The Digital Copyright Act of 2021/Tillis

Commentary of Electronic Frontier Foundation

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Introduction

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 more than 30,000 dues-paying members, and well over one million followers on social networks, we work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

For 30 years, EFF has represented the public interest in ensuring that law and technology support human rights and innovation. As part of that work, we have been involved in virtually every major case interpreting the DMCA. In the United States and abroad, we work to ensure that copyright policy, legislation, and practice appropriately balance the rights of artists, authors, and the general public. As a legal services organization, we also counsel users, including Internet creators, who have been wrongly accused of copyright infringement, and help them respond.

EFF appreciates the opportunity to comment on the discussion draft. Rather than responding to each subsection, our comments will focus on those provisions as to which we have particular experience and expertise. Overall, while we are sure this draft is well-intentioned, and realize that this is not a final bill, we must note that most of the significant proposals herein, even if watered down in some way, would cause deep and lasting damage to online speech, innovation, and competition.

We urge the drafters to set this proposal aside completely.

If Congress is committed to tinkering with the DMCA, then (1) as to Section 512, any reform should be directed at addressing the proven harm to legitimate speech, by clarifying that Section 512(f) penalties apply to objectively unreasonable takedown notices; and (2) as to Section 1201, it should either scrap Section 1201 completely or add a simple carveout for circumvention lacking a nexus to copyright infringement.

Section 2: Limitations on Liability Relating to Material Online (512)

The goal of the DMCA was to ensure that the Internet would be an engine for innovation and expression, not to ensure perfect infringement policing. The record shows that safe harbors were intended to facilitate "the robust development and World-wide expansion of electronic

commerce, communications, research, development, and education."[1] In the decades since the DMCA passed, we have seen this happen. The Internet is vital to almost every American's daily life.

Furthermore, Congress built-in protections for free speech, knowing that Section 512's quick and easy takedown process could result in lawful material being censored from the Internet, without any court supervision, much less advance notice to the person who posted the material, or any opportunity to contest the removal. To inhibit abuse, Congress made sure that the DMCA included a series of checks and balances. First, it created a counter-notice process that allows for putting content back online after a two-week waiting period.[2] Second, Congress set out clear rules for asserting infringement under the DMCA.[3] Third, it gave users the ability to hold rightsholders accountable if they send a DMCA notice in bad faith.[4]

The draft bill throws that system completely out of balance. It will upend decades of investment, innovation, and expression that relies on the 512 safe harbors. Just when more competition is sorely needed, the draft bill entrenches current gatekeepers and adds new ones. It will inevitably lead to over-censorship – particularly given the paltry penalties it proposes for abuse.

In particular, the changes to the knowledge requirements for OSPs, the new monitoring requirements, the notice and staydown mandate, the changes to notice requirements, and the creation of multiple pseudo-regulatory roles for the Copyright Office will be an unmitigated disaster for the Internet.

A) Lowering the Knowledge Requirements and Imposing a New Duty to Monitor Will Create Untenable Legal and Practical Uncertainty

Currently, the DMCA requires that a service provider cannot have actual knowledge that a given use is infringing or be "aware of facts or circumstances from which infringing activity is apparent." The new proposal changes the standard, so that a service provider may lose safe harbor protections if it is aware "facts or circumstances from which infringing activity is likely," is "willfully blind with respect to the infringement" or induces such infringement.

There are at least three fundamental problems with this change. *First*, as a practical matter, the existing knowledge standard has already been subject to many years of litigation, costing millions of dollars. At long last, all parties have the legal certainty the DMCA was supposed to provide in the first place. Rewriting the rules now will send millions more dollars to law firms, with little reason to expect it will send a penny to any actual creator. And that renewed legal uncertainty will chill investment just when the Internet needs competition more than ever. *Second*, as a matter of law, the term "likely" is hopelessly vague and ambiguous. Does it mean probable? Possible? According to whom? What are markers of "likely" illegality? Moreover, any

[1] S. Rep. 105-190, at 1-2.

[2] 17 U.S.C. § 512(g)(3).

[3] 17 U.S.C. § 512(c)(3).

[4] 17 U.S.C. § 512(f).

such determination requires OSPs to speculate because they, unlike the copyright holder, are not well positioned to know whether or not a given use is licensed, implicitly or explicitly, and/or make fair use determinations on the fly. Given the potentially devastating consequences if they guess wrong, service providers will inevitably choose to take content down at the slightest whiff of illegality. *Third*, as drafted the legislation appears to apply the same standard to service providers that merely facilitate access to the Internet. The only way an ISP can know whether infringement is "likely," absent a specific notification, is to actively intrude on their subscribers' private communications. Most ordinary people would not appreciate AT&T listening to their calls; it is unlikely they'll be any happier about AT&T monitoring their emails and texts.

