The Artists Rights Society (ARS) is the preeminent visual rights society and Copyright Management Organization (CMO) in the U.S. It represents the intellectual property rights, including the copyrights, of more than 122,000 artist members worldwide. Its rolls are comprised of painters, sculptors, illustrators, and architects, and include such well-known names as Frank Stella, Faith Ringgold, Pablo Picasso, Henri Matisse, Marc Chagall, Andy Warhol, Jackson Pollock, Mark Rothko, Georgia O’Keeffe, Alexander Calder, and Frank Lloyd Wright.

In the 22 years since enactment of the Digital Millennium Copyright Act (DMCA), digital reproduction of ARS members’ works and the display and distribution of such works using the Internet has fundamentally challenged the ability of ARS members to make meaningful use of the constitutionally grounded exclusive rights guaranteed to them under Section 106 of the Copyright Act. As more than 122,000 visual artists rely on ARS to monitor and license reproduction of their works, unauthorized digital reproduction is, today, ARS’ greatest challenge in effectively representing its members. Many works of visual art, today, are digitized, displayed, distributed, and commercialized in ways that had never been anticipated by artists at the time of their creation.

Last month the Copyright Office released its final report in a series of studies initiated in 2015 in response to two years of copyright reform hearings conducted by the House Committee on the Judiciary. The Copyright Office’s 198-page report exhaustively examined the two-decade history of Section 512 of the Digital Millennium Copyright Act (DMCA). Section 512 created a “safe harbor” for Internet Service Providers (ISPs), immunizing them from liability for copyright infringement for content passively transmitted through their services. In return for this immunity, however, ISPs are obliged to “take down” content when a rights holder supplies them with formal notice that the content is infringing. ARS appreciates Chairman Tillis’ decision to schedule this hearing on the effectiveness of Section 512 and whether there is now a need to consider reform of the notice and take down procedures written into law more than twenty years ago.

On March 10 this subcommittee heard testimony from Professor Michael D. Smith, a member of the faculty of the Heinze College of Information Systems and Public Policy at Carnegie Mellon University. Professor Smith provided the subcommittee with an analysis of the 33 peer-reviewed academic studies to date that have examined the effect of digital infringement of copyrighted works on the Internet. On the basis of this analysis Professor Smith informed the subcommittee “that there is near unanimity in the academic literature that digital piracy does exactly what one
would expect: It makes it harder for artists and rightsholders to profit from their investments in content creation.”

The experience of ARS’ 122,000 visual artist members confirms Professor Smith’s findings. Piracy currently runs rampant, and there are now unlimited websites where one can purchase reproductions of protected works of art on posters, t-shirts, mugs, key chains, iPhone cases, and other items. Additionally, there are now more ways than ever for users to post and share images, for example on Facebook, Instagram, Pinterest, Tumblr, YouTube, and other such websites that are commonly used for marketing purposes by commercial entities. While ARS carries out an active program of enforcement on behalf of its members, the limitations in current U.S. law – including the notice and takedown provisions of Section 512 – are inadequate to secure the exclusive rights guaranteed to its members in Article I, Section 8 of the Constitution.

In his March 10 testimony before the subcommittee, Loyola Marymount University law professor, Justin Hughes, discussed an extensive study by academicians Jennifer Urban, Joe Karaganis, and Brianna Schofield, showing a stark divide between big and small entity content owners. Large, corporate rightsholders now employ automated systems to detect copyright infringements. These systems send digitized §512 ‘notices’ to similarly automated systems of “major platform” ISPs. In the case of one representative example, Microsoft, 99.67% of automated takedown requests to its platform were accepted and the infringing URLs disabled. However, these “auto-DMCA” mechanisms are unavailable to millions of small business and individual rights holders, such as the artist members of ARS. While ARS attempts to police the Internet on behalf of its members, it is able only to employ what Professor Hughes calls the “classic system,” utilizing manual search and notification methods.

