



September 28, 2020

Dear Members of the House 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 regarding the Report of the Register of Copyrights on Section 512 of Title 17.¹

Section 512 of the Digital Millennium Copyright Act (“DMCA”) is a critical area of the law for U.S. startups. It allows startups to host user-generated content, and provides essential certainty they will not face crippling litigation or liability for alleged infringement they have no knowledge of or involvement in. Any changes to the current statute, or the notice-and-takedown and safe harbor system it embodies, might not have a significant impact on large companies that can accommodate adjustments in policy. But such changes could have an outsized, negative impact on startups and smaller online service providers (“OSPs”). Those changes would, in turn, have a negative impact on the users and creators who rely on these startups and smaller OSFs.

Indeed, twenty years after the DMCA passed, the evidence of its success is apparent. The U.S. has demonstrated its leadership in the global Internet ecosystem, a critical catalyst for job creation.² And the technology and business of running an Internet company are increasingly accessible.³ There is also a large and growing creative class that has come into existence thanks to a diversity of Internet platforms and online technology.⁴ Technology has democratized creativity, and created entirely new ways for

¹ *Section 512 of Title 17: A Report of the Register of Copyrights*, United States Copyright Office (May 2020), available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> [hereinafter “Copyright Office’s report”].

² See, e.g., McKinsey Global Institute, *Internet Matters: The Net’s Sweeping Impact on Growth, Jobs, and Prosperity*, McKinsey & Company (May 2011), https://www.mckinsey.com/~media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_exec_summary.ashx (study showing Internet consumption and expenditure contributing significantly to the economy, including that the U.S. captured more than 30% of global Internet revenues and more than 40% of net income).

³ For example, the cost of running a basic Internet application fell from \$150,000 per month in 2000—two years after the DMCA passed—to \$1,500 per month in 2011. Marc Andreessen, *Why Software Is Eating The World*, Wall St. J. (Aug. 20, 2011), <http://on.wsj.com/1gt4wRH>.

⁴ See, e.g., Colin Sullivan, *Creators and Tech Companies Can Be Friends*, Medium (Jan. 19, 2017), <https://patreonhq.com/creators-and-tech-companies-can-be-friends-c18a8508c60d> (“It is the best time to be a creator

independent creators to reach fans and customers. Overall, robust technical, creative, and economic sectors have emerged that were not possible before the DMCA.

While the Copyright Office did not recommend any specific legislative changes, its report appears critical of the current state of § 512 based on the incorrect perception that OSPs uniformly see the law as a success and rightsholders have concerns, which the Office interprets as requiring recalibration. This theme is unfortunately consistent with rhetoric over § 512 which creates a false dichotomy of “tech stakeholders” and “copyright stakeholders.” But this characterization leaves out a large and very important group of stakeholders: Internet users. And this third category of stakeholders is a large and diverse group that includes numerous small, Internet-enabled creators who are rightsholders themselves. Internet users, copyright owners, and OSPs have long recognized problems with the DMCA and related copyright laws—just different ones.⁵ If any stakeholder group were to rewrite the rules governing online copyright liability from scratch themselves, they would not craft identical proposals and neither would replicate every aspect of § 512. This is the mark of a compromise—a compromise that remains relevant and successful today.

Against this backdrop, the Copyright Office’s report raises a constellation of concerns. Briefly:

- *The current safe harbors and definitions of service providers are appropriate, and Congress must preserve flexibility and breadth in those definitions.* The Copyright Office’s report expresses some concern with how courts interpret the statutory language regarding OSPs eligibility for the safe harbors.⁶ To the contrary: In defining which service providers would be eligible for safe harbors, Congress successfully wrote a law that is broad and flexible. Indeed, Congress wanted to create safe harbors that “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁷ And it did. Congress should not constrict those definitions.

in human history, and that is largely due to the internet.”); Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America’s New Creative Economy*, Re:Create 2 (Feb. 2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf> (reporting \$6.8 billion in earnings for 17 million U.S. creators from these platforms: Amazon Publishing, eBay, Etsy, Instagram, Shapeways, Tumblr, Twitch, WordPress, and YouTube).

