



February 10, 2020

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

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

RE: Legislative hearing - The Digital Millennium Copyright Act at 22: What is it, why was it enacted, and where are we now?

Dear Chairman Tillis and Ranking Member Coons:

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With over 30,000 dues-paying members, and well over 1 million followers on social networks, we work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

For years EFF has fought against efforts to rewrite copyright law to favor a few incumbent special interests and disadvantage regular Internet users, including independent authors, artist and musicians. Any new review of the law must keep in mind the fundamental purpose: to stimulate artistic and technological creativity for the general public good. As the Supreme Court has noted, “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other Arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

### **Intermediary Liability**

The Internet has democratized distribution, to the benefit of creators and users. For decades, major broadcast entities, newspapers, record labels, movie studios, and telecommunications companies served as investors and gatekeepers for all kinds of content, and many profited from that means of control. Today, however, anyone can use an open platform now to create a work and gain access to the world, with virtually no distribution cost.

This new freedom would not exist if Congress had not had the wisdom, in 1998, to create “safe harbors” that protect service providers from monetary liability based on the allegedly infringing activities of third parties. To receive these protections, service providers must comply with the conditions set forth in Section 512 of the Digital Millennium Copyright Act (DMCA) including “notice and takedown” procedures that give copyright holders a quick and easy way to disable access to allegedly infringing content. Section 512 also contains provisions allowing users to challenge improper takedowns. Without these protections, the risk of potential copyright liability

would prevent many online intermediaries from providing services such as hosting and transmitting user-generated content. Thus the safe harbors, while imperfect, have been essential to the growth of the Internet as an engine for innovation and free expression.

### **Proponents of the Failed Stop Online Piracy Act Still Pursue the Goal of Fundamentally Changing the Internet to Protect Their Industries from Disruption**

Congress once came perilously close to upending these crucial liability protections with the Stop Online Piracy Act (SOPA). This legislation would have altered the responsibilities of open platforms to police other parties' copyrights. Thanks to historic online mobilization efforts -- including a day of action when 115,000 website owners formally protested the bill by blacking out their logos and millions of messages were sent to Congress (1 million through EFF alone)<sup>1</sup>—this dangerous legislation was stopped.

However, the same special interests that saw nothing wrong with SOPA continue to insist that the landscape of liability in copyright law must change, regardless of the costs to the Internet users or open platforms on which we rely to exchange knowledge and culture; and despite the fact that the entertainment industries are overall more profitable than ever before.

We strongly caution the Senate Judiciary Committee against accepting the false narrative that major corporate rightsholders are not the beneficiaries of the existing system. They have benefited from amendments to copyright law that have weighted the scales in their favor to the disadvantage of upstart creators, innovators, and Internet users of all kinds. To take just one example, copyright-related restrictions on DVD players all but halted innovation in that technology, to the detriment of businesses and consumers alike. Much of EFF's work on copyright issues is focused on ensuring that copyright is not used to give a small group of incumbent interests veto power over legitimate innovation, security research, remix culture, independent artists, competition, lawful speech.

### **Mandatory Copyright Filtering Must Be Rejected**

Major entertainment companies argue that the Digital Millennium Copyright Act's (DMCA) notice and takedown system should be abolished and replaced with mandatory copyright filtering (which they often refer to as "notice and stay-down").

This is a terrible idea. First, it will cause massive collateral damage to online expression. Google's Content ID system, for example, has itself consistently suppressed lawful speech, and harmed independent artists.<sup>2</sup> Second, filtering systems are ruinously expensive; making them mandatory will simply solidify the strength of incumbent tech giants, freeze the market, and insulate them from future competition and disruption.

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<sup>1</sup> Corynne McSherry, *Thank you, Internet! And the Fight Continues*, DEEPLINKS BLOG, <https://www.eff.org/deeplinks/2012/01/thank-you-internet-and-fight-continues>.

<sup>2</sup> Chris Sprigman & Mark Lemley, *Why Notice-and-Takedown is a bit of Copyright Law Worth Saving*, Jun. 21, 2016, LA TIMES, <http://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html> (The authors note that in order for Google to launch its own content filtering system the company has incurred a cost of \$50 million).

