Senate Committee on the Judiciary
Subcommittee on Intellectual Property
Hearing on
“Is the DMCA’s Notice-and-Takedown System Working in the 21st Century?”
June 2, 2020

The IP Subcommittee of the Senate Committee on the Judiciary convened on June 2, 2020 with Chairman Thom Tillis (R- NC), presiding along with Ranking Member Christopher A. Coons (D- DE). Senator Richard Blumenthal (D- CT) was also present.

Witnesses
Panel I:

Mr. Don Henley
Musician and Songwriter

Mr. Jonathan Berroya
Interim President and CEO
Internet Association

Mr. Douglas Preston
President
The Authors Guild
Mr. David Hansen, J.D.
Associate University Librarian and Lead Copyright & Information Policy Officer
Duke University

Panel II
Ms. Abigail Rives
IP Counsel
Engine

Mr. Kerry Muzzey
Independent Classical & Film Composer
Kirbyko Music LLC

Ms. Meredith Rose
Policy Counsel
Public Knowledge

Mr. Jeff Sedlik
President
Sedlik Photography

Chairman Tillis began noting that when the Subcommittee started this series of hearings in February, they had “no idea of the economic challenges that would soon grip this nation.” He pointed out that the creative industry has “shouldered outsized losses” due to the global pandemic, pointing out that “small creators, independent artists, authors and musicians” have suffered due to the closing of live venues, some of which will never reopen. Retail sales are plummeting; however, “piracy of creative works online has not slowed down.” He emphasized that “now more than ever, these small creators are dependent on the Internet ecosystem and strong efforts to combat piracy.” He noted that the Subcommittee had to consider “how best to prevent piracy and ensure these small business owners get adequate compensation for their creative work.”
With all that as a preface he noted that this was the Subcommittee’s third official hearing in their year-long review of the DMCA. He explained that the first two hearings were more “academic,” focusing on “why the DMCA was originally enacted” and on “how our foreign counterparts handle the online pirating of copyrighted material.” Today, he explained that the hearing was going to deal with a “more practical and potentially more divisive aspect of the DMCA,” the section 512 “notice and takedown provisions. These provisions were viewed originally as a “grand compromise between copyright owners and emerging online service providers – [i]n exchange for receiving a limitation on liability for infringing activities of their users’ online platforms, [they were] supposed to follow certain criteria to curb online piracy, including making reasonable efforts to remove pirated material once they received notice that it was online.” This bargain, however, is no longer working as the Copyright Office recently noted in its report on Section 512; it is no longer achieving “the policy goals that Congress originally intended.” Sen. Tillis explained that one of the reasons for this is the advances in technology that have made online piracy “easier, faster, and much more common.” He explained that copyright owners have to send “hundreds of millions of takedown notices only to see infringing pirate material reappear on the same web site sometime just minutes later.” On the other hand, “internet service providers, tech companies of all sizes and members of the general public have to spend countless hours of manpower replying to take down notices instead of having that time to develop new and innovative products and services.” It appears that this system is failing on both sides, and “failing badly.” He noted that the Copyright Office report explains the problems with the current system and recommends what can be done to “rebalance the current framework,” but Sen. Tillis doesn’t believe that “fixing the current framework is enough.” Specifically, he thinks that “we may be at a point where we need to design an entirely new system to combat online piracy, one that recaptures the balance that Congress intended and modernizes the copyright Internet ecosystem for the 21st century,” which is why he and Sen. Leahy sent the Copyright Office a letter last week asking them “how they would design an anti-piracy takedown system if they had to start from scratch.” Lastly, he noted that he is hoping today’s hearing will provide the Subcommittee with insights on “how the current notice and takedown system regime works or doesn’t work.” Sen. Tillis noted that already he has learned from this process that any new DMCA reform bill is going to have to account for “issues of scale,” since, as Prof. Tushnet noted during the first hearing, “if we design DMCA reform around addressing issues with large scale market participants, all we’re going to do is ensure that those individuals and companies have continued their market dominance” which is why today’s hearing will include both “content creators and users who operate at scale and that don't[;] [a]nd [for] those who don't [operated at scale], I want to understand the differences among the types of creators and tech companies whose actions are guided by Section 512 and how this affects [creators’] ability to send and to respond to take-down requests.”
Sen Coons began his opening statement by also thanking the Copyright Office for their Section 512 report, which required “years of study, multiple roundtables and more than 90,000 public comments.” He noted that he was particularly struck by the report’s conclusion that “Congress’ original intended balance has been tilted askew.” He kept his statement brief and concluded that he looked forward to a productive discussion on “whether we need to rebalance the DMCA to reflect the realities of today’s Internet.”

