July 28, 2020

Dear Members of the Subcommittee on Intellectual Property of the Senate Committee on the Judiciary,

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. We appreciate the opportunity to submit these comments as part of the Subcommittee's review of the Digital Millennium Copyright Act ("DMCA"), and thank the Subcommittee for holding this week's hearing on the DMCA and fair use. Fair use is widely recognized as "a necessary part of the overall design" of copyright law,[1] and must continue to be protected and permitted online.

For startups and smaller OSPs, it is critical that Congress factor the importance of fair use into any evaluation of copyright law, and Congress must not entertain changes to the DMCA which restrict fair use. Fair use avoids overly-rigid applications of copyright law, based on a recognition that certain applications could "stifle the very creativity which that law is designed to foster."[2] Indeed, "[t]he role of fair use, like the copyright system as a whole, is [] to encourage the new and different."[3] Moreover, in the U.S. "capacious copyright is tolerated on the premise that doctrines, like fair use, are available to protect users' rights."[4] Against a backdrop of an otherwise-imbalanced copyright system—where some rightsholders wield disproportionate leverage and have been able to use copyright law to stifle non-infringing innovation, speech, and creativity—both 17 U.S.C. § 512 and fair use are especially essential to fulfill the Constitution's provision for promoting progress.[5]

Exciting new creative works, technology platforms, and business models have emerged thanks to § 512's safe harbor framework, and an ever-growing number of online service providers ("OSPs") serve users and creators who rely on fair use. Startups and smaller OSPs operating within § 512's safe harbor framework know those users and creators are an important "constituency whose expression deserves to be protected."[6] These OSPs can also serve "as the first line of defense in protecting the fair uses of content that have helped to make their platforms so popular. Not to mention profitable, as fair use of content

[1] Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

[2] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citation omitted).

[3] Bill Patry, *Fair Use Is Good for Creativity and Innovation*, PIJIP Research Paper Series, Paper No. 2017-01, at 4 (2017), *available at* https://digitalcommons.wcl.american.edu/research/46/.

[4] Amanda Reid, *Considering Fair Use: DMCA's Take Down & Repeat Infringer Policies*, 24 Comm. L. & Pol'y 101, 126 (2019).

[5] *See* U.S. Const. art. I, § 8.

[6] Paul Sieminski, Opinion, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, Wired (Jan. 17, 2014), https://www.wired.com/2014/01/internet-companies-fair-use/.

drives consumer demand for online information and services."[7] But most OSPs will lack the context needed to assess most instances of fair use by themselves, and few can assume the risk of ignoring takedown notices directed to fair uses of content. Given the importance of fair use to creativity and innovation, these smaller companies in particular have a lot to gain from a DMCA system which fully accommodates and permits fair use.

While the current § 512 safe harbor framework largely works well, unfortunately, improper takedown notices targeting permissible, fair uses of content are a significant problem. OSPs routinely receive takedown notices seeking removal of obvious parodies, criticisms, and educational materials.[8] And the existing § 512 framework lacks effective mechanisms for opposing such improper notices. Congress could consider improvements to the system to reduce the volume and impact of improper takedown notices, and/or make it easier for small, independent creators who rely on fair use to counter faulty notices. For example, Congress could adopt an objective standard for evaluating improper notices under § 512(f), restore balance between the damages available for accused infringement and improper notices, pursue statutory damages reform, or allow users to counter notices without automatically assuming the risk of crushing liability.[9]

Specifically as it pertains to the topic of this week's hearing, first, § 512(c)(3) states that notice-senders must have a "good faith belief" that the accused content is not authorized. And courts have correctly interpreted the statute as requiring notice-senders to "consider the existence of fair use before sending a takedown notification under § 512(c)."[10] Notice-senders who fail to account for fair use can be liable for misrepresentation under § 512(f), because such notice-senders have failed to determine whether the accused content is actually authorized under the law.

Not only is this interpretation correct, it makes sense to require that notice-senders consider fair use. The DMCA shifts adjudication and enforcement of accused infringement away from the courts and into the hands of private third parties. Because § 512 sets up a system where users and creators accused of infringement are not afforded traditional due process protections, the only time fair use can be assessed is when the notice is sent. Indeed, in passing the DMCA "[t]he [Judiciary] Committee was acutely

---

[7] Paul Sieminski, Opinion, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, Wired (Jan. 17, 2014), https://www.wired.com/2014/01/internet-companies-fair-use/.