Indeed, requiring monitoring in any way—either where "reasonable," as part of regulations around best practices, or as possibly part of a new knowledge standard—would result in the suppression of lawful expression. Like filtering obligations (discussed below), a duty to monitor, especially across multiple services, will be expensive and time-consuming. The easiest path for most providers will be to overblock automatically rather than risk liability for failure to adequately monitor. At the same time users who fear their content may be blocked will take the most conservative approach in order to ensure that their message actually reaches an audience.

Moreover, any monitoring obligations will doubtless by hijacked by governments; once services have established monitoring mechanisms, governments will inevitably seek to use those mechanisms for other purposes.

Finally, it will crush competition and innovation. Even small services may have thousands of users, and offer multiple services. A duty to monitor will be time-consuming and expensive. For nonprofits or small services, it will mean they cannot afford to host user-generated content at all, from Wikipedia to the comments section of a recipe blog. If this had been the rule for the past two decades, we wouldn't have most of the services that exist today, not least because no one would choose to invest in them.

To be clear, the "reasonable" limitation on the duty to monitor does not mitigate the problem. Unlike an objectively reasonable determination of lawfulness, a duty to monitor "where reasonable" cannot refer back to any judicial determination or other standard – at least not until the years of inevitable litigation have concluded.

B) So-Called "Notice-and-Staydown" Requirements Are Filtering Mandates That Will Inevitably Suppress Lawful Expression

As we and others have repeatedly explained, in practice "notice and staydown" is a filtering mandate. Faced with crippling liability risk if they do not keep allegedly infringing material off all of their services, any company that can afford it will turn to automated filters. Thus, legal protections for online speech will be replaced by algorithmic categories. A decade of experience with the most sophisticated filters demonstrates that such filters inevitably flag and silence lawful expression. They are also prohibitively expensive.

1. The DCA's Requirements Will Lead to Copyright Filters

Giving platforms an affirmative duty to takedown anything that looks like a complete or near-

complete work that is on some list or was named in a previous takedown—or even *portions* for "short-form" media—would lead to over-blocking, sacrificing lawful content in an effort to limit potential litigation.

Both monitoring and "notice-and-staydown" would likely require copyright filters. Filters are easier and cheaper to use than hiring human beings to monitor uploads or takedowns. But they are also dangerous. YouTube's Content I.D. system, which cost $60 million to build and requires continue investments to improve and maintain, regularly flag lawful content: NASA gets blocked[5] from posting its own Mars rover footage; birdsong results in videos being censored, entire academic conferences lose their presenters' audio because the hall they rented played music at the lunch-break—you can't even post silence without triggering copyright enforcement.[6, 7, 8]

2. *Copyright Filters Overblock, Even When They Are Designed to Target Only "Complete or Near-Complete" Matches*

Despite years of financial and technical investments, filtering technologies continue to do a poor job of sorting legal expression from infringement – even when they are set to flag nearly complete audio and visual matches. For example, filters cannot tell the difference between two different performances of the same public domain work. As a result, a copyright holders' claim to a particular version of a work can block many other performances. For example, classical musicians have been struggling for years to share their performances of public domain works without running afoul of content flags based on other people's content.[9]

Furthermore, uses of "complete or near-complete" works is not necessarily copyright infringement. Fair use depends on context, and while in many cases a fair use may be a few seconds, as for some kind of music criticism, it can also be the whole piece, such as in a music

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[5] Timothy B. Lee, *How YouTube lets content companies "claim" NASA Mars videos,* Ars Technica (Aug., 8, 2021), https://arstechnica.com/tech-policy/2012/08/how-youtube-lets-content-companies-claim-nasa-mars-videos/.

[6] Messieh, Nancy, *Copyright claim on chirping birds highlights the flaws of YouTube's automated system*, The Next Web (Feb. 27, 2012), https://thenextweb.com/google/2012/02/27/a-copyright-claim-on-chirping-birds-highlights-the-flaws-of-youtubes-automated-system/.

[7] Cory Doctorow, *Youtube nukes 7 hours' worth of science symposium audio due to background music during lunch break,* boingboing (Nov. 25, 2014), https://boingboing.net/2014/11/25/youtube-nukes-7-hours-worth.html.

[8] Daniel Nass, *Can silence be copyrighted?,* Classical MPR (Dec. 2, 2015), https://www.classicalmpr.org/blog/classical-notes/2015/12/02/can-silence-be-copyrighted.

[9] Micheal Andor Brodeur, *Copyright Bots and Classical Musicians Are Fighting Online. The Bots Are Winning*, Washington Post (May 21, 2020), https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/?arc404=true (last visited Sep 29, 2020).

parody.[10]

Unfortunately, filters are not good at nuance or context. Creators on YouTube, for example, find that YouTube's Content ID filter a) starts applying more rigorous checks the longer the video is and b) that the threshold is about five seconds. For example, one creator reported uploading bits of a video to YouTube as he finished them, to see if the filter would block it. 20-minute chunks of the video passed. When he uploaded the whole work, it was blocked because of a match.[11]

On YouTube, Content I.D's inept matching tech has largely replaced fair use as the standard for lawful expression. The DCA would replicate that sad outcome all over the Internet.