First Panel:

Don Henley

Mr. Henley noted that he is in the “final chapter” of his career, but that he is testifying “out of a sense of duty and obligation to those artists and those creators who paved the road for me and my contemporaries... [a]nd for those who will travel this road after us.” He explained that he wants to “change or improve outdated laws and regulations that have been abused for over 20 years by big tech, the enormous digital platforms that facilitate millions of copyright infringements monthly.” As for the question at hand concerning section 512, he stated that “The notice and takedown system of the DMCA does not work for artists and songwriters when a simple online search for a song returns an endless list of sites that never asked the copyright owner for permission, never received a license and never passed on a penny to the artist for the use of their music. The system is not working today when the marketplace has matured; the digital platforms continue to use Section 512 as negotiating leverage to pay license fees which are well below market. The system is not working when the burden of policing copyright infringements on global platforms lies with the artist instead of the massive technology companies who own and operate the platforms.” In short, he stated, “The system is antiquated and badly broken and the creative community is paying a very steep price.” He elaborated on this point, noting that, the “DMCA was supposed to provide digital platforms with safe harbor from liability in exchange for cooperation and protecting creators’ works. It was meant to provide a proper balance in a symbiotic relationship that benefited all participants and strengthened the treatment of the online marketplace. Two decades later that balance is decidedly off in a world where more than 500 hours of video are uploaded to YouTube every minute, more than one billion videos are viewed on TikTok every day and there are over 500 million daily active users on Instagram. It is clear that the massive online services are flourishing, while artists have no ability to combat the rampant infringement that occurs on these platforms.” He explained that “content owners sent hundreds of millions of takedown notices annually, hundreds of millions and often for each infringing link or file taken down a dozen more pop up in its place, but even worse due to the antiquated procedures dictated by the DMCA, Internet services with clear oversight and control of content posted on their Web sites are continuing to monetize and collect advertising revenue on videos containing music.” He plaintively asked, “How is that a fair bargain?” He analogized the situation to forest fires, noting that the proper metric for
success in such a situation is not the “the number of attempts to extinguish the fires,” but rather it is important to “seek out the root causes of those fires, implement preventive measures and ensure that they don't reignite.” He noted that many of the large Internet companies have the tools to monitor infringement on their platforms and provide enhanced tools for content owners, but “they simply choose not to.” He incredulously noted, “they are capable of understanding and tracking individual likes and dislikes of the fans who visit the platform with frightening accuracy, and yet we are supposed to believe that putting in place a meaningful barrier to infringement is beyond their capabilities,” concluding it is just “beyond their desire.” Rather, the platforms are concerned that blocking infringing content will reduce traffic, and reducing traffic decreases their ad revenue. So instead of focusing on platform improvements that drive consumer satisfaction, they rely on copyrighted material whether licensed or not to keep consumers engaged with the DMCA as cover. He also castigated the courts which “have facilitated this world view, broadening application of the safe harbor provision, watering down obligations of online services and eliminating consequences.” The end result, in his view, is “an anemic notice and takedown system that still allows big tech to rake in revenue by monetizing access to unlicensed works despite being notified of the infringements or even repeat infringements.” In conclusion, he noted that the DMCA has not withstood the test of time, and is a relic best left in the past or updated to reflect a modern world; in other words, “the DMCA is a relic of the MySpace era in a TikTok world.”

