications, and intellectual property policy. Previously, she worked on consumer policy issues at the Federal Communications Commission, the Transatlantic Consumer Dialogue, and Knowledge Ecology International. Ms. Rose received her bachelor's degree and law degree from the University of Chicago.

Morgan Kibby is a classical pianist, cellist, and vocalist. In addition, as a writer, producer, and performer, she has both created solo works and works produced in collaboration with many other artists, which have garnered critical acclaim and award nominations. More recently, she has scored projects for several online streaming services and for films in competition at major film festivals. Jonathan Band is counsel for the Library Copyright Alliance. He is also an adjunct professor at the Georgetown University Law Center, has written extensively on intellectual property and the internet, and has many years' experience in private practice. He is a graduate of Harvard College and Yale Law School.

Matt Schruers is President of the Computer and Communications Industry Association where he directs its advocacy on behalf of leading internet, communications, and technology companies. He joined CCIA from private practice in 2005. For 10 years, he has served as an adjunct professor, teaching both intellectual property and internet law at Georgetown University and American University Washington College of Law. He is a graduate of Duke and the

University of Virginia School of Law. Terrica Carrington is Vice President, legal policy and copyright counsel at the Copyright Alliance, an organization dedicated to protecting the rights of creators and advocating policies that promote the value of copyright. Ms. Carrington is also an adjunct professor at George Mason University School of Law. She is a graduate of the University of North Carolina Chapel Hill and George Mason University School of Law.

We welcome all our distinguished Witnesses. We thank them for their participation. Now, if you would please rise, I will begin by swearing you in.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

[A chorus of ayes.]

Chair NADLER. Let the record show the Witnesses answered in the affirmative. Thank you, and you may be seated.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there is a timer on your screen. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

Mr. Sedlik, you may begin.

TESTIMONY OF JEFFREY SEDLIK

Mr. SEDLICK. Chair Nadler, Ranking Member Jordan, and other Members of the Committee, thank you for the opportunity to testify today on section 512 of the Digital Millennium Copyright Act (DMCA). My name is Jeffrey Sedlik. I've been a professional photographer for 35 years, and I am the author and owner of hundreds of thousands of copyrighted photographs. I am also the President of the PLUS Coalition, a global nonprofit organization in which diverse stakeholders from 140 countries have collaborated to develop standard technical measures to ensure that the public can access and understand rights information for visual works. The PLUS standard technical measures have multiple adopters, including Google, Yahoo, Adobe, and millions of creators and users throughout the world.

I make a living creating and licensing photographs to appear in all manner of media. The photographs that I create are protected under U.S. copyright law, at least in theory. In reality, my photographs receive very little protection because of the rampant infringement of my work that is knowingly permitted by online service providers on their platforms and websites.

Instead of using readily-available technologies to identify and mitigate copyright infringement, service providers hide in the safe harbor of 512, ignoring illegal activity, and allowing infringers to infringe, exploit, and monetize my work with impunity unless and until I submit a DMCA takedown notice. As a result, I am forced to dedicate my very limited time to searching for infringements, making screenshots to document the infringing material, collecting hundreds or thousands of infringement URLs, combing through ob-

scure OSP menus to find DMCA agent information, drafting and submitting takedown notices, and responding to inane, unnecessary, superfluous follow-up questions from service providers. Once the infringement is taken down, it will inevitably return, often the same day because service providers uniformly fail to effectively implement and enforce repeat infringer policies.

Enforcing my rights under the DMCA is an impossible task, not just for me, but for my fellow creators across this Nation. Most visual artists operate as micro businesses, often with no employees. Like other creators, in order to feed my family, I must generate revenue by creating and licensing new works continuously. In attempting to license my works, I find that I am forced to compete with hundreds of thousands of unlicensed, unpaid infringing uses of my works on service providers' platforms and websites. If I do not enforce my copyrights, my work has no value and my business is not sustainable, but if I dedicate the time and effort necessary to identify and repeatedly enforce my copyrights with takedown notices, I have no time left to create new works. This is an untenable situation—one that I and innumerable other visual artists and small businesses are forced to confront on a daily basis.

If my takedown notice is met with a counter notice, 512 allows me just 10 days in which to interview and retain an attorney and file a complaint in Federal court, or the infringement will be back online. If I do not have a copyright registration for the photograph in question, I face the prospect of paying the Copyright Office more than 10 times the normal registration fee to expedite processing of my application under the special handling procedures with no guarantee that the Office will be able to actually process and approve my registration within 10 days. Certainly, this is not the effective, balanced system envisioned by Congress when it enacted the DMCA. The fact that millions of takedown notices are issued each day is not a sign of success. It is a sign of an unbalanced system under strain and on the verge of failure, if not beyond.

I thank the Copyright Office for their years of great work on the 512 report. I agree with and support the recommendations of the Copyright Office. In my written testimony, I present 13 additional recommended revisions. I make these suggestions on behalf of the American Photographic Artists, the American Society for Collective Rights licensing, the American Society of Media Photographers, the Digital Media Licensing Association, the Graphic Artists Guild, the National Press Photographers Association, the North American Nature Photographers Association, the PLUS Coalition, and the Professional Photographers of America. In closing, I, again, thank the Committee for your efforts to improve the Copyright Act and for the opportunity to share my experience and suggestions in my testimony today.

Committee on the Judiciary
U.S. House of Representatives

Hearing:
Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades

September 30, 2020

Testimony of Jeffrey Sedlik

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Chairman Nadler, Ranking Member Jordan, and other Members of the Judiciary Committee, thank you for the opportunity to testify today on Section 512 of the Digital Millennium Copyright Act.

My name is Jeffrey Sedlik. I have been a professional advertising photographer for 35 years and am the author and owner of hundreds of thousands of copyrighted photographs. I am also the president of the PLUS Coalition, a global non-pro fit organization in which diverse stakeholders from 140 countries collaborated to develop Standard Technical Measures to ensure that the public can access and understand rights information for visual artworks.

I make a living creating and licensing photographs to appear in all manner of media. The photographs that I create and license are protected under U.S. copyright law, at least in theory. In reality, my photographs receive very little protection because of the rampant infringement of my work that is knowingly permitted by online service providers on their platforms and websites.

Instead of using readily available technologies to identify and mitigate copyright infringement, service providers hide in the safe harbor of 512, ignoring illegal activity, allowing infringers to infringe, exploit, and monetize my work with impunity, unless and until I submit a DMCA takedown notice. As a result, I am forced to dedicate my days and nights to searching for infringements, making screenshots to document infringing material, collecting hundreds or thousands of infringement URLs, combing through obscure website menus to find DMCA agent information, drafting and submitting takedown notices, and responding to inane, unnecessary follow-up questions from service providers. Once the infringement is taken down, it will inevitably return, often the same day, because service providers uniformly fail to effectively implement and enforce repeat infringer policies.

Enforcing rights under the DMCA is an impossible task, not just for me, but for my fellow creators across this nation. Most visual artists operate as micro-businesses, often with no employees. Like other creators, in order to feed my family, I must generate revenue by creating and licensing new works. But in attempting to license my works, I find that I am forced to compete with hundreds of thousands of unlicensed, unpaid, infringing uses of my works on service providers' platforms and websites. If I do not enforce my copyrights, my work has no value, and my business is not sustainable. But if I dedicate the time and effort required to identify and repeatedly enforce my copyrights with takedown notices, I have no time left to create new works. It is an untenable situation - one that I and innumerable other visual artists and other small businesses are forced to confront on a daily basis.

If my takedown notice is met with a counternotice, 512 allows me just ten days in which to interview and retain an attorney and file a complaint in federal court, or the infringement will be back online. If I do not have a copyright registration for the photograph in question, I face the prospect of paying the Copyright Office more than ten times the normal registration fee in order to expedite processing of my application under its special handling procedures, with no

guarantee that the Copyright Office will actually process and approve my registration within ten days.

Certainly, this is not the effective, balanced system envisioned by Congress when it enacted the DMCA. The fact that millions of takedown notices are issued each day is not a sign of success. It is a sign of an unbalanced system, under strain and on the verge of failure, if not beyond.

I respectfully suggest the following revisions to 512, to achieve a balanced, effective system:

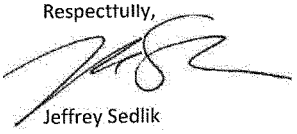
1. Revise and clarify the knowledge requirements, recognizing the right and ability to control infringing activity, and deeming that willful blindness and negligent blindness are the equivalent of actual knowledge.
2. Encourage service providers to collaborate with creators and other stakeholder groups to implement non-proprietary, opt-out and opt-in registries, available for voluntary use by creators and rights holders. With the exception of small service providers, require that service providers check all uploaded works against those registries prior to reproduction, storage, or display. For visual works, image recognition technology is readily available, scalable, highly accurate, and perfectly suited for this task. In addition, service providers should be required to search embedded metadata to identify infringing works.
3. Require that upon receipt of a representative list of links to infringing material, service providers must employ available technologies to identify and remove not only those representative examples, but all other existing infringements of a copyrighted work.
4. Require that service providers implement a "notice and staydown" procedure, replacing the ineffective "notice and takedown" requirement.
5. Define "repeat infringer" as a user who receives two or more takedown notices. Require that service providers implement and strictly enforce a repeat infringer policy.
6. Recognize embedded metadata and digital watermarks as Standard Technical Measures. Require that service providers maintain and preserve all metadata and digital watermarks in all files uploaded to their platforms, as a condition of eligibility.
7. Grant the Register of Copyrights the authority to establish and maintain a list of additional Standard Technical Measures.
8. Either waive the registration requirement for filing infringement claims in response to a 512 counternotice, or toll the counternotice period during the pendency of the standard copyright registration application processing period.
9. Prohibit service providers from publishing a creator's name, street address, phone, and email address, to stop the current practice of shaming creators and threatening their privacy and security.
10. Clarify that "infringement by reason of the storage" excludes the distinct, exclusive rights to display, distribute, perform, and create derivative works under Section 106.
11. Require, as a condition of eligibility, that service providers must disclose the identity of infringers so as provide rights holders with an affordable and practical procedure to discover that information without resorting to filing a legal action.

12. As a condition of eligibility, require service providers to allow rightsholders to conduct image recognition searches and metadata searches against databases of uploaded works, to identify any infringing works.

Lastly, I agree with and recommend the additional solutions proposed in the Section 512 Report issued by the Copyright Office.

Thank you for your efforts to improve the Copyright Act, and for the opportunity to share my experience and suggestions in my testimony today.

Respectfully,



Jeffrey Sedlik
Photographer

On Behalf of:
American Photographic Artists
American Society for Collective Rights Licensing
American Society of Media Photographers
Digital Media Licensing Association
Graphic Artists Guild
National Press Photographers Association
North American Nature Photographers Association
PLUS Coalition
Professional Photographers of America

Chair NADLER. Thank you. Ms. Rose?

TESTIMONY OF MEREDITH ROSE

Ms. ROSE. Chair Nadler, Ranking Member Jordan, Members of the Committee, thank you for inviting me to testify today on this important topic.

More than 229 million American adults use the internet each day. It is not just a delivery mechanism for copyrighted content. It is the lifeline by which they work, worship, connect with their families and communities, seek and receive healthcare, stay informed, organize debate, and exercise political speech every single day. Yet, despite the scale and importance of this constituency, they are conspicuously absent, absent from the Copyright Office section 512 report, absent from the oversight mechanisms governing their speech, and absent from the debate on Capitol Hill. This is the constituency on whose behalf I speak today, the forgotten 229 million users in this debate.

My written testimony gets into some detail, but I wanted to use my time to touch on three major issues: Section 512's outdated stance on broadband access, the powerful nature and attendant abuse of takedown notices, and the difficult realities of automated enforcement.

First, section 512 governs the way in which I am speaking to you right now, through a broadband connection. The Supreme Court has held that cutting individuals off, even after being convicted for child sex offenses, raises grave constitutional concerns. Therefore, we cannot as a society accept a law which allows unvetted accusations from private parties of a civil offense to disconnect an entire household from modern society. Yet, lower courts have interpreted section 512 to mean exactly that, that ISPs must shut off households' internet access upon receiving unproven allegations of copyright infringement.

A bright spot of bipartisanship currently is the push to expand broadband access, represented by no fewer than 30 bills currently before Congress in both chambers and across the political spectrum. Yet, major content companies insist that this power they wield is not only appropriate, but insufficient for their purposes. Historical context is important. When the DMCA was passed in 1998, ISPs were software providers that operated over the telephone network. As a user, if your AOL account was terminated, you could instead subscribe to any of the dozens of AOL competitors. In 2020, ISPs such as Comcast or Verizon control both the software and physical connection into your home. For the more than 100 million Americans living in homes serviced by only one broadband provider, an account termination means losing access to the internet in its entirety. Shifting ISP business models as well as the rising importance of broadband to modern life have rendered this punishment wildly disproportionate to the alleged offense.

Second, we must acknowledge the systemic problem of bad DMCA notices and their impact on everyday speech. A DMCA takedown has a power which is unparalleled in the online ecosystem. It can erase speech from the internet for up to two weeks. Takedowns are rarely contested, and there's no meaningful oversight of

these notices or disincentive against abuse, but the result is a long and thoroughly documented history of weaponization with experts estimating that nearly one-third of notices are problematic. Although bad notices stem from everything from algorithmic defects to deliberate abuse, their aggregate impact is undeniable. Senders can use takedowns to censor legitimate content, incomplete or error-filled notices can make it impossible for platforms to identify the works involved, and search and notice bots can and have disrupted livestreams and news broadcasts. Some stakeholders, however, still insist that they need faster takedowns with fewer user safeguards and greater potential liability for any platform that attempts to filter out defective or malicious notices.

Finally, we must understand the limits of private technologically based enforcement solutions. These often sound good in theory, but the reality is far messier. Because they operate automatically, these algorithms are prone to removing speech that is otherwise political, educational, or newsworthy, and policymakers must grapple with what users and artists alike have understood for ages, that the balance of equities in practice is not determined by the law, but by the financial incentives, design choices, and technological limitations of those who design the algorithms.

We are at a historic inflection point politically, economically, and socially. On the streets, at the polls, and in their homes, Americans are online. We are registering to vote, testifying before Congress, organizing political action, and attending weddings and funerals all online. We are debating and documenting our lives, our surroundings, and our realities across ideological and geographic divides. The internet is how we bear witness. It is how the work of community activists and organizers is amplified, and how we see ourselves and how we are seen by the eyes of the world. If we were to strike any sort of new balance, it must keep the needs of 229 million voices and their ability to speak freely at the front of mind.

Thank you, and I look forward to your questions.

[The statement of Ms. Rose follows:]

STATEMENT OF MEREDITH ROSE

Chair Nadler, Ranking Member Jordan, Members of the Committee, thank you for inviting me to testify today on this always-important topic.

Two hundred and twenty-nine million Americans use the internet each day.[1] That's 229 million American adults using the internet towork, worship, connect with family and friends, receive healthcare, consume and discuss the news, and organize political action each and every day. The laws we debate here set the rules for that speech. The ability of these 229 million users to speak freely online must be the first motivating priority of any reform to copyright liability. While we commend the Copyright Office's herculean effort to comprehensively evaluate section 512, wewere alarmed to see the resulting Report dismiss the concerns of everyday users. The Office's analysis performed a familiar sleight-of-hand by presenting user interests as co-extensive with those of platforms, effectively erasing free speech concerns from its analysis.

Congress must abandon the idea that copyright debates are mere sniping between rightsholders and platforms. The speech interest of every American internet user is

[1] U.S. Census Bureau, *QuickFacts: United States*, (last visited June l, 2020), *https://www.census.gov/quickfacts/fact/table/US/PST0452l9* (The total U.S. population is estimated at 328,239,523; 77.6% or 254,713,870 are over 18.); Monica Anderson, Andrew Perrin, Jingjing Jiang & Madhumitha Kumar, *10% of Americans Don't Use the Internet. Who Are They?*, Pew Res. Ctr. (April 22, 2019) *https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/* (if 10% of U.S. citizens over 18 do not use the internet, then 90% or 229,242,483 do).

directly in the crossfire. If we are to strike any sort of "new balance," it must center our nation's 229 million internet users and their ability to speak freely—not merely the administrative convenience of major industries.

I. The Risks to Users' Speech Online

A. ISP Disconnections

Alarmingly, stakeholders such as RIAA, MPA, and AAP[2] contend that section 512 grants them the right to demand that an entire household's internet access be terminated, based purely on accusations of copyright infringement. It goes without saying that Congress should not be making it easier for private third parties to unilaterally terminate a household's ability to participate in modern society.

The Federal Communications Commission has found that Americans use broadband "for every facet of daily life."[3] The current pandemic has driven Congress to emphasize the role of broadband in Americans' work, education, social lives, and health care services.[4] Broadband providers have pledged not to cut off people's broadband for non-payment, and Congress has proposed several bills designed to not only protect broadband as an essential communications service, but also to expand access and affordability. Despite this, it is the position of large rightsholders that their unvetted allegations of a civil offense are sufficient to cut an entire household off from the internet. Alarmingly, courts have largely gone along with this argument. This provision, before all others, is sorely in need of revision.

It is hard to overstate the outsize role that broadband access has adopted in the 22 years between the DMCA's passage and today. Americans use broadband to work remotely, attend classes, access critical medical care, consume essential news and information, and socialize. First responders use broadband to communicate life-saving information to local residents, and small- to medium-size businesses use broadband to access global markets that are critical to staying afloat.[5] This importance cannot be reconciled with the broad interpretation of section 512(i) as requiring that ISPs adopt policies that provide for the termination of subscribers upon repeat accusations of infringement.[6]

Much of this disconnect is due to outdated statutory terminology. Put simply, "internet service providers" meant something very different in 1998 than it does in 2020. Modern internet service providers have two distinct functions: The interactive software-level component that connects and routes traffic to the broader internet, and the physical infrastructure over which the traffic flows. In 1998, "internet service providers" were strictly software-layer services such as America Online and CompuServe, which operated over infrastructure provided by the existing telephone network. In 1998, termination from an "internet service provider" meant that a customer had to uninstall American Online and subscribe to any of its software-layer competitors. In short, when the DMCA was written, ISPs were edge services that operated in a competitive market and operated over a separately-owned, regulated common carrier. Congress did not suggest that the operator of the infrastructural component (*i.e.*, the legacy telephone network) could be held liable for copyright infringement.

In 2020, however, the software and infrastructure have come under the same roof; modern ISPs both route traffic *and* own the cable (or fiber) over which the traffic flows. This radically alters the stakes of "subscriber termination," as terminating an account bars the subscriber from the *physical network*. This is particularly dire in light of the current ISP market, which severely lacks competition. More than 100

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[2] U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights at 98*, fn 520 (May 2020)[hereinafter USCO 512 Report], *https://www.coppyright.gov/policy/section-512/section-512-full-report.pdf*.

[3] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Time Fashion, and Possible Steps to Accelerate Such Deplomen Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14–26, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, 1377 2 (2015).

[4] *See COVID–19 Broadband Bills, Public Knowledge* (Current as of June 1, 2020), *https://www.publicknowledge.org/COVID–19-broadband-bills/*.

[5] Robert Pepper *et al., Cross-Border Data Flows, Digital Innovation, and Economic Growth*, The Global Info. Tech. Rep. 40, 41 (20 I 6), *http://www3.weforum.org/docs/GITR2016/WEF GITR Chapter1.2 2016.pdf*; FCC, *Connecting America: The National Broadband Plan* 313 (March 17, 2010), *https://transition.fcc.gov/nationaI-broadband-plan/national-broadband-plan.pdf*.

[6] *BMG Rights Mgmt.* v. *Cox Communs.*, 881 F.3d 293, 302 (4th Cir., 2018).

million Americans live in homes serviced by only one broadband provider.[7] Forty-two million lack access to any wired or fixed wireless broadband, instead relying on limited mobile or satellite connectivity.[8] Only 27% of census blocks have access to more than two broadband providers at standard (25 Mbps) speeds; fewer than 2% have competitive access to 100 Mbps speeds.[9]

While deployment and speeds have improved marginally over time, competition has not. The reasons for this are numerous and well-documented: Truly high-speed wired broadband is only feasible over fiber and coaxial cable; the DSL providers who once provided a level of competition to cable are increasingly irrelevant; and mobile broadband remains a complement, not a substitute, to wired household broadband for the vast majority of users. Thus, for most households, being cut off from wired broadband means losing the kind of internet access necessary for those public policy reasons—school, work, and healthcare—that Congress and the FCC have consistently advanced its adoption.

It is also questionable (both as a legal and policy matter) whether the Act of providing broadband access should *ever* give rise to any form of secondary liability from which a provider must be shielded. The law does not specify how ISPs are supposed to obtain knowledge of repeat infringers; they are not required to accept DMCA takedown notices, as other online service providers are, since they do not actually host any material. ISPs also do not (and should not) have a general duty to monitor and track their users' activity. Private allegations of civil offense have never been—and should never be—sufficient reason to compel utility companies to cut off a customer's water or power. Within the context of copyright liability, modern-day ISPs are more akin to the power company that powers a user's computer than they are to a file-sharing service or streaming site.

B. Bad Notices

DMCA takedown notices are extraordinarily powerful tools with a documented history of abuse. A DMCA takedown has unparalleled power in the online ecosystem—the power to unilate rally, and nearly instantaneously, erase speech from the internet. Even when challenged, the law requires that the speech stay down for up to 14 days.

This power would be concerning even in a well-governed system. However, by any measure, the DMCA notice-and-takedown scheme is not well-governed. It suffers from a disproportionate number of bad notices that hide non-infringing speech and information from public view, affecting the ability of users and creators to use the internet for free expression and creativity. A quantitative study of more than 108 million takedown requests revealed that approximately 30% of requests were "potentially problematic," and further, that 4.5 million of the problematic requests were "fundamentally flawed."[10] Common causes include anticompetitive behavior,[11] a misunderstanding or misapplication of copyright,[12] and lack of useful identifying information for either the infringed-upon work or the allegedly infringing material.[13] The kinds of bad notices vary by plat form, and reflect the particulars of its user base; on Amazon's Kindle Direct, for example, approximately half of DMCA take-

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[7] Christopher Mitchell, *Repealing Net Neutrality Puts 177 Million Americans at Risk*, Community Networks (December 11, 2017), *https://muninetworks.org/content/177-million-americans-harmed-net-neutrality*.

[8] John Busby, Julia Tanberk *et al.*, *FCC Reports Broadband Unavailable to 21.3 Million Americans, Broadband Now Study Indicates 42 Million Do Not Have Access*, BroadbandNow (February 3, 2020), *https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent*.

[9] The FCC, *Internet Access Services: Status as of December 31, 2016,* fig. 4 (February 2018),*https://transition.fcc.gov/Daily__Releases/Daily__Business/2018/db0207/DOC-349074Al.pdf*. The FCC's more recent report contains less reliable figures as it includes satellite broadband, which is not an adequate substitute for terrestrial fixed connections, in the higher speed tiers. *See* Internet Access Services: Status as of December 31, 2017, fig. 4 (August 2019), *https://docs.fcc.gov/public/attachments/DOC-359342Al.pdf*.

[10] Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown in Everyday Practice* 2 (March 22, 2017) (UC Berkeley Pub. L. Res. Paper No. 2755628) [hereinafter Urban Report], *https://ssrn.com/abstract=2755628*.

[11] *See* U.S. Copyright Office, *Section 512 Study: 9th Circuit Public Rountable* 248 (May 13, 2016) (Testimony of Stephen Worth, Assoc. General Counsel of *Amazon.com*), *https://www.copyright.gov/policy/section512/public-roundtable/transcript__05-13-2016.pdf*.

[12] *See, e.g.*, Google Additional Comments Submitted in Response to U.S. Copyright Office's Nov. 8, 2016, Notice of Inquiry 910 (February 21, 2017). *https://www.regulations.gov/document?D=COLC-2015-0013-924873* ("[W]e explain at the appropriate step in our form that merely being the subject of a photo does not give one a copyright interest in the photo. In our experience, this warning dramatically cut down on the number of misguided notices.").

[13] Urban Report at 90 (noting that, by conservative estimates, 4.6% of notices contain incorrect or missing information about the allegedly infringed work or allegedly infringing material).

down requests are not infringement-driven, but are instead attempts by authors to remove competitors' books from the rankings.[14] Bad notices are, by any measure, pervasive, and have a substantial aggregate impact on user speech.

1. Sources of Bad Notices

Bad notices stem from a variety of sources that range from technical errors to deliberate bad faith. Generally, they can be broken down into four categories: Misuse of copyright, abuse of the DMCA takedown procedure for non-copyright ends, technical flaws, and algorithmic defects. Similarly, the goals and motivations behind bad notices can range from political censorship, to innocent error, to overzealous enforcement. Even at their most granular, each category of bad notice still accounts for millions of problematic takedowns.[15] Any solution to address the bad notice problem requires an understanding of these categories and how they occur.

Copyright misuse occurs when a notice sender leverages the notice-and-takedown process to remove content that incorporates or references their work, but is obviously noninfringing or fair use. For example, in 2019, several unreleased seasons of Starz shows and three episodes of American Gods were leaked to the public via a Russian streaming site. Starz used the DMCA takedown process to remove tweets and articles that reported on the leak, even though the coverage did not itself contain any infringing material.[16] By doing so, Starz was able to leverage the DMCA process to censor legitimate—if embarrassing—journalism. This type of takedown also catalyzed copyright law's most recent scandal, in which two authors both pulled unprotectable stock elements from a popular fanfiction trope.[17] In response to a new competitor in the niche genre, one author had her publisher issue takedowns against her competitor's work across several online retail sites, claiming an infringed-upon interest in stock elements which the author later admitted she had not created.[18]

A similar strain of abuse occurs when a claimant issues takedowns to remove or temporarily disable unfavorable content for reasons wholly unrelated to copyright. One of the most notorious forms of this is a practice known as "backdating." In order to remove or hide content, the actor will make a copy of the content and post it on an obscure site, backdating the copied material to a time before the original post. They will then issue takedowns against search engines and other indexes, forcing removal of the unfavorable original from search results, while ensuring that the fraudulently backdated copy remains far enough down the results to be functionally obscured. News outlet Benzinga was a victim of this exact practice after it published an article about the financial difficulties faced by Amira Nature Foods, a publicly traded company.[19] Other groups, including the Church of Scientology, have used groundless takedown claims to censor criticism and harass former Members.[20] Repressive regimes across the world, from Russia[21] to Ecuador,[22] have become adept abusers of the DMCA's notice-and-takedown regime to stifle critics and suppress coverage of human rights violations.

Most bad notices are the result of technical errors which, despite being technical in origin, nevertheless undermine the fundamental due process protections built

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[14] *See* Testimony of Stephen Worth, Assoc. General Counsel of *Amazon.com, supra* note 11. ("[W]ith Kindle Direct publishing, authors routinely try to climb to the top spot in their category . . . by issuing bogus notices against higher ranking titles. And this for us actually accounts for more than half of the takedown notices that we receive.").

[15] Urban Report at 96.

[16] Ernesto, *Starz Goes on Twitter Meta-Censorship Spree to Cover Up TV-Show Leaks* (Updated) TorrentFreak (April 15, 2019), *https://torrentfreak.com/starz-goes-on-twitter-mela-censorship-spree-to-cover-up-tv-show-leaks-190415/*.

[17] Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), *https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html*.

[18] *See, e.g., Atari, Inc.* v. *N. Am. Phillips Consumer Execs. Corp.*, 672 F.2d 607, 616 (7th Cir. 1982); *Walker* v. *Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) ("Elements such as drunks, prostitutes, vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx.").

[19] Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020) *https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001*.

[20] Eva Galperin, *Massive Takedown of Anti-Scientology Videos on YouTube, Electronic Frontier Found* (September 5, 2008), *https://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube*.

[21] Fuller, *supra* note 19.

[22] Alexandra Ellerbeck, *How U.S. Copyright Law Is Being Used to Take Down Correa's Critics in Ecuador*, Comm. to Protect Journalists (January 21, 2016), *https://cpj.org/2016/01/how-us-copyright-law-is-being-used-to-take-down-co/*.

into section 512. Two of the most substantively important requirements—that a takedown notice contains sufficient information about the allegedly infringed work ("AIW")[23] and allegedly infringing material ("AIM")[24]—are often unmet.[25] The same study that found problems with 30% of all takedown notices also discovered that it was difficult to identify the AIM in 13.3% of requests, and difficult to identify the AIW in 6% ofr equests.[26] Moreover, notices covering multiple claims do not always include clear details on the location of the allegedly infringing works. This has resulted in substantial, costly litigation over whether rights-holders or OSPs bear the cost of identifying infringing work.[27]

Finally, many bad notices can be pinned squarely on the rise of algorithmic monitoring and enforcement. Though the limitations of algorithms are discussed more extensively below, some examples may be illustrative. In one case, NBC issued automated takedowns against NASA's SpaceX launch livestream—because NBC was using the same feed on its own network, under a license (ironically) from NASA.[28] In another, algorithmic enforcement "blocked a 10-year-old boy's self-authored original video starring his LEGO mini-figures and garbage truck despite the fact that he used royalty-free music."[29] Ultimately, user speech and online ecosystems cannot sustain a system that defaults uniformly in favor of those issuing takedown notices.

2. Lack of Redress

There are no disincentives, either in the statute or the common law, against filing malicious notices. Section 512(f), which Congress included to deter abuse ex ante by providing penalties for bad notices, has been rendered dead letter—an outcome which, it is worth noting, is endorsed with some enthusiasm in the Copyright Office's 512 Report.[30] Users whose speech has been improperly removed lack any meaningful redress ex post as well. Counter-notices are subject to a waiting period of up to 14 days, a duration that can be lethal to time-sensitive speech including news reporting, documentation of human rights abuses, political speech, public debate, and critique. For individuals who make their living through their online speech, that fourteen days represents the loss of both direct income and relevance. Moreover, the mere Act of filing a counter-notice opens the user up to a potentially frivolous lawsuit. It is perhaps no surprise that platforms have reported counter-notice rates between 4.7% and 0.02%.[31]

3. Platform Responses to Bad Notices

In the absence of meaningful statutory safeguards, some platforms have sought to screen out abusive or detective notices, including by requesting missing information, clarification of ambiguous notices, or additional information about the nature of the claim prior to processing. As noted above, different communities, and the platforms on which they congregate, have different use cases for copyrighted content, and thus different risk profiles for use (and misuse) of DMCA notices. For example, the Hugo Award-winning Archive of Our Own, maintained by the nonprofit Organization for Transformative Works, hosts more than four million works which remix major media properties and one another.[32] Other sites, such as TikTok, base their

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[23] 17 U.S.C. 512(c)(3)(A)(ii).
[24] 512(c)(3)(A)(iii).
[25] Urban Report at 93.
[26] *Id* at 94.
[27] *Id.* at 93; *see, e.g., Perfect 10, Inc.* v. *Google, Inc.*, No. CV 04–9484 AHM SHX, 2010 WL 9479060 (C.D. Cal. July 30, 2010), aff'd., 653 F.3d 976 (9th Cir. 2011).
[28] Chris B—NSF (@NASASpaceflight), Twitter (May 28, 2020, 9:46 AM), *https://twitter.com/NAASpaceflight/status/1266002935051403264?s=?0*.
[29] Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 Stan. Tech. L. Rev. 473,476 (2016), *https://Iaw.stanford.edu/wp-content/uploads/2016/10/Accountability-in-Algorithmic-Copyright-Enforcement.pdf*.
[30] The Copyright Office believes that the only case which provides even a modest nod toward 512(f)'s enforceability—*Lenz* v. *Universal Music Group Corp.*, 815 F.3d 1145 (9th Cir. 2016)—was wrongly decided for placing potential liability on rights holders. *See* USCO 512 Report at 5.
[31] *See* Senate Committee on the Judiciary Subcommittee on Intellectual Property, *Is the DMCA's Notice-and-Takedown System Working in the 21st Century?* (June 2, 2020) (Testimony of Abigail A. Rives, Intellectual Property Counsel, Engine Advocacy and Research Foundation) *https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf*.
[32] *See, e.g.*, Caitlin Busch, *An Archive of Our Own: How AOJ Built a Nonprofit Fanfiction Empire and Safe Haven*, SyFy Wire(February 12, 2019), *https://www.sify.com/syfywire/an-archive-of-our-own-how-ao3-built-a-nonprofit-fanfiction-empire-and-safe-haven*; *See also, The Dig-*

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core functionality around users' ability to share, remix, and build upon one another's work, attracting users specifically because of that function. And some sites, such as ecommerce platforms, are more at risk for abusive or anticompetitive takedown notices that could substantially prejudice the economic interests of merchants or artists using the platform.[33]

Alarmingly, the Copyright Office study decides that these requests are sufficient to strip a platform of its safe harbor.[34] lt goes on to characterize users' anti-abuse proposals as attempts to "strip[] rightsholders from any realistic ability to enforce their (Congressionally mandated and constitutionally supported) rights."[35] In short, the Copyright Office's position as articulated in its Report is that all notices, no matter how obviously spurious or in bad faith, must be honored without further inquiry, and even the most cursory attempts at vetting will strip a platform of its safe harbor protections. This largely aligns with the position of rightsholders, who have balked at the idea of introducing additional safeguards into this system. Instead, these stakeholders insist that targeted speech must be removed faster,[36] with a longer period before reinstatement,[37] and the removal must be executed without any human oversight or verification of claims.[38]

It bears repeating: The DMCA's notice-and-takedown provisions are extraordinarily powerful tools with a documented history of weaponization. It is true that artists face a difficult task in attempting to police the use of their copyrighted content online; however, we must acknowledge the enormous power of these takedown notices, their documented history of misuse, and the profound effect of that misuse on lawful speech. Asking for faster, more powerful notices with fewer safeguards is akin to discarding a tank and asking for a warhead.

