



June 1, 2020

The Honorable Thom Tillis
Chairman
Senate Judiciary Committee
Subcommittee on Intellectual Property
Washington, DC 20510

The Honorable Chris Coons
Ranking Member
Senate Judiciary Committee
Subcommittee on Intellectual Property
Washington, DC 20510

Re: *Subcommittee Hearing: Is the DMCA's Notice-and-Takedown System Working in the 21st Century?*

Dear Chairman Tillis and Ranking Member Coons:

On behalf of the Computer & Communications Industry Association (CCIA)¹, I write to submit the following observations for the Subcommittee's consideration of the subject of Section 512, and request that this statement be included² in the record of the hearing. Section 512 provides critical legal certainty for the digital economy,² which according to U.S. government data accounted for 6.9% of GDP, \$1.35 trillion, in the United States in 2017.³

The compromise at the heart of the DMCA 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. Congress enacted this regulatory regime that mutually benefits and burdens rightsholders and service providers to encourage "the necessary investment in the expansion" of the Internet.⁴

Congress's prescience in enacting Section 512 of the DMCA allowed the U.S. Internet economy to develop into a leading export industry. This framework is so crucial to the market for online

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.ccianet.org/members>.

² See, e.g., Statement of the Computer & Communications Industry Association, Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, Hearing on "Section 512 of Title 17" (Mar. 13, 2014), <https://www.ccianet.org/wp-content/uploads/2014/03/CCIA-Stmt-on-Sec512-of-Title17.pdf>; CCIA Comments, In re Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7 (Mar. 31, 2016), <http://www.ccianet.org/wp-content/uploads/2016/03/CCIA-Section-512-NoI-Comments-2016.pdf>; CCIA Additional Comments, In re Section 512 Study: Request for Additional Comments, Docket No. 2015-7 (Feb. 21, 2017), <http://www.ccianet.org/wp-content/uploads/2017/02/CCIA-Additional-Comments-on-512-Study.pdf>.

³ Bureau of Economic Analysis, *Measuring the Digital Economy: An Update Incorporating Data from the 2018 Comprehensive Update of the Industry Economic Accounts* (2019), available at https://www.bea.gov/system/files/2019-04/digital-economy-report-update-april-2019_1.pdf; 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>.

services that it is incorporated as a binding bilateral obligation in numerous U.S. Free Trade and Trade Promotion Agreements so as to remove impediments to market entry by U.S. exporters.⁵ The certainty that Congress provided to the then-nascent Internet industry upon enacting Section 512 has encouraged investment and innovation online by providing legal certainty about intermediary liability limitations, enabling a thriving digital economy.⁶ Changes to Section 512 would disproportionately create burdens on small and medium-sized businesses.

Section 512's protections are critical for far more than just Internet and technology companies. Tens of thousands of websites and service providers depend on Section 512.⁷ An even larger number of individuals, small businesses, and independent creators utilize Section 512-dependent service providers to accomplish their daily activities and engage in commerce, especially in light of the current public health crisis.⁸

Five years have passed since Congressional hearings led to the Copyright Office's report on Section 512 and the digital economy has changed considerably since the Office started working. There are several examples of the report stating conclusions that are no longer accurate. For example, the report misstates certain aspects of U.S. and foreign copyright law.⁹ And it should be noted that both Registers who oversaw the drafting of the report departed the Office for executive positions with industry constituencies that have criticized Section 512. Accordingly, CCIA cautions against relying solely upon the report's analysis for decision-making.

⁵ U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahr. Free Trade Agreement, Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colom. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29; U.S.-S. Kor. Free Trade Agreement, June 30, 2007, art. 18.10, para. 30; U.S.-Mexico-Canada Agreement, Dec. 10, 2019, art. 20.88; U.S.-Morocco Free Trade Agreement, June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Jan. 19, 2006, art. 15.10, para. 29; U.S.-Pan. Trade Promotion Agreement, June 28, 2007, art. 15.11, para. 27; U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026, art. 16.9, para. 22.

⁶ Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), available at <https://www.strategyand.pwc.com/media/uploads/StrategyandImpact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf>; Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (2011), available at http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/lerner_fall2011_copyright_policy_vc_investments.pdf.

⁷ CCIA Comments, *supra* note 2, at 1.

⁸ Michael Masnick & Leigh Beadon, *The Sky Is Rising: 2019 Edition* (2019), <http://skyisrising.com/TheSkyIsRising2019.pdf>; 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>.

⁹ For example, the report directly misstates the holding of an important recent copyright case, *BMG v. Cox*. Compare Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* (May 2020) (hereinafter "512 Report"), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>, at 2 ("the Fourth Circuit has held that a repeat infringer under Section 512 means repeated *alleged* infringer") (emphasis in original) with *BMG Rights Mgmt. v. Cox Commc'ns*, 881 F.3d 293, 301 (4th Cir. 2018) ("someone who *actually* infringes a copyright differs from someone who has merely *allegedly* infringed a copyright, because an allegation could be false.") (emphasis in original). The report also misstates Canadian law several times. See 512 Report at 52-53, 59 (omitting important 2018 amendments that changed the operation of Canadian intermediary protections and relying extensively on a Canadian case, *Bell Media Inc. et al. v Goldtv.Biz et al.*, that is ongoing on appeal).

Moreover, the report conspicuously overlooks the problem of Section 512 misuse recently documented by major investigative pieces published in multiple prominent news publications. It is disappointing that the report says so little about fraudulent use of takedown demands to suppress speech, coming on the heels of a major Wall Street Journal investigation that uncovered serious cases of takedown abuse aimed at disappearing legitimate information from public view.¹⁰ The Washington Post also recently covered how DMCA abuse and overclaiming entitlements 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.”¹¹ This problem has been documented since at least 2008, when the late Sen. John McCain was himself targeted with an inappropriate takedown demand.¹²

Given the underinclusive and in some cases inaccurate nature of the Office’s report, I encourage the Subcommittee to consider scholarship on the subject, including the research cited in this letter.

Sincerely,

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¹⁰ 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>.

¹¹ 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-online-the-e-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_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-erotica-copyright.html>.

¹² 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. See also Jennifer Urban, Joe Karaganis & Brianna Schofield, *Notice and Takedown in Everyday Practice*, UC Berkeley Public Law Research Paper No. 2755628 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628; Matt Schruers, *This Post is No Longer Available Due To... (Why DMCA Abuse Occurs, Part II)*, Disruptive Competition Project (Feb. 5, 2014), <http://www.project-disco.org/intellectual-property/020514-this-post-is-no-longer-available-due-to-why-dmca-abuse-occurs-part-ii/>.