With over 122,000 members, many with massive bodies of work, it currently is not possible to pursue even a fraction of the infringing uses of ARS members’ works on the Internet. Therefore, ARS focuses its takedown efforts on the most commercial of uses and those that its members most complain of. Even so, there still are time-consuming and costly hurdles for ARS in protecting its members’ works. These include:

a. Internet service providers commonly reject bona fide takedown notices upon their initial submission, seeking more details through formulaic responses even when the exact URL’s and all other required elements pursuant to §512(c)(3) are provided. ARS has encountered this resistance and has spent time resubmitting notices and explaining to websites why they are obliged to take down the infringing uses at issue to qualify for a safe harbor.

b. ARS has encountered sellers, often from Asia and Eastern Europe, listing hundreds of infringing items on U.S. websites by popular artists (e.g., Andy Warhol or Pablo Picasso). Since most websites require specific URLs to be listed before removing the items, ARS submits these takedown notices in several large batches until these career infringers’ accounts are ultimately disabled. These are usually the users that cause the so-called whack-a-mole problem, as the same items are relisted under another seller name.
c. Some websites rely on privacy proxy services (e.g., domains by proxy) indicated on Whois registries to conceal their actual contact information. To contact such websites, ARS sends its notice to the proxy’s email. These notices are largely ignored by the website hosting the infringing content, and the proxy services generally do not take any action and appear to be automated.

d. Another problem, identified in the Copyright Office study is counter-notices which, while few in number, are extremely intensive, taking time and resources away from other infringement policing efforts. Sophisticated infringers are aware of this and purposely up the ante by filing counter-notices in an effort get rights holders to abandon enforcement as not worth the effort. In one such case, an infringer had brazenly displayed an entire film by an ARS artist, merely adding instrumental music in the background before posting it to a commercial website surrounded by advertising. Even in such cases, the cost and burden of filing a federal lawsuit pursuant to §512 (g)(2)(C) has to be carefully considered by ARS and its individual artist members.

The recent Copyright Office Section 512 Report confirms that the foregoing problems encountered by ARS are not unique and are common to rightsholders attempting to protect themselves from online infringement when infringers willfully assert, not only the delaying tactics expressly permitted in Section 512 as written, but also continue aggressively to use litigation to attempt to increase the burden on rightsholders. This is a particularly onerous problem for ARS members because they must personally bear the financial burden if enforcement of a takedown order requires litigation.

An example has been the effort to dilute the effectiveness of Section 512 (i) which provides that any ISP seeking the safe harbor benefit must have policies that provide for termination of repeat infringers. The Copyright Office Report notes that lack of specific statutory definition has encouraged some ISP’s to interpret this obligation as applying only to repeated adjudicated infringers so that a rights holder would have to go to court multiple times in order for the ISP to stop a persistent copyright scofflaw. ARS and its members typically lack the resources to take infringers to court multiple times to deny them access to Internet platforms for repeated infringement. The Copyright Office Report cites Corbis Corp. v. Amazon as an example of a case where §512 (i) was construed too narrowly, and an ISP was permitted to refuse a rightsholder’s justifiable request for termination of access to the site by a repeat infringer.1 In that case the Court permitted Amazon to allow a user to continue to sell goods through the Amazon marketplace by repeatedly creating new accounts after takedown of the initial account in response to the first take down request.

Section 512 (m)(1) does not require Internet service providers to monitor their websites or affirmatively seek facts to determine infringing activity. However, if the service provider has actual or “red flag” knowledge of the infringing activity then it does not qualify for the safe harbor. "[T]he actual knowledge provision turns on whether the provider actually or 'subjectively' knew of specific infringement, while the red flag provision turns on whether the

1 351 F. Supp. 2d 1090.
provider was subjectively aware of facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person.”