II. Algorithmic Enforcement Is Not a Viable Answer

We cannot reasonably think about reforming Section 512 without understanding the private enforcement mechanisms that stakeholders have held out as possible solutions. Given the time and expense of federal litigation faced by rights-holders (and the pressures of operating at scale faced by platforms), it is unsurprising that many stakeholders have embraced the idea of technological solutions. But while automated private solutions "might sound good in theory," the messy realities of implementation—technological limitations, complex legal protections and provisions, and the influence of a designer's commercial interests—"raises a slew of questions regarding policy."[39] Private enforcement "can have the same far-reaching effect as actual law," including the ability to deprive users of legitimate income streams, "without any corresponding due process or accountability."[40] Because they operate automatically, these algorithms have the remarkable power to almost instantaneously

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ital Millennilium Copyright Act at 22: What is it, why was it enacted, and where are we now? Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary, 116th Cong. 9(2020) (Statement of Professor Rebecca Tushnet Harvard Law School), *https://www.judiciary.senate.gov/imo/media/doc/Tuslmet%20Testimony.pdf* (Archive of Our Own"receive[s] relatively few notices of claimed infringement few of them are automated, and we subject them to individual review for validity. In the rare case that the notice complies with the DMCA and doesn't raise obvious fair use issues or assert non-copyright claims, our abuse team will remove the accused content and inform the user. Our experience with small-scale senders, consistent with the experience of many other OSPs, is that small-scale senders often consider DMCA claims to be a catch-all for objections such as that a work on the OTW's Archive has the same title as a differt work they've published for sale or that they don't wish their name to be used in a work. Our experience with large-scale senders is that many are careful to avoid challenging non-exact copies, but unfortunately some do send takedown notices based on unhelpful metadata (*e.g.*, title of a work even though the content is clearly different from that of the copyright claimant's work).").

[33] More than half of the DMCA takedown notices issued to Amazon's Kindle Direct, for example are attempts to deliberately suppress a competitor's book from climbing the rankings. U.S. Copyright Office, *Section 512 Study; 9th Circuit Public Roundtable* 248 (May 13 2016) (Testimony of Stephen Worth Assoc. General Counsel of *Amazon.com*), *https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-13-2016.pdf* "[W]ith Kindle Direct publishing, authors routinely try to climb to the top spot in their category . . . by issuing bogus notices against higher ranking titles. And this for us actually accounts for more than half of the takedown notices that we receive.").

[34] USCO 512 Report at 155.

[35] *Id.* at 169.

[36] *Id.* at 159.

[37] *Id.* at 162.

[38] *Id.* at 152 n. 813.

[39] Lauren D. Shinn, *Youtube's Content ID as a Case Study of Private Copyright Enforcement Systems*, 43 AIPLA Q. J. 359,372 (2015).

[40] *Id*.

erase speech—including political speech, education, news, and speech which supports the livelihoods of millions of creators who derive their primary income via platforms with algorithmic content matching. A system which relies wholly on automated enforcement erases the very "safety valves" which prevent copyright law from becoming absolute, and violative of the First Amendment.

A. Automated Solutions are Designed To Answer the Problems of Their Designers—Not Anyone Else

The way in which these systems operate is determined by the particular needs, commercial interests, and resource limitations of the developer and any large stakeholders with which that developer is cooperating. Policymakers must grapple with what users and artists alike have understood for ages—that the balance of equities in practice is determined less by the contours of law than by the aggregate results of numerous design choices which often have "more profitable" or "less profitable" answers, but rarely have clear right or wrong ones. An automated system which perfectly serves the needs of any one stakeholder—be it platforms, commercial-scale rights-holders, users, or small artists—invariably prejudices the interests of the remaining stakeholders.

B. Automated Solutions Have Multiple Points of Failure

We cannot reasonably think about reforming section 512 without understanding the private enforcement mechanisms that stakeholders have held out as possible solutions. Given the time and expense of federal litigation faced by rights-holders (and the pressures of operating at scale faced by platforms), it is unsurprising that many stakeholders have embraced the idea of technological solutions. But while automated private solutions "might sound good in theory," the messy realities of implementation—technological limitations, complex legal protections and provisions, and the influence of a designer's commercial interests—"raises a slew of questions regarding policy."[41] Private enforcement "can have the same far-reaching effect as actual law," including the ability to deprive users of legitimate income streams, "without any c01responding due process or accountability."[42] Because they operate automatically, these algorithms have the remarkable power to almost instantaneously erase speech—including political speech, education, news, and speech which supports the livelihoods of millions of creators who derive their primary income via platforms with algorithmic content matching.

Algorithmic matching has numerous steps, which we will necessarily simplify here. First, the system designer must compile and maintain a database of known content to which the algorithm can refer. A robust database contains, among other things, a reference file and ownership information for each work. The algorithm then uses reference files to create digital "fingerprints," which it compares against unknown media in an attempt to identify it.[43] When the algorithm returns a match, it provides rightsholders with a series of options. The scope and availability of these options depends on the design of the system, the level of access granted to the rights-holder, and other variab les. Common options include claiming the content's ad revenue, taking the content offline (either in toto or selectively disabling the matching piece), or doing nothing.[44]

Though various kinds of errors can occur throughout this process, users are most frequently affected by "false positives"—situations in which the algorithm incorrectly identifies content they have uploaded as infringing. Three common points of failure are errors in the database; erroneous flagging of content that does not match the reference file; and "content that matches the reference file and is owned by the claimant, but constitutes a legal use of the content."[45]

1. Database Errors

The first category of false positives—where the flagged content matches a reference file in the database, but the database's ownership information is incorrect—can be broadly thought of as database errors. These happen for reasons that range

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[41] Shinn at 372 (2015).

[42] *Id.*

[43] *See* David Kravets, *YouTube Alters Copyright Algorithms, Will "Manually" ReviewSomeclaims*, Wired (October 3, 2012), *https://www.wired.com/2012/10/youtube-copyright-algorithm/*.

[44] *See, How Content ID Works: What Options Are Available to Copyright Owners?*, YouTube (2020), *https://support.google.com/youtube/answer/2797370*.

[45] Shinn at 372.

from banal to malicious. Some database errors are caused by bad actors making false ownership claims, a problem that was particularly acute on YouTube in the early 2010s.[46] A low-quality or overbroad reference file can also cause an algorithm to throw false matches.[47] Selective additions of media to the database can also trigger improper takedowns, as when a new piece of media incorporates a pre-existing sample, and inclusion of the new media causes the algorithm to flag and remove the older clip.[48]

These kinds of false positives force us to confront difficult questions around database design, integrity, and access. In an ideal world, a content-matching database would be full of high-quality reference files, complete with thorough, current, and accurate information on ownership, licensing, and payment. An ideal database would also be widely open and available to artists who wish to use it to monitor (or monetize) their work. However, these two principles are often in tension; universal access creates a greater risk of introducing errors into the system, while curation creates gatekeeping power and an attendant risk of competitive concerns.

As with algorithmic design more broadly, any commercial database will reflect the priorities of its designer. These influences affect who is allowed to populate the database, how that information is vetted or revised, the oversight and handling of ownership disputes, and the transparency (or lack thereof) regarding its operation. We need look no further than the debates surrounding YouTube's Content ID system to see the risks and trade-offs of a private, in-house fingerprinting system designed to address the business interests of a specific platform.[49]

2. Strict Versus "Fuzzy" Algorithms

The second failure case—flagging content that does not match the reference file—reflects yet another trade-off in algorithmic design. Algorithms that only flag exact or near-exact matches protect a greater range of unlicensed, yet legal, uses and exert less of a chilling influence on user speech. However, they are also easier to circumvent through basic manipulation of the underlying media, such as altering the tempo or pitch of a sound recording, or flipping a video to its mirror image.[50] Algorithms that flag "fuzzy" matches will be harder to evade, but will throw more false positives and stifle some legitimate uses of content.

It is worth noting that the degree of "fuzziness" in an algorithm is a design choice that explicitly prioritizes certain genres and styles of content over others. Fuzzy algorithms are good at catching and flagging algorithm-evading "edits" to popular content such as Top-40 hits.

However, those same algorithms struggle when faced with classical and jazz music, where the underlying musical work is often in the public domain, and the difference between a copyrighted recording and a public domain or live performance may be as little as a few notes on an improvisational section, or the sound qualify of the space in which it was recorded.[51] Content ID, often held up as the industry

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[46] Perhaps the most notable instance of this misuse was when a Russian group falsely claimed ownership over a number of viral cat videos, diverting the videos' ad revenue into their own pockets. David Kravets, *Rogues Falsely Claim Copyright on YouTube Videos to Hijack Ad Dollars*, Wired (November 21, 2011), *https://www.wired.com/2011/11/youtube-fiIter-profiting/*.

[47] *See* Urban Report at 90–92 (analyzing specific instances when targeted material did not match the allegedly infringed work).

[48] Notably, a 2016 episode of Family Guy "included a clip from 1980s Nintendo video game Double Dribble showing a glitch to get a free 3-point goal. Fox obtained the clip from YouTube where it had been sitting since it was first uploaded in 2009. Shortly after, Fox told YouTube the game footage infringed its copyrights. YouTube took it down." Fox dropped the claim and issued an apology when the story went viral. Andy, *Fox "Stole" a Game Clip, Used It in Family Guy & DMCA'd the Original*, TorrentFreak (May 20, 2016), *https://torrentfreak.com/fox-stole-a-game-clip-used-it-in-family-guy-dmcad-the-original-160520/*.

[49] *See e.g.*, John Paul Titlow, *How YouTube Is Fixing Its Most Controversial Feature, Fast Company* (September 13, 2016), *https://www.fastcompany.com/3062494/how-youtube-is-fixing-its-most-controversial-feature*; Patrick McKay, *Open Letter to YouTube Regarding Content ID, FairUseTube.org* (September 15, 2011), *http://fairusetube.org/articles/21-open-letter.* But *cf.* SoundExchange Direct (2020), *https://sxdirect.soundexchange.com/login/?next=/*. While SoundExchange Direct is designed to organize metadata (rather than content fingerprint for large-scale algorithmic enforcement), is a good example of how a database can be structured to accommodate the needs of artists. Sound Exchange is, notably, a nonprofit.

[50] Nick Douglas, *You Can't Fool YouTube's Copyright Bots*, LifeHacker (January 24, 2018) *https://lifehacker.com/you-cant-fool-youtubes-copyright-bots-1822174263*.

[51] Michael Andor Brodeur, *Copyright bots and classical musicians are fighting online. The bots are winning.*, Wash. Post (May 21, 2 020), *https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musician-are-fighting-online-the-bots-are-winning/2020/05/20/alle349c-98ae-11ea-S9fd-28fb313d1886__story.html. See also* Ulrich Kaiser, *Can Beethoven*

Continued

standard of content-matching, once erroneously flagged a video that was ten minutes of solid (original) White noise.[52]

3. Legally Permissible Uses

Unlike an algorithm, copyright law is not binary or automated; the American system provides a number of exceptions and limitations that serve as a "safety valve" to protect legitimate policy ends. The Supreme Court has described these limitations and exceptions—specifically citing fair use—as "built-in First amendment accommodations" to prevent copyright law from unduly burdening free speech.[53] These contours of copyright law, however, depend heavily on social, factual, and cultural context. The fundamental balance of copyright law rests in "[d]etailed doctrines . . . carefully designed to guide traditional, human law enforcement agents in addressing these questions" of appropriate unlicensed use.[54] Algorithmic enforcement, as a binary system designed to equate the presence of copyrighted content with its misuse, "is blatantly hostile to users' interests because it shifts the neutral presumption of fair use against them." [55] Moreover, systems such as Content ID allow rights-holders to instantaneously divert revenue streams away from claimees upon filing a claim, leading to lost or delayed revenue, as well as a host of secondary knock-on effects for the user whose speech has been removed.[56]

Conclusion

Two hundred and twenty-nine million American adults live their lives online under the shadow cast by section 512. Whatever the risks or rewards, we cannot be reckless with the speech rights of those who find themselves governed by the system we create. Congress must acknowledge that this debate is not happening in a vacuum, and reject the fantasy of copyright being a struggle between "tech" and "content." Copyright law, broadband access, algorithmic governance, and economic incentive structures are all intertwined, and all impact Americans' ability to speak online. In a moment of massive social change, we must not take that for granted.

Chair NADLER. Thank you. Ms. Kibby?

TESTIMONY OF MORGAN GRACE KIBBY

Ms. KIBBY. Chair Nadler, Ranking Member Jordan, and Members of the Committee, thank you for inviting me to talk about the Copyright Office's report on section 512 of the DMCA. I appreciate the inclusion at the heart of this discussion is not just legal jargon, market analysis, or political calculations, it's the real and profound effects section 512's failings have on people like myself.

The Copyright Office's report is confirmation of what creators and copyright owners have said for years about section 512. It's just not working, but that statement is too benign. It's undermining creativity and, more alarmingly, systemically undercutting our next generation of artists. It's jeopardizing livelihoods of work-

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Send Takedown Requests? A First-Hand Account of One German Professor's Experience WithOverly Broad Upload Filters, Wikimedia Found (August 27, 2018), *https://wikimedia foundation.org/news/2018/08/27/can-beethoven-send-takedown-reguests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters/*.

[52] Chris Baraniuk, *White Noise Video on YouTube Hit by Five Copyright Claims*, BBC News (January 5, 2018), *https://www.bbc.com/news/technology-42580523*; Timothy Geigner, *White Noise on YouTune Gets FIVE Separate Copyright Claims From Other White Noise Providers*, TechDirt (January 5, 2018), *https://www.techdirt.com/articles/20180105/l0292038938/white-noise-youtube-gets-five-separate-copyright-claims-other-white-noise-providers.shtml*.

[53] *Eldred* v. *Ashcroft*, 537 U.S. 186, 219 (2003).

[54] Maayan Perel and Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 Stan. Tech. L. Rev. 473 (2016), *https://www-cdn.law.Stanford.edu/wp-content/uploads/2016/10/Accountability-in-Algorithmic-Copyright-Enforcement.pdf*.

[55] Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem With Content ID*, 13 Duke L. & Tech. Rev. 66, 68 (2015), *https://schoolarship.law.duke.edu/cgi/viewcontent.cgi?article=1271&context=dltr*.

[56] Amanda Perelli, *Prominent YouTube Creator Lindsay Ellis J. Challenging the Platform Over the Way It Handles Copyright Claims*, Bus. Insider (Oct. 29, 2019), *https://www.businessinsider.com/youtuber-lindsay-ellis-fights-platform-universal-over-copyright-claim-2019-10*.

ing-class musicians and obliterating healthy monetary velocity in our creative community. It's rewarding unscrupulous services that deal in the unauthorized trade and use of our works, and it's fundamentally sabotaging the legitimate online marketplace that we all rely on and that Congress envisioned.

As a self-employed creator, I've dedicated my life to my craft. Through decades of study, collaborating, and touring with artists like Amity 3 and Lady Gaga, unrelenting deadlines, scoring for film and TV, promoting my work, and navigating a music industry in constant structural flux, I have methodically committed myself to building my career and making art that moves people. It's no secret that the creative life can sometimes have little promise beyond that exchange, and so it becomes my very dedication that is robbed of agency when there is a clear expectation that I now also spend hours looking for violations of my work.

The popular mantra of working of 10,000 hours to achieve mastery should apply to my craft, not to the protection of my content. I can't afford to spend even a fraction of this time monitoring and noticing infringements as it's time spent away from my work, which is creating. So, the truth is I just don't do it. Trying to enforce my work within section 512's notice and takedown system is a futile endeavor as monitoring for infringements and sending notices does not curtail unauthorized works from popping up. It's like digging in the sand at high tide. And this problem is existential. When nascent artists don't see a viable path forward in a career already laden with inherent challenges, some simply won't continue. Perpetuating an ineffective enforcement system means fewer creative works, shrinking cultural identity, and fewer creators who cannot afford to press on. The intention of the DMCA's drafters was to decrease infringement, not to decrease production of creative works.

I've heard claims that implementing a system that takes down infringing copies promotes censorship. I would counter that stripping creators like myself of their fundamental rights, livelihood, and contributions is the true censorship. I'm frustrated that the existing system devalues us and, in turn, weakens our very culture. I recognize that creative fields occupy an odd place in the consciousness of priorities, especially in this challenging year, but culture is art defined by a systemic empowerment of creators. How many artistic futures will we sacrifice because we can't come together to get this right?

Unfortunately, service providers have no desire to shift our current paradigm. Why? Because the status quo under section 512 is simply more lucrative. Commercial works like mine drive online traffic and, in turn, generate advertisement revenue. In a system that allows for perpetual removal of works after the fact instead of requiring proactive licensing, there's simply no incentive to secure licenses or stop infringement. There is financial incentive to do the exact opposite. This is a flawed system established by section 512, and online services must be required to do their part to resolve it. The Office reportedly understood this and provided guidelines, including clarifying who actually qualifies for the safe harbor, strengthening policies on repeating infringers, and requiring more action by services. So, while my area of expertise is art, there's

technology. They surely can create algorithms to help us curtail the flow of infringing works on their platforms.

Some artists can afford to allow their works to be distributed freely across these platforms, seeing it as promotion, perhaps meaning to go viral. But even as a musician lucky to make a living doing what I love, every dollar counts. And in the shadow of an industry transformed with peer-to-peer sharing and the post COVID–19 obliteration of touring, our works on these platforms generate income. They're not a loss leader for other revenue streams. Undoubtedly, technology can be used to distinguish between artists who are okay with their unauthorized works on these platforms and those who aren't. There are already programs in place to monitor and filter unauthorized content. So, I have to ask, with the more than capable minds of tech, how hard can it be to present users with questions to confirm that they have authorization to upload content?

I'm grateful that Congress recognizes we are attempting to fix this and is pushing service providers to participate in finding solutions. As the Copyright Office put it, "The degree and breadth of cooperation between OSPs and rights holders that was anticipated in 1998 has not come to full fruition." It's absolutely true, and it's a shame because that is what was intended, a balance of interests and a balance of responsibility. So, we're hopeful that our tech partners will join us to finally achieve a fair and effective DMCA for all. Thank you so much.

[The statement of Ms. Kibby follows:]

STATEMENT OF MORGAN GRACE KIBBY

Chair Nadler, Ranking Member Jordan, and Members of the Committee:

I want to thank you for inviting me here today to talk about the Copyright Office's report on section 512 of the DMCA. I appreciate you including me because the heart of this discussion is not legal jargon or market analysis or political calculations. It is the real and profound effect section 512's failings have on everyday people like myself.

The Copyright Office's report is confirmation of what creators and copyright owners have been saying for years about section 512: It's just not working the way it's supposed to. But, that's too benign a way to describe the situation. It's worse than just broken. It is undermining creativity, and more alarmingly, quietly undercutting our next generation of artists. It is jeopardizing livelihoods for working class musicians, obliterating healthy monetary velocity in our creative community. It is rewarding unscrupulous services that deal in the unauthorized trade and use of our works. It is fundamentally sabotaging the legitimate online marketplace that we all rely on and that Congress envisioned.

As a self-employed creative, I've dedicated my life to my craft. Through studying voice, piano and cello, working and touring with groups like M83 & Lady Gaga, 16 hour days for months on end meeting deadlines while scoring for film and television, writing and producing for other artists, vigorously hustling to promote my work, and navigating a music industry that is in constant structural flux—I have passionately and methodically committed the time, sweat, and tears required in order to make a living doing what I love, coupled with a desire to produce art that moves people. It's no secret that the creative life can sometimes have little payoff beyond that exchange, and so it is this very dedication that is robbed of agency when there is a clear expectation that I now spend hours in front of a computer screen looking for violations of my work.

The popular mantra of working 10,000 hours to achieve mastery, (which, with the benefit of two decades in my field, I would amend to 100,000 hours) should apply to my craft, not to the protection of my own content. I can't afford to spend even a fraction of that time monitoring and noticing infringements as it's time spent away from my work—creating. So, the truth is, I just don't do it. Spending my time

enforcing my work within section 512's notice and takedown system is a futile endeavor, even with the backing of a large management company. I can monitor for infringements and send notices all day long, but more unauthorized works will just keep popping up. It's like digging in the sand at high tide. That may sound to some like defeatism, but it's the immediate reality that if dwelled on, feels insurmountable. The Copyright Office report itself stated that, "despite the advances in legitimate content options and delivery systems, and despite the millions of takedown notices submitted on a daily basis, the scale of online copyright infringement and the lack of effectiveness of section 512 notices to address that situation, remain significant problems."

Unfortunately, it remains problematic for millions of creators and it's existential. When artists, especially nascent ones, don't see a viable path forward in a career already laden with inherent and nebulous challenges, they simply won't continue. More alarmingly, some may not choose to walk a creative path. Perpetuating an ineffective enforcement system means fewer creative works, shrinking cultural identity, and fewer creators who cannot afford to stay in our business. That's not how it's supposed to be. The intention of the DMCA's drafters was to decrease infringement, not to decrease production of creative works themselves.

I've heard some claims that implementing a system that takes down infringing copies promotes censorship. However stripping creators of their fundamental rights, their livelihood, and ultimately their creative contributions is the real censorship. I am frustrated by how much the existing system devalues creators such as myself, and in tum weakens our very culture. I recognize that creative fields occupy an odd place in the consciousness of priorities, especially in this chaotic and challenging year. But culture is art, defined by systemic empowerment of already inherently courageous creators. How many of today's voices and bright creative futures are we willing to sacrifice because we can't come together to get this right?

Unfortunately, many short-sighted service providers have no desire to shift our current paradigm. Why? Because the status quo under section 512 is simply more lucrative. Commercial works like mine drive online traffic, which in tum generates advertising revenue. In a system that allows for perpetual removal of works after the fact, instead of requiring proactive licensing, there is simply no incentive to secure those licenses or stop the infringement. In fact, there is a financial incentive to do exactly the opposite. This is the flawed system established by section 512 and online services must be required to do their part to resolve it. If you have water pouring into your home, you don't resign yourself to endlessly cleaning up the puddles, you fix the leak where the water is streaming in.

The Copyright Office report understood this and provided some guidelines, including clarifying who actually qualifies for the safe harbor, strengthening policies on repeat infringers, and requiring more awareness and action by services. Clearly, service providers can do more. My area of expertise is art; theirs is technology. They can create algorithms to help you discover new artists or predict what—song you want to hear next; surely they can find ways to curtail the flow of infringing works on their platforms.

I know some artists are ok with their works being distributed freely across these platforms. They see it as promotion, perhaps even a means to go viral, and that's fine as long as that is their choice and they can afford to do that. But as a solidly working/middle-class musician who is lucky enough to make a living solely doing what I love, every dollar counts. $100 here and there may not seem like much, but sometimes even this small amount keeps the lights on in my studio. Sweat equity is not a factor to discount, but it should also be a choice, not an unspoken mandate to participate. Ultimately my work and my time are not simply investments: This is my occupation, my career. In the shadow of an industry transformed overnight with peer to peer sharing, and with the recent obliteration of one of the last remaining bastions of income in light of COVID–19 touring, my works on these platforms generate income; they're not a loss-leader for other revenue streams. Undoubtedly, technology can be used to distinguish between those artists who are ok with their unauthorized works on these platforms and those who aren't. There are programs already in use to monitor and filter unauthorized content. Even YouTube has its Content ID (though it remains inexplicably inaccessible to many and inadequate for others). So, I have to ask the most basic and obvious of questions: with the capable minds of tech, how hard can it be to present users with questions to confirm they have the authorization to upload content?

I am grateful that Congress recognizes what we are attempting to fix and is pushing service providers to participate in finding solutions. As the Copyright Office put it, "the degree and breadth of cooperation between OSPs and rights holders that was anticipated in 1998 has not come to full fruition." That's absolutely true and it's a shame, because that's what was intended—a balance of interests and a bal-

ance of responsibility. We've been at the table waiting perhaps a little less patiently every day, but we are here. We are hopeful our tech partners and will join us to finally achieve a fair and effective DMCA for all.

Thank you.

Chair NADLER. Mr. Band?

TESTIMONY OF JONATHAN BAND

Mr. BAND. Chair Nadler, Ranking Member Jordan, Members of the Committee, I'm grateful for this opportunity to provide the views of libraries on the Copyright Office's section 512 report. I will briefly discuss the importance of section 512 safe harbors to U.S. libraries. I will then make three points about the 512 report.

First, libraries agree with the report that Congress should not consider foreign approaches to online infringement, such as notice and stay down. Second, libraries agree with the Copyright Office that abusive takedown notices are a series problem requiring congressional attention. Third, libraries disagree with the report's conclusion that the balance Congress established in section 512 is askew. To the contrary, the DMCA is working just as Congress intended.

Libraries provide a variety of internet-related services. As a practical matter, libraries can provide these services only because of the DMCA's safe harbor limits libraries liability for their users' online activities. In particular, the mere conduit safe harbor in section 512(a) enables libraries to provide internet access to their users. Libraries are the only source for free internet access for most Americans. Also, they often are the only source for reliable broadband in rural areas. Even now during the pandemic when many libraries are closed, they've left their Wi–Fi networks on, enabling users to access the internet from parking lots. The section 512(a) safe harbor allows libraries to provide internet access without the threat of large copyright damages for infringing user activity.

Turning to the section 512 report, we agree with its conclusion that Congress should not adopt a notice and stay down regime. The filtering necessary to implement notice and stay down would have many false positives and would not accommodate fair use. This would be a serious problem in the area of political speech. A filter could wrongly block a campaign ad on the eve of an election. We also agree with the Office that the issue of abuse of takedown notices is serious and requires congressional attention. We urge the Committee to explore possible solutions to the misuse of the notice and takedown system. Perhaps the Federal Trade Commission should be provided with additional tools to address this issue.

While the 512 report got many things right, it got one very important thing wrong. It concluded that the balance Congress intended to strike in section 512 is askew. It reaches an incorrect conclusion because it did not appreciate the interconnected structure of the DMCA. Contrary to the suggestion of some that the grand bargain of the DMCA is to be found within section 512 itself, the DMCA's grand bargain was the adoption of the section 512 safe harbor in exchange for the enactment of the prohibition on the circumvention of technological protection measures in section 1201. As the Committee studies this issue, it must always bear in mind that section 1201 dealing with TPMs and section 512 dealing with

safe harbors were enacted together to create a balanced approach to copyright infringement in the internet environment. Thus, the effect of this and the fairness of the safe harbor system should not be considered in isolation, but in relation to the effectiveness and fairness of the anti-circumvention provisions.

Unfortunately, the Copyright Office conducted two separate studies, one of 512 and the other of 1201. The Office looked at each section in isolation, and, thus, did not consider whether the overall balance Congress struck in 1998 was still intact. The Committee should examine copyright and the internet through a wide lens. The question is not whether some individuals or even some industries are disadvantaged by online infringement and could be benefited by imposing greater burdens on service providers through amendments to section 512. Rather, the question should be whether the goals of the copyright system, promoting the creation and distribution of works for the public benefit, would be best served by recalibrating the balance established in the DMCA.

We live in a golden age of content creation and distribution. The DMCA is in large measure responsible for this golden age. It is a shining example of enlightened legislation for the public good. We disturb it at our peril. Thank you very much.

[The statement of Mr. Band follows:]

STATEMENT OF JONATHAN BAND

Chair Nadler, Ranking Member Jordan, Members of the Committee, I am counsel to the Library Copyright Alliance ("LCA"), which consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations collectively represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year. U.S. libraries spend over $4 billion annually purchasing or licensing copyrighted works.

I am grateful for this opportunity to testify on the Copyright Office's report on section 512 of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. 512. I will briefly discuss the importance of the section 512 safe harbors to U.S. libraries and the American public. I then will make three points concerning the Copyright Office's report. First, LCA strongly agrees with the Office's recommendation that Congress not consider foreign approaches to online infringement such as notice-and-staydown and site blocking. Second, LCA appreciates that the Office recognized that abuse of the notice-and-takedown system is a serious problem requiring Congressional attention. LCA urges this Committee to explore possible solutions to this issue. Third, LCA strongly disagrees with the Office's conclusion that the balance Congress established in section 512 is askew. To the contrary, the DMCA is working just as Congress intended.

I. The Importance of the DMCA Safe Harbors to U.S. Libraries.

Libraries provide to their users a variety of Internet-related services. As a practical matter, libraries can provide these services only because the DMCA's safe harbors limit libraries' liability for their users' online activities. The "mere conduit" safe harbor in section 512(a) has enabled libraries to provide Internet access to its users; the section 512(c) "hosting" safe harbor has permitted academic libraries to serve as institutional repositories for open access materials; and the section 512(d) "linking" safe harbor has allowed libraries to provide information location services to users.

A. Internet Access

Not only large commercial entities such as Verizon and AT&T Act as "service providers" within the meaning of section 512(k)(l)(A). Libraries play this role as well. In the United States, there are virtually no Internet cafes that provide users with the hardware necessary for Internet access. While Starbucks has Wi–Fi, it does not

supply laptops. Although increasingly more Americans at all income levels own smart phones, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare or unemployment benefits, on a smart phone. Libraries are the only source for free Internet connectivity and Internet-ready computer terminals for most Americans.

Seventy-seven percent of Americans without Internet access in their homes rely on public libraries for Internet access.[1] Public libraries provide the public with access to over 294,000 Internet-ready computer terminals.[2] In 2016, there were 276 million user-sessions on these computers. There were 227 computer uses per 1,000 visits to public libraries.[3]

A Pew Research Center survey revealed that 23% of Americans ages 16 and up went to libraries to use computers, the Internet, or a WiFi network.[4] Seven percent of Americans used libraries' Wi–Fi signals outside when the libraries were closed.[5] (During the COVID–19 pandemic, even though many public libraries were-and often still are-closed, the libraries left their Wi–Fi networks on, enabling users without home connectivity to access the Internet from outside the library structure. Indeed, some libraries boosted their Wi–Fi networks to enhance this outside-the-premises access.) Library users who take advantage of libraries' computers and Internet connections are more likely to be young, Black, female, and lower income.[6] Forty-two precent of Black library users used libraries' computers and Internet connections, as did 35% of those whose annual household incomes were $30,000 or less.[7]

According to the Pew Research Center survey, 61% of library computer users used the Internet at a library in the past twelve months did research for school or work; 53% checked email; 38% received health information; 26% took online classes or completed an online certification.[8]

Libraries' broadband connections are particularly important in rural areas; 58% of rural adults believe that access to high speed Internet is a problem in their community.[9] Accordingly, public libraries in rural areas have the highest ratio of Internet accessible computers: Twenty-three computers per 5,000 people.[10]

Libraries in K–12 schools and institutions of higher learning provide Internet access for students and faculty. Additionally, at many institutions of higher education, the library operates the campus-wide network.[11] Academic and school libraries also provide Internet access for students who do not have such access at home. During the COVID–19 pandemic, some community colleges that were otherwise closed still allowed students without broadband to use Internet-connected computer terminals in the college libraries.[12]

The section 512(a) safe harbor for "mere conduits" has enabled libraries to provide Internet access without the specter of liability for onerous copyright damages because of infringing user activity.

B. Institutional Repositories

With the growth of open access scholarly communications, libraries increasingly host online institutional repositories where academic authors can post papers, arti-

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[1] Pew Research Center, "Public libraries and technology: From 'houses of knowledge' to 'houses of access,'" *https://www.pewresearch.org/intemet/2014/07/09/public-libraries-and-technology-from-houses-of-knowledge-to-houses-of-access/* (2014).

[2] Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2016*, 29 (2019).

[3] *Id*.

[4] Pew Research Center, *Library usage and engagement*, *https://www.pewresearch.org/internet/2016/09/09/library-usage-and-engagement/* (2019).

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] Pew Research Center, Digital gap between rural and nonrural America persists, *https://www.pewresearch.org/fact-tank/2019/05/31Idigital-gap-between-rural-and-nonmral-america-persists/* (2019).

[10] Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2016*, 29 (2019).

[11] At many colleges and universities, the libraries participate in the Administration of campus-wide Internet access services. Under the Higher Education Opportunity Act, educational institutions have significantly more obligations to address copyright infringement by subscribers than do commercial Internet service providers. *See http://www.educause.edu/library/higher-education-opportunity-act-heoa*.

[12] Lauren Lumpkin, *A community for students' needs*, Washington Post, Bl, April 2, 2020.

cles, and theses.[13] The section 512(c) safe harbor shelters libraries from liability for infringing material that may be contained in the materials posted by third parties. Elsevier, for example, sent thousands of takedown notices to websites hosted by Harvard University, University of California, Irvine and *academia.edu*, a social networking site for academics. The articles targeted by these Elsevier notices typically had been posted by their authors, who may have transferred their copyright to Elsevier in the publication agreements. The publication agreements often allow authors to post their final, peer-reviewed manuscript of the articles, but not the final published version, *i.e.*, as formatted by the publisher.

Elsevier asserted that it pursued only final versions of published journal articles posted without their authorization. The section 512(c) safe harbor provided a mechanism for libraries to avoid getting caught in the middle of a dispute between the authors and their publishers.

C. Information Location Tools

Libraries also rely on the section 512(d) safe harbor for information location tools. Librarians prepare directories that provide users with hyperlinks to websites the librarians conclude in their professional judgment to contain useful information. Section 512(d) shelters a library from liability if the website linked to, unbeknownst to the library, contains infringing material.

II. The Importance of the DMCA Safe Harbors to the U.S. Public

The section 512 safe harbors have enabled the Internet to expand into a global communications medium that allows any speaker to reach a worldwide audience. It is section 512 that facilitates the Committee live-streaming this hearing across the country and around the world. It enables people watching the hearing to post responses online in real time. It permits experts and ordinary citizens to upload blog posts and videos tomorrow dissecting my testimony and that of my fellow panelists. Some of these videos might include mashups of our testimony. It allows Committee staffers next week to find and access all this this material and troves of other information concerning section 512 available online. Without the safe harbors of section 512, the providers of the services that enable all these activities would have to find alternative means of limiting their liability for the statutory damages available under the Copyright Act. This would involve filtering or limiting posting privileges to preapproved entities and individuals. Either alternative would in effect constitute censorship.

The pandemic has made us increasingly dependent on the Internet, and by extension on section 512. It is no exaggeration to say that section 512 has enabled millions of Americans to survive the pandemic by working, shopping and studying from home; communicating with friends and family; and accessing a bounty of entertainment content during these difficult times. To be sure, businesses and individuals pay for Internet access, but the cost would be far greater if the Internet access service providers had to contend with the cost of copyright infringement liability for their subscribers' actions.