[8] *See, e.g.*, Jacqui Cheng, *NFL Fumbles DMCA Takedown Battle, Could Face Sanctions*, Ars Technica (Mar. 20, 2007), https://arstechnica.com/information-technology/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions/ (reporting on takedown directed at professor who played a clip of the NFL's copyright message to students); Casey Fiesler & Corian Zacher, *The Missing Stakeholder of DMCA 512: Non-Infringing Users*, Authors Alliance (June 30, 2020), https://www.authorsalliance.org/2020/06/30/the-missing-stakeholder-of-dmca-512-non-infringing-users/ (reporting survey of fan creators, and discussing how removal of fair use works harm creators' creativity and ability to participate in their communities); Clicky Steve, *Hall of Shame: Something Stinks in Abbotsford*, Automattic (May 2 , 2017), https://transparency.automattic.com/2017/05/02/hall-of-shame-something-stinks-in-abbotsford/ (rightsholder requested removal of a blog post containing a modified logo illustrating author's frustration with rightsholder's actions towards the homeless community).

[9] For more explanation of these suggestions, *see, e.g.*, Abigail Rives, *Responses to Questions for the Record* 4-6, 12 (June 2020), *available at* https://www.judiciary.senate.gov/imo/media/doc/Rives%20Responses%20to%20QFRs.pdf.

[10] *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016).

concerned that it provide all end-users with appropriate procedural protections to ensure that material is not disabled without proper justification. The provisions in the bill [§ 512(c)(3) & (f)] balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse."[11] Put another way, because the DMCA encourages OSPs to provide immediate relief upon receiving a notice, it is immensely reasonable to expect notice-senders to assess whether the purported infringement is in fact an infringement or a permissible fair use.[12]

Second, courts measure whether a notice-sender was acting in "good faith" by a *subjective* standard,[13] which sets an unreasonably high barrier and results in an ineffective tool to combat improper notices. Even if a notice were *objectively* improper, a wrongly-accused infringer engaging in fair use would not be able to push back. In order to combat an improper notice, a wrongly-accused infringer would have to prove that a notice-sender *knew* it was doing something wrong and proceeded anyway. It is incredibly difficult—virtually impossible—to prove subjective bad faith in court, so abusers of the DMCA can effectively send faulty notices risk-free.[14]

Under such a subjective standard, rightsholders accused of sending improper notices dictate what they think is appropriate (and legally actionable)—and they can refuse to admit they sent a notice without subjective good faith.[15] So, for example, as long as rightsholders do not send their bots out "*intending* to err, their failure to validate the results of the scan or to check fair use defenses may be excused."[16]

Finally, as the Subcommittee considers the DMCA this year, it is imperative it avoid making the problem of improper takedowns targeting fair use worse. The law already creates an incentive for OSPs to "over-takedown." Changes to the law designed to impose more liability on OSPs, for example reducing the knowledge standard, would exacerbate existing problems and incentivize more takedowns of fair use. Risk-averse OSPs, especially startups, are understandably inclined to remove content in response to any notice. The alternative, refusing to remove content they know is a fair use, comes at great personal risk of

---

[11] S. Rep. No. 105-190, at 21 (1998) (referring to § 512(f) as a portion of the process due to accused infringers under the DMCA).

[12] *See, e.g.*, Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J.L. & Tech. 171, 229-30 (2010) (arguing that the DMCA "should require greater diligence" on the part of a notice sender, than the current interpretation of subjective "good faith," to achieve better balancing of § 512(f)).

[13] *Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004).

[14] *See, e.g.*, Eric Goldman, *DMCA's Unhelpful 512(f) Preempts Helpful State Law Claims*—Stevens v. Vodka and Milk, Technology & Marketing Law Blog (Mar. 28, 2018), https://blog.ericgoldman.org/archives/2018/03/dmcas-unhelpful-512f-preempts-helpful-state-law-claims-stevens-v-vodka-and-milk.htm (summarizing cases); Steve Vondran, *DMCA "Bad Faith" Takedowns and Counternotifications May Require a Plaintiff to Prove Subjective Bad Faith*, Attorney Steve Blog (Jan. 28, 2019) https://www.vondranlegal.com/ninth-circuit-512f-dmca-bad-faith-claims-require-evidence-of-subjective-state-of-mind (similar).

[15] *See, e.g.*, Joel D. Matteson, *Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It*, 35 Santa Clara High Tech. L.J. 1 (2018) (noting that "[t]he copyright holder is the party forming the subjective intent; therefore, that party is in a privileged position to declare whether or not that subjective state of mind has been met").

[16] Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J.L. & Tech. 171, 229-30 (2010).

extraordinarily high statutory damages. But if those same OSPs were put in the position of assessing infringement and fair use on their own (i.e., if Congress were to reduce the "red flag" knowledge standard or impose an affirmative duty to monitor), they would be forced to deploy technology to conduct review and removal and it would result in more problematic takedowns of fair use—all kinds of transformative uses of content, educational materials, criticisms, etc. would unfortunately be removed at increasing rates.

Engine appreciates the opportunity to provide these comments, and appreciates the Subcommittee's attention to the fundamental doctrine of fair use. We remain committed to engaging with Members on how the DMCA works for startups and smaller OSPs, and what any changes to the current framework would mean for them.