Jonathan Berroya

Mr. Berroya started by noting that Internet Association (IA) members are “creators, they are distributors, platforms and licensees of all types of content and they are committed to working with the rest of the creative community to improve the rights holder and user experience.” He also pointed out that he is an attorney who spent much of the last decade “protecting hundreds of popular software and videogame titles from online infringement while relying on the DMCA and other effective practices like personal outreach.” Contrary to the Copyright Office report, he believes given his experience that the DMCA and Section 512 are working as Congress intended, and as a result, the digital content ecosystem is thriving. He laid out three reasons why he believes that the DMCA is working; first, because “the DMCA allows rights holders to quickly take down infringing content without seeking judicial intervention[;]” second, because it gives “platforms the legal certainty necessary to host user generated content and the incentive to collaborate with other rights holders to combat infringement[;]” and third, because “users can enjoy it and create a wealth of legal online content.” As a result he does not agree with the Copyright Office’s finding that Section 512 “has been tilted askew.” He further explained that the report has failed to take into account the “changing landscape of the creative eco-system” which is currently experiencing “a golden age of content creation” where “[t]ech companies are now creators of and investors in award winning content…and [c]ompanies are investing in digital distribution more than ever before.” He
also explained that online service providers have “voluntarily created tools that go beyond what DMCA compliance requires to make copyright enforcement more scalable, make legal content easier to find and make illegal content more difficult to access.” They have also adopted technologies “to exclude infringing material from their systems and to create new opportunities for rights holders to capture revenue.” He noted that these actions are not the result of “litigation or legislation,” but rather have come about as a result of “thoughtful engagement with copyright owners, careful consideration of the rights of consumers, and efforts to guard against fraudulent misuse of copyright enforcement tools.” He continued explaining that users also rely on the DMCA flexibilities to both “create and enjoy online content,” and then provided statistics on how much content is generated by users on an average day: “hundreds of hours of video are uploaded to a member platforms every minute[,] hundreds of millions of photos and videos are uploaded every hour[,] and millions of people stream themselves playing video games each month.” These statistics show that the use of these platforms are aligned with the Constitutional objective to “promote the progress of science and the useful arts.” He explained that each of these works that are created by users is a copyrighted work, and “deciding whether a piece of content is or is not infringing requires knowledge of the underlying protected work, the type of license used to protect it and in many cases fair use analysis.” As a result, “the notice and takedown system works because it empowers the people who own the content to make a good faith determination about infringement[,] [i]t provides clear direction to platforms on how to respond to their takedown requests and it allows users to protect their rights as creators and consumers by issuing counter notices when their content has been erroneously flagged as infringing.” Mr. Berroya concluded his testimony noting that “the overwhelming majority of infringement takes place on websites hosted in foreign jurisdictions outside the reach of US law, not on [his] member company platforms.” As a result, he recommended that the “the best way to attack this problem may be through the inclusion of DMCA style requirements in treaties with other nations, rather than amending domestic legislation disturbing the balance of the DMCA.”

**Douglas Preston**

Mr. Preston started his testimony by recalling the “sickening feeling” he had when he first encountered book piracy, and seeing his entire life’s work “stolen, stripped of digital protection and put up on the Internet.” He said that it felt like having found his house robbed or like “being mugged everyday.” He explained that in the past decade authors have experienced a “42% drop in their writing income to $20,300 a year” much of which is attributed to piracy. As he noted, “it’s hard enough to make a living writing books, but piracy now makes it almost impossible.” He also explained that there are “hundreds if not thousands of websites devoted to book piracy” as well as the fact that legitimate online marketplaces such as eBay, Google and Facebook openly offer illegal e-books for
download and pointed out that his stolen e-books can be found “on the Google shopping main page right now.” The Internet, he stated simply, “has become a virtual candy store for the wholesale stealing of the creative work of authors.” The DMCA was meant to balance the interests of the internet service providers and copyright holders, but that’s not how it’s working today. As a result of a series of court decisions, “four separate criteria were reduced to just one[;]” and an “ISP now can benefit from the [512] safe harbor merely by complying with takedown notices.” He noted that those takedown notices must state the specific address of each pirated work, and the ISP is only required to take down the specific pirated e-book from the specific URL for which it receives notice. However, “a typical pirated site has tens of thousands of URLs,” and in practice, as soon as one link is taken down, another identical one, “pops up at a slightly different site.” It is an “unending [game] of whack-a-mole.” This is why he has given up trying to enforce against the piracy of his books. As a result, the Authors Guild is “asking Congress to restore section 512 to what was intended, which is a notice and staydown system instead of notice and takedown.” They believe that Congress “clearly intended that an ISP take down and then keep down proven pirated material,” and if this can’t be accomplished then the Authors Guild supports “tossing [the DMCA] out and coming up with a much more modern and efficient and effective way of stopping rampant piracy on the Internet.”