III. The Copyright Office's Section 512 Report

Turning to the Copyright Office's section 512 report, we acknowledge the Office's effort to solicit the views of all stakeholders and agree with its conclusion that Congress should not adopt a notice-and-staydown regime. Additionally, the Copyright Office correctly recognized that abuse of the notice-and-takedown system by rights holders, or people claiming to be rights holders, is a serious problem. At the same time, we disagree with the Copyright Office's conclusion that the balance Congress intended in section 512 is "askew."

A. Notice-and-Staydown and Site-Blocking

LCA strongly agrees with the Copyright Office's recommendation that Congress not pursue foreign approaches such as notice-and-staydown or site-blocking. The Office stated:

> There are important reasons to proceed cautiously when considering any of the proposed international solutions. While the Office has received submis-

[13] *See* Brianna Schofield and Jennifer Urban, *Takedown and Today's Academic Digital Library*, November 2015, available at file: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2694731*.

> sion from thousands of rightsholders, users, OSPs, academics, and others arguing for or against adoption of the international models below, much of the evidence is anecdotal or conflicting. The Office still has relatively little data on how well these international regimes are working in practice, or even how a notice-and-staydown requirement will ultimately be implemented in the European Union. To make the most informed decision possible, it will be necessary for Congress to consider many factors beyond simply the copyright law-questions of economics, competition policy, fairness, and free speech, to name but a few. It is the opinion of the Office that the international approaches discussed below should be adopted, if at all, only after significant additional study, including evaluation of the non copyright implications they would raise.[14]

Likewise, in its June 29, 2020, letter to Chair Tillis and Senator Leahy, the Office noted that a notice-and-staydown filter might prevent future uploads that "differ in significant respects from the subject of the takedown notice," such as a sample of a song being used as background music for different content. A staydown filter could also prevent the incorporation of a song into a political ad. The Office correctly asked, "how do you comply with staydown request requirements while also protecting legitimate speech?" Notice-and-staydown could have a particularly chilling effect on scholarly communications. A professor's fair use inclusion of an audio or video clip in an online article could result in the blocking of that article.

B. Abuse of the Notice-and-Takedown System

The Copyright Office report itself did not give sufficient weight to the problem of the abuse of the notice-and-takedown system. Despite evidence that as many as 30 percent of notices are defective in some manner, the Office did not recommend any concrete action by Congress to protect fair use and free speech. In a footnote, it did acknowledge that "abuses of the DMCA system do call for some enforcement mechanism."[15] It questioned the effectiveness of private actions under section 512(f) in deterring such abuses. Instead, the Office suggested that "to the extent that such tactics represent ongoing patterns of abusive business practices, governmental enforcement outside the context of section 512 would appear to be a better avenue for addressing their proliferation." However, the Office did not specify what sort of "government enforcement" would be appropriate, and by what agency.

The Office was stronger on this issue in the Tillis-Leahy letter: "The issue of abusive allegations of copyright infringement is serious, and congressional attention to the broader question of how to best discourage such uses of the copyright system could provide more effective mechanisms to address the problem." The Office still provided no specific course of action, perhaps feeling that this was outside the scope of its expertise. But anticompetitive conduct is very much within the expertise of this Committee, and LCA urges the Committee to explore possible solutions to the anticompetitive misuse of the notice-and-takedown system. Perhaps the Federal Trade Commission should provide additional tools to address this problem.

Abuse of the notice-and-takedown system threatens not only fair uses; it can stifle any form of speech. Simply by sending a takedown notice, a person can cause the removal of speech with which he disagrees.

C. The Balance in the Safe Harbors

While the Copyright Office section 512 report got many things right, it got one very important thing wrong: It concluded that the balance Congress intended to strike in section 512 is askew. It reached this erroneous conclusion because it did not appreciate the interconnected structure of the DMCA. Contrary to the suggestion of some that the "grand bargain" of the DMCA is to be found within section 512 itself, the DMCA's "grand bargain" was the adoption of the section 512 safe harbors in exchange for the enactment of the prohibition on the circumvention of technological protection measures ("TPMs") in section 1201. As the Committee examines this issue, it must always bear in mind that section 1201, dealing with TPMs, and section 512, dealing with safe harbors, were enacted together to create a balanced approach to copyright enforcement in the Internet environment. Thus, the effectiveness-and fairness-of the safe harbor system should not be considered in isolation, but in relation to the effectiveness and fairness of the anti-circumvention provisions.

What became section 512 and 1201 were originally introduced as separate bills in the 105th Congress. The TPM bill was supported by the entertainment industry

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[14] U.S. Copyright Office, *Section 512 of Title 17*, 185 (2020).
[15] *Id.* at 148 n.790.

and opposed by sectors of the technology industry. The safe harbor bill was supported by the online service providers and opposed by the entertainment industry. In the face of this opposition, both bills stalled. Chair Hatch, in a bold legislative move, merged the two bills into one. He calculated that the entertainment industry would be willing to accept the safe harbors in exchange for TPM protection. This calculation proved correct.

The entertainment industry believes that section 1201 has benefitted it enormously. In response to a notice of inquiry issued by the Copyright Office concerning section 1201, the Association of American Publishers, the Motion Picture Association of America, and the Recording Industry Association of America filed joint comments stating that "the protections of chapter 12 have enabled an enormous variety of flexible, legitimate digital business models to emerge and thrive . . . " Likewise, the tech industry, libraries, and consumer groups believe that the section 512 safe harbors have "allowed the Internet to become what it is today—a worldwide democratizing platform for communication, creativity, and commerce."[16] Although Congress attempted to achieve a degree of balance within each title—each title contains internal compromises—at the end of the day, the grand bargain of the DMCA was the marriage of the TPM and the safe harbor bills.

Significantly, these titles are working just as Congress intended. To be sure, one can disagree with some of the policy choices Congress made in each title.[17] But Congress made these policy choices with open eyes and a clear understanding of where the technology was headed. The courts generally have applied the DMCA in a manner consistent with Congress's intent. The overall balance struck in 1998 remains in place today.

As evidence of the imbalanced application of section 512 by the courts, the Copyright Office cited the concerns raised by the entertainment industry. But the entertainment industry has always opposed safe harbors for Internet service providers. The entertainment industry agreed to the safe harbors in 1998 as the price of obtaining the TPM provisions. As soon as the DMCA was signed into law, the entertainment industry reverted to its complaints about the safe harbors and how the Internet service providers were not doing enough to combat online infringement. While the rights holders did receive some benefit from the safe harbors—the automatic injunctions of a takedown in response to a mere notice of infringement—section 512 was never intended to provide a complete solution to the problem of infringement. Section 512 was adopted to help the service providers, not the content providers.

Unfortunately, the Copyright Office conducted two separate studies, one of section 512, the other of section 1201. It suggested amendments of both sections. The Office looked at each section in isolation, and thus did not consider whether the overall balance Congress struck in 1998 was still intact.

LCA urges the Committee to view the issue of copyright and the Internet through an appropriately wide lens. The question is not whether some individuals, or even some industries, are disadvantaged by online infringement, and could be benefited by imposing greater burdens on service providers through amendments to section 512. Rather, the question should be whether the goals of the copyright system—promoting the creation and distribution of works for the public benefit—would be best served by recalibrating the balances established in the DMCA.

In LCA's view, this is not even a close call. The amount of information individual users can access from home, the office, or the road, is astounding.[18] Much of this information, posted with the authorization of the rights holder, is free. Similarly, the Internet enables these users to upload their own creations to social media platforms where they can be accessed by a global audience. If the safe harbors limiting the copyright liability of the websites hosting this content were contracted, then the Internet could not be as open. Web hosts would only make available material from

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[16] Matthew Schruers, "Music Industry DMCA Letter Seeks to Tum Back Clock on Internet," *Disruptive Competition Project* (June 21, 2016), *http://www.project-disco.org/intellectual-property/062116-music-industry-letter-seeks-to-tumback-clock-on-internet/#WHQCArYrKl5*.

[17] In my view, the theory underlying title I remains fundamentally flawed. While TPMs have been extremely helpful to the development of legitimate digital business models, the critical element has been the technological protection provided by TPMs, not the legal prohibition on circumvention and circumvention tools. Section 1201 is overbroad; because it is not limited to acts of circumvention (and circumvention tools) that facilitate infringement, it interferes with lawful uses. Further, the triennial rulemaking is not a nimble enough process to address these many lawful uses inhibited by section 1201. The number of these uses continues to grow as more devices are controlled by software, which in turn is protected by TPMs. These TPMs interfere with repair, maintenance, and customization. The Copyright Office through the triennial rulemaking in effect regulates vast swaths of the U.S. economy.

[18] *See* Techdirt, *The Sky Is Rising*, *https://skyisrising.com/*.

trusted sources or would have to impose higher fees. Resources such as Wikipedia might disappear or greatly diminish.

At the same time, it is entirely speculative whether changing the safe harbors would benefit copyright owners economically. The majority of infringing content available online is hosted overseas, beyond the reach of U.S. law. The large service providers have automated the process of submitting takedown notices, and have developed other tools content providers can use to combat infringement. Most content industries have adjusted their business models towards streaming to take advantage of the low distribution costs and enormous audiences of the Internet while minimizing the risk of infringement. While the transparency reports released by Internet companies indicate a large number of takedown notices, this volume is a function of a number of factors: The automation of the process; rights holders sending notices to search engines on the assumption that the search engines are indexing the infringing content, even if they are not; governments and corporations realizing they can use the DMCA process to censor legitimate speech; and the enormity of the Internet, social media platforms, and search engines. While 75 million takedown notices a month may seem like a large number, it is a tiny fraction of the content available on the Internet.

At the same time, this volume of automated notices indicates that fair use is not considered before notices are sent, which in tum suggests that far more content is being removed than should be.

Because we disagree with the Copyright Office's assessment that section 512's balance is askew, we oppose the various amendments the report proposed, such as amending the red flag knowledge framework or adjusting the standards for terminating the accounts ofrepeat infringers. Section 512 is by no means perfect. We too could propose various changes, such as eliminating the requirement of every service provider registering its DMCA agent with the Copyright Office. Overall, section 512 works in the manner Congress intended.

We live in a golden age of content creation and distribution. The DMCA is in large measure responsible for this golden age. It is a shining example of enlightened legislation for the public good. We disturb it at our peril.

Chair NADLER. Thank you. Mr. Schruers?

TESTIMONY OF MATTHEW SCHRUERS

Mr. SCHRUERS. Thank you, Chair Nadler, Ranking Member Jordan, Members of the Committee. My name is Matt Schruers. I am President of the Computer and Communications Industry Association, which represents many of the world's leading internet communications and technology firms. Thanks for the opportunity to discuss section 512 today.

Section 512 represents an enduring compromise which requires service providers to respond expeditiously to complaints from rights holders in exchange for certain liability limitations. In return, rights holders get rapid extra judicial relief from reported acts of alleged infringement. This gives critical legal certainty to the digital economy, which accounted for 6.9 percent of U.S. GDP as early as 2017. CCIA members and thousands of other services, websites, and apps utilize these protections. An even larger number of small businesses and independent creators utilize those 512-dependent services to engage in communications, creativity, commerce, and campaigning, as well as accomplishing daily activities, a need that is particularly acute when a pandemic compels social distancing in so many contacts like this hearing.

Some companies voluntarily invest in additional service-specific tools to mitigate infringement and help monetize content. Section 512 makes this voluntary private sector cooperation possible. It is sometimes called DMCA plus because these service-specific systems exceed section 512's requirements. DMCA plus systems offer speed and efficiency, but they are costly. They're site and often media

specific, and they do struggle with false positives. That's important because the more powerful the tool, the bigger the risk of misuse against users. So, companies have to balance these concerns when employing DMCA plus tools.

The Copyright Office's report omits any consideration of this, and, as you've already heard, takes a very isolated view that largely overlooks users as a constituency in DMCA policymaking. This despite coming right on the heels of a *Wall Street Journal* investigation that uncovered serious cases of misuse by claimed rights holders who are actually attempting to suppress lawful speech. Now, to be fair, the Office subsequently acknowledged these concerns, but the omission of these well-documented problems in the report is noticeable. As my testimony describes in greater detail, political campaigns have been targeted with section 512 misuse for over a decade and even in this cycle. As an association executive, I frequently hear from industry about these problems, so any 512 amendments need to address these issues.

Speaking more broadly, amending section 512 is not the low-hanging fruit. The twin goals of ensuring that creators are compensated and that the public can access creative work is better served by promoting more legitimate channels through the distribution of copyrighted works and enforcing existing laws against offshore actors who aren't complying with section 512 in the first place. So, I would say one more effective way to prevent infringement is to enforce our existing laws against offshore actors who don't view the DMCA as a constraint, and then, separately, to ensure that consumers have options to lawfully access content when they want it and where they want it.

We know piracy rates fall when consumers have multiple lawful means of getting access to digital media, and CCIA members play an increasingly-important role here, enabling creators of all walks to reach a worldwide audience online. Digital services are increasingly the leading means by which creators can monetize their works, and they're playing a critical role in distributing creative content in the pandemic. Legislative efforts focused on fostering this kind of digital commerce would probably bear more fruit than implementing the report's uncertain recommendations.

Thank you. I appreciate it and look forward to any questions you have.

[The statement of Mr. Schruers follows:]

STATEMENT OF MATT SCHRUERS

Chair Nadler, Ranking Member Jordan, and Members of the Committee, my name is Matt Schruers, and I serve as President at the Computer & Communications Industry Association (CCIA), which represents Internet, technology, and communications firms.[1] CCIA was founded in 1972 to promote open markets, open systems, and open networks in the computer and telecommunications industry. Today, the Association continues to champion the same principles across these increasingly diverse and important sectors of the global economy.

Thank you for the opportunity to discuss the Copyright Office's report on section 512 of Title 17. My statement focuses on the economic significance of section 512,

[1] CCIA is an international, not-for-profit association representing a broad cross section of communications, technology and Internet industry firms. CCIA member's employ more than 1.6 million workers and generate annual revenues in excess of $870 billion. A list of CCIA members is available at *https://www.ccianet.org*.

and why the report inadequately reflects the interests of users, particularly when targeted by misuse of the statute to suppress speech and economic activity. It concludes by discussing how promoting lawful alternatives to piracy can achieve more than the unpredictable outcomes that would result from implementing the report's recommendations.

I. History and Economic Significance of Section 512

Section 512 was enacted by title II of the 1998 Digital Millennium Copyright Act (DMCA). It formed part of a compromise alongside title I of the DMCA, which attaches civil and criminal penalties to circumventing technological measures that we generally refer to as "DRM" (digital rights management).[2] Service providers agreed to support giving legal force to technological measures, and in tum, rightsholder constituencies endorsed section 512.

There are also compromises embodied within section 512. The compromise at the heart of section 512 imposes upon service providers the responsibility of responding expeditiously to complaints by putative rightsholders in exchange for liability limitations. In turn, section 512 guarantees to rightsholders rapid, *ex parte* extrajudicial relief from specific acts of alleged infringement upon affirmatively reporting those acts. In order for services to benefit from section 512, they must satisfy recurring compliance responsibilities. In addition to expeditiously responding to notices of claimed infringement and complying with Copyright Office formalities, section 512 compliance also includes maintaining and implementing a procedure for terminating repeat infringers, among other requirements.

Section 512 provides critical legal certainty for the digital economy, which according to U.S. government data accounted for 6.9% of U.S. GDP, $1.35 trillion, in 2017.[3] Economic research demonstrates that regulatory certainty about copyright intermediary protections encourages investment and innovation in this sector.[4] While section 512's protections are critical for CCIA member companies, they are also essential to economic interests far beyond the tens of thousands of websites and service providers that utilize its protections. An even larger number of small businesses and independent creators utilize section 512-dependent service providers to engage in communications, commerce, and campaigning, as well as accomplishing their daily activities—a need that is particularly acute when the ongoing public health crisis compels social distancing in so many contexts, including this hearing.

a. Section 512 Balances Not Two, But Three Separate Sets of Interests

Section 512 is often construed as mutually benefiting and burdening two groups: service providers and rightsholders. This is true, but incomplete. Users represent the critical third stakeholder of section 512's balancing act. Congress acknowledged this in legislative history, noting that it "believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet."[5]

These stakeholders also increasingly overlap and intersect. For example, many CCIA members are highly successful content creators and benefit from copyright protection, in addition to limitations and exceptions like section 512. Many users are also creators; a 2019 study found that nearly 17 million American creators earned

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[2] These provisions, codified primarily at 17 U.S.C. 1201 *et seq.*, are not otherwise a subject of this testimony.

[3] Bureau of Economic Analysis, *Digital Economy Accounted for 6.9 Percent of GDP in 2017* (Apr. 4, 2019), *https://www.bea.gov/news/blog/2019-04-04/digital-economy-accounted-69-percent-gdp-2017*.

[4] Survey research found that changing regulations to remove intermediary protections would have a negative effect on venture capital investment. Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early Stage Investment: A Quantitative Study* (2011), *https://www.strategyand.pwc.com/media/uploads/Strategyandimpact-US-Internet-Copyright-Regulations-Early-Stage-investment.pdf*. Similarly, economic research found that venture capital investment in cloud computing firms increased significantly in the U.S. relative to the EU after a copyright decision involving intermediary liability. Compare Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), *available at https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf*; with Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), *available at http://cdn.ccianet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf*.

[5] H.R. Rep. No. 105–551, pt. 2, at 21 (1998).

incomes from posting their personal creations on nine platforms in 2017, collectively earning $6.8 billion.[6] Unfortunately, users' interests were largely overlooked by the Office's section 512 report.

b. "DMCA-Plus" and Voluntary Measures

In addition to general section 512 compliance, some companies voluntarily invest in offering additional service-specific suites of tools for different types of creators to help prevent infringement online, and in some cases, monetize content. Section 512 makes this voluntary private sector cooperation possible. Providing rightsholders additional tools and services for content protection and monetization is sometimes referred to as "DMCA-Plus" because these service-specific systems exceed the requirements that businesses must meet to qualify for statutory protection under section 512.[7] These voluntary, additional layers of protection are desirable because they can expedite action, and often provide rightsholders opportunities not just to remove infringing content, but also to track and monetize their works online.

DMCA-Plus systems provide value when deployed voluntarily by firms that have the resources to do so competently. Services without the resources to implement such measures should not be penalized for lacking the capacities of their larger competitors, however. If the section 512 protections were interpreted otherwise, it would raise barriers to entry for startups, entrenching existing services behind a compliance moat. Section 512 protections were intended to reduce regulatory burdens in order to encourage investment and innovation, not to deter companies from experimenting because of fears of incurring costly new obligations.

The benefits of DMCA-Plus systems include speed, efficiencies of scale and, where automated, lower costs for all parties. However, DMCA-Plus tools are costly to develop,[8] site- and media-specific, and often struggle with false positives. False positives merit particular attention because any unjustified content filtering or takedown may suppress users' lawful free expression—another reason that it is fundamental that users be acknowledged as one of section 512's stakeholders.[9]

The more powerful the copyright management tool, the bigger the risk of abuse. Companies must therefore balance these concerns so that the risk of abuse and misuse is as low as possible. Companies calibrate access to tools to the needs of different rightsholders and creators, which may differ in, for example, the types of content they own, the volume of requests they submit, their ability to dedicate time and resources, their understanding of copyright law, and the complexity of their licensing arrangements.

In addition to aiding copyright enforcement, DMCA-Plus systems can generate revenue for rightsholders. For example, YouTube's Content ID has paid billions to the content industry, including $6 billion to the music industry as of 2018.[10] With Content ID, rightsholders can opt to remove the content, but may also claim the right to monetize it, in which case advertisements are placed adjacent to said content and rightsholders receive a share of the revenue stream associated with those advertisements. The inclusion of an advertising option benefits all of section 512's constituencies, since users' disputed content remains online, while the rightsholder receives previously unrealized revenue.

As another example, Facebook's Rights Manager tool was first launched in 2015 and has developed in close consultation with rightsholders. Rights Manager identifies millions of pieces of copyrighted content per week and provides rightsholders with the ability to block and disable content, in addition to a variety of other actions. For instance, Rights Manager allows rightsholders who choose not to disable content to obtain various forms of value, including data and insights about how their content is performing, promotional opportunities, and allows rightsholders to

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[6] Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy* (2019), *https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf*.

[7] *See* Jennifer Urban *et al., Notice and Takedown in Everyday Practice* (2016), *http://papers.ssrn.com/sol3/papers.cfm?abstract__id=2755628*, at 52.

[8] YouTube has invested more than $100 million building Content ID. Google, *How Google Fights Piracy* (Nov. 2018), *https://blog.google/documents/27/How__Google__Fights__Piracy__2018.pdf*.

[9] The Copyright Office noted this in a letter following this report. *See* Letter from Acting Register Maria Strong to Senator Tillis and Senator Leahy (June 29, 2020), *https://www.copyright.gov/laws/hearings/response-to-may-29-2020-letter.pdf* ("Even the most advanced filtering systems result in a non-negligible number of false positives and cannot identify whether content is protected by fair use.").

[10] Google, *How Google Fights Piracy* (Nov. 2018), *https://blog.google/documents/27/How__Google__Fights__piracy__2018.pdf*.

claim money from advertisements placed into their content via a streamlined in product process.

II. The Copyright Office's Report Is of Limited Use for Policymaking

Because it omits a critical constituency, and does not discuss one of the longest standing challenges confronting section 512, the Copyright Office's report is of limited use. It is encouraging that the Copyright Office recognized wholesale changes to the notice-and-takedown system are not needed. This includes the Office's decision not to recommend importing from abroad controversial proposals like "notice-and-staydown," a policy which has animated the European Union's contentious Directive on Copyright in the Digital Single Market. However, while the Office said it recommended no wholesale changes, it highlights a dozen areas for Congress to fine-tune, which arguably results in broad changes. By suggesting that numerous major cases on section 512 since 1998—all defense wins—should be reversed, the consequences of the Office's report would be considerable and unpredictable.

The report also conspicuously overlooked the problem of section 512 misuse. It is disappointing that the report said so little about fraudulent use of takedown demands to suppress speech, particularly as it came on the heels of a major *Wall Street Journal* investigation that uncovered serious cases of abusive takedowns aimed at disappearing legitimate information from public view.[11] The Washington Post also recently covered how section 512 misuse and overclaiming harms creators, and the New York Times just covered how easily section 512 can be "maliciously" "weaponized by authors seeking to take down their rivals."[12]

However, in a June 29 letter responding to an inquiry from Senator Tillis and Senator Leahy regarding the report, the Copyright Office acknowledged concerns regarding the impact of abusive takedowns on speech, among other important considerations affecting users. The Office wrote that "[t]he issue of abusive allegations of copyright infringement is serious, and congressional attention to the broader question of how to best discourage such uses of the copyright system could provide more effective mechanisms to address the problem."[13] CCIA shares this view. The recognition of the seriousness of section 512 misuse is significant, and the report should therefore be read in conjunction with the Copyright Office's June 29 letter.

a. Section 512 Misuse Disrupts Speech and Commerce

Although the Office subsequently recognized that section 512 misuse is a serious problem, the omission of this subject from the report itself is a significant deficiency. Misuse of section 512's extremely powerful takedown remedy is a well-documented, long-standing challenge. A decade ago, the Center for Democracy & Technology authored a report documenting section 512 abuse in political campaigns, and the concerns it identified then remain equally salient today.[14] Campaigns supporting the late Senator McCain and former President Obama were prominent victims of dubious takedown demands by copyright owners.

Takedown abuse persists this campaign season; in 2020, multiple CCIA member companies have received false section 512 notifications in connection with the Presidential debates and campaign videos on social media.[15] Committee Members can

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[11] Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), *https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001*.

[12] Michael Andor Brodeur, *Copyright bots and classical musicians are fighting online. The bots are winning.*, Wash. Post (May 21, 2020), *https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-outline-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313dl886_story.html*; Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), *https://www.nytimes.com/2020/05/23/business/omegaverse-eroitca-copyright.html*.

[13] Letter from Acting Register Maria Strong to Senator Tillis and Senator Leahy (June 29, 2020), *supra* note 9.

[14] Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), *https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf*, at 1.

[15] Charlie Hall, *Report: Phony DMCA claims nuked Twitch streams of the Democratic debate*, Polygon (Feb 28, 2020), *https://www.polygon.com/2020/2/28/21155955/twitch-streamers-banned-democratic-debate-phony-dmca*; Matt Schruers, *Claims Against Trump Campaign Video Call for Revisiting Intersection of Speech and Copyright*, Disruptive Competition Project (June 6, 2020), *https://www.project-dlsco.org/intellectual-property/060620-claims-against-trump-campaign-video-call-for-revisiting-intersection-of-speech-and-copyright/*.

imagine what it would be like to have their most effective campaign ad temporarily forced offline on the eve of an election by dubious copyright claims, just as it was gathering steam. The same can happen to individual creators, when the viral success of their work is cut short by someone who doesn't like their message, or a small business whose e-commerce site is struck down by a competitor on Black Friday.

As an association executive, I frequently hear from industry about fraudulent and abusive takedown demands that stifle speech and disrupt commerce. Most of these incidents do not receive the media attention they deserve. Abusive behavior includes fraudulent notices, as well as over-reaching reports purportedly based on copyright that in fact are attempts to censor legitimate speech, even complete fabrications to remove content considered undesirable by the claimant.

Publicly documented examples of section 512 misuse that CCIA member companies have experienced include extortion schemes tied to the section 512 takedown process;[16] blatant disregard for fair use;[17] section 512 abuse as a business model, such as reputation-related removals masquerading as copyright;[18] abuse to target competitors in online marketplaces;[19] and flawed automated systems that broadly target unrelated content.[20] Some companies receive floods of batch notices from large rightsholders directed to short clips of content in which music is incidental as a means to force them to negotiate.[21]

Any review of section 512 needs to account for these challenges. Section 512(f)'s penalties, designed to deter misuse, are obviously inadequate, but strengthening this provision is an incomplete solution, and is unlikely to resolve all of the scenarios described above.

b. Promoting Lawful Alternatives to Piracy Can Achieve More Than Implementing the Report Recommendations

In the sense that "the best defense is a good offense," the most effective way to prevent the infringement of copyrights is to ensure that members of the public, most of whom want to pay for content, can lawfully consume works digitally whenever and wherever they want. As the Commerce Department has noted, the digital distribution of content is a crucial component to ensuring Internet users consume lawfully licensed content.[22]

Research consistently shows that piracy rates fall when consumers have broad access to lawful means of digital media consumption,[23] such as when legitimate services such as Spotify and Netflix enter markets.[24] A copyright system with robust protection and flexibilities is essential, but ultimately, access to legitimate alternatives is the best way to fight online piracy, and CCIA members are playing an increasingly important role in this space.[25] Digital services enable creators, ranging

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[16] Julia Alexander, *YouTube gets alleged copyright troll to agree to stop trolling YouTubers*, The Verge (Oct. 15, 2019), *https://www.theverge.com/2019/10/15/20915688/youtube-copyright-troll-lawsuit-settled-false-dmca-takedown-christopher-brady*.

[17] Brief for Amici Curiae Automattic Inc., Google Inc., Twitter Inc., and Tumblr, Inc., *Lenz* v. *Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2015) (No. 13–16106), *available at https://www.eff.org/files/2015/10/30/lenz-automattic_google_twitter_tumblr_amicus.pdf*.

[18] Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), *supra* note 11.

[19] Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), *supra* note 12.

[20] Ernesto Van der Sar, *Bizarre DMCA Takedown Requests Censor EU "Censorship" News*, TorrentFreak (Aug. 11, 2018), *https://torrentfreak.com/bizarre-dmca-takedown-requests-censor-eu-censorship-news-181011/*.

[21] *See* Jennifer Urban *et al., Notice and Takedown in Everyday Practice* (2016), *supra* note 7, at 72.

[22] Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), at 77–78, *http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf*.

[23] Karl Bode, *Studies Keep Showing That the Best Way To Stop Piracy Is to Offer Cheaper, Better Alternatives*, Vice (Feb. 26, 2019), *https://www.vice.com/en_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-altematives*.

[24] *See, e.g.*, Scoop Media, *Netflex is killing content piracy* (Feb. 26, 2019), *https://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm*; Copia Institute, *The Carrot Or The Stick? Innovation vs. Anti-Piracy Enforcement* (Oct. 8, 2015), *https://copia.is/library/the-carrot-or-the-stick/*; Sophie Curtis, *Spotify and Netflix Curb Music and Film Piracy*, The Telegraph (July 18, 2013), *http://www.telegraph.co.uk/technology/news/10187400/Spotifyand-Netflix-curb-music-and-film-piracy.html*.

[25] *See, e.g.*, Dave Axelgard, *Helping Creators and Publishers Manage Their Intellectual Property*, Facebook (Sept. 21, 2020), *https://about.fb.com/news/2020/09/helping-creators-and-publishers-manage-their-intellectual-property/*; Leo Olebe, *Making Music & Streaming Easier* (Sept.

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from the largest content producers in the world to the individual artist working from home, to reach a worldwide audience online. Because section 512 facilitates the provision of many such services, it remains a crucial aspect of U.S. copyright policy.

IV. Conclusion

The Copyright Office's report largely ignored one of section 512's three constituencies, as identified by Congress; called for the rejection of decades of settled case law; and failed to address the critical issue of abuse of the processes that section 512 established. As such, it is of limited value in assessing the current copyright landscape. Past experience teaches that the twin goals of ensuring creators are compensated and that the public can access creative works are best served by promoting a diversity of legitimate options for accessing media.

Chair NADLER. Thank you. Ms. Carrington?

TESTIMONY OF TERRICA CARRINGTON

Ms. CARRINGTON. Good afternoon, Chair Nadler, Ranking Member Jordan, and Members of the Committee, and thank you for the opportunity to testify today. I am Terrica Carrington, VP and legal policy and copyright counsel at the Copyright Alliance, an organization dedicated to advocating policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators, including the more than 13,000 organizations and 1.8 million individual creators whose interests we represent.

After nearly 5 years of thoughtful and comprehensive deliberation by the Copyright Office, earlier this year, the Office issued its long-awaited section 512 report, which concludes that section 512 is unbalanced and not working as Congress intended. While online service providers, or OSPs, are routinely shielded from liability under the DMCA, the problem of online piracy has grown enormously, leaving copyright owners to shoulder the burden alone. Today I expect this Committee will hear from representatives of OSPs who will say that section 512 is working just fine. This only reinforces our point. Where the OSPs are pleased with section 512 and the copyright community is not, it is clear that the appropriate balance has not been achieved.

I want to focus my time on three issues of concern that highlight this imbalance.

(1) The intent of the notice and takedown process was to give copyright owners a faster alternative to filing for a temporary restraining order in light of the speed at which infringement can occur online. Today, vastly increased internet speeds and capabilities have left copyright owners virtually no opportunity to prevent mass infringement. The notice and takedown process does not work well for any size or type of copyright owner, even when automated technologies are used. The number of takedown notices sent is staggering and steadily increasing. The Office's report recognizes the frustrations related to the constant game of whack-a-mole faced by creators simply trying to enforce their rights. For example, the report details how the Recording Industry Association of America sent over 175 million takedown notices in the span of 3 years, yet continues to see those words show up again and again.

14, 2020), *https://www.facebook.com/fbgaminghome/blog/making-music-and-streaming-easier* ("Instead of suggesting you go to music law school to figure it all out, we want to make the whole process a lot easier so you can focus on being a great streamer, and not a rights specialist. That's why we're partnering with the music industry to open up a vast catalogue of popular music for Facebook Gaming Partners to play while livestreaming games."); Tatiana Cirisano, *Amazon Music Will Now Let Artists Integrate Twitch Livestreams: Exclusive*, Billboard (Sept. 1, 2020), *https://www.billboard.com/articles/business/streaming/9442797/amazon-music-twitch-livestream-artists*; Sam Byford, *Google Images is making it easier to license photo rights*, The Verge (Aug. 31, 2020), *https://www.theverge.com/2020/8/31/21408305/google-images-photo-licensing-search-results*.

Make no mistake. The large number of notices is not a measure of success. It is an indicator of a systemwide failure. The consensus from our individual creator membership is that online infringement has reached a point where, without access to effective tools, they're unable to protect their work. The Office's report states that, "A system that fails to provide adequate protection of creators' rights of all sizes ultimately fails to carry out congressional intent regarding section 512 as well as the overall purpose of copyright law." We agree.

(2) One of the most significant problems with section 512 stems from incorrect court interpretations and applications of the statutory text, particularly those regarding red flag knowledge and willful blindness. Various courts' interpretation of the red flag standard is so restrictive that they have basically eliminated the careful balance that Congress intended and have effectively written the red flag knowledge standard out of the statute. Some courts have also incorrectly applied the concept of willful blindness, allowing OSPs to benefit from safe harbor protection despite turning a blind eye to infringement.

(3) I'll address repeat infringement policies. These policies are essential to maintaining the strong incentives for OSPs to prevent their services from becoming safe havens or conduits for known repeat infringers. The problem is not in the legal framework drafted by Congress, but instead in how OSPs choose to implement these policies. OSPs and copyright owners, with the assistance of government, need to work together to ensure that repeat infringement policies are effective and are being implemented as intended. Through such cooperation, OSPs should be able to adopt more acceptable repeat infringement policies.

There is no silver bullet solution to fixing what ails section 512. Instead, we must consider a host of different options, including implementing standard technical measures, developing private sector voluntary agreements, enacting the CASE Act and legislation to harmonize criminal penalties for infringement, and amending the statute to clarify the knowledge standards in overturned erroneous case law. We applaud the Office for calling attention to areas of imbalance related to section 512 and how overly expansive or narrow interpretations of the statute have aided in skewing the balance that Congress intended. The copyright community stands ready to work with this committee, the Copyright Office, and other stakeholders to reduce today's rampant online piracy in a way that takes into account the interests of all stakeholders involved.

Thank you again for the opportunity to testify at this hearing, and I am happy to answer any questions.

[The statement of Ms. Carrington follows:]

STATEMENT OF TERRICA CARRINGTON

Good afternoon, Chair Nadler, Ranking Member Jordan and Members of the House Judiciary Committee, and thank you for the opportunity to testify at today's hearing titled, "*Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 USC 512 After Two Decades*."

