CreativeFuture
Creativity. Innovation. Tomorrow.

9 June 2020

The Hon. Thom Tillis
Chairman
Senate Judiciary Committee
Subcommittee on Intellectual Property
226 Dirksen Senate Office Building
Washington, DC 20002

The Hon. Chris Coons
Ranking Member
Senate Judiciary Committee
Subcommittee on Intellectual Property
226 Dirksen Senate Office Building
Washington, DC 20002

Dear Chairman Tillis and Ranking Member Coons:

Thank you for convening your June 2 hearing as part of your review of the Digital Millennium Copyright Act (DMCA). The title of your hearing posed the question: "Is the DMCA Notice-and-Takedown System Working in the 21st Century?"

Unfortunately, the answer is that the notice and takedown system today works best primarily for two groups: criminal enterprises involved in digital piracy, and the largest online platforms that unjustly profit from unlicensed access to the copyrighted content of others.

As the Copyright Office concluded just last month in its multi-year examination of Section 512 of the DMCA and its notice-and-takedown system, "Congress' original intended balance has been tilted askew."[1] Few besides the platforms and the advocacy groups they fund have the hubris to suggest otherwise. And, despite consistent claims from the big platform companies that the DMCA does not need updating, I am writing on behalf of CreativeFuture and its members to tell you otherwise.

CreativeFuture is a coalition of more than 560 organizations and 275,000 creative individuals engaged in film, television, music, photography, and book publishing – individuals who experience notice-and-takedown's grave shortcomings every day. The best remedy to the current problems would be for the platform companies take substantial and effective action soon to meet their end of the DMCA's intended bargain. If they fail, then we believe Congress must revise the law to reflect the current state of affairs in our digital world and to satisfy Congress' original intention to properly balance protecting creativity and growing the digital economy. That balance has disappeared.

The need is all the more urgent as millions of independent creatives – many of whom lack enough regular income to withstand even a moderately prolonged downturn – struggle to continue earning a living during this pandemic. Music venues, soundstages, and theaters are dark, taking with them the paychecks that many creatives, whether backstage or center stage, depend on day-to-day.

[1] U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (May 2020), https://www.copyright.gov/policy/section512/section-512-full-report.pdf.

Piracy, by contrast, has increased significantly in this shuttered environment, reaching an all-time high and impacting the streaming revenues that might otherwise provide hope for some creatives. U.S. visits to piracy sites grew 31 percent from February to March as stay-at-home orders took effect across the country, according to analytics firm MUSO. In April, with much of the country still sheltering in place, piracy visits grew 43 percent as compared to February. If this becomes the "new normal" for our country's consumers, this will unquestionably erode the legitimate market (whenever it finally reopens) for the work to which our community is so desperate to return.

Under the DMCA, online platforms were expected to collaborate with the creative community on effective mechanisms to stop infringing uses in exchange for the broad liability protection the law provides. But the platforms' tremendous growth in the twenty-two years since its passage, driven by their advertising and data-collection based business models for monetizing user-generated content, has given them little motivation to fix the endless game of whac-a-mole.

We are quite certain that Congress never intended to force individual creatives to spend huge portions of their days policing the global internet rather than creating. On YouTube alone, 500 hours of content is uploaded every minute. The burden has fallen on us – the individual creatives, not the powerful internet giants – to locate stolen sources and outlets of our work, complete endless takedown notices, serve them across hundreds upon hundreds of online service providers, and ultimately file suit in federal court as a last resort, both a physical and financial impossibility.

In the June 2nd hearing, we heard from Big Tech advocates such as Internet Association CEO Jonathan Berroya that online service providers such as the mammoth platform companies have invested ample financial and human capital to respond to notices. Good for them – that is, at a minimum, what the law requires. Some of these companies have the highest market capitalizations in world history – and, at the end of the day, apart from their legal obligations, stopping theft on their platforms is the right thing to do.

Berroya, representing what many consider to be the most innovative industries in the world, insisted that the 22-year old DMCA's Section 512 is working perfectly fine and does not need updating. The facts show otherwise.

The DMCA as it currently operates creates significant costs, even for the biggest companies with the most profits, because it enshrines a grossly outdated form of relief. Google's own Transparency Report indicates that the company's search business processed more than 78 million piracy removal requests in the month of March 2017 (the last time they publicly provided this data), which amounts to 1,700 requests per minute.

The platforms and their allies claim this as evidence that they are doing their part, but takedowns by definition can only occur only after harm to the content creator has occurred. As Don Henley testified at the hearing, measuring success by the number of takedown requests processed is "akin to measuring our country's success in fighting wildfires by measuring the number of attempts to extinguish them. Instead, we need to seek out the root causes of those fires, implement preventive measures, and ensure they don't reignite." And, while these platforms have the resources to process 1,700 takedown requests per minute, independent creatives don't have the resources to file at that capacity. This enormous amount of takedown requests likely represents just a fraction of the total instances of infringement. So obviously, the DMCA is not doing enough to stem the piracy tide.