⁵ Likewise, focusing narrowly on § 512 offers a limited perspective on the DMCA and fails to account for the broader copyright law, which many OSPs, Internet users, and Internet-enabled creators would argue only works for certain traditional rightsholder communities. Section 512 is only one fraction of the DMCA, and the DMCA is one statute in a much broader body of copyright law. In that broader context, some rightsholders wield disproportionate leverage under the law, and have been able to sue or threaten startups out of existence and stifle non-infringing speech and creativity. Merely by way of example, in 1998 and 1999, Congress passed many laws that considered certain rightsholders’ interests over those of, e.g., OSPs and users. For example, § 1201 of the DMCA expressly supplemented preexisting rights of copyright owners; in 1998, Congress extended copyright term another 20 years; and in 1999, Congress increased statutory damages by 50%.

⁶ Copyright Office’s report at 85-86. While it is beyond the scope of these comments, we have some concern with the role of the Copyright Office engaging in statutory interpretation which directly conflicts with a well-reasoned body of case law where courts—the branch of government traditionally responsible for statutory interpretation—have engaged in careful and thorough analysis of the statute while interpreting it and applying it in the context of several actual disputes.

⁷ S. REP. 105-190, 8.

- *The DMCA’s current knowledge standards are well tailored, and changes in this area of the law would put startups and their users at a significant disadvantage.* Imposing a duty to monitor or modifying the “red flag” standard even slightly would undermine the certainty of safe harbors. Specifically, the Copyright Office’s report unfortunately recommends incorporating “reasonableness” into § 512’s knowledge standards.⁸ This is particularly fraught from a startup perspective. Conditioning safe harbor protections on a startup adopting a “reasonable” approach to affirmative monitoring would be unworkable. It would be a fact-specific inquiry,⁹ have to be defined case-by-case (which could exceed \$500,000/case),¹⁰ and it could easily cost more than a startup has to prove its practices are reasonable. Such a safe harbor would have little practical value.¹¹

Likewise, the reasonableness standard is intentionally flexible, meaning that what is reasonable one month might not be reasonable the next—as technology changes, as a company grows, or as the type of infringement it encounters shifts. All of those are unpredictable occurrences, but considering the fast pace at which new technology emerges and how quickly startups can (and do) grow, the problem of a shifting reasonableness standard makes it a very poor fit to this context, since a startup could never know in advance whether or not a court would find its practices reasonable.¹²

- *Any changes to the knowledge standards implicate filtering tools—tools which are inadequate, expensive, and/or non-existent.* Any changes to § 512, namely changes to the knowledge standard or imposing some duty to monitor, could easily amount to a *de facto* requirement that platforms filter all user-generated content. But automated tools have many inherent limitations which make them incapable of fully addressing copyright infringement. Even complex, existing technologies are limited in their capacity to accurately identify the content they are designed to identify.¹³ In addition, even the most sophisticated tools (which are still imperfect) are so expensive they would not be obtainable for startups.¹⁴

⁸ Copyright Office’s report at 124.

⁹ See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (reasonableness of repeat infringer policy a question of fact); see also *Tran v. State Farm Mut. Auto. Ins. Co.*, 999 F. Supp. 1369, 1372 (D. Haw. 1998) (“An analysis of what is reasonable is almost always *de facto* a question for the jury.”).

¹⁰ Evan Engstrom, *Primer: Value of Section 230*, Engine (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs>.

¹¹ See, e.g., Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 25 (Mar. 2017), <https://www.engine.is/the-limits-of-filtering>.

¹² *Id.* at 24.

¹³ See, e.g., Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 Colum. L. Rev. Sidebar 83, 102-03 (2012) (describing how “[f]iltering is notoriously prone to mistakes and shortcomings and constantly risks being both over- and under-inclusive”); see also, e.g., *Is the DMCA’s Notice-and-Takedown System Working in the 21st Century?: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress 21-22 (2020) (testimony of Abigail A. Rives), available at <https://www.judiciary.senate.gov/imo/media/doc/Rives%20Testimony.pdf>; see generally Engstrom *supra* note 11.