My name is Terrica Carrington and I am VP, Legal Policy & Copyright Counsel at the Copyright Alliance, a non-profit, non-partisan public interest and educational organization dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The Copyright Alliance represents the copyright interests of over 13,000 organizations in the United States, across the spectrum of copyright disciplines, and over 1.8 million individual creators, including photographers, authors, songwriters, coder, bloggers, artists and many more individual creators and small businesses tbat rely on copyright law to protect their creativity efforts and investments in the creation and distribution of new copyrighted works for the public to enjoy.

One of the greatest threats to the welfare of the creative community is piracy. Piracy is a persistent and evolving problem for virtually all types of copyrighted works and copyright owners and undermines the rights of creators and the value of copyright. It is essential that the copyright industries, including the millions of individual creators and small businesses across the country that rely on copyright law be able to recoup their investments in order to fund the next wave of investment, create and distribute quality content for the public to enjoy and ensure job stability for the nearly 5.7 million men and women these industries employ in the United States. Piracy poses a threat to those investn1ents by unjustly enriching bad actors who make no investment and take no risk, at the expense of the creators behind those works.

Congress has long recognized the harms of piracy, and in 1998, passed the Digital Millennium Copyright Act (DMCA) as the primary way to combat online piracy. Section 512 of the DMCA includes a notice and takedown process for copyright owners and a safe harbor for online service providers (OSPs). The safe harbor for OSPs was meant to be a limitation on monetary liability, not an exception to copyright infringement.[1] OSPs were concerned about being party to lawsuits over isolated acts of infringement by their users, even if they were otherwise cooperative in remedying the infringement as soon as they were put on notice.[2] In exchange for OSPs' cooperation in detecting and addressing infringement, Congress created "safe harbors" to minimize the possibility that fear of liability would inhibit technological innovation. Section 512 sought to protect OSPs who work with the copyright community to mitigate and combat online infringement. The inclusion of these safe harbors, along with the other provisions in the DMCA, allowed the DMCA to "provide greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities."[3] Indeed, a review of the legislative history reveals that the intent of the safe harbors was to afford reasonable immunity to reasonable actors; not to create a mechanism by which OSPs could disregard copyright law.[4]

The notice and takedown process is a tool for copyright holders to get user-uploaded material that infringes their copyrights taken down off of websites and other internet sites. The process entails the copyright owner (or the owner's agent) sending a takedown notice to an OSP requesting the OSP to remove material that is infringing their copyright(s). In exchange for taking down infringing content, an OSP who did not upload the infringing material receives a safe harbor from monetary liability—but only if they comply with additional obligations, including: Implementing a repeat infringer policy; registering an agent with the Copyright Office; and responding to infringements "expeditiously" once they have actual or apparent knowledge of them. Even if a takedown notice meets all the legal requirements, the OSP still may refuse to takedown the material. However, if they fail to do so, then they open themselves up for potential secondary liability for assisting with copyright infringement.

After a takedown notice is sent to an OSP, the OSP usually notifies the user, subscriber or other person who is responsible for engaging in the infringing activity. If that person—the alleged infringer—in good faith does not think the activity is infringing, he or she can send a counter notice to the OSP explaining why they disagree with the copyright owner. After receiving a counter notice, the OSP forwards that counter notice to the person who sent the original takedown notice. Once the OSP has received a valid counter notice they wait 10–14 days. If the copyright owner sues the alleged infringer in that time frame the material will remain down, but if no suit is filed then the OSP must re-activate or allow access to the alleged infringing activity. This entire process is what is commonly referred to as the notice and takedown process. An OSP is not required to take any of these actions unless it wants to avail itself of the DMCA safe harbor.

In passing the notice and takedown provisions in section 512 of the Act, Congress intended to encourage copyright owners and OSPs to work together to combat exist-

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[1] *See Ellison* v. *Robertson*, 357 F.3d 1072 (9th Cir. 2004) *citing* S. Rep. 105–190, at 19 ("Congress provided that 'limitations ofliability apply if the provider is found to be liable under existing principles of law.'"); S. Rep. 105–190 ("The [safe harbor] limitations ... protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement. Monetary relief is defined in subsection [(k)(2)] as encompassing damages, costs, attorneys' fees, and any other form of monetary payment. These subsections also limit injunctive relief against qualifying service providers to the extent specified in subjection G).").

[2] *See* S. Rep. No. 105–190.

[3] S. Rep. No. 105–190, at 20; H.R. Rep. No. 105–551, pt. 2, at 49–50.

[4] *See* H.R. Rep. No. 105–551.

ing and future forms of online infringement.[5] This approach was designed to remedy hardships faced not only by large copyright owners and OSPs, but also individual creators who undeniably lack meaningful tools to fight online infringement.

Over two decades have now passed since the DMCA was enacted. Since that time, the interconnectivity provided by the internet has fundamentally changed commerce, communication, and the way the public experiences copyrighted works. Consumers can access and enjoy all sorts of copyrighted works where and when they want, and creators benefit from new platforms that reach new audiences. Although the intemet's impact on creativity and interconnectivity have given us much to cheer about over the past two decades, there is also much that is problematic. One of these problems is rampant online piracy. In the past two decades since the DMCA was enacted, online infringement has increased exponentially, causing widespread harm to the economic and creative vibrancy of the copyright community.

Although section 512 seemed to have achieved Congress's purpose when it was first enacted, over the past twenty-two years, court rulings and other unanticipated changes that have taken place in the online environment have rendered these provisions less effective, creating an ecosystem where mass copyright infringements are an unfortunate and regular occurrence. While section 512 remains a workable legal framework, it is evident that the statute is under strain and that stakeholder collaboration is needed in order for the statute to live up to its potential as imagined by Congress. If such collaboration doesn't come to fruition, perhaps it is time for Congress to reconsider this twenty-two-year-old bargain with an eye toward determining what areas of section 512 may need to be recalibrated in order to rebalance the system.

Members of this Committee will no doubt hear from OSPs who will say that section 512 is working just fine and recalibration is not necessary. From the perspective of the OSP community, that viewpoint makes sense because the section 512 safe harbors have routinely protected OSPs from liability. That is only one half of the section 512 bargain. While OSPs are routinely shielded from liability under the DMCA, the other half of the bargain remains unfulfilled, as online copyright infringement has grown enormously—leaving copyright owners to bear the brunt of the burden of taking action against infringement—with little to show for it.

To be clear, the fact that copyright owners shoulder most of the burden of taking action against infringement is not—standing alone—the only problem with section 512. An equally significant problem is that, when they do take on that burden and send takedown notices, the notices have little (if any) effect, as the infringing material is often immediately reposted. This results in the burden being placed almost exclusively on the creative community, and that is far from the balance and cooperation that Congress intended. This is a problem that can no longer go unaddressed.

When the Committee evaluates the divergent views on the efficacy of section 512, the primary focus should be whether section 512 effectively balances the interests of OSPs and copyright owners, and incentivizes cooperation between OSPs and rights holders to detect and address infringement, as Congress intended. Balance would be reflected by the fact that both sides are in agreement that section 512 is working (or not). Where one side, the OSP community, is pleased with section 512 but the other side, the copyright community, is not, it is clear that this balance has not been achieved.

We have identified below specific problem areas of section 512 that the Committee should consider as it moves forward with its evaluation of section 512.

I. The Notice and Takedown Process

In 1998, the intent of the notice and takedown process was to give copyright owners a faster alternative to filing for a temporary restraining order in court, mostly so they could prevent copies distributed legally on physical goods (DVDs, CDs) from being illegally distributed on the internet for people to download. Today, vastly increased download speeds and instant streaming capabilities have left copyright owners virtually no opportunity to prevent mass unauthorized copying, distribution and performance. The notice and takedown process doesn't work well for any size or type of copyright owner—even when automated technologies are used. As observed by Professor Bruce Boyden,[6] "even for the largest media companies with the most resources at their disposal, attempting to purge a site of even a fraction of the highest-value content is like trying to bail out an oil tanker with a thimble. The expenses

[5] *See* H.R. Rep. No. 105–796, at 72 (1998).

[6] Professor Bruce Boyden is a Professor at Marquette University Law School and a member of the Copyright Alliance Academic Advisory Board.

of locating, identifying, and then sending a notice for that many files is so significant that even large companies must limit their efforts."[7]

The number of takedown notices sent is staggering, and this number is steadily increasing.[8] The Copyright Office's recently published section 512 Report recognizes that the massive amounts of notices sent by copyright owners represent a never-ending uphill battle against infringement.[9] The report details the frustrations related to the constant game of "whack-a-mole" as illustrated by the experience of organizations such as the Recording Industry Association of America (RlAA), whose Victoria Sheckler explains, "[w]e have sent over 175 million notices in the past three years to a variety of entities that claim DMCA status, or DMCA safe harbor status. And yet, we continue to see our members' works show up again and again and again on these sites."[10]

Despite these glaring inefficiencies, there are those who believe that the large number of takedowns is evidence that the notice and takedown system is working. That is complete fallacy. The large number of takedown is not a measure of success; it is an indicator of a system-wide failure—especially when those numbers are increasing.

There are numerous examples of this failure for both large and small copyright owners. For example, consider a large movie studio's use of the process. For three months during the fall of 2015, Disney sent about 35,000 takedown notices directed to illegal copies of Avengers: Age of Ultron—which was still in theaters at the time—to a single site. That's more than 10,000 notices a month, more than 300 a day, directed to a single movie on a single file hosting site. Similarly, in the 3 months in the spring of 2015, Fox sent more than 57,000 takedown notices to a single file-hosting site for the film Kingsman: The Secret Service. That's 19,000 notices a month, to one site, for the same movie. Were the DMCA working as intended, one would expect the number of notices to the site to decrease over time. Yet, we see the opposite. For instance, in the Kingsman example, on April 30, Fox sent 697 takedown notices. On July 21, three months later, it had to send 881 notices to the same site for the exact same work. This is not an effective way to address piracy.

Online infringement is especially problematic for individual creators. Individual creators (who typically have been provided little information and lack meaningful resources) must usually rely on manual web searches, reverse image searches, Google alerts, or word of mouth to discover infringements of their work. In 2017, we conducted a survey of our members to gauge their experiences with the notice and takedown process in section 512 of the DMCA (2017 Survey).[11] Of the 1,362 respondents who took our survey, 52% said that they currently monitor the internet for copyright infringement of their copyrighted works, or have monitored in the past, while 37% said that they have never monitored for infringement. While it may be surprising that such a significant portion of creators do not monitor for infringement, the reasons why are enlightening. A lack of education and understanding about the DMCA and how to find and report online infringements was the most significant cause for their not monitoring. The second most significant cause was the difficulty and time commitment associated with small creators policing the internet for copyright infringement.

That is only part of the challenge for the individual creator. According to another survey of our members (2016 Survey),[12] even when a creator does discover an infringement of his or work, many of them do not know how to file a takedown notice or even what the notice and takedown process is; and even when they have participated in the process, they lack access to the technologies necessary to actually keep infringing content from reappearing.[13] About 70% of the creators responding to the 2016 Survey had never filed a takedown notice before because (1) they had never heard of it; (2) it would take too much effort; (3) the process is too difficult to navi-

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[7] *See* Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution for a 20-First Century Problem*, CENTER FOR PROTECTION OF INTELL. PROP. (Dec. 5, 2013).

[8] *Transparency Report*, GOOGLE, *https://transparencvreport.google.com/copyright/reporters/1594?hl=en* (last updated Aprll 8 2020). As of April 2020, the Recording Industry Association of America (RIAA and its members have sent nearly 94 million notices to Google alone).

[9] U.S. Copyright Office. *Section 512 of Title 17: A Report of the Register of Copyrights* at p. 81 (May 2020), *available at: https://www.copyright.gov/policy/section-512/section-512-full-report.pdf*.

[10] *Id.*

[11] *https://copyrightalliance.org/wp-content/uploads/2017/03/Copyright-Alliance-Section-512-Empirical-Research.pdf*.

[12] *https://copyrightalliance.org/wp-content/uploads/2016/11/Copyright-Alliance-Section-512-Comments1.pdf*.

[13] *Id.*

gate; or (4) they were skeptical it would do anything to stop online infringement.[14] The 2017 Survey indicated that most creators who monitor for infringement and have discovered infringement online want the material taken down, but only 35% actually send a DMCA takedown notices. The remaining 65% use other means for contacting the site (including "flagging" or "reporting" content) or the user directly.[15] These results illustrate a need for easily accessible educational resources to help creators better understand and avail themselves of the notice and takedown process. These educational offerings will also serve OSPs; better informed copyright owners will ultimately cut down on the number of inappropriate or incomplete DMCA takedown notices filed.

Individual creators who file notices lack the resources of larger copyright owners to make a meaningful impact. Creators report that sending takedown notices takes time from their creative pursuits, which pushes many to give up enforcement efforts all together. These creators are defenseless against the volume and reach of online infringement, especially given the speed at which content is reposted anew by users. For example, Keith, a writer from Austin, has never personally posted his work on social media sites, but still spent four hours on Tumblr trying to locate 50 of the 2,000+ URLs that contained re-postings of his work: "I can't afford the time to find the full 2,000 [that Tumblr asked for]," he said. He has also found his work on numerous other sites, including Twitter, Facebook, and lnstagram.[16]

The consensus from our individual creator membership is that online infringement has reached a point where content can be posted on hundreds of online infringement sites within days, and where individual creators-without access to effective tools-are unable to make any real impact in protecting their work. Online infringement has become so commonplace that it destroys once legitimate markets for creators' works. For example, Susan, an audio producer from California, was told by a radio station that they saw no point in paying her for her work because they could "get it for free."[17]

The impact of online infringement on a creator's livelihood has been thoroughly documented in testimony, news articles, and blog posts over the past several years. Here are just a few of the many stories told by creators:

- Maria Schneider, a Grammy award winning composer, testified before the House Judiciary Committee that she invested $200,000 of her own money into a new album to only discover her song had quickly been pirated all over the Internet.[18] "The resulting loss of income, combined with the cost of monitoring the Internet and sending takedown notices, threatens her ability to continue creating her award-winning music."[19]
- Kathy Wolfe, the owner of the independent film company Wolfe Video, lost $3 million in revenue in 2012 from the excessive pirating of her top 15 film titles.[20] She "found more than 903,000 links to unauthorized versions of her film" in a single year, spending "over $30,000 a year-about half of her profits—just to send out takedown notices."[21] With losses this large, she was forced to cut her marketing budget in half, cut employees' pay, and discontinue her own salary.[22] Making art is often expensive, and most artists already sacrifice paying themselves to keep the art going; this should not be exacerbated by online infringement.
- Tor Hanson, co-founder of YepRoc Records/Redeye Distribution, testified in 2013 at the House Judiciary Committee hearing on *Innovation in America: The Role of Copyrights* on this very point: "[We] have limited budgets and whatever revenue and profits [we] can eke out are directed toward [our] primary goals, music creation by [our] music label's artists and then the marketing and pro-

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[14] *Id.*

[15] *https://copyrightalliance.org/wp-content/uploads/2017/03/Copyright-Alliance-Section-512---Empirical-Research.pdf.*

[16] *Id.* And online infringement does not just stop at loss of compensation or control; it also can damage the professional integrity of creators. For example, Melissa, a photographer from California, was horrified to learn that her Victoria Secret style bridal photos were stolen and used on pornography sites. "This has been horrible!" she said. "I've been in business for 32 years. Married for 35 years and would never create anything for porn!"

[17] *Id.*

[18] *Section 512 of title 17: Hearing Before the Subcomm. of Courts, Intel. Prop., and the Internet of the Comm. on the Judiciary* (2014) (statement of Maria Schneider).

[19] *Id.*

[20] Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up*, WALL STREET JOURNAL, Mar. 3, 2013.

[21] *Id.*

[22] *Id.*

motion of this music to the American public so they are able to continue this creative process." [23]

- Jonathan Yunger, Co-President of Millennium Media, an independent film production company, testified on March 10, 2020 at the Senate Committee on the Judiciary, Subcommittee on Intellectual Property hearing on Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy? that despite Millennium Media's investment in film security, piracy continues to affect its box office revenue and distributors.[24] "[I]n 2014, our film, Expendables 3, was stolen by an employee of one of our venders and released online a month before it could open in theaters. By opening day, the movie had been downloaded 60 million times. It was calculated that we lost about $250 million in box office revenue." [25]

Individual creators face numerous other significant barriers to the effective use of the notice and takedown process, include the lack of uniformity and consistency from one OSP's web form to the next, and the practice by some OSPs of imposing requirements beyond those prescribed under the law. In addition, these individual creators and small businesses cite as barriers difficulty locating web forms and designated agents due to inconspicuous placement—since the DMCA only requires the information to be "in a location *accessible* to the public," but not conspicuously placed.

Numerous individual creators also voiced safety and privacy concerns about backlash from notice recipients. They are sometimes reluctant to send notices which require them "to reveal their personal information including phone numbers and a home address," due to safety concern and fear of retaliation.[26] Concerns over safety and privacy caused Blake Morgan, a musician and owner of the record label ECR Music Group, to stop sending takedown notices altogether because "it simply was not wmih it." [27] Photographer Yunghi Kirm's decided not to send a takedown notice to a website where her image had been used without permission because the group appeared to endorse violence and, in light of that, she was uncomfortable revealing her personal information to the group via a takedown notice.[28] Other individual creators have similar experiences. At least one Copyright Alliance member has even reported receiving death threats as a result of sending a takedown notice.

II. The Repeat Infringement Problem

No one in the notice and takedown ecosystem likes spending time and money to send or process the millions of takedown notices that are sent daily. This is time and money that the individual or company could have spent innovating and creating instead, which is bad for the U.S. economy. Congress clearly did not intend such outcomes when it passed the DMCA—section 512 was designed to protect copyrights, to protect non-culpable OSPs from liability when users uploaded infringing files and to maintain many of the traditional contours of secondary liability in the digital environment.[29] Congress understood that internet enforcement could not be solved unilaterally through government regulations. So, Congress created section 512 with the intent that the law would bring OSPs and copyright owners together to cooperate to detect and eliminate infringing material before that material was illegally distributed widely.

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[23] *Innovation in America: The Role of Copyrights: Hearing Before the Subcomm. On Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 113th Cong., 6 (2013) (Statement of Tor Hansen, Co-President/Co-Founder YepRoc Records/Redeye Distribution).

[24] *See Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy? Hearing Before the Subcomm. on Intel. Prop. of the S. Comm. on the Judiciary*, 116th Cong. 1, 4 (2020) (statement of Johnathan Yunger, Co-President of Millennium Media).

[25] *Id.* at 4.

[26] The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Comment on Section 512 Study (Apr. 7, 2016), at 10, *https://www.regulations.gov/document?D=COLC-2015-0013-90145*.

[27] *Id.* at 12.

[28] *Id.* at 12.

[29] *Columbia Pictures Indus.* v. *Fung*, 710 F.3d 1020, 1039–40 (9th Cir. 2013) (noting that "the DMCA's legislative history confirms that Congress intended to provide protection for at least some vicarious and contributory infringement," and explaining that inquiries into contributory copyright infringement and the prerequisites for one or more of the DMCA safe harbors should be conducted independently); *Playboy Enters., Inc.* v. *Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993); S. Rep. No. 105–190 at 19, 20 (1998); Boyden, *supra* note 7.

Today, not only are stakeholders grappling with tens of millions of notices a year,[30] but even worse, the business models employed by certain bad actors actually take advantage of judicial interpretations of this statutory scheme. As a result, uploaders repost infringing content within seconds, and these bad actors profit from having millions of infringing files shuffle off and back onto their website. After all, an OSP can obtain revenues even when copyrighted content stays up only for a brief time. If copyrighted content receives just one viewing or download before being taken down, in the aggregate of millions of works, that adds up to millions of ad revenue-producing views for the OSP.[31] Congress did not envision this type of abuse when it enacted the DMCA; such abuse needs to be addressed.

This viewpoint is supported by Professor Sean O'Connor, who explained that:

> The highest volume of notices seems to be for reposted works, *i.e.*, ones that have already been taken down on notice, yet reappear within hours often on the same site. Further, many of these do not even purport to be transformative or non-infringing. They are not mash-ups, remixes, covers, etc. They are simply the original work reposted repeatedly by an unauthorized person. That the posters do not seem to believe they have any real rights to the works seems supported by the surprisingly low number of counter notices submitted (relative to the enormous number oftakedown notices.[32]

III. DMCA Provisions Interpreted Contrary to Congressional Intent

One of the most significant problems with section 512 stems from incorrect court interpretations and applications of the statutory text. When this occurs it results in section 512 falling short of the goals Congress had for section 512 and dramatically shifts' the balance between the burden and responsibilities of copyright owners and OSPs. The area where this is most evident is in court interpretations of red flag knowledge contributory and vicarious liability and willful blindness, as well as the provision of section 512(c) that the copyright owner's notice may include a "representative list" of the infringements.

a. Red Flag Knowledge and Willful Blindness

An OSP will lose safe harbor protection by failing to Act when confronted with actual or apparent knowledge opyright owners can provide the OSP with actual knowledge by sending a notice or they can prove the OSP has apparent knowledge[33] of infringement under the "red flag knowledge" standard.[34] Once aware, the OSP is required to Act expeditiously to remove, or disable access to, the material" to remain eligible for safe harbor protect ions.[35]

Under the red flag knowledge standard, a copyright owner can prove an OSP has knowledge by showing it was aware of facts or circumstances that make infringement apparent. The court asks whether (1) the OSP was aware of the circumstances of infringement (the so called "subjective prong"); and (2) the "infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances" (the so-called "objective prong").[36] However the Second Circuit in *Viacom* v. *YouTube*[37] and the Ninth Circuit in *UMG Recordings* v. *Shelter Capital Partners*[38] and *Perfect 10* v. *CCBill*[39] arguably made the OSPs only responsible for responding to the infringement explicitly identified in takedown notice.[40] These decisions were exacerbated by the recent decision in *Ventura Content, Ltd.* v. *Motherless Inc.*[41] which held that "even if it were obvious to a reasonable person that some of the material on the site must be infringing, that is not enough to lose the safe harbor. It must be obvious that the particular material that is the subject of the claim is infringing." These courts' interpretation of the red flag standard is so re-

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[30] Boyden, *supra* note 7.

[31] David Newhoff, THE ILLUSION OF MORE, *Copyright Office to Review Safe Harbor in DMCA* (Jan. 6, 2016), *http://illusionofmore.com/copyright-office-to-review-safe-harbor-in-dmca/*.

[32] Section 512 of Title 17, *Hearing Before the Subcomm. Of Courts, Intell. Prop., and the Internet of the Comm. on the Judiciary*, 14 (2014) (testimony of Sean O'Connor).

[33] 17 U.S.C. 512(c)(1)(A)(ii) ("red flag knowledge").

[34] H.R. Rep. No. 105–551 (II), pt. 2, at 58 (1998).

[35] 17 U.S.C. 512(c)(1)(A)(iii).

[36] H.R. Rep. 105–551, pt. 2, 61 (1998).

[37] 676 F.3d 19 (2d Cir. 2012).

[38] 106 U.S.P.Q. 2d 1253 (9th Cir. 2013).

[39] *Perfect 10* v. *CCBill*, 488 F.3d 1102, 1113 (2007).

[40] *See* Boyden, *supra* note 7.

[41] *Ventura Content, Ltd.* v. *Motherless, Inc.*, 885 F.3d 597, 611 (9th Cir. 2018).

strictive that it has basically eliminated the carefully balanced burden allocation that Congress intended and effectively written the red flag knowledge standard out of the statute.

Some courts have also incorrectly applied the concept of willful blindness in the safe harbor context. Knowledge of infringing activity will be imputed to an OSP who has consciously avoided obtaining actual knowledge under a theory of willful blindness.[42] In *Viacom* v. *YouTube,* the Second Circuit articulated that willful blindness is triggered when the OSP is "aware of a high probability of the fact [of infringement] and consciously avoid[s] confirming that fact."[43] The willful blindness doctrine provides courts with additional guidance and effectuates Congress's intent to "discourage today's common 'do not look' policy."[44] But in *Capitol Records* v. *Vimeo*, the court shielded the OSP from liability despite a record that showed the OSP and its employees turned a blind eye to infringement. The court determined that any conscious avoidance by the OSP needs to be "tailored" to the "specific infringing content at issue in the litigation," and that the knowledge demonstrated in the record "did not relate to the Videos-in Suit."[45] However, the hallmark of a willfully blind defendant is that the defendant has affirmatively avoided acquiring specific knowledge about infringing material or activity on its system. By definition, then, an OSP that is willfully blind to infringing activity on its system has ensured that it will not have knowledge that is "tailored to" the "specific infringing content at issue," because that is the very knowledge the service provider has consciously avoided.

As a practical matter, if improper court decisions like these continue to proliferate, OSPs will effectively have no obligations other than to react to DMCA notices. Congress envisioned the DMCA as creating a regime of joint responsibility, in which OSPs would Act reasonably and proactively in the face of actual or apparent knowledge. Coupled with the existing practical limitations of the notice and takedown process, copyright owners would have little meaningful protection against online infringement. When there is no meaningful "red flag" knowledge requirement, the result is a toothless statute.

b. The "Representative List" Requirement

The section 512 notice and takedown process, as often interpreted by the courts, has largely placed the burden on copyright owners to list every instances of infringement on an OSP's website. The "representative list" requirement in provision 512(c)(3)(A)(ii) specifies that a takedown notice must identify the "copyrighted work claimed to be infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a *representative list* of such works at that site." This is paramount, given the volume of online infringement, because creators too often lack the time, money, and resources to list with specificity every single URL containing infringing copies of their work. Notwithstanding this language, many courts have placed the sole burden of tracking, identifying, and "adequately documenting" infringements squarely on the copyright owner which makes little sense in practice and discourages individual creators from enforcing their rights.[46]

Congress did not intend this high degree of specificity for notices. As noted in the legislative history, the "representative list" requirement is satisfied,

> [f]or example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.[47]

The legislative history demonstrates that the interpretation of the "representative list" standard in section 512 is yet another example of the courts misinterpreted the language of section 512 in a manner that directly contradicts the intent of Congress,

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[42] *Viacom*, 676 F.3d at 35 (quoting *Tiffany (NJ) Inc.* v. *eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010)).

[43] 676 F.3d 19 (2d Cir. 2012).

[44] Steven Tjoe, *Taking a Whack at the DMCA: The Problem of Continuous Re-Posting*, CENTER FOR PROTECTION OF INTELLECTUAL PROPERTY (Mar. 14, 2014), *http://cpip.gmu.edu/2014/03/14/taking-a-whack-at-the-dmca-the-problem-of-continuous-re-postings/*.

[45] *Vimeo*, 972 F. Supp. 2d at 524–25.

[46] *See Perfect 10* v. *CCBill*, 488 F.3d 1102, 1113 (2007); *Viacom Int'l.* v. *YouTube, Inc.*, 940 F.Supp. 2d 110, 115 (S.D.N.Y. 2013).

[47] H.R. Report No. 105–551 (emphasis added).

makes the notice and takedown process in effectual and harms the creative community.

IV. Repeat Infringer Policies

Section 512(i) provides that to be eligible for the DMCA safe harbor, an OSP must adopt and reasonably implement "a policy that provides for the termination in appropriate circumstances of subscribers and account holders ... who are repeat infringers." What constitutes a reasonably implemented repeat infringer policy has been interpreted as being highly fact specific and may vary from one context to another. But any interpretation regarding a user's status as a repeat infringer or whether a policy has been reasonably implemented has to align with the purpose and intent of the statute. Congress intended section 512 to encourage cooperation between OSPs and copyright owners in combating online infringement. As such, 512(i) incentivizes OSPs to cooperate by conditioning the benefit of the DMCA safe harbor on implementation of a policy that would help to deter infringement.[48]

Repeat infringer policies are "fundamental safeguard[s] for copyright owners ... essential to maintain[ing] the strong incentives for [OSPs] to prevent their services from becoming safe havens or conduits for known repeat copyright infringers."[49] The problem is not in the legal framework drafted by Congress, but instead in how OSPs choose to implement policies. As illustrated in *Capitol Records* v. *Escape*, some OSPs are fully capable of identifying works and tracking repeat infringers, but instead choose to craft a repeat infringer policy in a way that makes enforcement nonexistent.[50] As the court found, the online music service provider Grooveshark, owned by Escape, had two policies for removing content: One Strike and DMCA Lite.[51] Under the One Strike policy, content would be removed and the user would be banned from re-posting content.[52] On the other hand, under the DMCA Lite policy-which made up 94% of all Grooveshark takedowns-any takedown notice that Grooveshark decided did not perfectly comply with the DMCA's requirements would only result in the content being removed. The user's account would remain active.[53] In denying Grooveshark immunity under the safe harbor, the court noted that "[a]dopting a repeat infringer policy and then purposely eviscerating any hope that such a policy could ever be carried out is not an 'implementation' as required by 512(i)."[54] Yet because Grooveshark publicly claimed it complied with the DMCA (even though it did not) it was able to operate for 8 years.[55] For nearly a decade, Grooveshark profited from massive copyright infringement, misled users into thinking that they were a legitimate music service, and competed unfairly with other legitimate and licensed music services.

More recently, in *Sony Music Entertainment* v. *Cox Communications, Inc.*,[56] a jury in the United States District Court for the Eastern District of Virginia found Cox liable for contributory and vicarious copyright infringement, and ineligible for the DMCA safe harbors because it did not implement measures required by the DMCA to fight against infringement. Specifically, Cox would limit the number of infringement notices to get through, effectively allowing infringement to continue. Importantly, it also failed to discontinue service for its customers who pirated content. The complaint stated at least 20,000 Cox subscribers are repeat offenders. Ultimately, Cox's malfeasance led the jury to find that Cox's conduct was willful, awarding the plaintiffs $1 billion in damages for the 10,017 sound recordings and musical compositions at issue.

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[48] "[T]hose who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access." S. REP., No. 105–190, at 52 (emphasis added).

[49] *Capitol Records, Inc.* v. *MP3Tunes, LLC*, 821 F.Supp.2d 627, 637 (S.D.N.Y. 2011).

[50] Copy L. Rep. (CCH) P30, 744 (S.D.N.Y. 2015).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Letter from Paul Geller, Grooveshark's Executive Vice President ("There does appear to be some confusion about whether Grooveshark is a legal service. So, let's set the record straight: There is nothing illegal about what Grooveshark offers to consumers .... First, there is a distinction between legal and licensed. Laws from Congress. Licenses come from businesses. Grooveshark is completely legal because we comply with the laws passed by Congress, but we are not licensed by every label (yet). We are a technology company, and we operate within the boundaries of the Digital Millennium Copyright Act of 1998.") Digital Music News has since removed the open letter from their website.

[56] *Sony Music Entertainment* v. *Cox Commc'ns, Inc.*, 426 F.Supp.3d (D.E.D.Va. 2019).

Similarly, in *UMG* v. *Grande Communications*,[57] the court concluded that not only did Grande ignore over a million copyright infringement notices that were sent to it, it did not even have an existing repeat infringer policy. The court referred to this behavior as "the complete abdication of responsibilities to implement and enforce a terminating policy."[58]

On the other hand, the Ninth Circuit in Motherless[59] held that Motherless, a pornography site, was eligible for the section 512 safe harbor even though it lacked a formal repeat infringer policy. The evidence showed that repeat infringers continued posting infringing material, and the website maintained insufficient records from which failures to terminate could be gleaned.

While there have been some helpful decisions relating to the "repeat infringer" standard, the outcomes have not been uniform, and the positive decisions are not the panacea that some would make it out to be. First, as Cox and similar cases illustrate, large and sophisticated companies may pay only lip service to the requirement of a "repeat infringer" policy. Second, it's important to understand that lawsuits like Grande and Cox are expensive to bring—only a few can afford to bring them. Third, the OSP's actions in cases like Grande and Cox were so egregious and offensive that on a practical level those cases are not very helpful. Lastly, it's important to note that even where an OSP does reasonably implement a repeat infringer policy and terminates a subscriber under that policy, it is very simple for that person to circumvent the termination by signing up with a different OSP or re-subscribing with the same OSP under an alias.

That is why OSPs and copyright owners, with the assistance of government, need to work together to ensure that that repeat infringers policy are effective and being implemented as intended. Through such cooperation, OSPs should be able to adopt more acceptable repeat infringer policies.

V. Information Location Tools

When the DMCA was drafted, search engines already played a significant role in the internet ecosystem. In the years following its enactment, that role grew exponentially. Today when someone is looking for something on the internet, the first place they go to is a search engine. While search engines often direct people to lawful sources of content, too often they also direct users to illegal content. It is imperative that search engines and other OSPs who provide information location tools work with copyright owners find ways to work together to effectively address these infringement problems.

While the copyright community appreciates many of the additional steps these search engines have taken, it is important that the steps be effective and not just symbolic. For example, Google has implemented a policy whereby it demotes sites based on the number of takedown notices that Google receives in conjunction with other factors. Unfortunately, the demotion policies, and other policies, have largely been ineffective because infringing content still shows up near the top of search results. One solution would be for search engines to place less weight on the infringing site's traffic and more weight on the number of takedown notices the site receives. Another solution would be for search engines and copyright owners to jointly enlist the support of independent third parties to evaluate the effectiveness of particular measures, develop ways to improve their efficiency and effectiveness, and to highlight best practices.

Problems also remain with the autocomplete features of Google's search bar. While efforts have been made to remove piracy device terms like "Kodi" from autocomplete, the feature continues to steer users towards illicit websites and infringing content.[60] An example of these enduring shortcomings is evident by simply

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[57] *UMG Recordings, Inc.* v. *Grand Commc'ns Networks, LLC*, 384 F.Supp.3d 743 (D.W.D.Tex. 2019).

