



July 27, 2020

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

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

Re: July 28 Subcommittee Hearing: How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?

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, and request that this statement be included in the record of the hearing. Because fair use is so integral to the fabric of the Copyright Act, it must be a central consideration in any legislative effort, and we appreciate the Subcommittee holding this hearing on fair use during its series of hearings on the DMCA.

Copyright limitations and exceptions like fair use and Section 512 are critical to enabling new types of creativity that produce important economic activity.² Research in 2017 found that value added by industries that depend on limitations and exceptions to copyright like the fair use doctrine tripled since 2002. The study found that in 2014, fair use industries accounted for 16% of the U.S. economy, employed 1 in 8 U.S. workers, and contributed \$2.8 trillion to U.S. GDP.³

Fair use and the DMCA intersect in many ways, especially regarding overreaching takedowns. Although most rightsholders make good faith use of the DMCA, there are numerous well-documented cases of misuse of the DMCA's extraordinary remedy, including instances where non-infringing content has been removed.⁴ In a survey of Google Image Search takedown requests, a significant number of the requests raised substantive concerns, with one in nine "flagged with characteristics that weigh favorably toward fair use, suggesting that further review could reveal a fair use defense."⁵ Allowing abuses of Section 512 to continue unchecked may prevent fair use criticism, commentary, and political speech, as well as encourage attempts to take down

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.cciagnet.org/members>.

² 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>.

³ Andrew Szamoszegi & Mary Ann McCleary, *Fair Use in the U.S. Economy* (2017), <https://www.cciagnet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

⁴ See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

⁵ See Jennifer Urban et al., *Notice and Takedown in Everyday Practice* (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628, at 108.

content that's not infringing but that someone just doesn't like. Not only can takedown abuse censor legitimate fair uses and other uses of copyrighted material that are contextually permissible, but can also undermine important economic activity that creates jobs. There are a variety of contexts where abusive takedowns take place for the purpose of disrupting others,⁶ as well as scenarios in which batch notifications are a tactic used by large rightsholders to apply negotiation pressure.⁷

Recognizing that this extraordinary remedy could be misused, Congress built into Section 512 mechanisms for preventing abuse, which have proven insufficiently effective.⁸ Congress did not give digital services the legal flexibility to disregard clearly abusive takedown demands. This was not an oversight; rather, Congress calculated that other safeguards against abuse of the process would deter and prevent misconduct. Unfortunately, allowing the victims of fraudulent or baseless accusations to recover (at best) the costs of bringing expensive and uncertain litigation to protect free expression has not adequately deterred cases of abuse. The experience of political speakers targeted with abusive takedowns suggests that this calculus overestimated the deterrent effect of penalties for misuse.⁹

The Copyright Office's recent Section 512 report declined to focus on takedown abuse, though it has been widely documented by recent media investigations.¹⁰ In fact, the Copyright Office went so far as to state that digital services do not have discretion to disregard facially unreasonable takedown demands provided the paperwork is in order, and it did not reflect on the merits of that from a policy perspective. Although the Copyright Office's interpretation is not an implausible interpretation of the law, it makes for shortsighted policy for reasons that are clear: If digital services have no discretion to ignore dubious claims, legitimate speech can be heckled offline using copyright. Because the penalties for copyright claimants making misrepresentations under the DMCA are so weak, there is insufficient deterrent to engaging in misconduct in order to suppress content one does not like.

As the Subcommittee continues its investigation of this subject, I encourage it to explore how digital services can be empowered under the DMCA to reject questionable copyright claims against Internet users, particularly when the underlying activity in such cases is often non-infringing, or a fair use.

Sincerely,

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⁶ 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>.

⁷ *Notice and Takedown in Everyday Practice* at 72.

⁸ Section 512(f), under which a rightsholder who "knowingly materially misrepresents . . . that material or activity is infringing" is liable for "damages, including costs and attorneys' fees, incurred" by the wrongfully accused; and the counter-notification process of Section 512(g).

⁹ 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; Matt Schruers, *Claims Against Trump Campaign Video Call for Revisiting Intersection of Speech and Copyright*, Disruptive Competition Project (June 6, 2020), <https://www.project-disco.org/intellectual-property/060620-claims-against-trump-campaign-video-call-for-revisiting-intersection-of-speech-and-copyright/>.

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>; 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-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>.