



Before the
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet
Regarding
“Section 512 of Title 17”
March 13, 2014
Statement of the
Computer & Communications Industry Association

The Computer & Communications Industry Association (CCIA) represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA companies collectively generate more than \$250 billion in annual revenues, most of whom benefit directly or indirectly from the benefits of liability certainty regarding third party content online. CCIA requests that this statement be included in the record of this hearing.

I. Introduction

In 1998, Congress recognized that Internet investment would not occur if service providers faced copyright infringement liability for third party content that they handled “in the ordinary course of their operations”. *See* S. Rep. 105-190, at 8 (1998). The Digital Millennium Copyright Act addressed this problem through a delicate compromise whereby lawful services which respond expeditiously to allegations of infringement receive the benefit of liability limitations.¹ This compromise at the heart of the DMCA imposes upon service providers the costs of responding to millions of complaints in exchange for safe harbors from liability, while guaranteeing rights-holders a rapid response to claims in exchange for the responsibility to affirmatively report infringement.

II. Significance of the DMCA

The Section 512 safe harbor provides online intermediaries a measure of certainty in the

¹ 17 U.S.C. § 512.

face of extraordinary liability risks. Although DMCA compliance can be expensive for private sector Internet services, it is widely regarded as the cost of market entry for an Internet-based service that handles third-party content: a regulatory obligation undertaken by responsible corporate citizens.

By guaranteeing that service providers who respond expeditiously to infringement complaints will benefit from liability limitations, safe harbor protections enable the Internet industry to provide great economic benefits to the economy without the risk of being exposed to penalties based on misconduct by third parties using their service.

A large number of U.S. and even foreign sites invest considerable resources in DMCA compliance. Today, this successful framework regulates how numerous online services, including search engines, broadband providers, caching services, and webhosts address third party infringement. A pillar of modern Internet policy, the DMCA is so crucial to Internet and telecommunications sectors that it has been incorporated as a binding bilateral obligation in nearly a dozen U.S. Free Trade and Trade Promotion Agreements. Recognizing that liability risks “weaken private sector confidence” and impede market entry, numerous countries around the world have followed the U.S. lead in providing liability limitations to online services.² According to Copyright Office records, over 60,000 online services have complied with the formalities necessary to receive protection under the DMCA.³ An even larger number of individuals and businesses rely upon those DMCA-protected service providers to communicate, find goods, services, and information, and compete in the global marketplace at lower costs. The industries that rely upon these protections contribute enormously to economic growth, representing an online economy with a GDP larger than the entire nation of Canada. Since the millennium, they have accounted for 10% of growth in highly developed nations,⁴ and estimates suggest the Internet contribution to the economy will reach \$4.2 trillion across all G-20

² See OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives*, at 15 (2011) available at <http://dx.doi.org/10.1787/9789264115644-en>. Continued U.S. dominance in the Internet sector may result in part from the fact that these protections are often inadequately secured in foreign countries, causing greater liability risks. See Martin H. Thelle & Svend T. Jespersen, “Online Intermediaries: Assessing the Economic Impact of the EU’s Online Liability Regime,” at 7 (2012), available at <http://www.europeandigitalmedia.org/uploads/Press/documents/Copenhagen%20Economics-Online%20Intermediaries-201201.pdf>

³ See U.S. Copyright Office, Directory of Online Service Provider Designated Agents, at http://www.copyright.gov/onlinesp/list/a_agents.html.

⁴ Matthieu Pélissié du Rausas *et al.*, *Internet matters: The Net’s sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute, May 2011), at 1, available at http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters.

economies by 2016.⁵ In 2011 alone, search technology provided an estimated \$780 billion in value worldwide.⁶ These platforms are not just commercial actors themselves, but platforms and enablers of third-party commerce, and thus bring powerful technology and cost savings to small enterprises who could not necessarily afford it. Internet-enabled trade can also increase export opportunities by removing cost barriers.⁷

Just as DMCA-compliant platforms have revolutionized commerce, they have also transformed modern discourse and political activity. Online platforms such as YouTube have radically altered civic participation, disintermediating historical gatekeepers, and giving voice to those who otherwise could not reach a global audience. This is clearly evident in politics: although it is difficult today to envision national elections without online campaign videos, this development has occurred almost entirely within the last 10 years.