Mr. David Hansen, JD

Mr. Hansen noted that his testimony is reflective of his work at Duke University as well as that of other libraries, including members of the “Association of Research Libraries, Association of College and Research Libraries, the American Library Association and the American Association of Law Libraries,” and his testimony is presented on their behalf as well. He explained that his university’s and research library’s mission is identical to the goal of the Copyright Act, i.e., “to promote science and the useful arts.” He stated that there are many stakeholders interested in section 512, and he expressed his hope that “research and teaching will not be an afterthought” in this debate but rather, “a central consideration.” He explained that Duke University, like most other research universities and libraries, “straddles both sides of section 512[;] operat[ing] as a service provider for a very large network, but we're also significant producers of copyrighted content and we’re rights holders ourselves.” Given that, he believes that section 512 “works well” for them and does not believe that the “balance is askew,” although there are “some minor changes” that could be made. He cited statistics on the number of works that Duke generates, e.g., 10,000 research articles per year, and their goal is to disseminate them widely in order “get people to engage with those ideas,” for the most part with “no direct financial return, no royalties.” He stressed the need to share this research rapidly and provided an example of recent research by a faculty member on the decontamination of N95 masks in order to address PPE shortages in healthcare settings. As a result, their “strong preference is a system that keeps content up online unless there is significant evidence that infringement has occurred.” He then explained that the current system does
not always do that. He cited an example of academic researchers who try to share their own research but who face barriers due to the “lack of clarity around rights” and “in some instances publishers have made broad assertions under their contracts about their ability to control research.” The specific example concerned Elsevier who “reportedly issues 100,000 take-down notices to a site called ‘Research Gate’ which is a for-profit site but most of the content submitted there has been placed there by academic authors who are trying to share their own research with the world.” He stressed that “fair use is absolutely critical for research and scholarship.” However, section 512 does not explicitly address how “fair use factors into the notice and take down process.” He also noted that automated content identification should be “carefully limited.” Service providers play “an important role in protecting fair use,” and some have been proactive by requiring more supporting documentation by those making takedown requests. They support this even though the Copyright Office was critical of those practices. He explained the contours of Duke’s network as a service provider, noting it has 40,000 students, faculty and staff with network credentials, and handles much of the same kind of traffic that other networks do, such as streaming content and email. However, it also serves a “special purpose” as it is the technological backbone supporting Duke’s “teaching and learning” and the research pipeline through which faculty and graduate students obtain materials; and most importantly in the current crisis it is also an “important pathway for health related information for [their] university health system.” As a result, he expressed concern with the provisions in section 512 that require service providers to implement policies that terminate access for repeat infringers. “Denying a student access to the network can be debilitating,” he explained, “especially right now where virtually all instruction has moved online; [d]epriving a student of Internet access would be almost equivalent to expulsion.” As a result, he would “encourage the subcommittee to think hard about whether termination of Internet access continues to be an appropriate remedy for instances of alleged infringement.” He recognizes that some stakeholders feel that section 512 needs to be changed, but he urged the Subcommittee to “consider the unintended consequences that changes to Section 512 can have on research and teaching.”