3. Filtering Mandates Will Further Entrench Big Tech's Power Over Speech.

Given how much this proposal leaves to cycles of regulation and rulemakings, compliance will be expensive for even the most well-intentioned intermediary. The best way to cut those costs, on top of automation, will be to enter into massive licensing agreements. Indeed, the largest current platforms, in an attempt to appease traditional media gatekeepers, already do this voluntarily. Combined with the concentration of the market of platforms, this has made it very difficult for many creators to share their work.[12]

But at least there is currently the possibility that competitor will enter the market and choose to disrupt the status quo.

If the DCA became law, disruption is much less likely. It will be too difficult for a new player to challenge the dominance of OSPs that have already invested millions in filters and licenses. The start-up costs and liability concerns will discourage innovation, as will the cost of trying to figure out which rules apply, to whom, and how to follow those rules in the short and longer term.

4. Counternotices Will Not Be Effective Checks On Abuse and Misuse

Counternotices will not be an adequate check on this system.[13] Even under the current DMCA, where counternotices are sent only in response to specific takedown claims, counter notice and

[10] *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 584 (1994).

[11] Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*. EFF (December 10, 2020). Available at: https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online (last visited: Feb 22, 2021).

[12] *See* Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*. EFF (December 10, 2020). Available at: https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online (last visited: Feb 22, 2021).

[13] Note: the draft is also unclear as to whether someone who has their content blocked because of a notice applied to someone else would be able to counter-notice in the same way as under the original DMCA.

putback procedures are rarely used and ineffective.[14] For example, the fear of litigation against a large corporation—major movie and tv studios and music labels, for example—makes counternotices simply too risky for most small and independent creators. Even if they are sure of their rights, they do not have the resources for such a fight.

Notice-and-staydown requires services to not only remove the specific use of copyrighted material named, but any similar uses. That will sweep up other content based on an allegation made against another actor. If content can be permanently blocked even if that particular creator has not received a takedown for their specific use, the confusion will lead to even fewer challenges.

C) The Change in Notice Requirements Would Suppress Expression

In addition to the above, the loosening of requirements for valid takedowns would lead to the restriction of lawful expression. Lists of "representative works" make it difficult for OSPs to know exactly what is and is not infringing. Erring on the side of caution involves taking down more, not less. A "non-exhaustive list" is an extremely broad description. OSPs will take down more, and it will be difficult for targets to know what, exactly, they have done wrong. That, in turn, will further impede to use of the counter-notice process; if you don't know who is complaining, about what, it is hard to know whether to push back.

Similarly, the new notice requirements put the burden on OSPs to find the allegedly infringing work. If a notice imposes obligations based on nothing more than a statement that a copy of a work exists in more than one place on the service, OSPs will be forced to censor broadly. And, as noted, since the new takedowns *are not* specific as to which specific use they concern, their targets will have trouble articulating a defense.

The answer to the problem of flawed, broad takedowns is not to make them the standard.[15]

D) OSPs, Users and Creators Need Legal Certainty, Not "Best Practices"

The draft "best practices" proposal is frankly appalling, for at least three reasons.

First, it will exacerbate the legal uncertainty that these proposed changes will already create. OSPs cannot innovate or develop new services if the rules of the game could change every few years, and the consequence failing to predict the future could be ruinous liability. And since any such best practices will necessarily shape the entire internet ecosystem, creators and users of all types will also be affected – with little ability, in most cases, to shape the outcome.

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[14] *See:* Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown in Everyday Practice* 44 (UC Berkeley Public Law Research Paper No. 2755628, Mar. 29, 2016). Available at: https://ssrn.com/abstract=2755628.

[15] *See* Comments of Automattic to the Copyright Office. Available at: https://assets.documentcloud.org/documents/2781753/2016-03-31-Automattic-Inc-512-NOI-Comments.pdf.

Second, the Copyright Office is not an appropriate entity to develop best practices for entire industries. Any such best practices would require deep technological and practical expertise in the affected sectors. Assistance from the NTIA will not suffice. Further the Office is not trusted; its tendency to prioritize the interests of major media companies over those of non-traditional creators and the public is well-documented.[16] For example, during a heated debate over cable set-top box competition, the Office spent months consulting with the Motion Picture Association of America and its allies, and it ultimately advocated for those groups' views to the FCC and Congress. By contrast, the Office made no attempt to seek other views, whether from independent manufacturers, technologists, or consumers, until just before issuing its public statement.