III. How, When, and Why the DMCA Works

Online services do not receive the DMCA's safe harbor protections for free. In order to qualify, a service provider must:

- adopt and implement a policy to terminate access to repeat infringers, 17 U.S.C. § 512(i).
- accommodate "standard technical measures," should a consensus standard be in use, 17 U.S.C. § 512(i)(B);
- designate on its service, on its website, and to the Copyright Office, contact information of "an agent to receive notifications of claimed infringement," 17 U.S.C. § 512(c)(2); and
- most importantly, develop a compliance program that "expeditiously" facilitates the takedown of allegedly infringing content upon actionable notice by rightsholders or their authorized representatives.

The DMCA enforcement process begins when rights-holders notify Internet services of allegedly infringing content online. The process begins with the rights-holder because only rights-holders can reliably be certain of what the rights-holder owns, or has licensed. One

⁵ David Dean, *et al.*, BCG, *The Internet Economy in the G-20: The \$4.2 Trillion Growth Opportunity* (2012), available at <http://www.bcg.com/documents/file100409.pdf>.

⁶ Jacques Bughin *et al.*, *The impact of Internet technologies: Search* (McKinsey Global Institute 2011), at 1, available at http://www.mckinsey.com/insights/marketing_sales/measuring_the_value_of_search.

⁷ World Economic Forum, *Enabling Trade, Valuing Growth Opportunities* (2013) at 19-20.

established principle of the DMCA, however, is that it is not required (or economically feasible) for a site or service to preemptively monitor or filter data that crosses a given network. 17 U.S.C. § 512(m)(1). Nevertheless, many online services exceed their legal obligations in protecting the content and brands of others, investing millions in additional voluntary efforts, going above and beyond the DMCA.

Unfortunately, the protections of the DMCA are not so extensive as to protect lawful services from being litigated into bankruptcy. In *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013), the “promising start-up” Veoh and its investors were ultimately exonerated, but not before the plaintiffs’ extended litigation bankrupted the DMCA-compliant online video site.⁸ Viacom has arguably subjected YouTube to a similar strategy; the difference being that Veoh lacked the resources to survive years of marathon litigation. See *Viacom Int’l Inc. v. YouTube, Inc.*, No. 13-1720 (2d Cir. 2013) (pending).

If liability risks for DMCA-compliant services increase, this will have the effect of discouraging DMCA compliance, since companies will see no value in expensive compliance that yields no benefit. This unhappy result would injure both service providers and rights-holders, and it is thus best to consider “the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection.”⁹ Were the DMCA allowed to become nothing more than an invitation to interminable litigation, the online services depending upon it will have merely exchanged ruinous liability for ruinous legal fees.

IV. DMCA Abuse Results From Inadequate Deterrence.

One shortcoming of the DMCA is that its injunctive-like remedy, combined with a lack of due process, encourages abuse by individuals and entities interested in suppressing content. The absence of due process in the DMCA was not a mistake, however; it was designed into the statute to ensure rights-holders could gain expedient relief without judicially-related delay or cost. As the Center for Democracy & Technology noted in a 2010 white paper, the incentives of the DMCA system are such that

“Content hosts have a strong incentive to comply promptly with any facially

⁸ Eliot Van Buskirk, *Veoh Files for Bankruptcy After Fending Off Infringement Charges*, WIRED, Feb. 12, 2010, at <http://www.wired.com/business/2010/02/veoh-files-for-bankruptcy-after-fending-off-infringement-charges/> (“History will add online video site Veoh to the long list of promising start-ups driven into bankruptcy by copyright lawsuits — despite the fact that unlike the others, it actually prevailed in court.”).

⁹ *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004).

proper takedown notice they receive, because doing otherwise could jeopardize their crucial safe harbor protection. Even when a takedown notice targets non-infringing content, therefore, it is highly likely to result in the removal of that content – and hence the undue muzzling of legitimate speech.”¹⁰

The substantial costs of forfeiting the safe harbor enables self-identified rights-holders to exploit the statute’s incentive structure to effectively censor non-infringing content.

Because intermediaries bear large and measurable costs for failing to retain the safe harbor, but less quantifiable costs (in the form of potentially irate users and social losses to free expression and competition) from wrongful takedowns, many services naturally default to removing content without question – as Congress intended. Although most rights-holders make good faith use of the DMCA, there are numerous well-documented cases of misuse of the DMCA’s extraordinary remedy of disappearing content.¹¹ Preventing such abuses would be an appropriate subject of further inquiry.

¹⁰ Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, Sept. 2010, at 3, available at http://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

¹¹ See, e.g., <http://www.project-disco.org/intellectual-property/020514-this-post-is-no-longer-available-due-to-why-dmca-abuse-occurs-part-ii/>