Third, overreliance on filters creates an unstable, unsafe environment for small independent Internet creators who depend on platforms to share their work. Videos, music, and art that the flexible nature of fair use protects vanish in the rigid system of a filter.<sup>3</sup> For example, YouTube’s copyright filter has flagged a recording someone made of their own voice,<sup>4</sup> ten hours of static<sup>5</sup>, and a video using a two-second guitar riff as an example in an instructional video.<sup>6</sup> Rather than protect and promote creativity, filters concentrate it in the hands of current rightsholders. The safe harbor provided by the DMCA has made it possible for people to make and share new works, criticism, and commentary. Mandatory filtering would do untold harm to that ecosystem.

### **Given Copyright’s Draconian Penalties, Section 512 Safe Harbors are Essential to Maintaining the Free Flow of Information on the Internet**

Copyright law currently allows copyright holders who sue for infringement to seek “statutory damages” of at least \$200 and as much as \$150,000 per work. Statutory damages are determined by a jury, but do not require any evidence of the actual harm. As a result, potential penalties in civil copyright cases can be shockingly high. A 2006 suit against XM Satellite Radio over the design of a portable receiver with recording functions created a potential liability of \$37 billion, nearly three times the annual revenue of the entire recording industry. In fact, despite the ability to seek actual damages, statutory damages are sought as a default for the simple fact that they far exceed the actual economic harm caused by the infringement.<sup>7</sup>

Congress correctly understood that the application of ambiguous copyright doctrines to new Internet technologies would put service providers in an impossible position. In order to provide services to millions of users, service providers necessarily must make, manipulate, and transmit multiple copies of content at several stages of their technical processes. These myriad copies

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<sup>3</sup> Eliot Harmon, *Don’t Sacrifice Fair Use to the Bots*, DEEPLINKS BLOG, <https://www.eff.org/deeplinks/2019/03/dont-sacrifice-fair-use-bots>.

<sup>4</sup> Katharine Trendacosta, *The Mistake So Bad, That Even YouTube Says Its Copyright Bot ‘Really Blew It*, TAKEDOWN HALL OF SHAME, <https://www.eff.org/takedowns/mistake-so-bad-even-youtube-says-its-copyright-bot-really-blew-it>.

<sup>5</sup> Katharine Trendacosta, *Ten Hours of Static Gets Five Copyright Notices*, TAKEDOWN HALL OF SHAME, <https://www.eff.org/takedowns/ten-hours-static-gets-five-copyright-notices>.

<sup>6</sup> Julia Alexander, *YouTubers and Record Labels Are Fighting and Record Labels Keep Winning*, THE VERGE, <https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover>.

<sup>7</sup> Statutory damages also vary widely from case to case, even when facts are similar, making it difficult for businesses to predict potential liability and price their risk accurately. For example, a record label challenging three companies that used its recordings under similar circumstances received \$10,000 per work in one case, \$30,000 per work in another, and \$50,000 per work in a third. The massive size and unpredictability of statutory damages fuels an industry of abusive infringement allegations against individual Internet users and small businesses based on scant or even falsified evidence. The risk of massive statutory penalties coerces innocent people to pay \$2,000 to \$10,000 in “settlement” of these abusive claims. Former U.S. Register of Copyrights Maria Pallante emphasized the need to fix statutory damages in a 2014 address. Potential legislative fixes include requiring proof of actual harm where such proof is available, eliminating statutory damages in the types of suit most prone to abuse, and adding guidelines to the statute to make penalty amounts more consistent and predictable.

might arguably infringe one or more of the display, performance, distribution, reproduction, or other rights in copyrighted content. Thus, “without clarification of their liability, service providers [would] hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”<sup>8</sup>

Safe harbors are the foundation for free expression and creativity that relies on open platforms. Video hosting, social networking, and other means of interacting and sharing information have revolutionized how society organizes itself and participates in democratic processes. For example, tens of thousands of volunteers actively collaborate to create the world’s largest collection of knowledge through Wikipedia. This can only happen when all of the uploading, posting, and related acts in creating a wiki page do not simultaneously expose Wikipedia to essentially unlimited liability as a host, transmitter, or disseminator of that content.