**Questions for the First Panel:**

Sen. Tillis began the questioning by noting the advent of new forms of piracy that were not contemplated in 1998 when the DMCA was written, such as the illegal streaming of live sports and the “black market for illicit streaming devices sold with libraries of hundreds of films,” and in fact streaming now accounts for 80% of digital piracy. He asked Mr. Berroya, why the tech sector would want to continue to be governed by a law that couldn’t anticipate technology we deal with today; why shouldn’t Congress take the opportunity to look at aspects of modernization that the tech sector would consider to be helpful? Mr. Berroya noted that Chairman Tillis’ point was well taken, but that it was important to note that “there been a great deal of innovation on the side of platforms as well as ISPs over the course of the past two decades.” He noted that the DMCA set a
“floor not a ceiling,” setting “basic standards for what companies need to do if they want to enjoy the benefits of the safe harbor, but it does not limit them from doing more than that.” And as he noted, they are now creators as well, and are now aligned with the desires of other creators “to ensure that infringing materials get taken down off their platforms expeditiously.” However, he does not believe that the law needs to be amended to “create incentives for work that has already be done.” Sen. Tillis followed up by noting that that floor was set appropriately twenty-two years ago for the technology that was available then; however, now it’s “orders of magnitude more available and easier to obscure illicit activity.” So, he asked, “why wouldn’t we learn from some the good faith efforts [by ISPs] and …create a higher bar to reduce the amount of rampant piracy we see?” He specifically asked Mr. Henley for his perspective on this issue, who responded that the notice and takedown procedure is “unduly burdensome on the artist.” He then provided statistics to describe the magnitude of the problem, explaining that there are “currently about 6 billion posts on YouTube and out of those 6 billion posts, 4 billion of them are unclaimed and out of those 6 billion posts, 84% of them contained music, now let's say it takes two minutes to file a claim, so at two minutes per claim it would take 200 million hours to claim them and take them all down, and at minimum wage it would cost two billion dollars.” He noted however, that by the time these are all taken down, “there would probably be another billion posts on YouTube” again describing the system as an “endless game of Whack a Mole;” simply stated, “the notice and takedown system is badly broken.” He then provided an example of what happens with his works – explaining that Universal Music Group, which is the publisher for the Eagles and Mr. Henley’s solo music, has a “team of 60 people … who sit in a room with computers and all they do all day long, five days a week, sometimes six days a week, is deal with the platforms such as YouTube and Facebook …fil[ing] claims and issu[ing] takedown notices … [which] amount to between 200 and 500 claims a week… [a]nd when a claim is filed, the person who uploads the infringing content can appeal that claim can dispute that claim… [a]nd there's a process where it goes back and forth, you have a claim, you have an appeal and then you have a counter notice, and that process can go on and on until finally a stalemate is reached … [i]f the uploader refuses to take down the infringing content, then the artist, the person who created that content, has no choice except to file a lawsuit within 10 days…[n]ow most artists … don't have the time or the wherewithal to file lawsuits … [s]o the process is again simply overly burdensome on the artists.” Artists shouldn’t have to deal with this ridiculous process, he argued; their job is to create music and art, not to police the Internet for infringing content, which is the job of the “huge platforms.” He complained of the internet platforms’ disingenuity, noting that they “claim that they’re simply a conduit through which passes all this content, but they engage with that content, they curate that content… they manage that content… they can identify likes and dislikes, but they can’t seem to identify copyright material.” He also explained that the “Content ID” system does not work, and compared it to a “big net with huge holes.” He believes that online platforms are the gatekeepers and therefore are better positioned to enforce against piracy than artists/content creators.
Sen. Coons posed a question for the entire panel – namely, it appears that the system works well for some but is broken for others, and Congress had envisioned that rights holders and online providers would work together to standardize voluntary technological measures to combat piracy – why hasn’t that happened and how would they suggest Congress “combat digital piracy without stifling innovation or free speech”? Also what immediate change to improve notice and takedown would they suggest? Mr. Henley agreed with Mr. Preston and the Authors Guild that a notice and staydown system is needed, since notice and takedown is not working. He explained that the notice and takedown system was meant to encourage cooperation between rights holders and ISPs, not become a “get out of jail free card.” Re-balancing section 512 “will not threaten the Internet;” rather it will allow for a vibrant internet by ensuring that a “viable legitimate online marketplace for creative works and online services for the benefit of everybody.” Mr. Berroya stated that what’s needed is “additional collaboration” and while he acknowledged the challenges faced by smaller artists that don’t have the ability to pool their resources to “leverage technology in order to more effectively manage the takedown process,” he believes that the lack of collaboration “is at the heart of a lot of the current challenges.” He would caution against shifting the burden to platforms from rights holders. He pointed to the previous testimony in terms of the amount of content that gets posted online daily, the overwhelming majority of which is legal and the problem is that technology “cannot decide and produce a reliable fair use analysis.” In addition, platforms do not know how a particular piece of music is licensed,” he also noted that there are cases where copyright claims are not made in good faith. As a result, “first and foremost increased dialogue” is an “important first step.” Mr. Preston started his response by noting that the internet platforms only collaborate with a few of the largest companies and they don’t interact with many of the small authors/creators. When these creators have tried to engage with the platforms it has been a very frustrating experience “because these platforms simply are not capable of engaging with small creators and businesses.” In terms of Sen. Coon’s second question, Mr. Preston noted that they are asking for notice and staydown system, which means that once an ISP has received a notice they have to keep that title from being posted again. He analogized to a pawnshop, explaining that once the police “come and take away a stolen bracelet and then the next week, the same bracelet comes in a week later to be sold, [the pawnbroker] can't just put it up for sale again” and by extension, “if the same person in a pawnshop brings in multiple stolen items repeatedly, the pawnshop owner has an obligation to stop dealing with that person.” In this context, “if a Web site is hosted by an ISP or in the example of Google, if it is … responding to search requests and sending people to that web site and that web site has received thousands and thousands of takedown notices, then the ISP should stop dealing with that web site.” He then gave an example of a notorious book piracy website, that according to NYU had received 40,000 takedown notices, and yet Google was listing that website at the top of its search page. The Authors Guild spoke to Google about the situation, and as a result Google demoted the listing to lower in its search, but never took it completely off, just demoted it. He pleaded, “all we're asking is for ISP is to make a good faith effort to keep that stolen property from being fenced again and again and again
Mr. Hansen noted that in their roles as an ISP they receive, on average, approximately 380 takedown notices per month, “which is not a significant number considering the … volume of traffic” that goes through their network. There has been a dramatic decline of takedown through the years mainly due to “business model innovation,” i.e., “licensing alternatives where content has been made available at reasonable prices through reasonable means.”