[58] *Id.* The court found that even if the Grande had a policy of terminating repeat infringers—based on an assessment of its internal emails, statements by employees and utter lack of terminating even one customer—it certainly did not reasonably implement that policy from 2010 through 2016. The facts showed that prior to 2010 Defendant had terminate repeat infringer accounts. But from that time through May 2017, not a single subscriber account was terminated despite receiving over a million copyright infringement notices from Plaintiffs and tracking 9,000 customers in its DMCA "Excessive Violations Report." It wasn't until this suit was filed that Grande terminated a subscriber, and even then it was only 11 customers.

[59] *Ventura Content, Ltd.* v. *Motherless, Inc.*, 885 F.3d 597, 611 (9th Cir. 2018).

[60] Dani Deahl, *Google Removes "Kodi" From Search Autocomplete in Anti-Piracy Effort*, THE VERGE (March 29, 2018). *https://www.theverge.com/2018/3/29/17176894/google-removes-kodi-search-autocomplete-anti-piracy*.

typing "watch f' into the search bar. A user may be trying to find a legitimate way to watch the movie Frozen, and yet the search bar autocompletes to "watch free movies," and the results display links to pirate websites.

VI. The Counternotification Process

Despite clear evidence that the notice and takedown system is stacked against creators and copyright owners, some claim that OSPs bear a heavier burden by having to process a disproportionate amount of "bad faith" notices.[61] A 2016 report describe OSPs as being inundated by "mistaken and abusive takedown demands, but a closer look at the data reveals that these notices are not what the study claim them to be. A response to the study by the Center for the Protection of Intellectual Property (CPIP) explains:

> *The majority of the "questionable" notices come from those notices that raise "questions about compliance with the statutory requirements" (15.4%, about 281 notices) or raise "potential fair use defenses" (7.3%, about 133 notices). As to the statutory requirements issue, the authors argue that these notices make it difficult for Google to locate the material to take down. This claim is severely undercut by the fact that, as they acknowledge in a footnote, Google complies with 97.5% of takedown notices overall.*

Moreover, it wades into the murky waters of whether copyright owners can send service providers a "representative list" of infringing works. Turning to the complaint about potential fair uses, the authors argue that copyright owners are not adequately considering "mashups, remixes, or covers." But none of these uses are inherently fair, and there's no reason to think that the notices were sent in bad faith just because someone might be able to make a fair use argument.[62]

In the rare circumstance where a copyright owner sends a notice by mistake or in "bad faith," the counter notification procedure[63] offers an adequate remedy. In reality, very few counter notices are ever filed as compared to the number of DMCA notices sent because the content targeted by most takedown requests is clearly infringing, or is posted by users who do not wish to reveal their identity or location. However, when counternotices are filed without basis, they effectively stifle the enforcement efforts of copyright owners because they cannot afford or it is impractical for them to file suit in federal court.

Where a counternotice is filed, and there is no basis for it, the copyright owner has only ten days to bring suit against the alleged infringer before the infringing material or link is reposted.[64] Bringing a federal lawsuit is a significant burden, especially for individual creators; and the ten-day requirement is, as a practical matter, virtually impossible to satisfy for even the larger, more sophisticated copyright owners.

Making matters worse, the U.S. Supreme Court's recent decision in *Fourth Estate* v. *Wall-Street.com*,[65] holding that registration, under section 411 of the Copyright Act, occurs when the Register acts to either complete a registration or refuse it, effectively makes it impossible for copyright owners to satisfy the ten-day window for filing suit as set forth in the 512(g), unless they have previously registered their work. The Fourth Estate decision means that if a work has not been previously registered with the Copyright Office the copyright owner must wait for Copyright Office action before filing a lawsuit for copyright infringement, and that action may take many months. Pendency of copyright applications with the U.S. Copyright Office is measured in months, not days. So, unless a copyright owner is willing and able to pay the fee for expedited handling—a fee that is roughly over ten times the normal application filing fee—there is no way the copyright owner file a lawsuit before the ten-day window expires. And even if they can afford to and pay for expedited handling , there is no assurance that the Office will Act on the application before the ten-day window expires. So, in effect, the Fourth Estate decision has created a new requirement for using the notice and takedown system—the requirement that the

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[61] Jennifer M. Urban, Joe Karaganis, and Brianna Schofield, *Notice and Takedown in Everyday Practice*, UC Berkeley Public Law Research Paper No. 2755628 at p. 87 (March 22, 2017). Available at SSRN: *https://ssrn.com/abstract=2755628* or *http://dx.doi.org/10.2139/ssrn.2755628*.

[62] Devlin Hartline and Kevin Madigan, *Separating Fact From Fiction in the Notice and Takedown Debate*, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY (CPIP) (April 25, 2016). Available at: *https://cpip.gmu.edu/2016/04/25/separating-fact-from-fiction-in-the-notice-and-takedown-debate/*.

[63] *See* 17 U.S.C. 512(g)(2012).

[64] 17 U.S.C. 512(g)(2)(C).

[65] *Fourth Estate Public Benefit Corp.* v. *Wall-Street.com*, LLC, 139 S.Ct. 881 (2019).

work be registered with the U.S. Copyright Office before a notice is sent (*i.e.*, well in advance of any infringement).

One approach to solving this problem would be to extend the ten-day window. But that does little for those copyright owners who lack the financial resources to afford to litigate in federal court, so extending the period of time in which they may file a lawsuit before the infringing material is restored, alone, fails to adequately address the issue.

One way to help these creators is to pass the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), H.R. 2426 and S. 1273, a bill that would create an optional small claims tribunal within the U.S. Copyright Office. The Copyright Claims Board created by the CASE Act would be able to hear claims of infringement brought by copyright owners as well as declarations of non-infringement brought by users (as well as claims of misrepresentation under section 512(f), discussed below). Consequently, the small claims court created by the CASE Act would benefit both copyright owners and those who file counternotices but cannot afford to bring their claims or defenses in federal court.

Ever since the DMCA was passed, some groups have voiced concerns about the notice and takedown process being used to harass users, suppress speech and remove material posted by users who have valid fair use defenses. Such instances of alleged abuse of the notice and takedown process by rights holders, even if true, are vastly outnumbered by legitimate efforts to enforce copyright. To the extent that abusive and misleading notices occur, the DMCA adequately guards against this sort of abuse. The DMCA protects against such misuse by, among other things, requiring the sender of a DMCA takedown notice to assert under penalty of perjury that the material is infringing. Consequently, sending a takedown notice for the sole purpose of stifling speech opens that person up to a perjury charge.

Another way the DMCA protects against misuse is found in section 512(f) of the DMCA, which makes "any person who knowingly materially misrepresents . . . that material or activity is infringing" liable for the damages suffered as well as for attorneys' fees. Section 512(f) applies misrepresentation claims under a subjective standard, placing the burden on the alleged infringer to show that the copyright holder believed that the content subject to its takedown notice was non-in fringing.[66]

Some groups suggest that the protections afforded by section 512(f) are essentially ineffective because most of the recipients of takedown notices are individuals who do not have the money to sue in federal court[67] and because these recipients are often too afraid to file DMCA counter notices because of the requirement in the DMCA that the counter notice include a "statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located"[68] As a result, these groups argue that, despite the statutory protec-

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[66] In *Rossi* v. *Motion Picture Ass'n.*, 391 F.3d 1000, 1004–05 (9th Cir. 2004), *cert denied*, 544 U.S. 1018 (2005), the Ninth Circuit articulated, "[w]hen enacting the DMCA, Congress could have easily incorporated an objective standard ofreasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement .... Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner's notification is a "knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner."

[67] Parker Higgins, Corynne McSherry, and Daniel Nazer, *Who Has Your Back: Protecting Your Speech from Copyright & Trademark Bullies*, at p. 7, ELECTRONIC FRONTIER FOUNDATION (Oct. 27, 2014), *https://www.eff.org/files/2014/10/27/who-has-your-back-2014-copyright-trademark_O.pdf*. The EFF report says that "Users also may fear the significant expense of defending even a winning copyright case, allowing themselves to be silenced rather than facing the expense and risk of vindicating their speech in courts." (emphasis added); *See* Sherwin Siy, *Court Says Fair Use Still Matters in Takedowns: Here's Why That's a Real Victory*, PUBLIC KNOWLEDGE (Sept. 16, 2015); *https://www.publicknowledge.org/blog/court-says-fair-use-still-matters-in-takedowns-heres-why-thats-a-real-victory/*. Public Knowledge (PK) says states that "bringing a 512(f) case is still an expensive proposition" (emphasis added); *See also*, Comments of Engine, GitHub, Kickstarter, Medium, and Redbubble, section 512 Study: Notice and Request for Public Comment (April 1, 2016). Available at: *http://statistical.squarespace.com/static/57168 1753c44d835a440c8b5/t/573d28927c65e401e66l76df/1463625874743/Engine-Copyright-Office-512-NOI-Comments.pdf*. Engine says " ... the economic injury attributable to any individual takedown is unlikely to justify the costs of bringing a lawsuit under 512(f)." (emphasis added).

[68] 17 U.S.C. 512(g)(3)(D); *See* Higgins, McSherry, and Nazer, *supra* note 65. The EFF says "many users are intimidated by the requirement that they agree to be sued in federal court if the rightsholder wants to claim copyright infringement"; *See also* Comments of Engine, *supra* note 65. Engine states that" 512(g)'s requirement that senders of counter-notices consent to ju-

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tions and defenses afforded to recipients under the DMCA, the DMCA takedown process is being misused because users with meritorious fair use and misrepresentation claims are not able to avail themselves of them.

To the extent these claims have any validity, the CASE Act addresses them by creating a low-cost, efficient, and streamlined way to resolve copyright disputes that is accessible and affordable to individuals and small businesses and is a viable alternative to federal court.

Furthermore, if, in fact, users with meritorious defenses or viable misrepresentation claims are not using the counter-notice process because they are intimidated by having to agree to litigate in federal court, the CASE Act provides an ideal alternative by allowing them to assert their claims and defenses without the complexity and trepidation they associate with federal court.

Copyright owners already bear the burden for enforcing their copyrights on the internet, so if there were legislative changes to expand 512(f), it would potentially open these owners up to "limitless lawsuits just [for] policing [their] copyrighted material on the Inte rnet."[69] The overwhelming majority of takedown notices are legitimate; lowering the threshold for what is considered an illegitimate notice, or increasing penalties would severely undermine the statutory scheme with little positive benefit. As such, any effort to expand the scope of 512(f) liability or otherwise legislate new penalties is unwarranted, and would effectively create more barriers to enforcement for copyright holders.

VII. Standard Technical Measures

The House Judiciary Committee's 1998 report on the DMCA stated that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age," and the Committee "strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals."[70] This rationale led Congress to include 512(i) in the DMCA, specifically conditioning eligibility for safe harbor protection on whether a service provider "accommodates and does not interfere with standard technical measures," (STMs) which are to be developed based on "a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process."

Unfortunately, since the inception of the DMCA nearly 22 years ago, there have yet to be any standard technical measures adopted, effectively rendering the provision useless. *This is one of the most significant drawbacks to the effective application of the notice-and-takedown process*, as it nullifies a provision which is designed to facilitate cooperation between OSPs and copyright owners. To date, platforms like YouTube, Facebook, Scribd, and Dropbox have implemented technology capable of identifying and removing unauthorized copyrighted material posted by their users. Technologies like these should be shared with other OSPs in the context of 512(i), which specifies that STMs must be made "available to any person on reasonable and nondiscriminatory terms."

As written, there is enormous potential for the STM provision to incentivize new technologies and encourage stakeholder collaboration. However, to satisfy the requirements of the statute, stakeholders would need to come together "in an open, fair, voluntary, multi-industry standards process."[71] And that is not happening, thereby making the STM provision in section 512(i) irrelevant. That is clearly not what Congress intended. Congress did not include 512(i) in the DMCA to see it go unused for 22 years. Reviving 512(i) may be the easiest and most important thing that could result from Congressional review of section 512.

VIII. Next Steps and Possible Solution

While there is much in section 512 that is not working as Congress intended, the notice and takedown process can provide a workable legal framework for OSPs and copyright owners to protect against infringement of copyrighted content on the internet. What needs to be improved is the implementation and application of the

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risdiction where they are located and agree to accept service of process can be intimidating to many users .... Even users who strongly (and correctly) believe their use is fair or otherwise lawful may lack the legal sophistication to feel confident about making such a sworn commitment."

[69] *Ouellette* v. *Viacom Int'l., Inc.*, No. CV–10–133–M–DWM–JCL, slip op. (D. Mon. Mar. 13, 2012).

[70] *See* H.R. Rep, *supra* note 4, pt. 2 at 61.

[71] 17 U.S.C. 512(i)(2)(A).

process to better respond to highly advanced online infringement tactics and the limited resources of smaller creators and OSPs.

There is no silver bullet solution to fix what ails section 512. Instead, we must consider a host of different options, some of which include:

a. Technological Solutions

Automated technologies-available to copyright owners and OSPs no matter their size must be an integral part of any forward-looking solution. Because of the explosion of infringing content online, it is essential that such solutions to the extent reasonable, include the use of automated technologies. Automated technologies can intervene during the upload process, and can simplify the takedown process to effectively shorten the time that infringing content remains available for consumption. The vast majority of notices issued by reputable rights owners are legitimate. Even though the occasional so-called "bad notice" may slip through using automated technologies, the benefits of such services far outweigh the rare cases of "bad notices." And while we recognize that these automated technologies may not work for all OSPs, we remain optimistic that investment in new technologies and collaborative agreements are essential to a healthy online ecosystem.

Proper implementation and interpretation of all of the section 512 provisions will also incentivize OSPs to invest in automated technologies for copyright owners and their users. That means, as explained in more detail above, finally implementing STMs under section 512(i).

It has been said that section 512(m), which relieves OSPs of any duty to monitor, in conjunction with section 512(c)(l)(A)(ii), which permits an OSP to be held liable for "red-flag" knowledge, discourages ISPs from adopting certain technologies for fear that if they do, they may be liable under section 512(c). OSPs that reasonably implement effective filtering systems to monitor for and take affirmative action against piracy should be rewarded, not penalized. Consequently, we would be interested in exploring this dynamic further with the OSP community to determine the viability of eliminating the potential for liability through "red-flag" knowledge for those OSPs that effectively monitor for and take action against infringement.

Individual creators would benefit from greater access to automated technologies to ease the burden of filing takedown notices. The biggest hurdle is cost: Many automated technologies are not yet affordable for the average individual creator, but further discussions of the interested parties could reveal at least some solutions to the problem. Generally, OSPs (at least the larger entities) are better equipped to implement and extend access to automated technologies than individual creators.

b. Private Sector Voluntary Agreements

We enthusiastically support the use of voluntary, collaborative efforts to address the problem of online infringement. Such initiatives reduce and equitably apportion the burden of reducing infringement, removing profit from infringement, and educating users about legal alternatives. Any initiative, whether voluntary or statutory, cannot be considered effective if the burden of action falls primarily on the creator; everyone in the online ecosystem has a role to play in creating a fair and sustainable marketplace. We also believe that these efforts should complement the DMCA rather than supplement where the legislation falls short. For example, while a growing number ofISPs are voluntarily implementing content filtering technology, if STMs had been adopted in a collaborative manner pursuant to section 512(i), there would be less of a need for independently developed technology to balance the burden where the law has failed to.

There is a long and successful history of stakeholders developing voluntary agreements to further mutual objectives. Some examples include:

- The Trustworthy Accountability Group (TAG) initiative, launched in February 2015 validates tools and services that take measures to prevent advertisements from running on pirate sites.[72] According to the Digital Citizens Alliance, ad-

[72] TAG, a coalition of online advertising stakeholders, including advertising agencies, ad placement networks, media companies, and consumer protection organizations. Press Release, Advertising Industry Launches Initiative to Protect Brands Against Piracy Websites, Trustworthy Accountability Group (February 10, 2015), *https://www.tagtoday.net/advertising-industry-launches-initiative-to-protect-brands-against-piracy-websites/*.

supported pirate sites can be extraordinarily profitable, with many displaying ads from "blue chip premium brands." [73]

- In 2007, various stakeholders agreed upon the Principles for User Generated Content to eliminate infringing content, while still taking into account fair use considerations. This informal understanding at least illustrates a willingness of OSPs and copyright owners to agree on a middle ground.[74]
- Finally, collaboration between copyright owners and payment processors like Visa, Mastercard, and PayPal—encouraged by the Intellectual Property Enforcement Coordinator—has led to a process that prevents known infringing sites from access to payment networks. This helps cut off the revenues that such sites rely on to operate.

Private-sector voluntary agreements are a critical tool for addressing online infringement. It is time that the stakeholders in the internet ecosystem explore what mutually beneficial agreements may be possible moving forward.

c. Legislation

Legislative proposals could be enacted to help address some of the problems with section 512, without the need for amending section 512. The CASE Act is a good example of this type of initiative. Copyright Office Modernization legislation could also address some of the problems discussed above that was created by the Fourth Estate decision. For example, modernization legislation could provide that when a counter notice is filed, the copyright owner is allowed to institute a civil action for infringement of the copyright against the filer immediately (without waiting for the Office to Act on the registration application) once the registration application is filed that meets the statutory requirements and other requirements are met.

In addition, Congress should enact legislation to align criminal penalties for infringement of the public performance right, currently at most a misdemeanor, with those for infringement of the reproduction and distribution, which can result in felony charges for willful and egregious infringement. Although criminal enforcement of copyright infringement is a small portion of federal law enforcement overall, the presence of criminal penalties plays a significant role in deterring willful and egregious infringement. By deterring this criminal conduct, legislation to close the streaming loophole would therefore help reduce some of the strain on the notice and takedown system.

d. Amending Section 512

If technological solutions, voluntary agreements and other legislative proposals prove to be unavailing or ineffective, then Congress should consider other alte rnatives, such as amending section 512. While copyright owners collectively value the same end result-a digital environment that neither supports, nor cultivates piracy—different groups have different ideas about how best to achieve that end. One recommendation that is strongly supported by many Copyright Alliance Members, but not all, is implementation of a "notice and staydown" system. Before the possibility of a "notice and staydown" provision can be fully considered we all need to have a better (and common) understanding of what that means and how that would be implemented. In concept, a "notice and staydown" system makes a tremendous amount of sense, but neither legislation nor voluntary measures can be implemented based solely on a broad concept. We think the concept of a notice and staydown system is ripe for discussion between the copyright and OSP communities to better determine next steps.

Further, as explained above, the courts can alleviate some of the burden felt by individual creators by properly adhering to the red flag knowledge standard laid out in section 512. Congress may want to consider fine-tuning this provision so that when courts consider the red flag knowledge standard in the future they interpret it correct and as Congress intended.

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[73] *Digital Citizens Alliance*, GOOD MONEY GONE BAD: DIGITAL THIEVES AND THE HIJACKING OF THE ONLINE AD BUSINESS (Infograph) (2014), *available at http://www.digitalcitizensalliance.org/cac/alliance/resources.aspx*.

[74] The agreement was made by CBS, Disney, YouTube, and other copyright owners and OSP entities.

Chair NADLER. Thank you very much. We will now proceed under the 5-minute Rule with questions. I will recognize myself for 5 minutes.

One of the most striking changes between the early days of section 512 and now is the sheer volume of takedown notices that the biggest platforms now receive. It is orders of magnitude larger than 20 years ago with the number reaching to the hundreds of millions, getting close to a billion in some cases. To me, this volume simply does not seem like the hallmark of an efficient, well-functioning system, yet I know opinions on what this means are divided. Ms. Carrington, can you please identify whether you believe this volume is a sign of success or failure, and briefly explain why?

Ms. CARRINGTON. Yes, certainly. As you stated, I believe that a vast number of takedown notices that are being sent are an indication of a system-wide failure. They represent a lack of balance that Congress intended. Section 512 was in no way intended to be simply a notice and takedown framework. The notice and takedown framework are one part of section 512, but there are a number of other responsibilities that OSPs are supposed to be sharing with creators.

So, when we see numbers, such as the Google Transparency Report, showing, I believe, 75 million takedown notices or 75 billion takedown notices that is a clear indication of a failure. It is showing that creators are continuing to use their time over and over again to send these notices, and yet continue to not see any actual practical effect on the rampant piracy that exists online today.

Chair NADLER. What do you think we can do about that?

Ms. CARRINGTON. Well, I think that there are a number of solutions. I think the issues with section 512, we have reached a point at this point where there is not going to be any one simple fix, so we are going to need to do a number of different things, which are going to include, for one, implementing standard technical measures, making sure that OSPs have some incentive to actually come to the table and negotiate and actually implement those measures. To date, they do not have any incentive to do so. They are very comfortable with the status quo because the status quo allows them to operate in ways that are easier for them, but much more detrimental to the copyright community.

In addition, I think other voluntary measures need to be implemented. In addition, I think passing the CASE Act would be a huge step in the way of enabling copyright owners as well as users to have an alternative to figuring out these disputes outside of the section 512 framework. Then finally, amending the statute to clarify the knowledge standards and overturn erroneous case law will go a long way in restoring the balance that Congress intended.

Chair NADLER. Thank you. Ms. Kibby, thank you for being here today and sharing the perspective of someone trying to make a living from their creative work. Your acknowledgement that you do not really have the time to monitor for unauthorized uses of your work online is both illuminating and troubling. Is this a common situation for others you know working in the creative industries? More importantly, what is something we could do in Congress to help make it more realistic for you to obtain a fair return on your work when it is used on the internet?

Ms. KIBBY. Yes. I mean, it is just virtually impossible to spend any amount of time, even with the backing of a large management company, which I am very lucky to be a part of or to work with. As we all know, being self-employed, it requires you kind of working mentally 24/7, so I kind of gave up. There is just no way because the moment that I send any kind of notice to get something taken down, it immediately just pops right back up again.

I actually just found a video literally 5 days ago on YouTube where someone was using a song of mine that I put out years ago, but the title of the video was actually the official music video for this particular song. Not only are they infringing my rights in terms of it being my song that they are using, but they are taking away the aesthetic of the art that I am trying to create and misrepresenting me. I think that it seems pretty obvious that there are some basic questions that can be asked for people that are uploading content that we can all agree on would just streamline the process so that we don't get into the nitty-gritty. I think that there seems to be, to me, a very black-and-white series of questions that we could at least start with as something to discuss and agree on.

Chair NADLER. Okay. In my remaining time, Mr. Sedlik, I know you have experience trying to develop standards that would help visual artists, but it seems like success has been difficult and slow. Are there steps that Congress could take to help encourage the development and adoption of more standard technical measures?

Mr. SEDLIK. Yes. Our model at the PLUS Coalition was to bring together all stakeholders into a group, in which we set all our baggage aside and leave all other issues at the door, and just talk about how to communicate rights information accurately and effectively. Congress could help by enabling a system that would allow the different stakeholder groups to access and recognize STMs once they are developed. The technology is readily available for a means to communicate rights information for the identification of works and for all systems to be able to be searched to be able to find the right information before that work is posted. The missing piece is education and the ability to identify the STMs.

Chair NADLER. Thank you very much. My time has expired. Ms. Roby?

Ms. ROBY. Thank you, Mr. Chair, and I want to thank all the witnesses for being with us here today, so thank you so much for your time. The Copyright Office's report, the product of many years of review and submissions from hundreds of stakeholders, concluded that the balance between copyright holders and platforms has been tilted askew, "fails to provide adequate protection of creators' rights and fails to carry out congressional intent regarding section 512," as well as the overall purpose of copyright law. The DMCA is over 20 years old. Google had just been founded the month before the law was signed, and there was no YouTube, Twitter, Facebook, TikTok, and many other web sites and platforms that we use today. At the bare minimum, it seems like we should be looking at ways to bring this law into the 21st century to address the current internet, not one of 1998. I just want to say to each of you, I appreciate very much your written testimony and your oral testimony here today to lay out for us the most important

of the Copyright Office's suggestions for reform so that we can ensure that the DMCA is working for all stakeholders.

Last year, I had the opportunity to travel to California to tour several movie and TV studios, and one of the most eye-opening experiences I had was when I saw the pirate living room demonstration. This demonstration showed how easy it was for people to access pirated material online and how much of that material was infected with malicious software and viruses. Most websites that offer pirated material are large criminal organizations. However, under current law, if the material is being offered in a streaming format, the operator of that website is only able to be charged with a misdemeanor. In contrast, if the same material is being offered in a downloadable form, the operator can be charged with a felony. This is commonly referred to as the felony streaming loophole. As more content becomes available online through streaming services, so, too, does the amount of pirated material.

As the Ranking Member mentioned, the U.S. Chamber of Commerce estimated that commercial-scale piracy drains a minimum of $29 billion from the legitimate American economy each year. In my home State of Alabama, the motion picture and television industry are responsible for more than 10,000 jobs and $387 million total wages in our State. The music industry contributes $636 million to the GDP and supports more than 14,000 jobs. These industries benefit small businesses, such as florists, and restaurants, salons, caterers, hotels, and other hospitality businesses that benefit the filming of a movie or the recording of a song. When copyrighted materials get pirated, it hurts all these small businesses.

Earlier this year, the Senate conducted several series of roundtables with stakeholders from across the spectrum, including several of our witnesses here today, to close the felony streaming loophole. I was extremely pleased that as a result of very hard work by everyone involved, there was negotiated draft text and report language that was agreed to by the stakeholders involved. I have been working with several of my colleagues on the House side to move this negotiated draft legislation forward, and I am hopeful that we can get it done by the end of the year.

So, to confirm with our witnesses who directly participated or were represented in these negotiations, Ms. Carrington, Ms. Rose, Mr. Van, and Mr. Schruers, you are supportive or at least neutral on this negotiated language? Each of you please answer.

Ms. CARRINGTON. Yes, that is correct.

Ms. ROSE. Yes, that is correct.

Mr. BAND. Yes, that is right.

Mr. SEDLIK. That is correct.

Ms. ROBY. Well, I appreciate it very much, and I look forward to continuing to work with you on this very important issue. Again, I can't thank you enough for, again, your written testimony, but also your oral testimony here today to talk about this very serious topic. Thank you so much. I yield back.

Ms. SCANLON. [Presiding.] The gentlewoman yields back. The Chair recognizes Ms. Lofgren for 5 minutes.

Ms. LOFGREN. Thanks very much. This is a very useful and interesting hearing. There is actually just a handful of us on the Committee that were Members of the Committee when we wrote the

DMCA, and I am one of them, and I recall what we were trying to achieve at that time. It is not always what people describe today, but we did the best we could. What we wanted to do was to make possible growth in the technology sector while protecting the rights of creators, and that is kind of what we hoped to do.

We had some concerns at the time, I did, Ms. Kibby is not in favor of somebody abusing the notice and takedown. I mean, you just want to get paid for your work, but there are some who abuse it, for example, cited in some of the testimony, the Church of Scientology doing takedown notices to prevent criticism of their activity. That is not what you are about. You want to get paid for your work. So, I was concerned at the time that the tech sector would really not be motivated to stand up for the First Amendment. They would want to take down to protect themselves, and, in fact that has occurred, although there are problems in terms of the volume.

Obviously, if you look at what has happened since 1998, because of streaming services like Netflix, the MPA reported global industry revenues of more than $100 billion for the first time ever in 2019. For the music industry, U.S. revenues for recorded music reached over $11 billion in 2019, the 4th straight year of double-digit growth. Video games, global revenues are way up, over $150 billion globally in 2019 and higher, I am sure, since then. Entirely new categories for creators have emerged online as podcasts and creators who share their work on video platforms like YouTube and Twitch are building audiences.

That doesn't mean that this has worked for everybody, and we have heard from people that it hasn't worked for, so the question for us now is how to adjust. We need to make sure that we protect the rights of authors and creators in order to promote the useful arts. That is what the Constitution says, and so the question is how to do that. It is absolutely appropriate to take a look at this because the entire world has changed since we drafted the DMCA. We may take action that has impacts that we don't want to have.

So, let me ask you this, Ms. Rose. You were trying to speak for users, and I found the testimony of all the witnesses very helpful, but some have suggested that we should adjust the red flag knowledge infringement standard. I am wondering what you think about that, and would that help, and would it have impacts or unintended consequences. What is your thought on that?

Ms. ROSE. So, I apologize in that that is one of the components of the section 512 that I am actually not terribly familiar.

Ms. LOFGREN. Okay. Fair enough. Let's see, who else? The libraries may have an opinion on that.

Mr. BAND. Sure. So, first, I think with respect to red flag knowledge, I think the courts have interpreted it correctly. The Office acknowledges that by changing the red flag knowledge standards as they are suggesting, it could very well require notice and stay down, *i.e.*, filtering of some sort, so that would move towards an EU model that really would have very serious First amendment issues. So, you know, this is an area where other changes could have, as you suggest, very serious unintended consequences. Again, the report itself acknowledges that, that changing the red flag knowledge standard could very well lead to, as a practical matter, filtering requirements. For the bigger platforms, that is not a big

problem. For the smaller platforms, that could be a very serious issue, certainly libraries. If they needed to start doing that, that would be very costly, but also it could have various impacts on users.

Ms. LOFGREN. I see my time is up, and I have a lot of other questions. I want to thank the Copyright Office for the work that is put in, and just note that I do think copyright modernization is going to advance the cause of compensation for artists tremendously. It is not going to solve all the problems, but it is going to be a huge help for artists and creators getting paid for their work. I will defer other questions to my written opportunity and thank each and every one of the witnesses for being with us today and sharing their perspective. I yield back.

Ms. SCANLON. Mr. Biggs from Arizona is recognized for 5 minutes.

Mr. BIGGS. I thank the Chair, and I am grateful for all the witnesses being here today. It has been very interesting and very informative. Because we only have 5 minutes and this is a very, in some ways, very complex topic, I am going to approach this from the point of view of one of my favorite YouTube online creators, Rick Beato, who, Madam Chair, I would, without objection, submit for the record Mr. Beato's testimony from July 20, 2020 before the Senate Intellectual Property hearing, and as well as a piece entitled, "When a Guitar Lesson Becomes Controversial."

Ms. SCANLON. Without objection.

[The information follows:]

MR. BIGGS FOR THE RECORD

Rick Beato's July 28, 2020 Testimony to the Subcommittee on Intellectual Property hearing entitled,"How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?"

Chair Tillis, Senator Coons, and Members of the Subcommittee. I thank you for inviting me to participate in today's hearing. My name is Rick Beato.

I have been asked to come here today and discuss the issue of Fair Use related to my work as a content creator on YouTube.

For four years I have developed an educational YouTube channel I call "Everything Music." In this time, I have steadily built an international audience of 1.7 million subscribers and my channel has had over 200 million views. I have created 750 videos on topics ranging from music theory, ear training and improvisation, to film scoring, production, copyright, interviews, and a series of 94 videos entitled "What Makes This Song Great?" In this series, I explore the individual elements of famous songs, examining the melodic and harmonic structure along with its production technique to answer the question of what actually makes a song great.

When I began the series, I uploaded the episodes knowing that the videos would be instantly recognized by YouTube's Content ID algorithm and demonetized. A demonetized video means that the artist or copyright holder receives all the ad revenue generated from the video that would normally go to the content creator. Some artists like the Eagles, Jimi Hendrix, and Guns N' Roses are what I refer to as "blockers." Blockers are artists who have a zero use policy for ANY of their work, regardless of the length or purpose of the excerpt. I have never sought to claim Fair Use for any of these videos, even though a case could be made that I was providing education through commentary, criticism, research and teaching based on the Fair Use policy defined by U.S. law.

From 1987 to 1992 I was an Associate Professor of Music at Ithaca College. In those days just, as it is today, the use of recorded music for analysis in classroom instruction was commonly used and protected under Fair Use. YouTube, in many ways, is the new university. It is a place where people go to learn things. The do-it-yourselfers who want to fix their hot water heater, consumers who want to compare cameras, or students who want to simply learn how to play a song. In my view, this is the most important function of YouTube.

As a songwriter I've been signed to multiple publishing deals since 1992, most recently Sony ATV. I've had songs as a writer on many records including a number one, million-selling Country song as recently as 2013. Out of my 750 YouTube videos, 254 have been demonetized and 43 have been taken down or blocked. For the record, I have never had a copyright strike filed against me by YouTube.

This brings me back to Fair Use. Two elements of Fair Use that I believe covers teaching videos have to do with the amount of the copyrighted material used and whether or not it harms the copyright holder's ability to profit from their original work. I would argue that if a video is using brief excerpts of music to demonstrate a compositional technique it should be covered under the Fair Use guidelines. The rules governing the application and interpretation of Fair Use should be shouldered by all parties and not only the

content creator. The concept of Fair Use is meaningless when frivolous or random interpretations allow a team of searchers, typically employed by a major label, harass creators for content that falls under the legal definition of Fair Use. A clear-cut case of piracy is one thing, but there have to be exemptions for Fair Use.

One of my recent music theory videos called "The Mixolydian Mode" was manually claimed by Sony ATV because I played ten seconds of a Beatles song on my acoustic guitar to demonstrate how the melody is derived from this scale. This is an obvious example of Fair Use. In response, I made a video entitled "The Music Industry SCAM to Ripoff YouTubers." The video describes how record labels employ Content ID farms, essentially collection agencies, to manually claim YouTube videos for demonetization. Don Henley testified to this before this very Committee. My video received over 500,000 views within 24 hours and the claim was then released by Sony without me even filing a dispute. I believe the claim was released because I have a channel with over one and a half million subscribers and hence have a platform to air these grievances. Creators with smaller audiences are not so fortunate.

I accepted the invitation to testify today because we need to find solutions to these problems. In the case of Fair Use, content creators should be protected from frivolous demonetizations. I would like to propose what I call a Fair Use Registry, where one could get a certification as a good actor similar to Twitter's blue checkmark. When a video is posted, it can be checked against the database of Certified Fair Users. The content creator would then be whitelisted for use. YouTube already sets benchmark's for channel monetization. The Fair Use Registry would work along the same lines.

I reason that I create videos, such as those in my "What Makes This Song Great?" series, is to introduce classic songs to new audiences, and reinvigorate these same songs.

Thank you so much for your time. I would be happy to answer any questions you have.

When a Guitar Lesson Becomes Controversial—OZY

Posted: 08 Nov 2019 12:00 AM PST

In the smartphone era, anyone who dreams of being a rock star can download instructional apps such as Yousician, ChordBank and Fender Play, or spin up any number of YouTube tutorials on how to cover the classics and look the part doing it.