Predictable means of controlling liability is the only way platforms can continue to scale and innovate with an ever increasingly connected global community of users. Efforts to reverse course should be scrutinized heavily for their ramifications on the long and continuing success story of the modern Internet.

### **Fair Use Is an Essential First Amendment Safeguard**

Laws that protect copyright are compatible with the First Amendment only to the extent that they respect copyright’s traditional boundaries – including fair use. The Supreme Court has specifically identified fair use as a speech-protective safeguard. And rightly so. Whether it’s quoting in a blog, inserting video clips into a news report, or using a song for purposes of satire or parody, free speech and commentary often depends on incorporating and referencing other people’s creation in a new expression. Unfortunately, copyright owners often object to these uses and look for ways to take them offline via improper copyright complaints. An email complaint to your webhost or ISP may be all it takes to make your online speech disappear from the Internet — even when the legal claims are transparently bogus. These speech suppressing actions are so numerous that EFF created an ongoing blog series to inform the public of how copyright complaints regularly harm creative lawful expression.<sup>9</sup>

In particular, copyright claimants often misuse the DMCA to demand that material be immediately taken down without providing any proof of infringement. Service providers fearful of monetary damages and legal hassles usually comply. The DMCA also puts anonymous speech in jeopardy; by misusing its subpoena power, copyright holders can attempt to unmask an Internet user’s identity based on a mere allegation of infringement without filing an actual lawsuit or providing the user any constitutional due process. For example, EFF represented a client who anonymously criticized their church on a reddit online discussion group by writing text and sharing images from the church’s internal publications. Reddit subsequently faced a subpoena premised on copyright infringement and a demand that they reveal the identity of the poster to the church.

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<sup>8</sup> S. Rep. 105 - 190, at 8.

<sup>9</sup> Takedown Hall of Shame, available at <https://www.eff.org/takedowns>.

EFF was successful in quashing the subpoena, but it serves as powerful example of how copyright is often used as an end run around constitutionally protected rights.<sup>10</sup>

### **Limitations and Exceptions in Copyright Are Essential to Investment and Job Creation**

It is no accident that America is the home of the world's largest and most innovative technology companies. Copyright law's limitations and exceptions allow for innovative fair uses of copyrighted works without facing crippling liability or having to pay for permission to innovate. The careful balancing act has provided the opportunity for the growth of search engines, remote storage, and open platforms. It is a uniquely American phenomenon, as other countries have adopted more restrictive and burdensome copyright regimes.

Clarifying the scope of limitations and exceptions has regularly unlocked extraordinary potential in the marketplace. For example, a federal appeals court's ruling recognizing the lawfulness of creating a remote DVR service that allowed customers to remotely record and play back content unleashed a billion dollars in *increased* investment in remote content storage services following the Second Circuit's guidance.<sup>11</sup>

Venture capitalists look at two barriers when deciding on whether to fund an Internet startup. They first assess the cost of entry into the market, which for many new Internet products is very low. Then they determine the extent of the company's exposure to liability. When dealing with technologies that interact with copyrighted works, the liability risk is exceedingly high. Whenever a safe harbor or limitation to copyright liability exposure is clarified, the greater the willingness of venture capitalists to risk scarce investment dollars.

For decades the same industry players in Washington DC have driven Congress to expand the scope of liability. Today, the best way to free up private investment dollars and help create more businesses here at home requires a new emphasis on reducing liability when launching Internet companies. Such a focus will help promote desperately needed competition, allow for new innovation, and launch more small businesses.

### **Section 1201: The Dark Side of the DMCA**

While Section 512 of the DMCA has fostered an explosion of commerce, expression, and innovation, Section 1201 of the same legislation has had the opposite effect. Section 1201 makes it unlawful to interfere with digital locks on copyrighted works (often known as technological protection measures) or to distribute tools for doing so—even if the user's intent and subsequent use are otherwise lawful.