As the Copyright Office suggests in their recent Section 512 report, overly broad interpretations of the DMCA safe harbor requirements, by both the internet companies and the courts, have upset the balance Congress intended to achieve with Section 512. Rapid and efficient takedowns by the big platform companies, to the extent it is achieved, is not the right measure of success. The DMCA was meant to give the creative community *effective* tools to protect their rights. That is achieved by efficiently minimizing the need to chase after pirated content – to end whac-a-mole. The grant of immunity to online service providers because they manage massive notice-processing systems at scale is based on the wrong metric.

Just as the DMCA works well for online service providers, it works *really* well for criminal enterprises. engaged in digital piracy. A study from the Digital Citizens Alliance looked at a sample of the top 589 pirate sites and found that they generated an estimated $209 million in annual advertising revenue alone. Profit margins for sites supported solely by advertising ranged from 86 to 93 percent – because they did not have to pay people to write scripts, work on sets, or bring stories to life. They simply paid for their websites and built successful businesses on stolen creative content, with no product cost.

The written and oral testimony of the Internet Association's Jonathan Berroya suggested that the notice and takedown system can be credited for today's wealth of options in online delivered content. In reality, that success is in spite of notice and takedown. While the DMCA deserves some credit, that is a consequence of the anti-circumvention provisions in the law that enabled content creators to develop a variety of secure business models. That success is not a function of the notice-and-takedown system.

For all but the largest companies, the notice-and-takedown remedy is illusory. As Kerry Muzzy testified at the hearing, even niche artists can find tens of thousands of unauthorized copies of their work on YouTube or other online services. Significantly, these copies are posted not just by ordinary people, but by otherwise legitimate brands who are misusing the content for their own purposes. While YouTube's Content ID can help root out those illegitimate copies, YouTube refuses to provide that tool to most independent creatives.

If any individual creative wants to have even a fighting chance of preserving their rights, they must spend hours upon hours filing thousands of takedown notices. This robs them of time and money that they could spend creating more art. Adding insult to injury, YouTube's system gives those who are the object of takedown notices a one-click defense; all they have to do is assert (not demonstrate, but assert) "fair use," and YouTube says "too bad, copyright owner… now you've got to sue them." As Mr. Muzzey said at your hearing, "This is the situation that composers like me are in – the DMCA gives me a remedy, filing lawsuits, that isn't really a remedy. There is no remedy for me." One potential remedy, of course, would be for Congress to pass the CASE Act, giving individual copyright owners access to a small claims process that would help to fix this costly dead-end.

Public Knowledge argued to the Subcommittee that reform of the DMCA will lead to spurious takedowns and the chilling of speech. But even accepting existing research at face value, the number of malicious takedown requests pales in comparison to the volume of clear infringement, with the amount of demonstrated harm to the creative communities both quantifiable and enormous.

Copyright infringement online is not free speech. The Supreme Court has long observed that "the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use

of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[2] Absent reform of Section 512, that engine of free expression will not work.

So, what can Congress do? Hearings like the one held on June 2 are an important start. The American public needs to hear about these issues. We thank you both, Chairman Tillis and Ranking Member Coons, for doing the difficult work of gathering as much information as possible on both sides of the issue.

Second, you can use your powers of persuasion to get online service providers to live up to their end of the Section 512 bargain. The DMCA envisioned collaboration. It contained provisions suggesting that online service providers come together to develop technical solutions to piracy. There have been some successful examples of this collaboration. Several years ago, at the request of Members of Congress, major payment processors agreed to work on solutions to combat piracy – and now, it is very difficult to use credit cards on traditional piracy sites.

The same Congressional persuasion could motivate cooperation by hosting services like registries, registrars, and proxy services that piracy operations use – all legitimate businesses that should not want to facilitate criminal operations. Further, companies like YouTube can expand access to effective copyright infringement identification tools like Content ID – something they have previously refused to do even when asked to do so by this Congress.

The criminal enterprises, and the online service providers that they use, should not profit from theft. CreativeFuture's members work tirelessly to tell stories and employ the most talented craftspeople in the industries of film and television, music, photography, publishing, and software, including video games. Yes, *all* of us want audiences to see and engage with our work. But if people who had nothing to do with creating our work are able to appropriate our profits without any compensation – especially when they are some of the largest and most profitable American companies – this is an injustice.

We need for Congress to restore the balance intended when they crafted the Digital Millennium Copyright Act twenty-two years ago. This can be achieved through greater collaboration and innovation in reducing piracy and infringement. If that fails, it can be achieved through new legislation.

With thanks for the Subcommittee's hard work on these important matters, I ask that this letter be submitted into the record of the hearing.

Respectfully,

Ruth Vitale
Chief Executive Officer

[2] *Harper and Row v. Nation Enterprises*, 47 U.S. 539 (1985).