And while these free, straight-to-camera lessons range from wobbly to accomplished, record producer Rick Beato (bee-YATO) has attracted more than a million subscribers with professional-looking segments combining a music teacher's ear for detail, a mastery of multiple instruments and a bit of **Anthony Bourdain Swagger:**.

As host of the **popular YouTube series** *What Makes This Song Great*, Beato has now racked up no million views from a library of 700-plus educational videos and nearly 80 deconstructions of rock radio standards. But his illuminating and often inspirational videos are under constant threat.

An ongoing copyright fight has embroiled many You Tube content creators who feel they would be on firm legal ground with "fair use" protections, if only they could afford to mount a formal legal challenge. Still others stay mum out of concern YouTube will penalize them or de-platform their channels.

I'm basically creating free commercials for these songs.
rick beato

Videos focused on the music of Radiohead and Fleetwood Mac, among others, have been removed by artists and record companies using YouTube's own scanning software and the site's manual claiming tool, which can trigger a takedown notice or claim a video creator's portion of any pre-roll ad revenue.

"These blanket takedowns prevent [artists'] music from being discovered by a new generation and make their repertoire mostly music for old people," Beato says. "I'm basically creating free commercials for these songs while I'm teaching music appreciation, music production, songwriting and arrangement."

Beato's online scholarship can be highly technical, but his insights into studio production, rock history and music theory are accessible even if fans' knowledge of chord progressions is limited to the lyrics of *Leonard Cohen's "Hallelujah."*

"I focus on important conventions," says Beato, 57, who earned a master's degree in jazz studies from Boston's prestigious New England Conservatory in 1987. "So my core audience of musicians will say, 'Oh! *So that's* why my music teacher was talking to me about that!'"

Beato's own inspiration came early on at Sunday family gatherings in Rochester, New York, where family members would play everything from contemporary pop to traditional Italian songs.

Today, the fun of Beato's videos is that of watching an irreverent Mozart deconstruct Salieri as he plays in time with each song's most recognizable riffs, beats and passages while including a bit of band lore.

These segments could be considered part of a modern nouvelle vague of online pop culture dissertations that includes the piano-focused *Playground Sessions* and the comedic, movie-themed *Honest Trailers, Because Science* and *How It Should Have Ended.*

Beato breaks down the "stems" that make up each song, showcasing individual band members' contribution to the track and demystifying the process. He's able to identify and trace some chord patterns even to antiquity: The Police's 1981 hit "Every Little Thing She Does Is Magic" is supported by an ascending Lydian bass line that was known in ancient Greece, possibly as far back as 500 B.C.

Clad in a simple black T-shirt and jeans in his Atlanta studio, looking like the cool uncle who might buy you your first beer, Beato explains why certain songs remain timeless, despite shifting tastes. He notes that songs like Toto's "Africa," the Beatles' "Let It Be" and U2's "With or Without You" are constructed from the same chord progressions. "The innovation is in the way it's put together," he says.

Beato says he, too, is building something new out of familiar elements, protected under the fair use exemption in copyright law that allows for the academic discussion, commentary, criticism or parody of copyrighted works.

From the music industry's perspective, however, songs streamed on YouTube can function as an on-demand jukebox, eliminating the listener's need to ever buy the music. "Music publishers have a legal and fiduciary responsibility to our songwriters to protect the value of their copyrights," says Golnar Khosrowshahi, CEO of inde-

pendent music publisher Reservoir. "We understand that the current systems, particularly in the digital arena, are not structured in a way that recognizes all creators fairly, and at Reservoir, we continue to advocate for changes that will benefit everyone."

The global recorded music market has grown to just over $19 billion, *according to industry figures*, with users of paid streaming services accounting for 37 percent of total recorded music revenue—as physical album sales and individual download purchases decline.

For some in the music industry, the real issue is how little YouTube pays well-known recording artists for the use of their music on its site, meaning they need to be ever more zealous about copyrights. According to *Digital Music News*, YouTube pays artists $0.00074 per stream—less than Pandora and Spotify—adding up to $1,500 for every 2 million plays on the site.

For a massive company like Google, "it's basically free," says Ashlye M. Keaton, an attorney who co-founded The Ella Project, a nonprofit that provides legal resources to musicians and content creators across Louisiana. The tech giants, she says, avoid liability by using automated systems to take down anything that could potentially violate copyright law. Meanwhile, "the 'little guy content creator' arguing fair use does not have the same privileges and protections that big multinational firms have, so that hardly seems fair."

In the face of criticism, YouTube—which did not reply to requests for comment—has said it is curtailing the use of manual claiming for ″very short or unintentional uses of music.″ But that wouldn't apply to Beato, who showcases entire songs. Rather than dealing with legal hurdles, he has decided to simply post his enthusiastic videos and hope for the best.

However, with the growing popularity of his channel, some artists have started to embrace Beato's show. Last year, he interviewed Peter Frampton in the singer's home studio about how his iconic "Do You Feel Like I Do?" riff was originally overlooked by the improvisational guitarist himself.

As for where the road takes him from here, Beato plans to keep breaking down the chord progressions, odd time signatures and songwriting innovations underpinning rock's most memorable moments—and hoping YouTube and the record labels let them stay up. "I don't think I'll run out of videos," he says. "If I had to, I could probably name a thousand great songs off the top of my head."

Mr. BIGGS. Thank you. Now, Mr. Beato is a songwriter, producer, engineer, and educator, and he is a YouTube content creator, which is why I watch him because he does incredibly interesting theoretical breakdowns of what he calls the, I think, the great songs. Maybe it is a Steely Dan song. Maybe it is a Led Zeppelin song. Maybe it is a Police song. He will take a small riff and he will define it, break it down, educate us on it, and some folks immediately take down his content. He has done more than 750 videos on topics ranging from music theory, ear training, improvisation, et cetera, but he has done almost 100 videos of what makes a song great. Some of those immediately come down, and I won't name the artists, but their labels immediately pull them down.

So, we are talking about creators today, and I appreciate the creators. I want to ask, Ms. Rose, the Copyright Office report did not distinguish between traditional creators, such as recording artists, from purely online creators, such as those who produce content for YouTube or Facebook, such as Mr. Beato. What makes the interests of such online creators different from traditional creators with respect to section 512?

Ms. ROSE. Thank you. I also am a fan of Mr. Beato's, so I will commiserate there with the occasional disappearance of his videos. There are a number of points of difference between what we consider sort of the more "traditional trajectories and traditional artists," and those sorts of new creators that we see emerging largely through online platforms. One is obviously, the method of getting your content out to the public. Those are going to be governed by different systems. When you are a traditional recording artist, you have a record label, the publishers.

Mr. Beato completely makes his own content, releases it through YouTube, and thus is entirely subject to the way in which YouTube has structured its particular implementation of things like monetization, de-monetization, and notice and takedown. At the end of the day, a lot of these new creators, Mr. Beato, are reliant on some of the provisions of fair use, which is a built-in sort of safety valve for First amendment concerns, to alleviate some of the problems that would otherwise arise from sort of total copyright control. In his case, education, criticism, and commentary are the bread and butter of what he does, and what he has been facing is a good illustration of the fact that these systems, especially algorithmic ones designed in-house for specific companies to address their business needs, cannot account for those things. They fundamentally can't. They are binary systems in a lot of ways and copyright is not a binary system, and so it is a poor match to say that really what we need to do is just sort of nerd harder and develop better algorithms, and that will somehow take care of these things, because at the end of the day, they are just not capable of doing that.

Mr. BIGGS. So, when we look at section 512(f), and you have been critical of victims of abusive takedown notices, that the provisions of 512(f) are too weak. What would you say is a better way to beef up that for frivolous notices, while not going so far as to o penalize copyright holders to issue notices in good faith, but just turn out to be wrong?

Ms. ROSE. So, I think the easy or the lowest-hanging fruit on this is Lenz v. Universal decided that there was a subjective knowledge

standard for what constitutes good faith notice. Changing that to an objective standard would be far more enforceable at a minimum.

Mr. BIGGS. Okay. Thank you. Really quick, Mr. Band, do you believe that government enforcement is needed, and, if so, what specific types of enforcement do you think should be implemented to deter abusive takedown notices?

Mr. BAND. Yeah, thank you for the question. I think that something outside the DMCA might be needed, and so that would be something along the lines of maybe FTC enforcement or some other government agency. I think the Office recognizes that that even though you could tinker with 512(f) and maybe make it easier to bring action, still you are talking about individuals bringing actions. Just as it is hard on the rights holders end for individuals to enforce their rights, it is hard for individuals on the user side to enforce their rights as well. So, that is why you might need something, an agency like the FTC, that could really bring the weight of the government and go after these bad actors, and that would also have a significant deterrent effect.

Mr. BAND. Thank you. I yield back.

Ms. SCANLON. Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON of Georgia. Thank you, Madam Chair. Thank you, and I thank the Chair for hosting this hearing today, and I thank the witnesses for their testimony.

The IP Subcommittee has spent much of this Congress exploring how to promote and protect intellectual property rights in the patent and trademark space, and today's discussion from the copyright angle has been particularly informative. Copyright law governs the work of artists and innovators, designers and developers, and other content creators. It is crucial that these creators can rely on copyright law protections to make their living. This is even more true in an age where the click of a button can plagiarize a lifetime of work. As Chair of the Subcommittee on Intellectual Property, Courts, and Internet, I believe it is important that we work with the Copyright Office to ensure that the rules of the road are clear for content users, platforms, and internet service providers.

Section 512 was created before the internet had permeated our lives, and I am concerned that the law has failed to keep up, not adequately protecting creators and not necessarily providing clear guidance to users and others, and this needs to change. So, I look forward to further hearing from the witnesses. I thank you for the very great testimony that you have already given, and we look forward to exploring how Congress can help pave the way to the future.

Now, Mr. Sedlik, I understand that many online platforms have now started to require those submitting takedown notices to provide information above and beyond what section 512 requires in order to start the takedown process. Not only does this seem to raise concerns about the extra burden imposed on rights holders beyond what Congress intended, but it implies that rights holders must figure out how to use takedown systems that are potentially very different very different if they are monitoring several platforms. Can you speak to the impact that having to deal with different takedown processes is having on rights holders?

Mr. SEDLIK. Thank you for the question. Absolutely. As a rights holder and creator, after a day of creating photographs, I am forced to search for potential infringements and to send DMCA takedown notices, of which I send 100 to 200 each week. I have no employees, so in the evenings, I go to the platforms, I find the DMCA agent information, which can take considerable time because it is often buried in the terms and conditions on these sites. Then each and every OSP has a different form, and all of them are manual by the way. You must enter your name, your address, and the other information manually, or you can send an email. I choose to send an email.

I then send that email meeting every single requirement with the actual sections of the statute identified, and then 1 or 2 days later I get in response a question such as, it is unclear why you think this use infringes on your copyright, or please provide a URL pointing to an example of your work on the web, even though I have provided them with a copy of my work with my DMCA takedown notice. It would help to have some level of automation built into these forms, not to send the DMCA takedown notices in bulk, but instead to be able to create an account and be able to save my address and phone information and be able to input just the specific information about that particular takedown and submit it.

I would also say that these takedowns are not expeditious as required under the statute. I have seen it with me take up to a month or 6 weeks. Often it does happen within 72 hours, and, further, there is this exchange back and forth repeatedly asking me for information I have already provided. It would be fantastic if the OSPs could each establish a way for us to more efficiently submit these notices.

Mr. JOHNSON of Georgia. Thank you. Would you like to comment on that as well?

Mr. SCHRUERS. Certainly. Thanks for the question. I think there is a lot that can be done by way of improving systems. A lot of services are constantly trying to iterate on and improve their systems so that they function more expediently. It is important to recognize that a lot of platforms have entirely different interfaces. The design of the platform is asymmetrical from others, and, as a result, the content isn't necessarily going to port easily from one web form to another.

The ease with which takedowns are filed in bulk is one of the reasons why we are seeing takedown rates get so high, and, unfortunately, there is no penalty for submitting inaccurate or wrongful claims. As a result, there is an industry of enforcement vendors that will take payment from rights holders to go out and send these notices, often without paying much attention to whether the work that they are complaining about is actually where they say it is online.

Some surveys of these submissions reflect that in some cases, upwards of 80 percent of things that are being submitted in takedowns aren't even there in the first place, and that is important because when you have an individual artist who is trying to get content removed, their inquiry is in line behind all this other spam.

Mr. JOHNSON of Georgia. How often does that spam occur?

Ms. SCANLON. I am sorry. The gentleman's time has expired. The Chair recognizes Mr. Cline for 5 minutes.

Mr. CLINE. I thank the Chair, and I want to thank our witnesses for attending today. As has been explained, when the DMCA was first passed by Congress, section 512 was meant to preserve strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital network environment, while also providing greater certainties to service providers concerning their legal exposure for infringements that may occur in the course of their activities. In the 20 years since the DMCA was first signed into law, the volume of online piracy and infringements has exploded.

The study that has been 5 years in the making provides for some very interesting debate and discussion. One area that has been underutilized is 512(i)(2) dealing with standard technical measures. In the study comments, many stakeholders noted that no measures currently qualify as STMs despite the availability of various technologies and the potential interest in consensus building across industries. So, I would like to start with a question to Mr. Sedlik. Can you just generally talk about what standard technical measures are already out there and why they haven't been more widely adopted or more measures developed?

Mr. SEDLIK. I can speak to our standard technical measure developed by the PLUS Coalition recently adopted by Google, previously adopted by Yahoo, adopted by Adobe many years ago. I believe that the hesitancy with regards to standard technical measures is the perception, I think an incorrect one, that they would be used to stifle fair use and to stifle free speech. The visual creators at least, and I believe the other creators, not only want to be compensated for their use, but they also want attribution for their work as it is distributed.

So, the development of standard technical measures does not, under the statute, require a formal standards body. It only requires two groups of participants, the online service providers and the copyright owners, to get together and to have a discussion on how to use technology. The most important thing to me is identification of creators' works and making information available for users and machines to make an informed decision about making use of works.

Mr. CLINE. Do you believe that 512(i) has restricted or discouraged the use of STMs? I mean, do you support the recommendations in the report that Congress may want to either broaden the language or give the Copyright Office regulatory authority to oversee the development of STMs? It seems awfully heavy handed.

Mr. SEDLIK. I don't know that I support regulatory authority. I do think that there needs to be a means of recognizing STMs, and that can be done through a coalition or consortium or Committee of stakeholder groups that look at STMs and see if they can check the boxes in 512 as to whether or not it is open and fair and developed in a broad process, et cetera. In our process, we had 1,500 participants from 140 countries from all different stakeholder groups and individuals participating to arrive at a way to identify works.

The big problem is that the OSPs are stripping out the right information, what we call our embedded photo metadata, from our

works when it is distributed, and, thus, our works are orphaned and virally distributed with no attribution information. I do—

Mr. CLINE. Mr. Schruers, do you want to respond to that?

Mr. SCHRUERS. Certainly. So, as I was saying previously, the number of variations and systems online is almost as many as the number of online services. So, what technology may work for short-form video service is not necessarily going to work for a text-based social media service. As I think we have heard, there are a lot of individual companies that have implemented particular technical measures into their own either DMCA compliance or their own DMCA plus systems. Now, the fact that those might not qualify as standard technical measures because of the narrowness of the definition in the statute doesn't mean that they are not getting implemented by these different companies. It is just an indication of the fact that with the number of variations of services online, it is somewhat more challenging to come up with a one-size-fits-all solution.

Mr. CLINE. Right, you don't agree that it requires consensus from all stakeholders across every industry. You agree that it requires only broad consensus, so that is achievable in theory, correct?

Mr. SCHRUERS. Well, I certainly think that achieving standard technical measures in a way that complies with the definition provided by the statute is feasible. The market has evolved in such a way that the participants haven't found their way on that consensus yet.

Mr. CLINE. Okay. Well, I look forward to the Copyright Office having additional discussions, and I think they are going to have a symposium in the near future as to what they have issued in their report, so I look forward to further developments there. Thank you, Madam Chair.

Ms. SCANLON. Okay. Thank you. The Chair recognizes Ms. Demings for 5 minutes.

Ms. DEMINGS. Thank you so much, Madam Chair, and thank you to all of you for being with us today. Ms. Kibby, the Chair mentioned this somewhat, but when we think about the Congress of yesterday, we could not have predicted how expansive and advanced our online ecosystem would become. We had absolutely no clue. So, as today's Congress continues to examine section 512, including whether any updates may or may not be needed, what do you believe we should keep in mind to ensure that we are future proofing, if you will, our work in this area? It is so critical that we get it right. I would love to hear from you.

Ms. KIBBY. Thank you so much. I think it is about simplifying, to be honest. The fact of the matter is that artists such as myself, we are really just looking to get paid for unauthorized use of our works and to take down things that infringe on our artistic integrity. It is pretty basic. I mean, I am only speaking for kind of my community that I am in, specifically musicians that I know and artists, but I will come back the idea of simplification. I refuse to believe that there is not a way for us to come together as creators and service providers, and I am not the person to perhaps come up with these questions, but to have a discussion of what are some basic questions that can be established that we check back in on that would be viable, even 10 years from now. I think that we are

at a place where we have seen how the online service providers have evolved in terms of their technology. I think that we must be in participation with one another to come up with some basic questions to make sure that our rights are protected and also the creators on YouTube, for example, can continue to do what they do, because it is not like we are not in support of both types of creators and there must be some kind of compromise. Ultimately, from my position and type of creator, I can speak for musicians, and we are ultimately left holding the bag at the end of the day.

Ms. DEMINGS. Thank you. Mr. Sedlik, anything you would like to add to what has been said?

Mr. SEDLIK. Yes, and I would say that abuse of DMCA takedowns pales in comparison. Certainly, there is abuse, but it pales in comparison to abuse of the fair use exception. The fair use exception is absolutely vital to copyright law, but it is not a license to steal. Go ahead and criticize my work, review it and make fun of it, teach about my work, but don't make coffee mugs, and shirts, and posters, and iPhone cases. Now, 9 out of 10 unauthorized uses, I get a response back from the user saying this is fair use when they are using my work on socks and tee shirts, and so education is a great first step. The Copyright Office—I applaud them today—launched an educational website for 512 to teach the public about notices and takedowns and counter notices.

Ms. DEMINGS. Thank you so much for that. Ms. Carrington, my colleague, Ms. Lofgren, asked about this, but I would like to hear your answer on red flag knowledge and hear what you believe the practice means, and if you agree with the Copyright Office's conclusion that the courts have blurred the lines between actual knowledge and red flag knowledge.

Ms. CARRINGTON. Yes, thank you for that question. I completely agree with the Copyright Office's conclusion. Section 512 is written such that even in the absence of actual knowledge, red flag knowledge is supposed to trigger a duty to investigate and find the infringing material. Unfortunately, there have been a number of court cases—Viacom in the Second Circuit, UMD, Perfect 10 in the Ninth Circuit and others—that have conflated that red flag knowledge with actual knowledge in a way that essentially reads the red flag knowledge out of the statute, and what that does is it hinders the balance that Congress intended. It was supposed to be a balance in which copyright owners and OSPs are cooperating to address these issues, but when courts have decided that they only need to respond when they get specific notices or when they have specific knowledge about infringement, that takes away a huge part of the statute and really goes a long way towards contributing to this unequal balance that the report documents so well.

Ms. DEMINGS. Again, thank you all. Madam Chair, I yield back.

Ms. SCANLON. Thank you, and the Chair recognizes Mr. Chabot for 5 minutes.

Mr. CHABOT. I thank the Chair for yielding. All the way back in 1789, our founding fathers included in our Nation's most important governing document, the Constitution, a clause granting Congress the power to quote "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." A year later,

Congress did just that by passing, and President Washington signed into law, the first Copyright Act. In the 230 years since its enactment, there have been millions of works registered and numerous amendments passed to improve our copyright system. The most recent significant change occurred in the Music Modernization Act, and this was back in 201, intended to streamline and reform how music is licensed and artists are compensated. Before that, over 20 years ago, we passed the Digital Millennium Copyright Act, or DMCA, to help protect the works of creators on the internet. Obviously, a lot has changed since then.

Ms. Kibby, let me begin with you. You have created a number of works over the years since DMCA was enacted. How is your ability to produce new creative works, and the ability of other creators like you, been affected by activities needed to protect your existing works through section 512?

Ms. KIBBY. Thank you for asking. Honestly, like I said in my opening statement, I just don't do it. I am so demoralized, and frankly, don't know many other musicians in my small circle that even consider it worth doing because they literally just pop up again. I mean the internet is so vast that there is no human way possible to really stay on top of infringements.

Mr. CHABOT. Thank you very much. Some platforms, like YouTube and Facebook, provide automated filtering tools that are supposed to help find and block copyright infringement. I would ask any of the panel Members who would like to address this, how effective are they and are they adequate to protect copyrighted works on those platforms? I would be interested to hear from anyone who might like to comment.

Mr. SCHRUERS. This is Matt Schruers. I would be happy to comment on that.

Mr. CHABOT. Thank you.

Mr. SCHRUERS. So, these services, provide a valuable additional tool to creative industries and individual artists on top of, of course, the DMCA compliance. As I said in my previous statement, a lot of these are both site and sometimes media specific, and they require large investments, so expecting small startups to implement these kinds of systems isn't really practical. But, within the system, these not only streamline and expedite enforcement, but they also create new opportunities for monetizing content. So, in many cases, artists can say this content, which is appearing on your site belongs to me, but rather than take it down, why don't you run ads next to it, and then the artists needn't do anything more, but can now claim a share of the ad revenues that are associated with the advertisements that have now been co-located next to that content. So, in some ways, this is a way of making lemonade from lemons, trying to turn this infringement into a monetization opportunity that works.

Mr. CHABOT. Yes?

Ms. CARRINGTON. Yes, I would like to also respond.

Mr. CHABOT. Go right ahead.

Ms. CARRINGTON. Sorry.

Mr. CHABOT. Go right ahead.

Ms. CARRINGTON. Sure. So, I would also like to respond to that. I think the technology that exists, such as Content ID, Rights Man-

ager, Audible Magic, right now, in the absence of mandatory STMs per section 512(i) they are really, in a sense, trying to put a band-aid on a gaping wound. What really needs to happen is that these technologies, the underlying technologies which would be completely appropriate to become STMs, should be implemented as STMs. Of course, the technology would have to be implemented in accordance with the statute, which means that they need to assist copyright owners of all sizes. I really want to emphasize that because there are concerns with Content ID and other similar technologies, and that they are not made available consistently to both large and small content owners, and so, I really want to emphasize that. Also, in addition, STMs are supposed to be developed with participation from different stakeholders. The operations need to be transparent, and they must be made available to all. So, while these various technologies have assisted in some ways, there are huge gaps that needs to be filled through STMs as well as voluntary measures.

Mr. CHABOT. Thank you, Madam Chair. My time has expired.

Ms. SCANLON. Okay. Thank you. The Chair recognizes Mr. Deutch for 5 minutes.

Mr. DEUTCH. Thank you, Madam Chair. After this Committee embarked upon its own multi-year review of the Copyright Act to examine what is working and what is not working for creators and stakeholders, and now after the Copyright Office's thorough review of section 512, I feel like we are in a good place to actually Act on some of the recurring problems that we have seen with the current system. The basic premise of our copyright law is that we are all enriched when creators create, and they must be able to earn a fair return on their ingenuity. The core of what we are talking about today is how we can improve accountability and curb abuses of the delicate balance that the 512 notice and takedown system seeks to achieve without upsetting the whole apple cart. As we have seen, and as the Copyright Office's report reflects, section 512 has become a cornerstone of growth and development of the internet as we know it, both for better and for worse.

I have previously described 512 as a flawed framework because it puts all the burden of enforcement on the victims of the crime. While this is universally unfair in theory, the system represents an insurmountable burden to small creators who cannot afford the cost of enforcing their copyright across the vast and ever-growing online platforms.

Now, Ms. Kibby, I would like to follow up and refer to a conversation you had with Chair Nadler, something you point out your testimony, that all the hours you spend trying to track down and stop infringement of your works robs you of time spent actually creating new music or further honing your craft. When the internet was in its infancy, that searching might have been a distraction and a frustration, but with the myriad of platforms and services, it just seems impossible. So, Mr. Sedlik, you go on to further describe how enforcing your rights under 512 is impossible, and I agree with that. What we have is a whole group of creators who have been effectively left out of copyright protection. I think the CASE Act was a step in the right direction here, but the 512 regime compounds existing problems. So, Mr. Sedlik, can you elabo-

rate on some of the ways that you suggested to shift some of the weight of the burden off small creators like yourself?

Mr. SEDLIK. Sure. Well, one of them is to revise and clarify the knowledge requirements recognizing that service providers have the ability to control infringing activity and deeming that willful blindness and negligent blindness are the equivalent of actual knowledge. The service providers have knowledge that there are works in their systems that have identifying material embedded in the work that enable the service providers, no matter what type of platform or technology they are using, to read the information out of our visual works and to Act on that information, or at least consider it or make it available to the public. That is perhaps the number one concern of creators in the visual arts is that when we take the time to put our rights information into our works, it should not be ignored by the service providers. Google just took the right step on August 26th and is making information available in all images that are in Google Images if creators take the time to put work in there. We would like to see that across the board from all OSPs.

Mr. DEUTCH. Great. I appreciate that. I want to just finally to spend a minute talking about the bad actors, the repeat offenders who take advantage of the system, that force creators like Ms. Kibby and Mr. Sedlik into a perverse game of whack-a-mole where creators must chase down each Act of infringement online, each link, each stream. I wonder if there is anything, we could do specifically on repeat infringers, the small percentage of actors in this case who represent the lion's share of the problem. Mr. Schruers, do you have thoughts on that, how to better distinguish between legitimate users and bad actors?

Mr. SCHRUERS. Well, so section 512 already requires digital services to have and enforce a repeat infringer policy, and we have seen from the Cox case that the failure to meaningfully enforce that kind of policy can result in serious liability. Of course, there are certain constraints for anonymous users. Unless you are going to forbid anonymous use of the internet, it is difficult to meaningfully catch all repeat users, repeat infringers. Certainly, we have seen courts say you need to have this policy and you need to meaningfully enforce it. So, I think that is certainly happening already, and I know within industry that enforcing that policy is a critical part of their internal DMCA compliance, lest you wind up facing a massive judgment.

Mr. DEUTCH. I appreciate that. Madam Chair, section 512 certainly has value, but it also has flaws. We can't continue to ignore the impact that those flaws have on American creators and on our economy. I thank the witnesses for their time and hope the Committee can navigate its way to tangible solutions for the complex problems that we are discussing here today. I yield back.

Ms. SCANLON. Thank you. The Chair recognizes Mr. Armstrong for 5 minutes.

Mr. ARMSTRONG. Thank you, Madam Chair. I want to talk a little bit about the elements of notification in section 512(c) and some of the legal and practical implications, and, Mr. Sedlik, you had mentioned the URL issue earlier. So, a claimant's infringement requires, among other elements, identification of the material that is

claimed to be infringing and information reasonably sufficient to permit the service provider to locate the material, and some courts have interpreted this element to require a high degree of specificity, including an exact URL for the alleged infringing material. This creates a significant burden for rights holders and contributes to the whack-a-mole problem. So, Mr. Sedlik, what kind of burden is it for an independent singer-songwriter, or anyone else for that matter, to track down each specific URL to protect their copyrighted material?

Mr. SEDLIK. If you could only see my spreadsheets of those URLs. It is a huge burden, and the DMCA should be amended to require that, upon receipt of a representative list of links to infringing material, service providers must employ available technologies to identify and remove not only those representative examples, but all other existing infringement of a copyrighted work. I would say that the statute says information identifying and the work itself is, by definition, data which is information identifying. So, if I were to provide a copy of my work to an online service provider, there is sufficient technology available to use my work to conduct image recognition and identify all copies of my work across the platform and give me the opportunity to determine which ones are licensed and which are not, and give the users the ability to claim fair use should they wish to do so.

Mr. ARMSTRONG. Yeah, and the standard is information reasonably sufficient to permit the service provider to locate the material. Requiring an exact URL further shifts the burden onto the rights of shareholders and away from the service provider, who actually or theoretically controls the site and often generates revenue from that contact. I don't think it is a good argument for service providers to say they can't be expected to search massive amounts of content on their site if they generate revenue from that exact same content. Your testimony suggests only requiring a representative list, URLs that would serve as examples but would require the takedown of all represented copyright work. Can you just elaborate on that a little bit?

Mr. SEDLIK. Sure. Well, the work itself should serve as a way for the OSPs to be able to identify all copies of that work even if they have been modified—cropped, flipped colorized, changed in some ways—to determine where these copies exist on their systems. So, the URLs aren't even needed. The work itself, if submitted to the online service provider in a similar system to what Facebook is implementing right now as a means of rights holders to submit their work, would be sufficient and should be sufficient under the statute. I think the courts have got it wrong.

Mr. ARMSTRONG. Mr. Schruers and Ms. Rose, I am going to ask you the same question. Should larger, more sophisticated service providers be able to search and filter infringing material that is reasonably identified, meaning something more general than a specific URL?

Mr. SCHRUERS. So, if I may, some services already do this. I would point out that there are inherent challenges in assuming that because one iteration of a work that has been identified as infringing, that it can necessarily be extrapolated to all other uses of that work on the platform. We do require rights holders to say that

they have a good-faith belief that this is infringing, but after they make that representation with respect to all potential iterations the work that exist across the platform. We have heard about the scenario with Mr. Beato earlier today. I am not personally familiar with his work, but it sounds like he is an educator who helps people—

Mr. ARMSTRONG. Yeah, and I am just going to stop you here because that is not my question.

Mr. SCHRUERS. Okay.

Mr. ARMSTRONG. I understand the different iterations. I mean, do they need the specificity of the exact URL, that is the question, or can larger providers do it in a different way?

Mr. SCHRUERS. Well, yeah. So, I think it is difficult to paint all service providers with a broad brush, but in many cases, the identifying information that is required in a particular system is not necessarily the URL. The URL is sort of the—

Mr. ARMSTRONG. I have 15 seconds, and, I am sorry, Ms. Rose, I hope we can get to you later. From an enforcement standpoint, we have done this before, not necessarily in this area, but we do it with drug analogs in the criminal system. When we first started having analogs that existed, if you changed one single thing in it, then it was legal until either the DEA or the State legislation made it illegal again, and we figured out that was untenable. While not exactly an apples-to-apples comparison, there are ways to do this that would make it a little less burdensome on the actual singer-songwriters. With that, I yield back.

Ms. SCANLON. Thank you. The Chair recognizes Mr. Swalwell for 5 minutes.

Mr. SWALWELL. Thank you. Mr. Armstrong, if you have another question, I am happy to yield to you if you want to get that in there. I was interested in your dialogue.

Mr. ARMSTRONG. I would just ask the same question to Ms. Rose. Should larger, more sophisticated service providers be able to search and filter infringing material that is reasonably identified, meaning something more general than a specific URL?

Ms. ROSE. So, while I can't speak to the capacities of larger platforms, and I think there is. Certainly, to agree with my colleague, Mr. Schruers, I think that are some have the capacity possibly to do that and some that don't. I worry about any provision which would mandate such capacity, particularly on smaller platforms. We tend to fall into a trap in a lot of these situations where we have the impulse to legislate based on what Google and Facebook are capable of doing, and in doing so, create a set of rules that end up creating unfair or unreasonable expectations for smaller websites, often run by nonprofits that host user-generated content as well.

Mr. ARMSTRONG. Just really quickly, and I agree with that because what we don't want to do is create more of an incentive to create market share in the top. Thank you, Mr. Swalwell. I yield back.

Mr. SWALWELL. Thank you and reclaiming my time. To follow up on Mr. Deutch's point, Mr. Schruers, how do repeat infringer policies vary among different online service providers?

Mr. SCHRUERS. So, it depends very much on, in large part, because we have a huge variety of service providers that fall under section 512. So, the cost, for example, of terminating somebody's social media account is perhaps not as serious, at least for some users, then terminating someone's broadband access, which could also terminate their livelihood, their ability to engage in prayer and worship, and communication, and so on. So, different services take different approaches. I know some broadband providers, for example, have more extensive policies. Some digital services, quite frankly, are very strict.

The number of instances will often vary, and whether or not a user disputes a claim against them will often be a relevant factor, too. So, it is not uncommon for someone to submit a takedown against a critic who says I don't like their work, or a competitor. My testimony has a number of examples of that. One doesn't want to hold against a legitimate user, a so-called strike, when that claim was made in bad faith, and we will often see policies take that into account.

Mr. SWALWELL. Thank you. Speaking of livelihood, Ms. Kibby, being someone in the artist community, lay out for us what it means for you financially for your livelihood if we do not have better protections for what you create?

Ms. KIBBY. Yes, of course. Thank you. Unfortunately, as a smaller artist, streaming is already not a huge part of my income. I mean, we can all recognize that the music industry has been completely turned on its head over the last 20 years, I don't expect much from streaming to begin with. I think on YouTube, 1,499 streams equals $1, so it is not that much. I am a working-class musician, so let's say I get $100 from YouTube streams. That could make the difference between me keeping the lights on in my studio for a month or not. The frustrating thing is that most of us are working-class musicians. We make careers out of this. We are not famous. We don't dream of buying big houses and expensive cars. We just want to do what we love, and it is kind of bleak, to be perfectly honest.

Mr. SWALWELL. We want you to do what you love, too, because we love listening to it and being entertained by it. So, I am grateful to the Chair for having this hearing, and I am grateful to the panelists for participating. I yield back.

Ms. SCANLON. Thank you. The Chair recognizes Mr. Tiffany for 5 minutes.

Mr. TIFFANY. Thank you, Madam Chair. I yield my time to Mr. Cline from Virginia.

Mr. CLINE. Thank you. I thank my colleague, and I want to follow up on Mr. Swalwell's questions to Ms. Kibby because we all want you to do what you love, and we love that you are doing it. So, when you are dealing with these platforms, are you able to enter into agreements, licensing or otherwise, to be compensated for your works across the board, or are there some platforms that are more willing to enter into these agreements than others?

