



Statement of

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**before the
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY**

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Good afternoon, Chairman Tillis, Ranking Member Coons and staff of the Subcommittee on Intellectual Property and thank you for the opportunity to testify at today’s briefing on the requirements and procedures related to filing a takedown notice under section 512, and for holding the year-long series of hearings on the Digital Millennium Copyright Act (DMCA).

My name is Keith Kupferschmid and I am the CEO of 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, coders, bloggers, artists and many more individual creators and small businesses that 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.

When Congress enacted the safe harbor provisions of the DMCA, the intent was to “appropriately balance[] the interests of content owners, on-line and other service providers, and information users”¹ by incentivizing “service providers and copyright owners to cooperate to

¹ H.R. REP. NO. 105-551, pt. 2, at 21 (1998).

detect and deal with copyright infringement”² online. As these hearings and the recent Section 512 report issued by the U.S. Copyright Office have demonstrated, that balance has not been achieved. While online service providers (OSPs) are routinely shielded from liability under the DMCA, the problem of online copyright infringement has grown enormously since 1998, leaving copyright owners to bear the brunt of the burden of detecting and dealing with infringement.

A number of factors have skewed this balance over the years. In a prior written statement that we submitted for the record for the third DMCA hearing held by the Subcommittee earlier this year, we described in great detail the many problems with Section 512 that have developed over the years, including the immediate reposting of infringing material once it has been taken down—a phenomenon known as the “whack-a-mole problem”—and faulty court rulings misinterpreting key provisions of section 512, like the red flag knowledge standard. We raised concerns about the failure to implement Standard Technical Measures (STMs) under section 512(i), and the lack of uniformity, transparency and enforcement of repeat infringer policies. We also discussed the many changes in technology, access and business practices since the DMCA’s inception which have dramatically decreased the potential effectiveness of section 512. Because the focus of today’s briefing is on the requirements and procedures related to filing a takedown notice under section 512(c)(3) and a counter-notice under section 512(g)(3), I will limit my comments to those two provisions. But before doing so I want to emphasize that the concerns raised in our prior written statement are of equal, if not more, significance than the issues and concerns I will discuss today.

Representative List

Let me begin by discussing the notice requirements in section 512(c)(3) and specifically the “representative list” requirement in section 512(c)(3)(A)(ii). This provision 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.” When the DMCA was enacted 22 years ago the representative list

² H.R. REP. NO. 105-551, pt 2., at 49 (1998).

language was an extremely important component of the DMCA. As online piracy has grown over the years so has the significance of this provision.

Congress did not intend to require that notices include each specific URL where an infringement appears, as some courts have ruled. In addition to the language in section 512(c)(3)(A)(ii) expressly allowing for the submission of a representative list, the legislative history also explains how the “representative list” requirement is satisfied and that it is not very exacting:

“[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.”³

While some courts have indicated that Section 512(c)(3)(A)(iii), often referred to as the “identifiable location” provision, supported their conclusions that specific URLs must be provided for a notice to be valid, that provision does no such thing. Rather, it simply states that the takedown notice must identify the infringing material by including “information reasonably sufficient to permit the service provider to locate the material.”

Where there are multiple works being infringed, it is clear from the statutory language and the legislative history that Congress did not intend to require that takedown notices identify infringing material by URLs. If Congress intended that, it could have been more specific – as it was in the representative list provision when it referenced “single online site.” Further the legislative history states:

³ H.R. REP. NO. 105-551, pt. 2, at 55 (emphasis added).

“Subsection (c)(3)(A)(iii) requires that the copyright owner or its authorized agent provide the service provider with information reasonably sufficient to permit the service provider to identify and locate the allegedly infringing material. *An example* of such sufficient information would be a copy or description of the allegedly infringing material and the URL address of the location (web page) which is alleged to contain the infringing material. The goal of this provision is to provide the service provider with adequate information to find and address the allegedly infringing material expeditiously.”⁴

Congress listed a URL as “*an example*,” not as a requirement. And the statute plainly doesn’t require it. Indeed, in some cases, as with mobile apps, there is no readily accessible URL or other persistent identifiable information available upon which to send a notice. The courts have also interpreted paragraph (iii) as applying to instances where multiple works are at issue even though the text of the legislative history makes clear that the example of using a URL was limited to one “URL address” not multiple *addresses*, which would often be necessary to identify multiple works.