Third, it is profoundly undemocratic and likely unconstitutional. In effect, it gives the Copyright Office enormous authority to set the rules for the Internet. Those with money and influence will find ways to lobby the Office to shape those rules; those who lack it will be forced to bear the consequences, with no meaningful recourse.

E) Repeat Infringer Policies Cannot Be "One-size Fits All," Particularly Given the Potentially Devastating Effects of Account Termination

The draft tasks the Copyright Office, in consultation with NTIA, with developing a model repeat infringer policy that will be the minimum baseline for safe harbor protections. Part of the value of the DMCA is that the rules are clear and flexible to the many different kinds of OSPs that exist and might exist in the future. What a repeat infringer looks like on one service is not what it will look like on another. Even if the model policy is updated and changed, it will always be behind innovation, not adapted to it. And the changing nature of such a policy would introduce more uncertainty into the system, as opposed to the clear rules of the road Congress sought to provide with the DMCA. Fear of losing their channels under the repeat infringer policy has already made creators on YouTube loathe to challenge *any* form of copyright claim—be it a

[16] *See, e.g.*, Kerry Sheehan, *Let's Make the Copyright Office Less Political, Not More*, EFF Deeplinks Blog (Mar. 27, 2017), https://www.eff.org/deeplinks/2017/03/lets-make-copyright-office-less-political-not-more; Corynne McSherry & Katharine Trendacosta, *Internet Users of All Kinds Should Be Concerned by a New Copyright Office Report*, EFF Deeplinks Blog (June 1, 2020), https://www.eff.org/deeplinks/2020/06/internet-users-all-kinds-should-be-concerned-new-copyright-offices-report (noting Copyright Office's failure to recognize the public as a relevant stakeholder in its Section 512 report); Meredith Rose, et al., *Captured: Systemic Bias at the U.S. Copyright Office*, Public Knowledge (Sept. 8, 2016), https://www.publicknowledge.org/documents/captured-systemic-bias-at-the-u-s-copyright-office/; *see also* Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 Berkeley Tech. L. J. 775 (2019), https://btlj.org/data/articles2018/vol33/33_3/Perzanowski_Web.pdf (discussing "the Office's long-recognized tendency to prioritize the interests of copyright holders over those of the public"); Joseph Liu, *Copyright Rulemaking: Past as Prologue*, 33 Berkeley Tech. L. J. 640 (2019), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2236&context=lsfp (noting that industry capture "is a particular concern in areas like copyright law, where focused interests have much to gain by lobbying for protection, while the public interest is diffuse and has a more difficult time organizing itself in opposition").

filter or a fraudulent DMCA takedown, and created an ecosystem where extortion can flourish.[17]

Moreover, the consequences of cutting off someone's access to a service will be different for different OSPs, which should affect how easily a repeat infringer policy can be triggered. In particular, terminating internet access can have devastating consequences for education, employment, health, and so on, keeping in mind that multiple people may rely on the account and that in most of the United States users have no alternative for high-speed access. Many millions of Americans use the Internet for work, career building, education, communication, and personal purposes. And few could go to another provider if an allegation of infringement kicked them off the ISP they had. Most Americans have only one or two high-speed broadband providers with a majority stuck with a cable monopoly for high-speed access.[18]

This same problem also suggests that Copyright Office should not take lead on drafting a model policy. In its Section 512 report, the Copyright Office implicitly acknowledged the risks of account termination when it observed that stating that different approaches might be needed for students and universities, because students need the Internet for "academic work, career searching and networking, and personal purposes, such as watching television and listening to music," and students living in campus housing would have no other choice for Internet access if they were kicked off the school's network.[19] Of course, the same holds true for all Internet users. An agency that nevertheless thinks the real problem of repeat infringer policies is that courts aren't requiring service providers to create and enforce stricter ones cannot be trusted to represent the full public interests copyright policy affects.[20]

F) Standard Technical Measures Must Be Identified, If at All, With the Input of ALL Affected Groups

The draft directs the Copyright Office, in consultation with NIST, to establish "standard technical measures" through rulemaking. Any such process must include representation from all stakeholders, and should not be convened by the Copyright Office.

Under the DMCA, a standard technical measure must (1) have been developed pursuant to a broad consensus in an "open, fair, voluntary, multi-industry standards process"; (2) be available on reasonable and nondiscriminatory terms; and (3) cannot impose substantial costs on service providers.[21]

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[17] *See* Unfiltered and Jack Hauen, *A Scammer Used YouTube's Copyright System to Ransom Creator*, Vice.com (February 7, 2019). Available at: https://www.vice.com/en_us/article/evevdk/scammer-used-youtube-copyright-system-to-ransom-creators.