Ms. KIBBY. I would love to answer your question in an intelligent way, but unfortunately, I cannot. As a general rule, I make the art and my management takes care of the rest, so I can't speak to the specifics of each platform unfortunately.

Mr. CLINE. Okay. Some of the larger platforms, whether it is Facebook or Twitter, are they cooperating with you to make sure that you are compensated for music that is put out there on their platforms?

Ms. KIBBY. Right. In general, any company that profits from music, needs to pay the creators. We all agree on that. Specifically, Twitter makes takedown very difficult, which adds to the frustrations that I expressed earlier. It is not easy. With YouTube, for example, the video that I mentioned earlier, I sent a notice, and I must go through the whole rigmarole of justifying what is my work. Well, not only my work, but also misrepresenting me as an artist. It is very difficult across the board, obviously, with differences here and there depending on the platform, in general, it is extremely difficult. On top of it, I am small enough that I will never have human interaction with anybody from these platforms. I am relegated to a general algorithm-generated email.

Mr. CLINE. Thank you. Mr. Schruers, some of your association's members have a business model based on internet traffic, such as services supported primarily by advertising revenue. Since infringing content can drive traffic just as much, if not more, than non-infringing content, what incentives exist for such providers to do more to help copyright holders protect their works if their current efforts are enough for a section 512 safe harbor?

Mr. SCHRUERS. So, thanks for the question. I don't agree with the contention that infringing works are necessarily driving more traffic than non-infringing works. The vast majority of users and people want to ensure that the artist they know and love, are compensated for the work that they do. On top of that, digital services want to be regarded as valuable contributors to the creative economy. So, it leads to these, as I said, voluntary efforts that we often see where digital services try and find mechanisms whereby artists can identify the works that have been uploaded without authorization, and advertisements can be located next to those works upon identification to allow the artist to monetize some of that infringement. Those arrangements are, as I said, site specific. They vary based on what kind of media is being used, and so the ease with which that is done changes depending on the particular context. These are the opportunities that digital services are looking for to ensure that everyone can take advantage of the value of these distribution systems.

Mr. CLINE. Thank you. What problems do copyright holders face? This can be for Ms. Carrington—when a counter notice is filed to restore content that they requested be taken down, and how should the counter notice system be changed to address those problems in a fair and balanced way?

Ms. CARRINGTON. Thank you for that question. So, one of the major issues that contributes to the lack of balance in section 512 right now has to do with the notice and counter notice process. Right now, if a creator finds their work has been infringed, they are able to send a takedown notice, but the users of that work have the ability to send the counter notice putting that work back up, and often times they allege fair use in ways that are very obviously not fair use. Once that happens, a user sends a counter notice, there are really no options left for a copyright owner. The statute

basically says that they would need to then go to Federal court. Most creators, especially small individual creators and small businesses absolutely cannot afford the cost of Federal court. So, one option that I think would be a definite benefit in this area, and I am very grateful to the House for having passed the CASE Act 410 to 6, but it would be to pass the CASE Act, which would give an alternative dispute resolution system for these kinds of issues.

Mr. CLINE. Thank you.

Ms. SCANLON. Thank you, and the Chair recognizes myself for 5 minutes. I do want to thank Chair Nadler for holding this hearing. We have been hearing a lot in my region on the section 512 issue, particularly from small businesses and artists who are struggling to effectively use the notice and takedown system to enforce their copyrights online. In addition to lacking the resources of larger creators or corporations, they can even be prevented from using tools that could make navigating the regime easier, and there seems like a fairness issue. Given some of the conversations we have been having in the Antitrust Subcommittee with some of the abuses and market takeover of larger platforms, this seems like it fits right in with that discussion. So, we have heard some conversation about some of the larger platforms having developed automated systems for the detection of copyright infringement. However, often they are provided to only select rights holders, such as YouTube with Content ID, and smaller businesses and small solo creators can be locked out of those tools, forced to manually detect infringement, and that puts them obviously at an extreme disadvantage.

Mr. Sedlik, your story is one I have heard, and I would be interested in hearing more about what you think might be potential solutions to the problem. I am particularly interested in the knowledge requirement and the willful disregard issue.

Mr. SEDLIK. Well, if the OSPs have access to a copy of a protected work, whether by doing as Facebook is about to do in requesting that creators submit copies of their work so that people can recognize unauthorized copies on their system, then that is a great step in the right direction. One of the most significant benefits would occur if the OSPs were to recognize and protect and maintain the rights information that we put into our work, and that includes not just on the servers of OSPs, but they use what are called content delivery networks, which are other parties that do what is called localized caching of works. Those parties, those localized caching services and content delivery networks strip all of the rights information out of the work to decrease the size of the work and make it load faster.

If Congress can look at that and perhaps increase the scope of the protections afforded under 1202, that would be a great benefit. The stripping of our rights information is absolutely key. As soon as our work is put up onto a social media platform, it is injected into the stream of commerce. I marked one of my works. I put a special mark on it, uploaded it to Facebook as a test, and within 3 weeks, it was up on Amazon being sold as socks, Miles Davis, right? On socks. I bought these socks online very shortly after a specially marked version was uploaded. This is a very real issue, and my students at the Art Center College of Design are some of the best artists I have ever seen in a generation of artists that

have very little chance at success in running a sustainable business or even pursuing art and making art during their lifetimes.

Ms. SCANLON. I think we can assume that you did not receive any reimbursement from your purchase of those socks.

Mr. SEDLIK. I did not, and there is no system that I know of that provides artists with compensation when their work is used, for example, on a social media platform. We are hoping to see that developed, and the visual arts community is ready, willing, and able to participate in discussions with social media platforms on revenue shares for the use of our works.

Ms. SCANLON. Okay. Thank you. I appreciate your insight here. With that, I will yield back, and the Chair recognizes Mr. Raskin for 5 minutes.

Mr. RASKIN. Madam Chair, thank you very much. I have got a question based for Morgan Kibby. It is based on an article that I read yesterday about a bunch of rock bands who have been in a fight with President Trump because he has been using their songs without their permission. The Rolling Stones are involved, Neil Young, REM, Guns N' Roses, Elton John, Rihanna, Tom Petty and the Heartbreakers, like, a dozen others, whose music has been used in various Donald Trump campaign events without their permission. They are furious about it because they say they deplore his politics, and they don't want to be associated with it. So, I guess my first question for you is, you have expressed very powerfully how the copyright law at least theoretically protects your financial interests, but would you also describe how it protects your interests and the integrity of your art and what you are trying to do with your art against dilution and distortion and corruption online?

Ms. KIBBY. Thank you so much for this question. It is just as important as the financial benefit of having some agency with my copyright. The video, once again, that I talked about earlier, I dislike the imagery. It does not represent me. It has nothing to do with me. In a world where people make snap judgments about everything across the board day-to-day, for artists particularly, especially one, I don't use social media for personal purposes. It is literally only my art. I have spent years developing my voice as an artist, growing, maturing, crafting that into something that is very important to me and helps people digest, who I am. So, yes, that is a long answer to your question. Yes, it is just as important.

Mr. RASKIN. Well, and if you have got giant rock and roll bands, like the Rolling Stones, and Tom Petty, and George Harrison's estate, that are wrestling with the President about this and are caught up with lawyers, and who knows how much money they are spending, is it possible for someone like you to chase down people who are essentially tarnishing your intellectual product and your artistic legacy online?

Ms. KIBBY. We all know the answer to that question is absolutely not. By the way, I am not a green musician. I have been in the music industry for 20 years. I make a good living. I am not rich. I am not poor. I am, solidly down the middle. For me, it is virtually impossible to even consider pursuing protecting myself. I must acknowledge Mr. Sedlik. Especially working with young people, I see this. I have a couple of mentees, and I work with younger people a lot in my industry. It really breaks my heart because if it is dif-

ficult for me, imagine how it is for this next generation of artists that will not have the same opportunity to build a financial or create a foundation the way that I was able to 15 years ago. So, I am very concerned.

Mr. RASKIN. Thank you. Ms. Rose, the gentlelady from California mentioned the Church of Scientology as one that, as an entity, abuses the takedown orders. I am wondering if you know anything about that and if you could describe what they have done, and who are the other abusers and how serious a problem is that?

Ms. ROSE. So, as far as the specific instance of Church of Scientology, I do not have the examples at my fingertips, but there have been several documented instances where critiques of doctrine particularly, including quotes from some of their texts, short quotes meant for the purposes of criticism or education, as well as documentation, was in Going Clear, a recent documentary about it, also faced some DMCA challenges based purely on the desire to silence.

Mr. RASKIN. Well, do you think it is possible people like Morgan Kibby, while we prevent abuses by religions that claim that their doctrine is somehow copyrighted and protected material that can't be quoted by former members or people criticizing them?

Ms. ROSE. I think there certainly is. I think that is something that is going to require a lot of effort, frankly. If we knew what it was, we would have probably figured it out and implemented it some time ago. What we need to do is move away from the understanding that we had in 1998 where the balance being set was one between established content industries and a relatively nascent online tech ecosystem, and consumers were not explicitly part of that. Now we have passed the point where the ability of folks to speak and critique freely is so dependent on access to the online ecosystem, we need to make sure that consumers and everyday voices are a recognized constituency group and help build our policy around that.

Mr. RASKIN. Thank you.

Mr. STANTON. Congressman Raskin, your 5 minutes are up. The next up will be Congresswoman Garcia. The plan right now is to continue to go through all the Members' questions—

Ms. GARCIA. I am trying to get this unmuted.

Mr. STANTON. —so that we don't stop for votes, but votes are happening right now. Congresswoman Garcia?

Ms. GARCIA. Thank you, Mr. Chair, and thank you to the Chair for bringing this important bill to the table. I wanted to start with Mr. Band. Mr. Band, libraries occupy a unique space in providing public access to the internet. I can tell you that without a public library in several areas, and I grew up in a rural area, so every time I go home, I hear this from my sister. She has got to go from the farm into town to go to the library to be able to use the internet. The libraries still play a very important role in America. So, what part of this section 512 framework is most important for libraries being able to carry out their functions, and, given their unique role, can and should libraries take extra steps to educate users about the function of copyrights to provide compensation for authors and creators?

Mr. BAND. Thank you very much for the question. The most important part of the DMCA for libraries is section 512(a). It is called

the safe harbor for mere conduits, and so it makes sure that if you are providing broadband access, that you are shielded from liability for any infringing activities of your users if you are not part of what they are doing. The potential for damages could be enormous. Mr. Schruers alluded to this case involving Cox where it might be liable for about $1 billion in damages. So, protecting libraries from that is incredibly important, and it enables libraries around the country to continue providing services for people who need it.

Ms. GARCIA. Moving forward, I mean, a lot has happened since this was first enacted, and now we are dealing and wrestling with what changes need to be made. Moving forward and looking at the role libraries will play in the future, is there anything that we need to do today to prepare for the changing times?

Mr. BAND. Well, I think that preserving the basic framework is the most critical thing, and to remember that, as others have said, that the internet ecosystem is incredibly diverse. You have large players. You have small players. You have for profit. You have nonprofit. The legal framework needs to remain relatively simple so that you don't have sort of a one-size-fits-all and you don't have technological mandates because, again, there is such a tension between different interests. In particular, libraries are often interested in representing the interests of their users, right? The amazing thing about the internet is that it allows all of us to become artists and speakers and allows all of us to share our views and our perspectives with the world. This is where, it really intersects with the First Amendment.

Ms. GARCIA. Thank you.

Ms. GARCIA. Thank you. In the interest of my time because I have got little time left, Mr. Sedlik, I had a question for you, and just in simple words, 25 words or less, if I could ask every Panel Member, beginning with Mr. Sedlik. This all sounds complicated if anybody's watching, unless they are really experts in this field. Tell me in 25 words or less why it matters to the everyday constituent in my district that we pass this bill. I mean help me connect the dots here. Why does it matter?

Mr. SEDLIK. To which bill are we referring?

Ms. GARCIA. I am sorry. The bill that we are discussing today.

Mr. SEDLIK. Updating the DMCA?

Ms. GARCIA. Yes, sir. What does all this really mean, the changes to section 220? How does the average person buy into it and even care what we are talking about today?

Mr. SEDLIK. My short answer is that creators depend on having for a limited time the ability to benefit from their creations, and then the ownership and the access and the use passes to society. The DMCA is supposed to provide a fair means for creators to be able to create and have an incentive to create, and for OSPs to be able to have safe harbor when using creative works that are uploaded by their users.

Mr. STANTON. Thank you very much. Congresswoman, the 5 minutes is up, and I appreciate those questions.

Ms. GARCIA. Thank you, Mr. Chair. I yield back.

Mr. STANTON. Thank you, Congresswoman. Next will be Congressman Correa.

Mr. CORREA. Thank you, Mr. Chair. I want to thank Chair Nadler for holding this most important hearing, and I want to thank our guests today, our witnesses, for your time and interest. As we think about DMCA 1998, 22 years have gone by, and you have the evolution of the internet. I look at the internet as a distribution system, so to speak, where small, creative artists can market your products and get compensated for what you do, because at the end of the day, all of us enjoy your music, your songs. The world is much, much better off when you are doing what you do best. So, I am going to ask Ms. Kibby and Mr. Sedlik, do you believe that the notice and takedown system of section 512 is robust enough to effectively handle even greater shift in the online environment? Question?

Ms. KIBBY. No.

Mr. CORREA. Why not?

Ms. KIBBY. No. It is just, the parameters for participating in the structure that we have, it is not working. We have noted earlier there are millions of takedown notices, and yet I still see infringement on my rights popping up all the time.

Mr. CORREA. Mr. Sedlik?

Mr. SEDLIK. Yes, it is a distribution system, but it is a distribution system for infringements. Ninty-nine percent or more copies of my work online are unlicensed, unauthorized uses, some being fair use, most being infringements. The DMCA gives me the opportunity to pull some of those down, but there are millions. In front of my class when I am demonstrating how to file a DMCA takedown notice, I can find between 50 and 100 infringements in 10 minutes every semester, so this is an untenable situation for us. The DMCA is a step in the right direction, and it needs to be refined. I have provided some specific recommendations in my written testimony.

Mr. CORREA. So, a brief answer from all the panelists. Since 1998, the ability to automate and detect infringement online has improved. Some of the larger platforms have developed much better automated systems to detect infringement. Is this a benefit that the solo creators and small businesses can take part, or is this just a benefit that is really reserved for the bigger guys? Please.

Ms. ROSE. I would like to answer that if I may.

Mr. CORREA. Please.

Ms. ROSE. Right now, most of the sort of algorithmic detection processes that are available on the market have been developed inhouse by large established players. These are very complex pieces of technology. They are usually designed to be proprietary, especially in the case of YouTube's Content ID, which is sort of one of the most famous examples. It is designed very specifically for YouTube and YouTube's major content partners. So, no, this is not something that is available to small businesses, small platforms, and it is also not available, frankly, to small artists. We have heard from a few other folks, my colleagues here on the panel, who have testified that this is not made available to small artists in any meaningful capacity. So, any sort of private-side solutions is necessarily going to reflect the priorities of the individuals and organizations who develop it, and that's one of the problems we have to wrangle with.

Mr. CORREA. Would the ability to share this technology with the small businesses, the individual songwriters, be part of the solution?

Ms. ROSE. Potentially. There is some discussion, for those who are familiar with the patent sphere, something like a standard essential patent where there are licensing obligations placed on this kind of technology to license it out under fair, reasonable, and nondiscriminatory terms, is certainly an option. As the market currently stands, it just risks re-entrenching the market power of the few very, very large dominant players who have managed to develop the technology in the first place.

Mr. CORREA. Solutions? Anybody? Got 30 seconds.

Ms. CARRINGTON. So, I would also like to jump in on that question. I agree, automated technologies are not made available to small players, individual creators, and that is a huge problem. The scale of piracy that is on the internet today, expecting people to manually find and send takedown notices for each instance of infringement is just an unrealistic task, and it is an uphill battle that small creators just cannot surmount.

Mr. CORREA. Thank you very much. I am out of time. Mr. Chair, I yield.

Mr. STANTON. Thank you, Congressman Correa. Next up will be Congresswoman McBath for 5 minutes.

Ms. MCBATH. Thank you, Mr. Chair, and thank you to each and every one of you for being here to discuss our copyright laws today. I am proud to represent Georgia's 6th District, which is home to many members of the creative community, especially people are involved in film and music and television. I have to say, probably outside of California and New York, we have now become one of the largest environments for the creative technology and creators of television and movies and music. These creators, of course, and some like yourselves today, bring much to our lives by sharing your talents. They are sharing their talents, movies that inform and inspire us, television shows that we watch with our loved ones, and music that we dance to through every stage of our life. We rely on graphic artists, too, when we send cards to a friend that we can't see in person, which I am sure we are having a lot of success doing that in COVID–19, and when we wear tee shirts to express our views, and when we hire photographers to document our most special moments.

Our world is so much richer because of the creative minds among us, and, like I said, those of you that are with us today. We have got to make sure that our laws are serving the needs of persons such as yourselves, and this is especially important right now as we continue through a health crisis that has closed concert venues and limited the operations of music and film studios. I believe that we can maintain the internet as a critical place for the spread of information and ideas while also making sure that our artists can actually make a living.

Ms. Kibby, your testimony resonated with me, and I did read it. It resonated with me because I have heard from many working-class musicians, as you put it, from my own district. You emphasize that copyrighted infringement is especially damaging to musicians who are early in their careers or are still thinking about

whether their talent is something that they want to continue to pursue professionally. Can you elaborate on your experience working with and mentoring emerging artists and how they are thinking about these issues that we are discussing today?

Ms. KIBBY. Yes, thank you for the question. It is terrifying for them if I can be completely blunt. The pandemic has just robbed us of one of the remaining viable ways to make a living. You used to be able to hop in a van, and even if it wasn't comfortable and it wasn't plush, you could tour and make some money to get by. Now that is not even available to large artists who are canceling multimillion-dollar tours and who employ hundreds of people. It is just so saddening talking to one of my mentees. She has to live with her mother, and she doesn't know when she is ever going to be able to move out. She is not able to participate in any active live shows and can't even network with people now because she can't physically be around people. It is kind of a conundrum.

Ms. MCBATH. Well, thank you so much for that, and I would like to move on. Mr. Sedlik, I have read your testimony as well, and thank you so much for the recommendations that you made for revisioning section 512, to make revisions to 512. The recommendations in your written testimony include prohibiting service providers from publishing creators' names, addresses, phone numbers, and emails, and you mentioned that publishing this information has led to shaming and threatening creators. Can you expand on these incidents and the reforms that you are recommending, that you are suggesting?

Mr. SEDLIK. Thank you for the question. So, when we as creators, create our works initially, we do so with the expectation that we are going to be able to benefit from them over time. The first initial use for which the work is created is only the first in a long chain of a lifetime of uses, over our lifetime and our heirs' lifetime, of our works, and those might be very different types of uses. For example, I might create a book, and it will later be used on tee shirts without my authorization, in magazines and newspapers for various commercial uses, and so my ability to protect my work overtime is absolutely essential. I lost my train of thought there, so I am going to yield my answer.

Ms. MCBATH. Thank you. I yield back. Thank you for your answers.

Mr. STANTON. I am going to yield 5 minutes to myself. One of the concerns that I have heard about changing section 512 are the barriers for entry to new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller businesses not to compete all together. This is a question for any of the witnesses who would like to answer. What are some of the ways that these concerns can be alleviated if section 512 is, in fact, changed?

Mr. SCHRUERS. If I may, unless somebody else wants to go first.

Mr. STANTON. Jump in, please.

Mr. SCHRUERS. All right. I guess what I would say is at the outset, my testimony points out that arguably, section 512 is not the low-hanging fruit of the Copyright Act. While we acknowledge there are problems that affect creators as well as users who are often the target of misuse that my testimony describes in greater

detail, providing additional certainty and mechanisms around encouraging the promotion of creative works online is likelier to provide greater benefits in the long run. To achieve that, we would look to modernizing the copyright system to make licensing information more available and easily accessible to ease the speed with which a willing buyer can find a willing seller and license those works.

Mr. STANTON. Any other witness who would like to answer that same question?

Ms. CARRINGTON. Yes, thank you. I would also like to answer that question.

Mr. STANTON. Please.

Ms. CARRINGTON. So, I think it is very important that OSPs come to the table and engage in the kind of cooperation that Congress intended. To your question about innovation and new businesses, it is important to remember that no one is expecting that a small OSP or a new fledgling platform is going to implement the same level of an anti-piracy program as, say, Google. Our expectations are that the scale of an OSP's anti-piracy program is commensurate with the level of infringement and piracy on their site, so that is definitely not going to be a barrier to entry. It is the price to play. Creators are being hurt by piracy, and OSPs absolutely have a responsibility to do something about that.

Mr. STANTON. Thank you very much. Any other witness like to answer the same question, impact on small businesses and what can be changed to improve that?

Mr. BAND. If I may, I would just add that it is important to recognize that if this hearing were held 10 years ago, we would be having a very different conversation. At that point you would be having a lot of the large content providers, the motion picture studios and so forth, bringing their concerns and talking about how the service providers are not addressing their needs and the threats they are under. Now, because a lot of the problems of the large providers have been addressed through things like Content ID, the problem is different. It has evolved, and it is a more targeted issue, obviously something that we need to come up with a solution to, but it is important to recognize that the problem has evolved. It is, in many ways, a much narrower problem, in its own way, it is a harder problem to address because it is easier to figure out how to work with motion picture studios and harder to figure out how to address the enormous variety of individual artists.

Mr. STANTON. I thank you very much. I will yield back the rest of my time, and now will turn to Congresswoman Mucarsel-Powell. Congresswoman, 5 minutes?

Ms. MUCARSEL-POWELL. Yeah. Thank you, Mr. Chair, and thank you, the witnesses, again, for coming. I represent South Florida, Florida's 26th District, and Miami is home to some of the biggest Latino creators in the industry. I wanted to shift a little bit and ask you, maybe starting with Ms. Kibby then Mr. Sedlik, some people have mentioned that they would like the United States to move towards a notice and stay down approach where OSPs must make efforts to take down infringing material and prevent similar infringement in the future or open themselves to liability. So, do you

know of other countries that have effectively implemented such a system that we should look at as a model?

Ms. KIBBY. I will let Mr. Sedlik take that question.

Ms. MUCARSEL-POWELL. Okay.

Mr. SEDLIK. We have to be very careful with notice and stay down, but at the same time, we need to find a solution. When I put my work up, it comes down within a few days and then it comes right back up, and there needs to be a solution to that. I can't keep up with this whack-a-mole type of [inaudible]. So, what needs to happen is a notice and stay down procedure that does not stifle free speech and does not stifle fair use. It is important to recognize that my work itself is free speech. My photographs are free speech. The infringement that is occurring is inhibiting and chilling my ability to exercise my right to free speech, so it is a two-way street.

Ms. MUCARSEL-POWELL. Does any other witness have any information on models that have worked in other countries that we can look at moving forward?

Ms. ROSE. Yes. So, I think the closest approximation right now is the European Union implemented or passed a new copyright directive recently. The states, individual member states, are still in the process of implementing the copyright directive into their individual laws. So, we actually have a very interesting situation right now where we essentially have a lot of sort of test runs of a lot of these potential or proposed changes to copyright law. That will take a few years for those implementations to happen, and then there will be inevitably legal challenges to various aspects of it. In this case, the U.S. has the benefit of being able to observe what happens in the wild as these proposals move forward over the next several years.

Ms. MUCARSEL-POWELL. Thank you, Ms. Rose. Before we close down, one last question. I know that other nations have actually implemented systems that place more responsibility for negative externalities on service providers, and some advocates for service providers have argued that this inhibits investigation, and that the U.S.'s more relaxed system allows it to maintain its position as a leading Nation in technology. Do you have any evidence that would support this?

Mr. SCHRUERS. I think, if I may, this is Matt Schruers, representing a number of those industry constituents, I think the fact that the U.S. technology industry is the envy of the world and digital exports are one of our fastest-growing export sectors is illustrative of the fact that we have struck the right balance, that we got it right, which is not to say that there are not problems. I think we have talked about challenges, but among all the other alternatives, this is the best path forward. While we still have challenges to deal with, no one else has managed to do it better. I would note that the Copyright Office, for example, does not recommend implementing the highly controversial system that Europe is looking at it in part because they simply haven't figured out how to say if you have a stay down obligation, if a work is taken down for an infringing use today, but it is the subject of a lawful use tomorrow, how does one thread that needle? There is no good explanation for that, at least that I have heard, and certainly I haven't

seen any European member states come up with that. I would say we have managed to strike the right balance.

Ms. MUCARSEL-POWELL. Yeah. Thank you, Mr. Schruers. Look, I think we have to protect people, artists like Ms. Kibby, that have to continuously work through a system where she can't even talk to someone directly. She must go through this process on Twitter or whatever other platforms she is using. We need to find solutions and I think that it is important to look at what is working in other places and what we can really study here so that we can bring that balance, so thank you. Thank you to all the witnesses. I yield back my time.

Mr. STANTON. Thank you very much, Congresswoman. I see no further Members here to ask additional questions, so this concludes today's hearings. We thank all our outstanding witnesses for participating.

Without objection, all Members of the Committee have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Without objection, this hearing is adjourned. Thank you, everybody.

[Whereupon, at 2:29 p.m., the Committee was adjourned.]

QUESTIONS AND ANSWERS FOR THE RECORD

Congressman Greg Stanton
House Judiciary Committee Hearing on Section 512 of the Digital Millennium Copyright Act
Question for the Record
Wednesday, September 30, 2020

Statement:

More than 20 years ago, the policy makers who pioneered the Internet Age worked together to craft Section 512 of the Digital Millennium Copyright Act. Section 512 was created to protect "original works of authorship" under copyright law by providing safe harbors for online service providers. One of the provisions of that law sought to balance a copyright owners' ability to protect their works with the responsibility of an online service provider to remove the content from a website. Providers who comply with that provision – what is known as "notice and take down" – can limit their liability.

All of us know, though, that since that law was passed, the Internet has changed so significantly – far beyond what any of us could have imagined in the late 1990s. We use the Internet to learn . . . to watch movies and TV and user-created content . . . to buy and sell . . . to set the thermostat in our homes . . . and so much more. With this exciting growth have also come significant challenges for copyright owners who want to protect their content.

One of the most prevalent forms of copyright infringement is online streaming. In fact, illegal streaming now accounts for 80 percent of digital piracy including illegally streamed music, movies, and shows.

The recent report by the Copyright Office considered whether Section 512 is currently working for all parties that use it. Their finding was that "the original intended balance has been tilted askew" and that notice and take down notices have not fixed digital piracy. The report also found that while online service providers are generally satisfied with Section 512, artists and content creators are not . . . in my view, for good reason.

We need to modernize Section 512 to meet the challenges of the modern age. Congress must be mindful of the concerns on both sides of this issue and realize that remedies will have to be scalable to the issue in the Internet ecosystem. A solution that works for a small business might not work for Facebook. One fix will not solve every problem. Like many of my colleagues and witnesses here today, I also believe that we must strike the right balance between combating digital piracy without stifling innovation or free speech. I appreciate the testimony I have heard so far today and look forward to working with Chairman Nadler, Ranking Member Jordan, and stakeholders on finding solutions that are sustainable and helpful to creators and the platforms that host the content.

Questions:

For all witnesses:

- Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on Section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: *If Congress and stakeholders do not come back to the table and work together on ways to modernize and Section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use Section 512*?

- One of the concerns that I have heard about changing Section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller businesses to not compete altogether. *What are some ways that these concerns can be alleviated if Section 512 is in fact changed*?

- Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including Section 512's safe harbors and notice-and-takedown system. The

Copyright Office found in its report that education resources about notice-and takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but *what more can the Copyright Office do to restore these imbalances?*

- *What is the one change that you would like to see to Section 512 and why*?

Questions for the Record from Rep. Reschenthaler:

To Morgan Kibby:

You identified Twitter as a platform that makes it difficult for creators to effectively enforce their rights through the notice-and-takedown process. Would you elaborate on the problems associated with Twitter's copyright infringement policies, and how you think they should be doing things differently?

Questions for the Record from Rep. Reschenthaler:

To CCIA:

Some online service providers (OSPs) offer products intended to help creators monitor and prohibit infringement of their works. This makes sense because OSPs are the ones that have the technologies creators need to effectively find and evaluate potential infringements of their works, as the DMCA instructs them to. However, some OSPs don't readily provide access to these tools; in fact, some withhold them outright and others charge for access. Why aren't these technologies broadly available to creators at no additional charge? Otherwise, the sole burden is on creators to enforce their rights in today's digital environment. Should creators pay OSPs that host the infringing works for the tools they need to do address those infringements?

RESPONSES OF PROFESSOR JEFFREY SEDLIK TO CONGRESSMAN STANTON'S QUESTIONS FOR THE RECORD

1. Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: If Congress and stakeholders do not come back to the table and work together on ways to modernize and section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use section 512?

Witnesses representing Online Service Providers (OSPs) at the hearing claimed that the DMCA is working as intended, and that nothing is broken. Most OSPs continue to ignore the very real problems with section 512 because their business models rely in great measure on their exploitation of infringing material uploaded by their users. Most OSPs are unwilling to participate in any process that may disrupt that business model, or prevent them from continuing to profit handsomely from rampant piracy and from the infringement that they continue to facilitate on their platforms, with impunity.

Section 512(i) and other provisions of the DMCA are currently structured in a way that encourages collaboration among stakeholders only in the event that copyright owners and service providers agree that a problem exists and requires a remedy. But OSPs continue consistently deny and downplay the scale of piracy and infringement occurring on their platforms, and claim that all is well, and that everything is working just as Congress intended when drafting the DMCA. OSPs are well aware that the loopholes and ambiguity in section 512 play heavily in their favor. OSPs have every incentive to maintain the status quo by discouraging and delaying efforts to collaborate on standards, and by opposing statutory and regulatory revisions that might limit their ability to continue profiting from the rampant infringement occurring on their platforms, and thereby tilt the scales of the online marketplace into equilibrium.

Meanwhile, small creators and copyright holders complain that loopholes, ambiguity, and other shortcomings of section 512 are facilitating and perpetuating infringement and other abuses of their creative works, devaluing those works and impeding or even destroying their businesses. OSPs persistently leverage the inadequacies of section 512 to frustrate rights holders' desperate attempts to protect their creative works against infringement on OSP platforms. Facing widespread repeat infringement, cumbersome takedown forms on OSP websites, and tactics employed by OSP DMCA agents to discourage rightsholders from completing the takedown process, many creators find that attempting to enforce their rights under the current section 512 is a hopelessly useless endeavor.

After decades under the section 512, we have a system under which one stakeholder group (the OSPs) thrives while claiming that all is well, while the other stakeholder group (creators and copyright owners) suffer horribly, persistently complain of serious, ongoing problems endangering their businesses. This is not a sign of a balanced system. This is not a system working as intended. By carefully structuring their business models to exploit the loopholes and weaknesses of the DMCA, the OSPs have built empires, monetizing infringing content without fear of liability, and enjoying rapid and explosive growth. OSPs are among the most wealthy and powerful companies on earth. Meanwhile, creators and copyright owners struggle desperately to survive in a marketplace where infringement of their works is the rule, not the exception.

The loopholes in the DMCA must be closed. Ambiguity must be resolved. All stakeholders must be held accountable for their inaction. The development of a clearly articulated intent to adopt a balanced system, weighing the equities and interest of all stakeholders, is a good starting point.

The community of visual artists has been and continues to be devastated by the massive scope of online infringement, and is already seated at the table with Congress, eager to cooperate with OSPs to remedy the proven inadequacies of section 512. Unfortunately, OSPs continue to insist that all is well, and refuse to take their seats at the table and roll up their sleeves to collaborate on developing and implementing corrective measures to achieve a more balanced, effective system.

In refusing to recognize the well documented points of failure in section 512, OSPs are filling their coffers while destroying the livelihoods of small creators and discouraging the progress of the arts envisioned by Congress in article I, section 8, Clause 8, of our Constitution.

The community of visual artists has been and continues to be devastated by the massive scope of online infringement, and stands ready to cooperate with OSPs to propagate systems "to detect and deal with infringements that take place in the digital networked environment" as intended by Congress.

2. One of the concerns that I have heard about changing section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller businesses to not compete altogether. What are some ways that these concerns can be alleviated if section 512 is in fact changed?

Concerns that revisions to section 512 will create barriers to entry for new businesses are biased, misplaced, and misguided. These concerns focus solely on OSPs, ignoring existing, long term, formidable barriers to entry for small creators whose survival depends directly on revenue from licensing their copyrights for authorized uses on the internet, and who are unable to sustain their businesses due to rampant infringement by OSPs, who infringe with impunity due to unresolved loopholes and ambiguity in the section 512.

Under the current section 512, OSPs enjoy unfettered access to copyrighted creative works, exploiting those works to attract users in order to ultimately generate advertising revenue, while knowing or having reason to know that the majority of the works uploaded to their platforms are infringing material. OSPs profit unfairly by exploiting copyright protected works on a massive scale, without the knowledge or permission of the copyright holders, while hiding in the safe harbor of section 512, in a manner never envisioned by Congress.

When entering the marketplace, new, small OSPs have access to technologies that would, if implemented, reduce, and nearly eliminate infringement on their platforms. These new OSPs need not develop new technology for this purpose. The technology has been available for decades, it is readily available, at low cost, for integration in any OSP platform. The integration of these technologies is a small price to pay for OSPs, who build their businesses on the backs of creators and copyright owners while offering little or no compensation.

The barrier to entry is real, but it is faced by creators unable to monetize their copyrighted works in an environment of widespread, legalized infringement by OSPs and their users.

3. Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including section 512's safe harbors and notice-and-takedown system. The Copyright Office found in its report that education resources about notice-and takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but what more can the Copyright Office do to restore these imbalances?

Section 512(i) of the DMCA conditions OSP safe harbor eligibility on not interfering with Standard Technical Measures ("STMs") that "have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." The Copyright Office should be directed by Congress to more aggressively encourage and facilitate collaboration by stakeholders on the development of STMs, and to promote and enable the development of networked, interoperable public and private registries to provide OSPs and the public with ready access to rights holder information necessary to identify copyrighted works made available on the internet.