Sen. Blumenthal noted that he saw the purpose of this hearing to be about accountability, and both the DMCA and section 230 of the Communications Decency Act (CDA) accord broad immunity and both need to be reformed. He supports narrow and targeted reforms to section 230 that impose accountability for sex trafficking and other abuses such as child abuse, as provided in the EARN IT Act. In the earlier testimony he heard reference [by Mr. Berroya] to “old fashioned collaboration,” but he feels that is appropriate only for an “old fashioned process” and is no longer appropriate to the present technology and “threats to rights that are imperiled by the lack of accountability and enforcement.” He asked whether anyone on the panel supported the status quo and would argue that there was no need for improvement. At first all the witnesses were silent, so Sen. Blumenthal was going to assume that silence indicated that everyone on the panel agreed that “some kind of improvement is warranted.” Mr. Berroya belatedly responded, noting that “the Internet Association would disagree that domestic law needs to change in order to address a problem that is largely overseas.” Mr. Blumenthal pressed him, asking, “So you want to just leave the system as it is in the DMCA?” Mr. Berroya responded that yes, “the DMCA is working as it is intended to.” He responded that “it preserves the critical balance between all stakeholders involved … It incentivizes collaboration” and he believes that this collaboration allows for “a quicker response [to piracy] than otherwise might occur.” Sen. Blumenthal responded that this argument is “belied” by reports from his constituents who are independent artists and are “forced to scour YouTube and other platforms” for infringements; it is not collaborative; it is a “full time effort” on their part, and the burden is placed on them. He concluded by noting that “rights holders are effectively charged with monitoring the entire Internet for infringements on their copyrights, and that burden is especially problematic for independent artists who are more vulnerable to rights infringing activities. So, I think that dismissing these complaints … in effect …ignores a very pressing problem that we need to address.”

Sen. Coons also followed up with Mr. Berroya noting that he is concerned that “some of our most profitable companies have found success at the expense of the smallest members of our creative community” and asked how such small creators can be expected to “police the internet” and whether some of our “largest and most sophisticated companies” shouldn’t “shoulder some of the responsibility for the infringing material that is being monetized on their platform?” Mr. Berroya again noted that collaboration was “essential”
as was the “pooling of resources” as that is the only way to “deal with the scale of global piracy.” Until this “pooling of resources” occurs, then it will “continue to be a game of whack a mole.”

In remarks between the first and second panel of witnesses, Sen. Tillis noted that in the world of technology available today, where “many of these … platforms have the technology to virtually anticipate the next song you want to hear or the next thing you want to buy” there has to be a way for Congress to come up with a system that is “sustainable, not disruptive, and helpful to our creators.”

Second Panel

Ms. Abigail Rives

Ms. Rives started by noting that during the pandemic “we’re more reliant than ever on platforms that would not exist but for the DMCA.” In her opinion, “overall section 512 is working well.” As she explained, in 1998 Congress knew that ISPs “would need legal certainty that they would not be automatically liable when their users were accused of copyright [; and] today’s startups need the same certainty and protections” as their predecessors. She argued that “changing the DMCA, even in ways that might seem minor would shift the ground underneath today’s startups.” She noted for instance that imposing a “duty to monitor based on a reasonableness standard” would be “unworkable” and lead to more and more expensive litigation. While she believes the notice and takedown system is “largely working well,” she does note that there is significant abuse of the system and “no meaningful opportunities to curtail it.” She referenced Prof. Tushnet’s testimony on Feb. 10, referring to the fact that most OSPs see very little actual infringement. In terms of improper takedown notices, she pointed to an example where a “musician posted a video of himself playing a public domain song written by Bach, and Sony sent a takedown notice claiming ownership of part of a Fox composition and refused to back down when the musician disputed Sony’s obviously incorrect claim.” She next addressed the issue of whether the red flag knowledge standard should be changed or whether an affirmative duty to monitor should be imposed. She believes these would “create new costs and risks that startups operating on thin margins would be unable to bear.” While “established incumbents” have automated systems to deal with their “infringement monitoring,” she pointed out that start-ups don’t, and in addition these automated filters have high error rates and cannot “address fact specific questions of infringement.” These filters are also cost-prohibitive for start-ups to develop and implement.
Mr. Kerry Muzzey

Mr. Muzzey, who is a modern classical composer and one of the “very few and very lucky independent artists” that have access to YouTube’s “Content ID” system, shared most of his experience with notice and takedown has been through the use of this tool on YouTube, and it has become a key part of licensing business. He noted that he was concerned about testifying at the hearing for fear of retaliation by YouTube and Google; concerned that they may take away his ability to use Content ID as a result of raising these issues publicly. He noted that Content ID is an “amazing technology” that allows him to locate uses of his music on the platform, and to date it has located approximately 110,000 videos that use his music without permission. He was clear that these were not “cute little kitten videos,” but rather commercial uses of his music by, e.g., “car companies and luxury hotel chains, Fortune 500 companies, pharma companies and dozens of international [TV] series.” He has issued DMCA takedown notices against these sites, but this is where “the broken part of the DMCA process revealed itself.” After issuing the takedown notices, he would receive a counter-notification stating that the use was a “fair use” even though in his view, “100% of this counter-notification assertion was false.” As a result of these counter-notices, he had 10 days to file a lawsuit against the uploader, or else YouTube would reinstate the video, and during those 10 days the video would stay up and both the uploader and YouTube would continue to monetize that video with his music in it. Given that he is an independent artist without a staff of lawyers to file lawsuits, it is hard to fully vindicate his rights. While copyright law tells him that he “has the right of ownerships to the music [he] creates, but if [he] doesn’t have a legal remedy when [his] work is stolen, [does he] really have that right?” The DMCA gives him a remedy – filing lawsuits; but “that isn’t really a remedy.” He urged the Subcommittee to “fix a broken law” by revising the DMCA for small creators who have been “left with no rights or remedies.”