[18] Ernesto Falcon, *New FCC Data Indicates Future Broadband Access for Most Americans Will Be a Monopoly*, EFF (December 12, 2018). Available at: https://www.eff.org/deeplinks/2018/12/new-fcc-data-indicates-future-broadband-access-most-americans-will-be-monopoly.

[19] Copyright Office Report at 100-1010.

[20] Copyright Office Report at 100-109.

[21] 17 USC § 512(k)(1).

This formulation correctly understands that any STM must not become mandatory absent consensus within a wide range of affected stakeholders. Developing that consensus is challenging given the many industries involved and, more importantly, the many types of copyright owners that would be affected by any such measures, from large movie studios to vidders to YouTube creators to musicians to teachers to political organizers to ordinary people just posting the proverbial cat videos. Many of these creators may, for example, be much more concerned about protecting fair use than protecting a movie studio's ability to monetize snippets.

This is not a problem the Copyright Office can solve, both because it is a tremendous challenge and because the Copyright Office has not shown much interest in developing policy that reflects the needs of all stakeholders. EFF's own investigations have revealed attempts by the Office to lobby other government agencies against long overdue reforms that would have benefited consumers, technology users, and the public as a whole.[22] Moreover, the DMCA has already saddled the Copyright Office with many additional obligations, such as the 1201 exemption process. Congress should not add more.

G) The Proposed Penalties Will Not Deter Abuse, But There Is a Better Way Forward

The proposed legislation fails to make the single necessary change that would actually deter abuse: clarification that the sender of a takedown notice must have an *objectively reasonable* belief that the material at issue is not authorized by the copyright owner or the law, including the fair use doctrine. Rather than creating new requirements or penalties, the purpose of this change would be to prevent incorrect interpretations of the statute from gutting the Section 512(f) safeguard.

When it passed the DMCA, Congress knew that Section 512's powerful incentives could result in lawful material being censored from the Internet without prior judicial scrutiny, much less advance notice to the person who posted the material or an opportunity to contest the removal. To inhibit abuse, Congress made sure that the DMCA included a series of checks and balances. First, it included Section 512(g), which creates a counter-notice process that allows for restoration after a two-week waiting period. Second, it included Section 512(c)(3), which sets out clear rules for asserting infringement under the DMCA. Third, it included Section 512(f), which gives users the ability to hold rightsholders accountable if they send a DMCA notice in bad faith.

As the Senate Report on Section 512(f) explained,

> The Committee was acutely 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 balance the need for rapid response to potential infringement with the end-users['] legitimate interests in not having

[22] *See* https://www.eff.org/deeplinks/2016/10/newly-released-documents-show-hollywood-influenced-copyright-offices-comments-set; https://www.eff.org/deeplinks/2016/08/copyright-office-jumps-set-top-box-debate-says-hollywood-should-control-your-tv

material removed without recourse.

S. REP. NO. 105-190 at 21 (1998).

Specifically, Section 512(f) creates a cause of action against "[a]ny person who knowingly materially misrepresents under this section [i.e., under Section 512] – (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification." By its clear language, Section 512(f) refers back to Section 512(c)(3), which outlines the specific affirmations required to allege infringement under the DMCA. *See id.* § 512(c)(3)(A); *see also id.* § 512(b)(2)(E) & (d)(3). A mere statement that material is "infringing" does not suffice; to allege infringement under the DMCA the complaining party must state that it "has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, *or the law*." *Id.* § 512(c)(3)(A)(v) (emphasis added). Taken together, Sections 512(c) and (f) deter improper notices: 512(c) by requiring a notice sender to properly consider whether her notice targets actual infringement, 512(f) by imposing a penalty if she fails to do so.[23]

Unfortunately, the Ninth Circuit Court of Appeals undermined Congress' purpose in *Lenz v. Universal.* The Ninth Circuit correctly held that the DMCA requires a rightsholder to consider whether the uses she targets in a DMCA notice are actually lawful under the fair use doctrine. 815 F.3d 1145, 1153 (9th Cir. 2016). However, the appeals court also held that a rightsholder's determination on that question passes muster as long as she subjectively believes it to be true. *Id.* at 1154. This leads to a virtually incoherent result: a rightsholder must consider fair use, but has no incentive to actually learn what such a consideration should entail. After all, if she doesn't know what the fair use factors are, she can't be held liable for not applying them thoughtfully. As Judge Milan Smith noted in his dissent, "in an era when a significant proportion of media distribution and consumption takes place on third-party safe harbors such as YouTube, if a creative work can be taken down without meaningfully considering fair use, then the viability of the concept of fair use itself is in jeopardy." *Id.* at 1160. If the sender of an improper takedown cannot suffer liability under Section 512(f) no matter how unreasonable its belief, the *Lenz* decision sharply limits Section 512(f) protections for even classic fair uses upon which creators rely. *Id.* (concluding that the Ninth Circuit's "construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices"). For example, some rightsholders unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to make sure such beliefs don't thwart new creativity. Allowing a copyright owner to hide behind unreasonable beliefs undermines this crucial protection for online expression. By contrast, requiring a rightsholder to form a reasonable good faith belief as to