Toward those ends, in 2002, Register of Copyrights Marybeth Peters urged the photography industry to facilitate a consultative, multi-industry process to develop an STM for visual works, for use by all industries and the public. Acting on Register Peters' advice, the photography industry then approached publishers, advertising agencies, design firms, museums, libraries, OSPs, RROs, educational institutions, stock photography agencies and others. In 2004, stakeholders and groups from all of these industries formed the industry-neutral, non-profit PLUS Coalition. I helped found the PLUS Coalition and currently serve as President.

In an open, fair, voluntary, multi-industry process, with intensive participation by over 1,500 representatives from all of the above-described industries, and with input from OSPs such as Microsoft, Yahoo and Google, the PLUS Coalition then developed standards and guidelines supporting the use of embedded rights metadata as an STM for visual works, in all industries. The PLUS standards were then integrated within other, pre-existing standards, and built into software and tools employed by

all industries and communities engaged in creating, distributing, using, and preserving visual works.

The PLUS standards do not impose substantial costs or burdens on service providers or their networks. Since 2006, the PLUS standards, in combination with mature technology to embed and read data in digital files, has been used by copyright owners to identify and protect copyrighted visual works, and is employed by users and intermediaries to identify rights holders and rights information pertaining to visual works. For reference, I provide four examples:

i. PLUS standards for embedded rights metadata are integrated in the cross-industry IPTC Photo Metadata Standard, the global standard for image metadata, used in all industries and user communities as an STM to identify rights holders and rights information for visual works, and to protect those works.

ii. PLUS standards field "Licensor URL" for embedded rights metadata has been adopted by Google and integrated in Google Images as an STM to allow users of Google Images to identify rights holders and rights information for visual works, and thus to protect those works.

iii. PLUS standards for embedded rights metadata are integrated in Adobe applications utilized by more than 15 million users globally as an STM for visual works, to identify rights holders and rights information and thus to protect those works.

iv. PLUS standards for embedded rights metadata are integrated in ExifTool, the primary tool employed to read and write embedded image metadata for the purpose of identifying rights holders and rights information as an STM for visual works, and thus to protect those works.

Embedded metadata for photographs and other visual works is a mature technology, broadly employed in and recognized by all manner of devices for more than 30 years. By embedding rights metadata in their works, visual artists provide all OSPs with a means by which OSPs can employ automation to identify works, authors, and rights information at any scale. OSPs can in turn employ automation to Act on that information at scale, and to make that information available to the public engaged in accessing works distributed and displayed by OSPs, just as Google has done by adopting a PLUS standards rights metadata field for identifying rightsholders and rights information in Google Images.

The PLUS Coalition is an example of a successful voluntary initiative to create and broadly deploy an STM, allowing creators and copyright owners to embed standardized copyright management information within digital photographs, where that metadata can be readily accessed and acted upon by online service providers (OSPs) and the public.

Unfortunately, the PLUS Coalition is a rare example of a successful STM initiative. Many well- intentioned efforts to develop effective STMs never get past the conceptual stage due to a lack of incentive and desire on the part of OSPs. Under section 512, if an OSP doesn't like a proposed STM, it can simply abandon an initiative or agreement and thereby claim that the technology or system was not developed with a broad consensus of service providers and is not a qualified STM under section 512.

OSPs must come to the table and make a good faith effort to collaborate on development and implementation of effective STMs. By revising section 512 to ensure that OSP safe harbor eligibility is premised on OSP participation in development of STMs, more successful STMs will be developed, resulting in widespread, significant improvements for all stakeholders.

As I wrote in my testimony, service providers need to be encouraged to collaborate with creators and other stakeholder groups to implement non-proprietary, opt-out and opt-in registries, available for voluntary use by creators and rights holders. OSPs should be required to check all uploaded works against those registries prior to reproduction, storage, or display. For visual works, image recognition technology is readily available, scalable, highly accurate, and perfectly suited for this task. In addition, OSPs should be required to search embedded metadata to identify rightsholders and to discover infringing works.

Embedded metadata and digital watermarks should also be formally recognized as STMs, and service providers should be required to maintain and preserve all metadata and digital watermarks in all files uploaded to their platforms, as a condition of safe harbor eligibility.

Finally, the Register of Copyrights should be granted the authority to establish and maintain a public listing of recognized STMs.

Lastly, a point of clarification. As noted in the Copyright Office report on section 512, there has been nomulti-industry process to develop a single, universal STM

with the OSPs, for application across a broad spectrum of content types. However, such an STM is an impossibility, as technical differences between the different types of content prevent the possibility of creating a single STM that can be applied across all types of content, STMs can and should be developed for each type of content (musical works, motion pictures, books, etc.) as the PLUS Coalition has done for photography and the visual arts.

4. What is the one change that you would like to see to section 512 and why?

In my testimony, I detail twelve revisions to section 512 that will help to achieve a balanced, effective system, such as revising and clarifying knowledge requirements, recognizing meaningful STMs, and encouraging voluntary initiatives. All of my proposed revisions will improve the DMCA, but most needed is a provision updating the notice and takedown system to remedy the widespread "whack-a-mole" issue, in which infringing content is immediately reposted to OSP platforms immediately after a previous infringement is removed by an OSP in response to a DMCA takedown notice submitted by a copyright owner. The next section 512 must provide for a notice and *stay-down*, requiring that OSPs take action to prevent their users from successfully reposting infringing content after it is removed in response to a legitimate DMCA take down notice.

OSPs argue that implementing a notice and stay-down system would be overly burdensome and ineffective. However, many of these same companies and services have developed far more sophisticated technologies to harvest our data, curate content for us, and target us with advertisements. The burden should not be on copyright owners and creators to monitor for infringement. In all fairness, as OSPs profit from the distribution and display of infringing content while benefiting from safe harbor under section 512, OSPs should shoulder the burden of policing and enforcing infringement on their platforms.

In addition to the revisions enumerated in my testimony, the counter notification procedure described under 512(g)(2)(C) should be revised to provide the rights holder with 30 days to file an action seeking a court order. The current statute requires that copyright owners identify an attorney in the applicable district, contact that attorney, retain that attorney, secure information sufficient to determine venue and other details required in a complaint, and file an action, all within ten days of receipt of a counter notification, or the OSP will replace that content within four days of the tenth day, further damaging the copyright owner. After infringing content is restored due to a counter notification, many OSPs then refuse to accept further takedown notices from the copyright owner for that same infringing material. The ten-day requirement creates an untenable if not impossible burden for both copyright owners and OSPs, and must be revised to accommodate practical considerations.

Public Knowledge

December 21, 2020

Representative Greg Stanton
House Judiciary Committee
128 Cannon HOB
Washington, DC 20515

Re: House Judiciary Committee Hearing on Section 512 of the Digital Millennium Copyright Act, Questions for the Record

Dear Representative Stanton,

Thank you for the opportunity to respond to your questions. My answers are below.

Sincerely,

Meredith Rose
Senior Policy Counsel
Public Knowledge

1. **Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on Section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: *If Congress and stakeholders do not come back to the table and work together on ways to modernize and Section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use Section 512?***

For users, "business as usual" means that life will, largely, continue on as it does--for better or for worse. Broadband connections for families, small businesses, and others will continue to be at risk of termination based on unreviewable accusations of copyright infringement--even as we face a worsening pandemic, and rely ever more on our broadband connections for remote work and learning.[1] Users and creators alike will continue to be targeted by bad faith notices;[2] larger sites will continue to view Section 512(g) as optional, and decline to reinstate content even when in receipt of a valid counter-notice.[3]

2. **One of the concerns that I have heard about changing Section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller businesses to not compete altogether. *What are some ways that these concerns can be alleviated if Section 512 is in fact changed?***

Obligations should be tailored to accommodate differences of scale among platforms (and differences of sophistication among rightsholders and users). An ideal system would thus allow for an easier regulatory glide-path for new entrants, while placing heavier burdens on "big" players. This also requires lowering the existing burden on smaller OSPs, rather than maintaining the status quo as a baseline.

However, we must acknowledge that it is extremely difficult to design a system for identifying "big" versus "small" players that does not produce undesirable secondary effects. Smaller platforms, for example, have expressed concern that the metrics embodied in the EU Copyright Directive (setting different obligations for platforms that are less than three years old, AND enjoy annual revenue below 10 million euros, AND have fewer than 5 million average

[1] *BMG Rights Mgmt. v. Cox Communs.*, 881 F.3d 293, 302 (4th Cir., 2018). It is worth reiterating that major rightsholders have *vociferously* defended their unreviewable, unilateral power in this regard. U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* at 98, fn 520 (May 2020) [hereinafter USCO § 512 Report], https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

[2] Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020) https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html.

[3] See, e.g., Meredith Rose, *The Trouble With Twitch's Mass Takedown*, Public Knowledge (Nov 12, 2020), https://www.publicknowledge.org/blog/the-trouble-with-twitchs-mass-takedown/.

unique monthly visitors[4]) will lead small platforms to artificially depress their organic growth in order to avoid a sharp cliff of compliance obligations.

Some benchmarks (such as nonprofit status) are relatively non-controversial, but under-inclusive. However, more common metrics (such as revenue, staff size, and traffic) are vulnerable in a number of ways; large behemoths can game the system by moving revenue or outsourcing staff, while a small blog that goes viral can be inadvertently swept into megacorp-scaled compliance obligations if designed poorly. Put simply, we need more data. We believe that the NTIA study requested by Senator Tillis earlier this month will provide a starting point for understanding how various metrics actually relate to the vague notion of "big versus small," and whether any measurement (or combination of measurements) might be useful in setting statutory language.

3. **Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including Section 512's safe harbors and notice-and-takedown system. The Copyright Office found in its report that education resources about notice-and takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but *what more can the Copyright Office do to restore these imbalances?***

Fundamentally, change must come from Congress. However, there are some things which the Copyright Office can do to help even out existing imbalances. First, the Office can dedicate a section of its DMCA portal to educating notice senders on how to avoid misuse or abuse of take-down notices. Additionally, the Copyright Office should more thoroughly engage with the documented chilling effect of bad notices on online speech, and examine what kinds of penalties would be necessary to make platforms comply with the counter-notice and put-back procedures in 512(g), which platforms too often view as optional.[5]

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[4] Article 17, Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, p 124, https://www.europarl.europa.eu/doceo/document/A-8-2018-0245-AM-271-271_EN.pdf?redirect

[5] See, e.g., Meredith Rose, *The Trouble With Twitch's Mass Takedown*, Public Knowledge (Nov 12, 2020), https://www.publicknowledge.org/blog/the-trouble-with-twitchs-mass-takedown/ ("The DMCA, as it's written, has only thin procedural protections for users who are subject to a takedown notice. Those protections are embodied in 512(g) — and the reality is that a platform feels far more threatened by a copyright infringement lawsuit, with its legally-presumed damages of $150,000+ per instance, than it does by the risk of a lawsuit filed by a few users who have to prove actual financial damage.").

4. ***What is the one change that you would like to see to Section 512 and why?***

The law should be updated to clarify that ISPs are not liable for copyright infringement committed over their networks merely by virtue of transmitting or relaying traffic at the direction of its user. As I discussed in my testimony, "internet service providers" meant something very different in 1998 than it does in 2020. In 1998, "internet service providers" were software-layer services such as America Online and CompuServe, operating over the existing telephone network. Thus, in 1998, termination from an "internet service provider" meant that a customer had to uninstall American Online and subscribe to any of its numerous competitors. In short, when the DMCA was written, ISPs were edge services that operated in a competitive market and operated over a separately-owned, regulated common carrier. Congress did not suggest at any point that the operator of the infrastructural component (i.e. the legacy telephone network) could be held liable for copyright infringement.

The act of providing broadband access, as a legal and policy matter, does not (and should not) give rise to any form of secondary liability even requiring a shield. The law as it stands has no indication of how ISPs are supposed to obtain knowledge of repeat infringers; there's no requirement to accept notices under the DMCA; and they do not host any material. On a policy level, ISPs do not (and should not) have a general duty to track their users' activity--let alone to terminate a customer's connection to the broader internet over unproven, private allegations of a civil offense.

MS. KIBBY RESPONSE TO QUESTIONS

Congressman Greg Stanton

Statement:

More than 20 years ago, the policy makers who pioneered the Internet Age worked together to craft Section 512 of the Digital Millennium Copyright Act. Section 512 was created to protect "original works of authorship" under copyright law by providing safe harbors for online service providers. One of the provisions of that law sought to balance a copyright owners' ability to protect their works with the responsibility of an online service provider to remove the content from a website. Providers who comply with that provision - what is known as ″notice and take down″ - can limit their liability.

All of us know, though, that since that law was passed, the Internet has changed significantly, far beyond what any of us could have imagined in the late 1990s. We use the Internet to learn, to watch movies, TV and user-created content, to buy and sell, to set the thermostat in our homes and so much more. With this exciting growth have also come significant challenges for copyright owners who have an inherent right and need to protect their content.

One of the most prevalent forms of copyright infringement is online streaming. In fact, illegal streaming now accounts for 80 percent of digital piracy including illegally streamed music, movies, and shows.The recent report by the Copyright Office considered whether Section 512 is currently working for all parties that use it. Their finding was that ″the original intended balance has been tilted askew″ and that notice and take down notices have not fixed or even weakened digital piracy. The report also found that while online service providers are generally satisfied with Section 512, artists and content creators are not, and in my view, are justified in feeling so.

We need to modernize Section 512 to meet the challenges of the modern age. Congress must be mindful of the concerns on both sides of this issue and realize that remedies will have to be scalable to the issue in the Internet ecosystem. A solution that works for a small business might not work for Facebook. One fix will not solve every problem. Like many of my colleagues and witnesses here today, I also believe that we must strike the right balance between combating digital piracy without stifling innovation or free speech. I appreciate the testimony I have heard so far today and look forward to working with Chair Nadler, Ranking Member Jordan, and stakeholders on finding solutions that are sustainable and helpful to creators and the platforms that host the content.

Questions:

For all witnesses:

- Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on Section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: *If Congress and stakeholders do not come back to the table and work together on ways to modernize and Section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use Section 512?*

  The current application of section 512 has already cost so many of my fellow creators their careers and their livelihoods. In light of the additional harm COVID–19 has wrought on creatives, if we don't address the shortcomings of 512 and, more appropriately, its implementation, many more will have no choice but to abandon their craft and the digital marketplace, our culture, will suffer.

  Of course, failing to correct section 512's deficiencies will allow irresponsible companies to disadvantage and prosper at the expense of other businesses—particularly smaller and newer ones—that obtain the proper licenses and responsibly address any infringing activity on their platforms. Edging out smaller players through unethical and unfair means under the cover of section 512 is a threat to growing and legitimate businesses, to creators, and to the marketplace itself. We don't allow brick and mortar businesses to be driven by illicit activity and we can't allow the Internet to be either.

- One of the concerns that I have heard about changing Section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and

smaller businesses to not compete altogether. *What are some ways that these concerns can be alleviated if Section 512 is in fact changed?*

Section 512 was created more than 2 decades ago, in part to help fledgling Internet businesses get their footing in a nascent online environment. The law provided them significant protections and now, today, many of those businesses are multibillion-dollar international behemoths. They are raking in money off content while creators of that content like me, are barely making a living. The true risk in NOT addressing the shortcomings of section 512 is to the millions of smaller creators out there who struggle to make ends meet as they are expected to comb the vast depths of the Internet to find the infringements preventing them from making a return on their investment.

In addition, the real risk to smaller businesses, and the actual reason they may be unable to compete, is that an ineffective section 512 gives an unfair competitive advantage to companies that are able to offer infringing and unlicensed works with impunity. A section 512 that worked as Congress intended would not only stop the infringing activity through an effective notice and STAYDOWN system, it would preclude many of these illicit and undeserving businesses from qualifying for the safe harbor in the first place, which would benefit smaller businesses playing by the rules.

Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including Section 512's safe harbors and notice-and-takedown system. The Copyright Office found in its report that education resources about notice-and takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but *what more can the Copyright Office do to restore these imbalances?*

Education is an important component in establishing an effective notice and takedown system, and the Copyright Office is uniquely positioned to offer that. The Copyright Office could also be instrumental in helping to establish standard technical measures used to recognize and stop infringing activity. Congress included these STMs in section 512 and expected their implementation based on a broad consensus of participants, but for two decades tech companies have refused to come to the table to establish them. And why should they? The current operation of Section 512 creates an imbalance that benefits tech companies at the expense of creators. Establishing STMs would increase their responsibilities and interfere with those benefits. With prompting by Congress, however, the Copyright Office could serve to bring the parties together and finally establish, as intended, the STMs that could help prevent the mass infringement now occurring online.

- *What is the one change that you would like to see to Section 512 and why?*

Ensure that, when infringing works are taken down, they do not reappear. Works that are removed due to a takedown notice are routinely—and often automatically and instantly—reposted. There is no reason that a creator like myself should have to send a repeat notice for the same work, on the same platform, and often by the same user, ad infinitum. It's no wonder so many of my colleagues have decided to give up—their jobs had transformed from creating their art to searching for infringements of it. Endlessly. That's not a livelihood, it's debilitating and creative purgatory. It robs us of agency and of focus. Takedown should effectively mean staydown. That is what Congress intended and that is the only way section 512 will be successful.

Questions for the Record From Rep. Reschenthaler:

You identified Twitter as a platform that makes it difficult for creators to effectively enforce their rights through the notice-and-takedown process. Would you elaborate on the problems associated with Twitter's copyright infringement policies, and how you think they should be doing things differently?

Twitter is an incredible platform with some brilliant technical minds behind it that is very capable of doing more. I wish there were more will and desire to address the key problems regarding infringement that they are well aware of and more than capable of entering into nitty-gritty dialogue about how to fix.

Unfortunately, like so many other digital platforms, I know both anecdotally from colleagues and from my own experience that Twitter

largely fails on both ends—notice and takedown. The platform makes it difficult to figure out how to send notices and then can take an eternity to remove an infringing work. And then, of course, when a work is finally taken down, it almost always pops right back up and we have to start all over again. So, yes, on paper technically we have rights but, under such an inoperative system, we effectively have none as it pertains to effectuating a just outcome.

BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

HEARING ON SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

RESPONSES OF JONATHAN BAND TO CONGRESSMAN STANTON'S QUESTIONS FOR THE RECORD

- Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on Section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: *If Congress and stakeholders do not come back to the table and work together on ways to modernize and Section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use Section 512*?

Thanks in large measure to Section 512, we live in a golden age of content creation and distribution. The amount of information individual users can access from home, the office, or the road, is astounding. *See* Techdirt, *The Sky Is Rising*, https://skyisrising.com/. Much of this information, posted with the authorization of the rights holder, is free. Similarly, the Internet enables these users to upload their own creations to social media platforms where they can be accessed by a global audience. If Section 512 is left undisturbed, this golden age will continue.

The vast majority of individual creators benefit greatly from the democratization of distribution enabled by the Internet. They can now reach their audience without reliance on the traditional media gatekeepers. To be sure, there is a subset of individual creators for whom the Internet, with its risk of infringement, may be a net negative. It is entirely speculative whether recalibrating the balance established in the DMCA will actually address the concerns of this subset. Amending Section 512 might not reduce online infringement; and even if it does, these creators might not see any additional revenue. At the same time, if the safe harbors limiting the copyright liability of the websites hosting user-uploaded content were contracted, the Internet could not be as open. Web hosts would only make available material from trusted sources or would have to impose higher fees.

- One of the concerns that I have heard about changing Section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller businesses to not compete altogether. *What are some ways that these concerns can be alleviated if Section 512 is in fact changed*?

Unfortunately, these concerns cannot be alleviated. The uncertainty that would result from the changes proposed by the Copyright Office would have a chilling effect on investment and innovation by new businesses. Large, established companies could better absorb the costs flowing from the uncertainty. The changes proposed in Chairman Tillis's discussion draft, which

go much farther than the Copyright Office's, would result in unending uncertainty as the Copyright Office recreates new legal standards every five years.

- Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including Section 512's safe harbors and notice-and-takedown system. The Copyright Office found in its report that education resources about notice-and takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but *what more can the Copyright Office do to restore these imbalances?*

I disagree that the number of inappropriate takedown notices has anything to do with copyright education. The entities sending the vast majority of abusive takedown notices are sophisticated players who know exactly what they are doing. *See* Jennifer Urban, Joe Karaganis, and Brianna Schofield, *Notice and Takedown in Everyday Practice*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628 (2017). They are intentionally gaming the system to their benefit.

- *What is the one change that you would like to see to Section 512 and why*?

Congress needs to explore ways of addressing the problem of abuse of the notice-and-takedown system. This might involve government enforcement outside the context of Section 512. For example, perhaps the Federal Trade Commission should be provided with additional tools to deal with the anticompetitive misuse of the notice-and-takedown system.

Additionally, libraries should not be required to register their designated agent with the Copyright Office under section 512(c)(2). The requirement to register a designated agent with the Copyright Office is a bureaucratic obstacle that traps less sophisticated OSPs without providing meaningful benefit for rights holders.

Finally, if additional burdens are imposed on online service providers ("OSPs"), such burdens should be placed only on commercial OSPs, and not OSPs operated on a nonprofit basis, such as libraries.

December 21, 2020

December 18, 2020

Matt Schruers
President, Computer & Communications Industry Association
Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades
Hearing before the House Committee on the Judiciary on September 30, 2020

QUESTION FROM REP. RESCHENTHALER

1. **Some online service providers (OSPs) offer products intended to help creators monitor and prohibit infringement of their works. This makes sense because OSPs are the ones that have the technologies creators need to effectively find and evaluate potential infringements of their works, as the DMCA instructs them to. However, some OSPs don't readily provide access to these tools; in fact, some withhold them outright and others charge for access. Why aren't these technologies broadly available to creators at no additional charge? Otherwise, the sole burden is on creators to enforce their rights in today's digital environment. Should creators pay OSPs that host the infringing works for the tools they need to address those infringements?**

I write in response to the Committee's questions conveyed on December 16, 2020, following the above-referenced hearing on September 30, 2020. Due to the limited time for reply, these answers are necessarily brief, but CCIA looks forward to continuing discussions with the Committee members.

Some companies have different tools tailored to different types of creators. The more powerful the copyright management tool, the bigger the risk that it is abused to unfairly appropriate earnings of other content creators, or suppress those creators' voices. Companies must therefore balance these concerns so that the risk of abuse and misuse is as low as possible. Companies calibrate access to tools to the needs of different rights-holders and creators, which may differ in, for example, the types of content they own, the volume of requests they submit, their ability to dedicate time and resources, their understanding of copyright law, and the complexity of their licensing arrangements.

Unfortunately, even major rights-holders can mismanage such tools, resulting in unfair or inaccurate claims on legally uploaded content. Given the outsized negative effect that misuse of tools has on the broader ecosystem, digital services generally work to match rights-holders with the solution that best suits their needs and the resources they can dedicate to responsibly managing the tool.

The tools and access to them continue to evolve through constructive conversations between rights-holders and digital services. Congress should do what it can to maintain a cooperative spirit between rights-holders, digital services, and users — particularly given that these constituencies increasingly overlap — rather than pit stakeholders against one another.

December 18, 2020

Matt Schruers
President, Computer & Communications Industry Association
Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades
Hearing before the House Committee on the Judiciary on September 30, 2020

QUESTIONS FROM REP. STANTON

1. **Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on Section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: *If Congress and stakeholders do not come back to the table and work together on ways to modernize and Section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use Section 512*?**

I write in response to the Committee's questions conveyed on December 16, 2020, following the above-referenced hearing on September 30, 2020. Due to the limited time for reply, these answers are necessarily brief, but CCIA looks forward to continuing discussions with the Committee members.

As enacted, Section 512 provides necessary flexibility that has been able to adapt to changes in new technology. The DMCA's flexibility has been crucial to the creation of effective technological tools and private-sector practices that have evolved because of the legal certainty that Section 512 offers.

2. **One of the concerns that I have heard about changing Section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller businesses to not compete altogether. *What are some ways that these concerns can be alleviated if Section 512 is in fact changed*?**

While it is difficult to be specific without additional details regarding the proposed changes, Section 512 currently provides critical legal certainty for the digital economy, which

according to U.S. government data accounted for 6.9% of U.S. GDP, $1.35 trillion, in 2017.[1] Economic research demonstrates that regulatory certainty about copyright intermediary protections encourages investment and innovation in this sector.[2] Reforms that would push services to more readily take down lawful content, or terminate accounts inappropriately, would harm this ecosystem, with the burden falling disproportionately on small businesses and independent content creators who may lack the resources to resist unjust claims against them by other putative rightsholders.

3. **Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including Section 512's safe harbors and notice-and-takedown system. The Copyright Office found in its report that education resources about the notice-and-takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but *what more can the Copyright Office do to restore these imbalances?***

As CCIA explained at greater length in a letter to the Committee in January 2017,[3] the objectives of copyright law would best be served by focusing the Copyright Office's energies on modernization, and enhancing the Office's core responsibilities of registration and recordation.

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[1] Bureau of Economic Analysis, *Digital Economy Accounted for 6.9 Percent of GDP in 2017* (Apr. 4, 2019), https://www.bea.gov/news/blog/2019-04-04/digital-economy-accounted-69-percent-gdp-2017.

[2] Survey research found that changing regulations to remove intermediary protections would have a negative effect on venture capital investment. Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), https://www.strategyand.pwc.com/media/uploads/StrategyandImpact-US-Internet-Copyright-Regulations-EarlyStage -Investment.pdf. Similarly, economic research found that venture capital investment in cloud computing firms increased significantly in the U.S. relative to the EU after a copyright decision involving intermediary liability. *Compare* Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), *available at* https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf; *with* Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), *available at* http://cdn.ccianet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf.

[3] *See, e.g.*, CCIA Comments to House Judiciary Committee on Copyright Office Modernization (Jan. 31, 2017), *available at* https://web.archive.org/web/20181222192621/https://judiciary.house.gov/wp-content/uploads/2017/01/computer-communications-industry-association.pdf.

4. ***What is the one change that you would like to see to Section 512 and why?***

As discussed at greater length in my written testimony to the Committee in September, Section 512(f)'s penalties, designed to deter misuse, have proven to be inadequate. Strengthening this provision would improve the situation, though it is an incomplete solution.

Respectfully submitted,

Matt Schruers
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Terrica Carrington, Vice President, Legal Policy and Copyright Counsel
Copyright Alliance

Questions:

For all witnesses:

- **Section 512 was enacted in 1998, more than 20 years ago. It took the Copyright Office more than 5 years to write the report on Section 512. It seems to me that although technology certainly does move fast, solutions to the problems at hand are coming slowly. My question for all of the witnesses is: *If Congress and stakeholders do not come back to the table and work together on ways to modernize and Section 512 and find solutions to the issues we have discussed here today, what will happen to the Internet and to the stakeholders that use Section 512*?**

In the past two decades since the DMCA was enacted, online infringement has increased exponentially, causing widespread harm to the economic and creative vibrancy of the copyright community. Piracy and infringement are not victimless acts. The kind of rampant infringement taking place on the internet today causes significant harm to creators, including millions of individual creators and small businesses across the country, who are robbed of control of their work, and the chance to recoup their investments. A business can only operate at a loss for so long before closing up shop; many individual creators have had to give up their careers and shutter their small businesses because it is virtually impossible to succeed in a market where infringement forces them to compete with pirated, "free" versions of their own work. Meanwhile, bad actors who make no investment and take no risk are unjustly enriched, and internet platforms bring in billions of dollars in revenue while turning a blind eye to the infringement. With each passing year, more creators are forced out of business, and the notion that a creative career is not a viable long-term option becomes more widespread. If we do not address the problems that ail Section 512, this trend will continue, to the detriment of creators as well as our society, culture, and economy. Businesses, large and small, across the creative industries employ nearly 5.7 million people in the United States. All 5.7 million of those jobs depend on a copyright law that is effective in combatting infringement.

A safe and secure internet benefits us all. A truly free internet, like any truly free community, is one where people respect the rights of others and can engage in legitimate activities without a threat of harm—and where those who do not respect the rights of, or cause harm to, others are held accountable. The United States has been a world leader in creativity and innovation because of its strong protection for intellectual property rights. However, if we allow the deficiencies in Section 512 to remain unaddressed, the U.S. is unlikely to retain that status.

- **One of the concerns that I have heard about changing Section 512 are the barriers to entry for new businesses. Uncertainty due to changes in the law and not being able to afford litigation on copyright infringement can cause new and smaller**

businesses to not compete altogether. ***What are some ways that these concerns can be alleviated if Section 512 is in fact changed?***

As a general matter, the nature and scale of an OSPs anti-piracy program should be commensurate with the amount of infringement on its site. We do not expect a small-scale platform with relatively little infringement to implement an anti-piracy program as complex as an OSP like Google or Facebook. However, it's worth noting that any business—large or small, old or new—whose business model relies on infringement will undoubtedly view a well-functioning Section 512 as a barrier to its business. Whether online or brick and mortar, the fact that a business is new and small does not, and should not, give it a free pass to run roughshod over the rights of creators (many of whom are also operating small businesses), while it amasses wealth on the backs of struggling creators. Right now, it's the creators who bear the burden of uncertainty. Righting the intended balance of the DMCA does not require that service providers accept unreasonable risk or uncertainty. The idea of the DMCA was always simple and straightforward: Good actors should enjoy liability protection, bad actors should not. If you know that infringement is ocurring on your site or service, you should be required to take action in response. The problem is that the courts have read the statute so broadly as to protect both good and bad actors, and that is not what Congress intended when it passed the DMCA. This creates an enormous amount of uncertainty for creators who are asked to invest resources, time, and money into something they may never be able to protect. Shifting the balance back to where it was intended would not in any way create unreasonable or unmanageable uncertainty for those who are, in fact, good actors.

With regard to standard technical measures (STMs), it's important to understand that section 512(i) does not require consensus on a given STM from all stakeholders across every industry. Section 512(i) requires only "broad" consensus. Thus, there can be significant flexibility in agreeing to STMs across different types and sizes of copyright owners, OSPs, users and services. There need not, and should not, be a one-size-fits-all approach.

Your question also mentions the expense of federal copyright litigation. This is a problem for individuals and small businesses whether on the creator side or the user side of a copyrighted work. The Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), H.R. 2426 and S. 1273, which is currently pending before Congress, would address this by creating a voluntary, low-cost alternative to federal court for small copyright claims. The Copyright Claims Board created by the CASE Act would be able to hear claims of infringement brought by copyright owners as well as declarations of non-infringement brought by users, as well as claims of misrepresentation under section 512(f) brought by either side. Consequently, the small claims court created by the CASE Act would benefit both copyright owners and users who cannot afford to bring their claims or defenses in federal court.

- **Just this morning the U.S. Copyright Office launched a website dedicated to the Digital Millennium Copyright Act which consolidates information and resources about various aspects of the Act including Section 512's safe harbors and notice-and-takedown system. The Copyright Office found in its report that education**

resources about notice-and takedown system may help "alleviate certain imbalances in the section 512 framework by reducing the number of inappropriate notices and counter-claims." This is certainly a step in the right direction, but *what more can the Copyright Office do to restore these imbalances?*

We commend the Copyright Office for launching these new webpages dedicated to information and resources on the DMCA, and for committing in its Section 512 Report to publish standard notice and counter-notice forms. These efforts on the part of the Copyright Office are a good start, but service providers must do more to make the process for sending a DMCA notice clearer, including greater transparency, conspicuous placement of DMCA forms, and uniformity. The Copyright Office can only do so much if service providers are allowed to ignore the standard notices and guidance by the Office and there are no repercussions for doing so. The Copyright Office should also make clear that the standard forms are a floor and not a ceiling. Service providers should be encouraged to work cooperatively with rightsholders to promote trusted notifier programs, technology tools, and other mechanisms to ensure that their efforts to work with rightsholders to identify and respond to infringement are both efficient and effective.

Regarding STMs, the U.S. Copyright Office should take the lead in facilitating these discussions among stakeholders, as well as recognizing existing STMs that have been developed in the marketplace. This fall, the Office took its first steps towards facilitating the development of STMs and we support their ongoing efforts. But if OSPs do not support the Copyright Office process, and refuse to be willing participants in it, then Congress should vest the Copyright Office with the regulatory authority to proceed without them.

- ***What is the one change that you would like to see to Section 512 and why?***

There is no silver bullet solution to fixing what ails Section 512. Instead, we must consider a host of different options that together can help alleviate the uneven burden on copyright owners and impose accountability on OSPs. Given that, despite there already being a mechanism in Section 512 for implementing STMs, no STMs have been adopted to protect copyrighted works, this is an area ripe for action. Recognizing the important role that technology would play in combatting infringement, and the need for stakeholders on both sides to work together to develop and implement that technology, in its 1998 report on the DMCA, the Senate Judiciary Committee stated that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in the digital age," and urged stakeholders "to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals." This rationale led Congress to include section 512(i) in the DMCA, specifically conditioning eligibility for safe harbor protection on whether a service provider "accommodates and does not interfere with standard technical measures," which are to be developed based on "a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process." The lack of STMs is a significant contributing factor to the lack of balance apparent in the Section 512 today, and addressing this problem would go a long way toward recalibration. As stated in the response above, if OSPs continue to refuse to be willing participants in developing and adopting STMs, then Congress should vest the Copyright

Office with the regulatory authority to proceed without them. If forced to limit our recomendations to only one change, this would be the change we would recommend because the STM provison already exists in the law and giving the Copyright Office regulatory authority as we suggest could be passed by Congress surgically and quickly, without the need for opening up the entire DMCA, which would be very complex and take a long time to reform.

If not limited to one change, then the list would likely begin with fine-tuning the knowledge standards, as recommended by the Copyright Office in its Section 512 Report, so that when courts consider the red flag knowledge standard in the future they interpret it correctly and as Congress intended. Various courts' interpretation of the red flag standard is so incorrect and restrictive that it has basically eliminated the careful balance that Congress intended and has effectively written the red flag knowledge standard out of the statute. Some courts have also incorrectly applied the concept of willful blindness, allowing OSPs to benefit from safe harbor protection despite turning a blind eye to infringement.

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