Ms. Meredith Rose

Ms. Rose noted that this is “not about content v. tech,” but rather Section 512 impacts all Americans, who use the internet as “more than just a delivery mechanism for copyrighted content.” She stated that in order to “reform the system” it is “important to acknowledge the ways in which” it is broken. Specifically, she noted three areas: 1) bad DMCA notices; 2) shortcomings with algorithmic enforcement; and 3) giving private parties the power, without due process, to remove a family’s access to broadband. On “bad” DMCA notices, she noted that it was important to acknowledge that not only do these occur but that they happen at an enormous scale (one study she discussed “looked at 1.8 million notices and concluded that nearly one third of them were problematic and that 4.5 million of them were fundamentally flawed,”) and they lead to the erasure of speech from the Internet for up to 2 weeks “without any meaningful oversight.” She noted that senders can use takedown notices to “censor legitimate content” and incomplete or error-filled
notices “can make it impossible for platforms to identify the works involved” and at times have even led to having live streams and news broadcasts be interrupted. And, even with all these errors, some stakeholders “still insist on faster takedowns with fewer safeguards and more potential liability for any platforms that attempt to filter out defective or malicious notices.” With respect to algorithmic enforcement mechanisms such as “Content ID,” she noted that these solutions “sound good in theory” but “the reality of their implementation is messy and full of difficult design choices because they operate automatically.” As a result, these algorithms can “instantaneously remove speech that may otherwise be political, educational or newsworthy.” As for the issue of broadband access, she argued that Congress should “not permit let alone strengthen provision of laws which allow third party private actors to terminate a person’s Internet access unilaterally and without …due process.” She noted that when the DMCA was passed in 1998, ISPs “were software providers that operated over the telephone network” and “being dropped by your ISP meant uninstalling American Online and installing any of the hundreds of competitive options that were available.” In contrast, she noted that now the “ISP controls both the software layer and the physical connection into your home.” As a result, “being disconnected means losing access to the Internet” and she argued that “the punishment is now wildly disproportionate to the accused, not even adjudicated, offense.”

Mr. Jeff Sedlik

Mr. Sedlik explained that he is a professional photographer, who makes his living creating and licensing photographs to appear in all manner of media. He noted that “in theory” his work is protected by the U.S. copyright law, but “[i]n reality, my photographs receive very little protection because of the rampant infringement of my work that is knowingly permitted by online service providers on their platforms and on their web sites.” He complained that service providers hide behind the Section 512 safe harbors rather than “using readily available technologies to identify and mitigate copyright infringement.” He summarized his enforcement efforts, saying “I am forced to dedicate my days and nights to searching for infringements, making screenshots to document infringing material, collecting hundreds of thousands of infringement URLs, combing through obscure web site menus that are different on every site to find DMCA agent information, drafting and submitting takedown notices and responding to inane unnecessary delay tactics such as follow up questions from service providers. Once the infringement is taken down, it will inevitably return, often on the same day; providers uniformly fail to effectively implement and enforce repeat infringer policies.” In short, he noted that “[e]nforcing rights under the DMCA is an impossible task” not just for him but also for his fellow creators. The “balance” that he faces is that he must “generate revenue by creating and licensing new works” but in doing so, he finds that he is forced to compete with “hundreds of thousands of unlicensed unpaid infringing uses of his work,” but if he doesn’t enforce his copyrights, his work has “no value and [his] business is not sustainable.” But if he dedicates the necessary time and effort to enforce his rights, he has
“no time left to create new works.” In terms of specific suggestions on how to revise section 512, he recommends the following: first, “revise and clarify the knowledge requirements recognizing the service providers’ right and ability to control infringing activity and deeming that willful blindness and negligent blindness are the equivalent of actual knowledge;” second, “encourage service providers to collaborate with creators and other stakeholder groups to implement nonproprietary opt out and opt in registries available for voluntary use by creators and rights holders;” third, for visual works, service providers should be required to use image recognition technology which is “readily available, scalable, highly accurate and perfectly suited for the task” of identifying infringing works. In addition, service providers should also be required to search embedded metadata to identify infringing works, and upon receipt of a representative list of links to infringing material, service providers must employ available technologies to identify and remove not only those representative examples but all other existing infringements. He also recommends that service providers be required to implement a “notice and staydown” procedure (rather than the ineffective “notice and takedown” process). He also recommends that service providers be required to strictly implement a repeat infringer policy and terminate access for users who receive two or more takedown notices. He also suggested that the new law recognize “embedded metadata and digital watermarks” as “standard technical measures, so that service providers are required maintain and preserve all metadata and digital watermarks in all files uploaded to their platforms as a condition of eligibility for the safe harbors. In addition, provide the Register of Copyrights the authority to establish and maintain a list of “additional standard technical measures.” The Register should also have the authority to “either waive the advance registration requirement for filing infringement claims in response to a 512 counter notice or toll the counter notice period during the pendency of the standard copyright registration application processing period.” He also suggested that service providers be prohibited “from publishing a creator's name, street address, phone and email address to stop the current practice by service providers of shaming creators and threatening their privacy and security.” He also suggested that as a condition of eligibility “service providers must disclose the identity of infringers so as to provide an affordable and practical procedure to discover that information without resorting to formal legal action.” He also recommended that as a condition of eligibility, service providers should be required “to allow rights holders to conduct an image recognition search and medias searches against their databases of uploaded works to identify any infringing works.” Lastly, he noted that he agreed with the recommendations in the section 512 report issued by the Copyright Office.
Questions for Panel II