[23] Some have suggested that Congress intended for speech concerns to be addressed almost exclusively via the counter-notice process spelled out in Section 512(g). That cannot be correct. First, it effectively reads Section 512(f) out of the statute, rendering it superfluous. Second, it's clear from the statute itself that Congress viewed Section 512(f) and Section 512(g) as distinct, independent remedies. Users who have been improperly targeted can choose to counter-notice under Section 512(g), to take legal action under Section 512(f), or both. If Congress had intended Section 512(g) to be the primary remedy for misuse of the DMCA, it could have required users to take advantage of the counter-notice process before, during, or after filing a lawsuit under Section 512(f). It did not.

whether the use she is targeting is unlawful or not comports perfectly with Congress' intent.

Congress could remedy this erroneous reading of the statute by clarifying, once and for all, that Section 512(f) encompasses an objective standard, i.e., that the sender of a takedown notice must have a reasonable belief that the material at issue is not authorized by the copyright owner or the law. To be clear, in many instances a reviewer will be confronted with facts that make the legal conclusion of infringement simple. In other instances, a reviewer will be confronted with facts that make the legal conclusion of non-infringement equally simple. As for the edge cases, where it is not immediately clear whether the use is lawful for not, the reviewer is obligated only to form a reasonable belief—one that is *defensible*, even if it turns out to be incorrect. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (a good faith belief "need not be correct," but it must "be defensible").

In addition, a reasonable belief requirement helps reconcile the DMCA and the First Amendment. The Supreme Court has repeatedly affirmed that while Congress has broad latitude to exercise its power under Article I, section 8, it goes too far when it alters the traditional contours of copyright. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *see also Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

Section 4: Appointment of the Register of Copyrights; Copyright Office Relocation

EFF opposes both moving the Copyright Office from the Library of Congress to the Department of Commerce and making the Register of Copyrights a presidential appointee. This proposal would exacerbate existing problems and create others.

A) The Library of Congress Is the Proper Home for the Copyright Office

The Register of Copyrights has long been part of the Library of Congress, and therefore part of the legislative branch of the U.S. government.[24] The Register is responsible for establishing the procedures and policies of the Copyright Office, administering rulemaking procedures, interpreting U.S. copyright law, advising the Librarian of Congress, and testifying before Congress. *See* 17 U.S.C. § 701. These responsibilities reflect the Register's primary role: helping Congress craft copyright law, ensure it is administered fairly, and evaluate its effect on creativity and access to knowledge.

Maintaining public access to knowledge has been and should remain the role of the Library of Congress. As the head of the Copyright Office, the Register stands in a "unique position as the guardian of copyright registration documents," comprising "an unparalleled database of cultural heritage, as the Office has registered millions of copyright claims for authors, artists, publishers, producers, and distributors of creative works since 1897."[25] This crucial repository of government documents must remain the responsibility of the Library of Congress, which serves

[24] https://www.copyright.gov/circs/circ1a.html.

[25] Compendium of U.S. Copyright Office Practices, 100:4, 3rd ed. (Jan. 28, 2021). Available at: https://www.copyright.gov/comp3/chap100/ch100-general-background.pdf.

as the nation's repository for documents of all kinds, including all works registered with the Copyright Office.

More broadly, libraries—and especially the Library of Congress—have an institutional obligation to the public, to the cause of intellectual freedom, and to the principle of access. As the Library puts it, its mission is "to further the progress of knowledge and creativity for the benefit of the American people." Given copyright's constitutional mandate to promote progress, that should be the Copyright Office's mission as well, and we think the Office's mission is best served when it is subject to the oversight and guidance of the library community.

B) The Proposed Changes Would Fundamentally Alter the Balance of Power and Give the Executive Branch Undue Influence Over Copyright Policy

This section proposes changing the structure of the federal government in a manner that will give the President outsized influence over copyright law and policy. Specifically, it proposes (1) taking the Copyright Office out of the Library of Congress, (2) putting it in the Commerce Department, and thus the executive branch, and (3) replacing the Librarian of Congress, who currently appoints the Register, with the President of the United States—who would get not only the power of appointment, but also the right of termination at will.

These changes would fundamentally change the balance of power between the legislative and executive branches of government with respect to copyright law and policy. Since 1897, the Register has been appointed by and responsible to the Librarian of Congress. Today, the Register serves as the director of the Copyright Office of the Library of Congress, acts "under the Librarian's general direction and supervision," and has as her primary responsibility advising Congress "on national and international issues relating to copyright . . . and related matters." 17 U.S.C. § 701(b)(1).[26] The Register's responsibility to federal and judicial department—to "[p]rovide information and assistance to Federal departments and agencies and the Judiciary"—is second in order and weight. *Id.* § 701(b)(2).