Most creators lack the time, money, and resources to list with specificity every single URL containing every single infringing copy of their work in a takedown notice—a gargantuan task. Yet, notwithstanding the express language in section 512(c)(3)(A)(ii) to the contrary and the clear intent of Congress, courts have interpreted the statute in a way that places this immense burden on copyright owners. It makes little sense in practice to require individuals to find each discrete instance on a given site where their work is infringed, and rather than promote a fair and functional digital ecosystem, this standard discourages individual creators from enforcing their rights.⁵

⁴ S. REP. NO. 105-190, at 46 (1998) (emphasis added).

⁵ 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). *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 643 (S.D.N.Y. 2011) (finding that plaintiff “had to provide sufficient information—namely, additional web addresses—for [defendant] to locate other infringing material.”).

By conflating section 512(c)(3)(A)(ii) and (iii) and requiring specific URLs be included in the takedown notice where multiple copyrighted works are being infringed, courts have rendered the representative list requirement meaningless. We urge Congress to resolve this problem.

Additional Takedown Requirements Imposed by Service Providers

Another significant problem facing copyright owners is the practice by some service providers of imposing requirements beyond those prescribed under section 512(c)(3). In the Copyright Office’s Section 512 study, the Office notes that “the proliferation of new web-based submission forms and OSP-imposed requirements for substantiation of takedown notices in order to ensure the efficiency of the process has had the effect of increasing the time and effort that smaller rightsholders must expend to send takedown notices.”⁶

Some examples of the additional requirements that creators have reported include:

- Service providers requiring a rightsholder to submit a registration certificate to demonstrate proof that they are the copyright owner before the infringing material is taken down;⁷
- Service providers asking rightsholders to provide a link to their website to prove that they are the copyright owner of the work;⁸
- YouTube requiring rightsholders to provide a time stamp to indicate where in a video the infringement appears;⁹

⁶ See United States Copyright Office, Section 512 of Title 17: A Report of the Register of Copyrights at 5 (May 21, 2020) (“USCO Report”), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

⁷ See *id* at 154 (citing Tr. at 57:14–19 (May 2, 2016) (Lisa Shaftel, Graphic Artists Guild (“GAG”)) (“Creators have found that they can’t satisfy the requirements from a lot of the ISPs in their takedown notices. In particular, artists have said that many ISPs have required that they prove copyright registration as part of their takedown notice or other means of proving ownership of the image.”)).

⁸ See B. Brown, Additional Comments Submitted in Response to Copyright Alliance’s *Section 512 Survey* (2017) (“CA 512 Survey”) (unpublished 6086669995_Copyright-Survey-2017) (on file with author).

⁹ See Julian Bill, More Information and Better Tools to Resolve Manual Content ID Claims, YouTube Official Blog (Jul. 9, 2019), <https://blog.youtube/news-and-events/better-tools-to-resolve-manual-Content-ID-claims>.

- Service providers (such as Google) “requiring the rightsholder confirm whether they are the subject of a photograph, combined with “warnings” if they answer affirmatively;”¹⁰ and following up with creators to request that they explain how they are the copyright owner;¹¹
- Service providers requiring the copyright owner to affirmatively acknowledge the provisions of section 512(f); and
- Service providers (like Twitter) rejecting compliant takedown notices sent via email to the designated agent and re-directing the copyright owner to the service provider’s DMCA webform.

These practices create significant barriers to the effective use of the notice-and-takedown process, particularly for individual creators and small businesses who are less knowledgeable about the intricacies of the notice-and-takedown procedure, and rely on the forms and guidance provided by online intermediaries. And while creators endure the undue delay caused by this superfluous correspondence, the infringing material continues to draw an audience and earn revenue both for the infringer and the platform itself. These examples of service providers creating additional hurdles for sending a takedown notice go well beyond the requirements of the law, and cause some creators to question whether these additional hurdles are intentionally designed to discourage use of the notice-and-takedown process.¹²

¹⁰ See USCO Report at 154 (May 21, 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> (citing Google Inc., Additional Comments Submitted in Response to U.S. Copyright Office’s Nov. 8, 2016, Notice of Inquiry at 9–10 (Feb. 21, 2017) (“Google Additional Comments”) (“The commenter also pointed out that we 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. This, in turn, streamlined the removal process for meritorious notices and decreased our turnaround time for removal of images.”) (internal citation omitted)).