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<sup>10</sup> Alex Moss, *Reddit Commenter's Fight for Anonymity is a Win for Free Speech and Fair Use*, DEEPLINKS BLOG (May 21, 2019), available at <https://www.eff.org/deeplinks/2019/05/reddit-commenters-fight-anonymity-win-free-speech-and-fair-use>.

<sup>11</sup> Josh Lerner, Harvard Business School, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies 1* (2011) available at [https://www.hbs.edu/faculty/Publication%20Files/15-082\\_ce76cd68-19d3-4328-9df0-fb74913cd5db.pdf](https://www.hbs.edu/faculty/Publication%20Files/15-082_ce76cd68-19d3-4328-9df0-fb74913cd5db.pdf).

Congress intended for the law to buttress technological controls major media companies used to dictate access to digital content. But it is no longer used for that purpose alone, or even primarily. As software has proliferated, this deeply flawed law has caused extraordinary collateral damage, interfering with ownership rights in digital devices, stifling the development of new products, suppressing lawful speech, inhibiting security research, and stifling competition with large technology firms.

EFF has twice challenged the constitutionality of Section 1201; the second challenge is now pending.<sup>12</sup> But even if Section 1201 were constitutional, in practice it has strayed far away from its original purpose, undermining the settled expectations of the purpose of copyright law that ordinary Americans hold.

### **Section 1201 Has Eroded People’s Right to Repair the Things They Own**

Americans expect to be able to repair and take apart the things they own, such as cars, home electronics, and appliances. In the United States, tens of thousands of companies employing over a million Americans provide the tools, parts, and services for repairing and tinkering with personal property, with revenues totaling hundreds of billions of dollars.<sup>13</sup>

This industry, and personal property rights, are being systematically undermined by copyright regulation. Copyrighted code resides in your car, your phone, your baby monitors—essentially all of your “smart” electronics. That code often encumbered by licenses and software locks, which sellers use to impose a host of restrictions. For example, auto manufacturers, inkjet printer companies, and others have use copyright law to prevent independent mechanics and small businesses from repairing devices or providing competitive products. They and other manufacturers have weighed in during regulatory proceedings before the Copyright Office, asserting that farmers do not really own their own tractors, gamers do not own their game consoles, and Americans do not own their televisions.

Aftermarket businesses, farmers, the electronics repair community, companies with innovative add-on technology for existing devices, and other ordinary Americans think this is wrong. They want to be buyers, not renters. It is time to scale back Section 1201’s reach into industries and markets that do not even have the slightest relation to copyright law and allow people to tinker with, repair, and fully own their computerized devices.

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<sup>12</sup> *Green v. U.S. Department of Justice*, Case No. 1:16-cv-01492-EGS (D.D.C); see <https://www.eff.org/cases/green-v-us-department-justice>.

<sup>8</sup> Auto Mechanics: \$70B, 271,026 businesses, 585,865 jobs, <http://www.ibisworld.com/industry/default.aspx?indid=1689>; Auto Parts Wholesaling, \$198B, 23,275 businesses, 238,426 jobs, <http://www.ibisworld.com/industry/default.aspx?indid=914>; Auto Parts Stores, \$58B, 63,430 businesses, 383,827 jobs, <http://www.ibisworld.com/industry/default.aspx?indid=1012>; Electronics Repair, \$19B, 53,960 businesses, 140,298 jobs, <http://www.ibisworld.com/industry/default.aspx?indid=1702>.

## Section 1201 Hinders Efforts to Develop Interoperable Products That Allow Competition Against Big Tech

Many in Congress and around the country are concerned about the power of Big Tech. One remedy for market concentration is adversarial interoperability,<sup>14</sup> whereby a new market entrant creates a product or service that works in concert with an incumbent's existing offering: this has been key to disrupting market domination in fields ranging from broadcast television<sup>15</sup> to local-area networking<sup>16</sup> to business productivity software<sup>17</sup> to the personal computer.<sup>18</sup>

But tech giants can use Section 1201 of the DMCA and other laws within the Senate Judiciary Committee's jurisdiction, such as the Computer Fraud and Abuse Act, to prevent new entrants from using adversarial interoperability to challenge their dominance. Startups that want to develop competitive interoperable products are quickly chilled due to the enormous liability risks that are brought on through anti-competitive conduct masked as copyright claims. As a result, new products, services, software updates, and applications that can disrupt the concentrated Internet market for users remain suppressed.