Severing the Copyright Office from the legislative branch will alter this balance and give the President direct influence over copyright law and policy. It will also give the executive the power to deprive Congress and the public of crucial information. As Congress is aware, "there are times when the executive branch chooses to resist disclosure" to its requests for information, and the mechanisms available for compelling disclosure from the executive branch "do not always ensure congressional access to requested information."[27] In other words, Congress lacks the power to compel executive branch officers to disclose information against the President's will, even when necessary to evaluate his actions. Given its limited subpoena power, Congress should not give the executive branch control over information relating to the administration of copyright

[26] *See also* Compendium of U.S. Copyright Office Practices, 100:4, 3rd ed. (Jan. 28, 2021) ("The Register is the principal advisor to Congress regarding domestic and international copyright issues, but also works closely and collaboratively with other federal departments and agencies in copyright matters."). Available at: https://www.copyright.gov/comp3/chap100/ch100-general-background.pdf.

[27] Congressional Research Service, *Congressional Subpoenas: Enforcing Executive Branch Compliance* (Mar. 27, 2019). Available at: https://fas.org/sgp/crs/misc/R45653.pdf.

law that it could withhold from legislators or the American public in the future.

C) The Proposed Changes Will Further the Politicization of the Copyright Office at the Expense of the Public Interest

As noted, EFF and others have documented evidence of industry capture at the Copyright Office. The changes proposed here are likely to entrench this dynamic and even worsen it.

First, remaking the Register of Copyrights as a presidentially appointed, Senate-confirmed position will politicize the Office at the expense of the public interest. The Register has already gone from being a neutral expert to a political player. We fear that a presidentially appointed Register will result in more partisanship and susceptibility to control by powerful incumbent interests. After all, no President is going to select an appointee that will be shot down by lobbying from special interest groups. This change would also remove the Librarian as a check to ensure the Register acts consistent with the public interest, while at the same time imposing the threat of removal if the Register should take a position that proves politically unpopular for the President.

Second, moving the Copyright Office to the Commerce Department would not just allow but *encourage* the Office to focus on stakeholders it considers economic drivers and to privilege commercial interests over creativity, freedom of expression, and access to knowledge. In contrast to the Library of Congress's public-oriented mission, the Department of Commerce sees itself as having just "one overarching goal: Helping the American Economy Grow."[28] But that is not the only, or even a primary, goal of copyright law. Re-establishing the Copyright Office as an arm of the Commerce Department would effectively communicate that the Office should consider economic interests above all else and endorse the view that the content industry is the Office's most important constituent. The public interest is already too often an afterthought at the Copyright Office; Congress should not push that trend further.

The Copyright Office as it is currently constituted has its problems, but the proposed legislation will not fix them. Instead, it would result in an institution even less likely to serve the public interest in a balanced copyright system.

EFF recognizes that the changes proposed in Section 4 may be an attempt to preempt an appointments clause challenge of the type raised in *United States v. Arthrex*, and thus protect the viability of the administrative judges created by the CASE Act to adjudicate certain copyright claims. But if so, these changes are dangerously premature. Congress should wait to see how the Court rules before making changes that will undermine the accountability of the Copyright Office and the public's confidence in its administration.

Section 5: Modernizing the Circumvention Exemptions (1201)

EFF appreciates this effort to grapple with Section 1201's many flaws. However, we do not believe a piecemeal response is adequate to remedy them. Congress must be bolder, and either

[28] U.S. Dep't of Commerce, *About Commerce*, https://www.commerce.gov/about (last accessed Feb. 23, 2021).

excise the provision altogether or require that any violation have a nexus with copyright infringement.

Section 1201 of the DMCA causes broad and well-documented harms to speech; to competition, innovation, product safety and security; and to consumer choice and autonomy.[29] It has no demonstrated effect advancing the purposes of copyright law; to the contrary, it inhibits them.

The fix is simple: repeal Section 1201.

Failing that, Congress can significantly mitigate the law's constitutional defects and practical harms by making clear that only acts of circumvention with a close nexus to copyright infringement are actionable under Section 1201. This approach, expressed in the Unlocking Technology Act,[30] would cleanly address the majority of harms inflicted by the law and would better conform Section 1201 to both its intended scope and the Supreme Court's guidance that the traditional limits on copyright law, such as fair use, are needed to avoid conflict with the First Amendment.

Both of these approaches have a virtue that the current Section 1201 lacks: *simplicity.*

This proposal, by contrast, will do little to address Section 1201's fundamental flaws and may even backfire. One of the reasons the existing permanent exemptions are inadequate to protect lawful and important activities is that they are difficult to rely on in everyday practice, particularly for those who cannot afford regular review by a specialist attorney. The permanent exemptions are replete with conditions that are difficult to satisfy *ex ante* or whose satisfaction cannot be guaranteed. These conditions act as traps for the unwary, discouraging lawful and important activities. The proposed revisions to the permanent exemptions would not eliminate this problem.