¹⁴ *Id.*

- *OSPs should retain flexibility in defining and implementing repeat infringer policies.* Judicial conceptions of a “repeat infringer” are problematic, because some courts have started to treat repeat *accused* infringers as repeat *actual* infringers,¹⁵ despite the fact that the statute uses different language to refer to claims of infringement and repeated acts of infringement.¹⁶ The Copyright Office’s report is concerning to the extent it is read to endorse that *mere accusations* of infringement should be enough to remove users from the Internet or deprive small, independent creators of their ability to post their own creations.¹⁷ Mere (and often improper) allegations of infringement should not be enough to remove someone from a platform. And OSPs should not be forced to expel their customers, users, and creators based on mere allegations of infringement. Instead, OSPs need flexibility to develop and apply repeat infringer policies, to collect and review facts of individual cases and remove those users deemed to be actual repeat infringers. Binding them to rigid frameworks, and necessarily tying these decisions to allegations of infringement, will just make it easier for abusers to know what accusations to make to stifle competitors, other creators, critics, or Internet users.
- *The Copyright Office has correctly identified education as an opportunity, and plans to launch educational efforts relevant to the DMCA.*¹⁸ The burden imposed by improper notice senders and some volume of infringement claims could be alleviated by better education for Internet users and rightsholders about what is (and is not) infringement, how to send a proper notice, and which individuals possess rights to enforce a copyright.
- *The notice & takedown system is essentially working, and working well, but there is abuse of the system and no meaningful opportunities to curtail it.* Unfortunately, the Copyright Office’s report does not recommend increased penalties for misrepresentation in abusive notices or counter-notices, nor does the report contain any other suggestions for resolving the problem of abuse of the notice-and-takedown system. Instead, the Copyright Office noted that many people raise concerns about abuse.¹⁹

Improper takedown notices are a significant problem and the current DMCA fails to meaningfully combat that problem.²⁰ Sections 512(f) and (g) should be mechanisms for users to push back against improper notices, but those provisions have proven ineffective at combating the problem.²¹ Indeed, since issuing its report, the Copyright Office has further stated:

¹⁵ *E.g., BMG Rights Mgmt. (US) LLC v. Cox Commc’ns Inc.*, 881 F.3d 293 (4th Cir. 2018).

¹⁶ *E.g., compare* 17 U.S.C. § 512(c)(3)(A) *with* § 512(i)(1)(A) (referring separately to “notification[s] of *claimed* infringement” versus “repeat infringers”) (emphasis added).

¹⁷ *See* Copyright Office’s report at 103.

¹⁸ Copyright Office’s report at 6, 171-73.

¹⁹ Copyright Office’s report at 145-46.

²⁰ Rives *supra* note 13 at 11-17.

²¹ *See, e.g., Jennifer M. Urban et al., Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc’y U.S.A. 371 (2017) (recommending that notice-and-takedown “needs better mechanisms for ensuring that infringement is actually likely before material comes down and stays down, and better due process mechanisms for targets).

The Office recommends that Congress consider not only reforms to section 512(f), but also broader solutions outside of section 512 to address abuse practices generally, including the filing of abusive complaints in court or the sending of abusive cease and desist letters. The issue of abusive allegations of copyright infringement is serious, and congressional attention to the broader question of how to best discourage such uses of the copyright system could provide more effective mechanisms to address the problem.²²

* * *

Thank you again for the opportunity to provide these comments. 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. And, as in all policy areas, Engine strives to seek solutions and work with lawmakers whenever possible to find compromise that ensures clarity for startups.

²² Letter from Maria Strong, Acting Register of Copyrights and Director, to Senators Thom Tillis and Patrick Leahy 4 (June 29, 2020), available at <https://www.copyright.gov/laws/hearings/response-to-may-29-2020-letter.pdf>.