## Cybersecurity Is Hindered When Copyright Provides a Veto on Security Research

The Internet of Things (IoT) has also meant the rapid deployment of poorly secured computers to the Internet. Even expensive IoT devices like cars often lack rudimentary security protections—witness, for example, how researchers were able to hack a Jeep Cherokee over the Internet.<sup>19</sup>

One way to address this problem is to ensure that independent security researchers can do their work – and share it. Manufacturers urge that they alone should have the power to authorize security research, but they do not have a strong track record of securing devices, in part because they wish to protect their brand and may hesitate to reveal vulnerabilities for that reason. In many consumer electronics markets, devices are sold to a customer and the manufacturer does not maintain any ability to update the software on the device, meaning that they cannot offer patches for security vulnerabilities. Even when they do have that ability, it is not always

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14 Cory Doctorow, *Adversarial Interoperability*, DEEPLINKS BLOG (Oct. 2, 2019) available at <https://www.eff.org/deeplinks/2019/10/adversarial-interoperability>.

15 Cory Doctorow, *A Cycle of Renewal, Broken: How Big Tech and Big Media Abuse Copyright Law to Slay Competition*, DEEPLINKS BLOG (Aug. 19, 2019), available at <https://www.eff.org/deeplinks/2019/08/cycle-renewal-broken-how-big-tech-and-big-media-abuse-copyright-law-slay>.

16 Cory Doctorow, *SAMBA versus SMB: Adversarial Interoperability is Judo for Network Effects*, DEEPLINKS BLOG (Jul. 18, 2019), available at <https://www.eff.org/deeplinks/2019/07/samba-versus-smb-adversarial-interoperability-judo-network-effects>.

17 Cory Doctorow, *Adversarial Interoperability: Reviving an Elegant Weapon From a More Civilized Age to Slay Today's Monopolies*, DEEPLINKS BLOG (Jun. 7, 2019), available at <https://www.eff.org/deeplinks/2019/06/adversarial-interoperability-reviving-elegant-weapon-more-civilized-age-slay>.

18 Cory Doctorow, *'IBM PC Compatible': How Adversarial Interoperability Saved PCs from Monopolization*, DEEPLINKS BLOG (Aug. 5, 2019), available at <https://www.eff.org/deeplinks/2019/08/ibm-pc-compatible-how-adversarial-interoperability-saved-pcs-monopolization/>

<sup>19</sup> Andy Greenberg, *The Jeep Hackers are Back to Prove Car Hacking Can Get You Much Worse*, Aug. 1, 2016, WIRED, <https://www.wired.com/2016/08/jeep-hackers-return-high-speed-steering-acceleration-hacks>.

profitable for a company to bother monitoring and providing security updates, or the company may go out of business. The devices remain on the Internet, insecure and potentially hacked to compromise their owners, obtain proprietary information, or to form a malicious botnet capable of attacking other targets on the Internet.

The owners of the devices and interested security researchers can step up to fill this security gap, but Section 1201 of the DMCA prevents them from analyzing most of the potential vulnerabilities in these devices.<sup>20</sup>

We thank the Committee for providing us an opportunity to share our findings on the Digital Millennium Copyright Act. Should you wish to contact EFF to discuss any of these matters further, please feel free to contact our Senior Legislative Counsel (Ernesto@eff.org).

Sincerely,

Electronic Frontier Foundation

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<sup>20</sup> Kit Walsh, *One Weird Law That Interferes With Security Research, Remix Culture, and Even Car Repair*, DEEPLINKS BLOG (Oct. 11, 2019), <https://www.eff.org/deeplinks/2019/10/one-weird-law-interferes-security-research-remix-culture-and-even-car-repair>.