¹¹ See The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Additional Comments on Section 512 Study at (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92439>.

¹² See Anonymous, Additional Comments Submitted in Response to CA 512 Survey (unpublished . 6064677435_Copyright Alliance DMCA survey) (on file with author) (stating that Google, Amazon, etc. “often seem to make sending takedowns or dealing with infringements as time consuming as possible and I get the impression they have no real interest in stopping it”).

If Congress thought it necessary for rightsholders to provide more information in a takedown notice it could have easily expanded the list of requirements. For example, Congress could have added a requirement that a rightsholder include a copyright registration certificate or a registration number in a takedown notice. Instead Congress chose to require a statement under penalty of perjury that the notice sender is the rightsholder or is authorized to send the notice by the rightsholder.¹³

If a service provider wants to impose additional requirements and ignore the policy decisions made by Congress, there is nothing stopping it from doing so. But a service provider that chooses to do so and does not take properly noticed infringing material down expeditiously (regardless of whether the service provider receives the additional information requested from the notice sender) cannot avail itself of the DMCA safe harbors.

The Copyright Office Section 512 Report also identifies instances of service providers outright refusing to act upon takedown notices on the grounds of their own fair use assessments. The Report referred to instances where OSPs believe they were dealing with a “case[] of apparent fair use” and declined to act on takedown notices that they determined were “directed at clear fair uses, clearly uncopyrightable content, or contain clear misrepresentations regarding copyright ownership.” As above, while OSPs do have the right to decide whether they want to remove infringing material in response to a takedown notice they do so at their own peril because by declining to act on a takedown notice they are no longer eligible for the DMCA safe harbors.

Problems with Web Forms Used by Service Providers

Another concern related to the mechanics of the notice and takedown process flows from the OSPs’ increasing reliance on web-based submission forms that introduce additional friction into

¹³ In addition, the notice and takedown process was intended to render expeditious removal of infringing content to combat the speed with which infringing material can be disseminated online. And since a copyright owner’s rights exist from the moment a work is created, regardless of whether the work is ever registered with the Copyright Office, it would only exacerbate the harm caused to the rightsholder to allow infringing content to remain accessible online while the rightsholder waits for the Copyright Office to issue the registration, which could takes months.

the process.¹⁴ For individual creators and small businesses, this problem is two-fold: (1) it makes filing notices more cumbersome because of inconsistencies between sites and unnecessary steps, and (2) it sometimes makes figuring out how to file on a specific site extremely difficult.

First, creators struggle with the lack of uniformity and consistency among specialized web forms provided by service providers for sending a takedown notice, which makes the process for dealing with multiple infringements on multiple platforms unnecessarily complex and confusing.¹⁵ For example, in order to send a takedown notice, Google takes creators through a complicated process of answering a series of five or more questions, followed by a prompt to “Create Request,” which then leads the creator to log into a Google account (or create one), then fill out ten explanatory responses.¹⁶ This laborious process is not unique to Google. Other large service providers similarly require copyright owners to fill out their own extensive forms, require the entry and acceptance of CAPTCHA codes, force creators to endure repeated online advertisements, and employ other methods that discourage the submission of takedown notices.¹⁷

Second, these individual creators and small businesses sometimes struggle even to locate web forms due to inconspicuous placement— since the DMCA only requires the information to be “in a location *accessible* to the public,” but not conspicuously placed. In many cases, this seems like a deliberate attempt by service providers to deter creators from sending takedown notices. The situation is made worse in some instances when, on top of that, the service provider has failed to include contact information for its designated agent.

To help address this problem, in its Section 512 Report, the Copyright Office said that it will publish standard notice and counter-notice forms and develop additional user education materials

¹⁴ See United States Copyright Office, Section 512 of Title 17: A Report of the Register of Copyrights 153 (May 21, 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

¹⁵ Anonymous, Additional Comments Submitted in Response to CA 512 Survey (unpublished 6071962898_dmca) (on file with author) (complaining that “there is no single, unified, easy to use online form available”).