Courts have diluted the red flag obligation for OSPs to deny continued access to a user where “infringing activity is apparent.” The Copyright Office Report discusses the Ninth Circuit’s holding that “general knowledge that one’s services could be used to share unauthorized copies of copyrighted material” is not enough. In another case, the Court found that where an alleged infringer actually described photographs as “illegal” or “stolen” there was not a red flag because the use of the words illegal and stolen “may be an attempt to increase their salacious appeal, rather than an admission that the photographs are actually illegal or stolen.” ARS views this as example that is particularly troubling.

ARS’ experience is that even after multiple valid takedown notices over the span of several months, the same series of works continue to be found on the same website. On such occasions, ARS should be able to assert that the website has a “red flag” that encompasses infringing uses that were not specifically listed in prior takedown notices and should lose its safe harbor status.

If section 512 were to be amended to include a definition of “red flag” knowledge, then Internet service providers would be incentivized to take a more active approach. If numerous takedown notices identifying the same infringing uses within a short period were to automatically trigger “red flag” knowledge, then copyright owners would not have to go to court to obtain damages. Everyone would benefit. Users’ would have increased confidence in the copyright security provided through use of legitimate websites as opposed to their unscrupulous competitors. Artists – who overwhelmingly possess limited financial resources – would benefit by the reduced likelihood of having to initiate costly litigation to secure their legitimate rights. ARS strongly urges the subcommittee to address this issue legislatively.

ARS has observed the willful blindness of certain websites on which piracy flourishes. Regretfully, several reported cases have construed the obligations of websites narrowly with the result that websites are not compelled to go beyond removing uses that are specifically identified in proper section 512 notices. The Copyright Office Report agrees that these cases misread Congress’ intent, and ARS urges the subcommittee to act on the Copyright Office’s conclusion.

ARS believes that an issue of particular importance discussed in the Copyright Office Report is whether a rights holder must consider the existence of fair use before sending a takedown notice. This is a requirement imposed by the Ninth Circuit in Lenz v. Universal Music Corp. However, the test imposed by the Court in that case does not really translate to works of art that are copied in their entirety, unlike a film or video work that is excerpted. Section 512 should place the burden of establishing fair use (an affirmative defense) on the user of the copyrighted material.

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3 UMG Recordings v. Veoh, 718 F. 3d 1120 (9th Cir. 2015)

4 Perfect 10, Inc. v. CC Bill, LLC, 488 F. 3d 1109 (9th Cir. 2007)

5 UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013).

6 804 F. 3d 1120 (9th Cir. 2015)
The copyright owner is already under the great burden of continuously monitoring and counteracting infringing uses.

ARS always takes a cautious approach when removing works of art through section 512 notices on behalf of its members and focuses its efforts on the most problematic infringing uses. When ARS identifies an online use as infringing, it addresses such unlicensed use through demand letters, or through takedown notices for websites that avail themselves of section 512. In both cases, the user may assert fair use as an affirmative defense.

The counter-notice procedure provided for in section 512(g) is a mechanism that allows users to assert that their use is non-infringing and ARS believes that this is the mechanism that should have been used to address the fair use issue raised in *Lenz*.

While the Copyright Office suggests that the evolution of this issue in the courts simply be monitored by the Congress, ARS believes that the Ninth Circuit imposes a burden that is too subjective on rightsholders and the statute should be clarified to place responsibility on the recipient of the take down notice to raise the issue in a counter-notice.

Another part of the Copyright Office Report that ARS recommends the subcommittee consider seriously is the discussion of the “Notice-and-Staydown” requirement adopted in a recent European Union Directive. The Report describes such a system as follows:

> Once a webhost is on notice that a work is being infringed, it should not receive continued safe harbor protection unless it takes reasonable measures to remove any copies of the same work reposted by the same user and also takes down all infringing copies of the work that bear the same reasonable indicia provided by the rightsholder.

ARS strongly supports an amendment to Section 512 that would harmonize U.S. law with the European Directive on notice and staydown.

In conclusion, ARS believes that the notice and takedown system of the DMCA is not working as intended when it was enacted in 1998 and that Congress should amend Section 512 to preserve effectively the constitutionally mandated rights of visual artists in the Internet environment of the 21st Century.

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