**Sen. Tillis** addressed his first question to **Ms. Rives**, noting that there is an economic ecosystem on both sides of the issue, and asked these witnesses whether they could see a path to revising the 512 balance, since that resisting any changes would seem to benefit a sector that has “done relatively well.” **Ms. Rives** responded by noting that most OSPs experience an “extraordinarily small” amount of infringing notices (or as Professor Tushnet referred to it in the earlier hearing an “artisanal” amount) and to force these platforms that host a lot of creative content to screen all that content would impose a terrible burden and threaten their existence. She also explained that these platforms have given creators the ability to have “a voice … find fans…find an audience,” which would not have been possible because these platforms couldn’t have existed but for the DMCA. **Sen. Tillis** next asked **Mr. Muzzey** and **Mr. Sedlik** if they knew then what they know now about the daily challenges of being a small creator, “how would that affect your career choices?** Mr. Muzzey confessed that he has recently thought that perhaps he should have gone to “med school.” While he notes that at times he is disheartened when he comes across unlicensed uses of his music and is told “you should be lucky we picked yours” when he would have preferred they license his music legitimately, he is an optimist at heart and is in the game for the long haul. Mr. Sedlik noted that he is also a teacher and he sees a lot of talented young artists and he is concerned because they have a “slim to none chance at success in the professional world because out of the gate all of their works as soon as they post them online will be taken … and there’s little if anything they can do about that.”

**Sen Coons** asked **Ms. Rives** to be more specific with respect to the policing challenge for a start-up company and whether industry standardization would alleviate burden. **Ms. Rives** noted that the companies she works with just don’t see that much infringement. As a result, any mandates would impose a burden on these companies without catching more infringers. With respect to standardization, she pointed to her written testimony where she expounds in more detail about the limitations of filtering technology, noting that while there have been efforts to automate and use algorithms to detect potential infringement, those are imperfect, with high false positives. More importantly, the tools to do this just don’t exist and would have to be created. **Sen. Coons** then asked Ms. Rose whether Congress should be exploring an alternative dispute resolution process given the complaints he has heard about abusive takedown notices and counter notices and the fact that litigation is a very costly and time-consuming way to resolve these disputes. Ms. Rose responded that yes, that is something to be considered, but questions would arise around “the sort of inevitable design choices about what that venue would look like.” She expressed concern that the Copyright Office Section 512 study tied this issue to a “particular piece of legislation which is much broader and more complex than simply resolving DMCA notices and counternotices.” [Ed. Note: this is a reference to the CASE Act] She did note that while it depends on the execution, she believes, “in theory” that “there’s a lot of merit to the idea.”

Testimony:
Mr. Don Henley:
https://www.judiciary.senate.gov/download/henley-testimony

Mr. Jonathan Berroya:
https://www.judiciary.senate.gov/download/berroya-testimony

Mr. Douglas Preston:
https://www.judiciary.senate.gov/download/preston-testimony

Ms. Abigail Rives:
https://www.judiciary.senate.gov/download/rives-testimony

Mr. Kerry Muzzey:
https://www.judiciary.senate.gov/download/muzzey-testimony

Mr. Jeff Sedlik
https://www.judiciary.senate.gov/download/sedlik-testimony