¹⁶ USCO Report at 156 (May 21, 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>

¹⁷ USCO Report at 157; The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Comment on Section 512 Study at 6, <https://www.regulations.gov/document?D=COLC-2015-0013-90145>.

regarding the types of notices that are appropriate under section 512. 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. And it goes without saying that the Copyright Office can do all this but if the service providers ignore the standard notices and guidance by the Office and there are no repercussions for doing so, then the Office's efforts here will be for naught.

Both copyright owners and OSPs stand to benefit from improvements in this area. If forms appear conspicuously on a website, copyright owners will be more likely to see and use the proper forms rather than contacting the website operator through other methods that are less efficient and take up the OSPs time. Uniformity will also help creators more efficiently and effectively enforce their rights because once they understand the requirements for one DMCA form, they understand the requirements across the board. Likewise, more conspicuous and uniform webforms will also help service providers by decreasing instances of non-compliant notices and allowing service providers to process forms more quickly and efficiently. Uniformity should also help small start-up service providers who may struggle with creating the proper forms.

Lastly, it also worth noting that many service providers also engage in scare tactics to discourage creators from sending takedown notices. For example, creators are often made aware that their personal information, including phone numbers and a home address, will be shared with the infringer and/or the public, triggering legitimate concerns about safety. After sending takedown notices, our members have reported harassment ranging from insults and obscenities, to threats of bodily harm or death following the disclosure of their personal information.¹⁸

¹⁸ Copyright Alliance, *Section 512 Survey* (2017); *See* 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>; *See* Tr. at 64:18–65:1 (May 2, 2016) (Sandra Aistars, Mason Clinic) (“[W]hen you’re submitting a takedown notice, most sites will, you know, certainly walk you through the requirements of the DMCA takedown notice. Many of them will emphasize the penalties that might be associated with sending an inaccurate notice, the fact that the notice and your personal information will be made publicly available, the fact that the notice will be forwarded on to the Chilling Effects website and so forth.”).

Counter-Notices Under Section 512(g)(3)

In practice, very few counternotices are ever filed as compared to the number of DMCA notices sent. The disparity in the amount of counternotices filed compared to takedown notices sent is largely a testament to the amount of clearly infringing content targeted by takedowns. In the rare circumstance where a copyright owner sends a notice by mistake or in “bad faith,” the counter notification procedure¹⁹ offers an adequate remedy for the aggrieved party.

Unfortunately, the counternotice process is also subject to abuse. The counternotices our members receive are often not sent in good faith. For example, some of our members have reported receiving counternotices that simply say “I’m sorry,” or assert a claim of fair use where there’s no objective basis for a fair use claim. In some instances, the infringer files a counternotice including a clearly false name and/or address. And once that counternotice is filed, even if it was clearly filed in bad faith, the copyright owner has only ten days to bring suit against the infringer before the infringing material or link is reposted.²⁰ 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 decision in *Fourth Estate v. Wall-Street.com*,²¹ 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

¹⁹ See 17 U.S.C. § 512(g) (2012).

²⁰ 17 U.S.C. § 512(g)(2)(C).

²¹ *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019).

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 can 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. In effect, the *Fourth Estate* decision renders toothless any meaningful opportunity to address a contested infringement takedown before the content is put back online for those who have not yet registered. This eviscerates Congress’s intent to provide an expeditious method for the takedown of infringing content, and for fair resolution of attendant disputes.

Most of today’s discussion will undoubtedly be about statutory requirements and legalese, but I hope that the creators themselves and how they are affected does not get lost. The act of sending notice after notice for years on end, with little if any effect, only to see their works continue to be infringed takes a real mental and emotional toll on creators. As one creator put it, “The anger of that circumstance quickly gives way to hopelessness because I know that I don’t stand much of a chance against a corporate behemoth, whether that’s YouTube or any of the companies stealing my work and using YouTube’s platform to display it and to co-monetize it with YouTube.” The hopelessness that this creator describes is one reason that so many creators, faced with the insurmountable burden of online infringement, eventually give up their work to pursue careers with more stability and certainty. This is not the outcome that anyone wants. As the Subcommittee continues its review of the DMCA, we ask that you keep the creators whose work enriches our lives at the forefront of your minds. Service providers have flourished under the DMCA. If the DMCA is to achieve the balance that Congress intended, then like these service providers, creators too deserve the support necessary to thrive.

Thank you again for the opportunity to testify as a part of this briefing. I am happy to answer any questions.