Amateur and independent creators, small businesses, researchers, hobbyists, repair professionals, and other individuals should be able make lawful uses of copyrighted works with confidence. In addition, Congress should avoid statutory language that attempts to address policy or regulatory issues that are far afield from the purposes of copyright law, such as product safety, automotive design, disclosure of security vulnerabilities, or anything that effectively expands copyright's reach beyond its traditional contours. These policy concerns are the subject of other laws and regulations enforced by expert agencies, or in the courts through tort and commercial law. The DMCA need not address these concerns, and it should not duplicate or be contingent upon the application of other laws.

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[29] The harms have been extensively documented over years of Congressional inquiry and triennial rulemakings. *See generally* 2016 Study of Section 1201 Comments of the Electronic Frontier Foundation; Comments of the Cyberlaw Clinic at Harvard Law School; Comments of the Institute of Scrap Recycling Industries, Inc.; Comments of the American Automobile Association; Comments of the Auto Care Association; Comments of Mozilla, Inc.; Comments of New America's Open Technology Institute; Comments of the Owners' Rights Initiative; etc., at http://copyright.gov/policy/1201/.

[30] H.R. 1587 (114th Cong.), https://www.govtrack.us/congress/bills/114/hr1587.

Finally, the triennial rulemaking process, however reformed, cannot save Section 1201. EFF has participated in virtually every rulemaking process, and it is clear that it has produced, and can only produce, limited exemptions that do not go nearly far enough to protect innovation, speech, and other legitimate activities.

Despite clear guidance from Congress that the Librarian "*shall* publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected,"[31] the Copyright Office has taken the position that the Librarian has total discretion to deny exemptions – even those that meet this statutory standard. The rulemaking authorities also argue that this process is immune from judicial oversight. This unaccountable process has been onerous for all parties and heavily skewed against the public interest.

The Copyright Office also lacks the expertise and mandate to act as a general regulator of technology and culture. The overbreadth of Section 1201 causes it to impede important and legitimate conduct everywhere that digital software and other copyrighted works appear. It might be possible for an agency to apply a clear standard that provides clear breathing room for lawful activity, perhaps as a backstop to a defendant's raising fair use in court, a way to get clarity before risking suit. But that would be a far cry from the current system of freewheeling policy decisions that implicate multiple economic centers and the fundamental rights of technology users without binding legal standards or judicial oversight.

Section 6: Promoting Attribution through Copyright Management Information (1202)

Section 1202A's prohibition sweeps far too broadly.

Everyone is an author of copyrighted works: virtually every photo, email, or voicemail that is not in the public domain potentially implicates the rights granted in Title 17. There are sometimes very good reasons to remove authorship information in those works, such as to preserve privacy or confidentiality. It is also common to quote or caption copyrighted material for the purpose of criticizing it and to intentionally avoid elevating the identity or platform of the author or publisher. For many transformative and other fair uses, preservation of authorship information is either not essential or is even counterproductive to the aims of the speaker or user of the work.

This proposal would penalize these normal activities, as well as harmless omissions that simply do not merit legal action, to the benefit of no one except copyright trolls.

Moreover, the proposed cause of action does not hinge on infringement and thus leaves in question whether fair use would be a defense to a 1202A claim. In the parallel situation of Section 1201, the Copyright Office, the DOJ, and one federal appellate court have said that fair use is not a defense, though there is a Circuit split on whether a nexus to infringement is required.

[31] 17 USC 1201(a)(1)(D) (emphasis added)

It is also unclear why the provision hinges on the definition of copyright management information – which is quite broad and vague already. A copyright owner who is not the author could comply with their obligation to include CMI without identifying the author, and an author could argue that removing any information that makes it harder to find them could be a violation – even if done with the permission of the copyright owner. This provision is an invitation for a flood of new nuisance litigation, particularly given the statutory damages available under Section 1203.

Copyright law already gives authors an astonishing breadth of rights and enforcement mechanisms, and the opportunity to contract with publishers for the attribution they seek if they assign away their rights. To the extent that publishers abuse their bargaining power to force authors into unfavorable deals, the creation of a waivable right does little except to add a clause to their form contracts, and the creation of an unwaivable right would rob authors and publishers alike of the flexibility to reach a contractual arrangement that suits their particular needs.

In short, the proposed Section 1202A is counterproductive to the purposes of copyright law. For ordinary people, small business, and privacy advocates, copyright law is already a thicket of traps for the unwary. Congress should not pursue additional causes of action that make it harder to participate in our shared culture, particularly causes of action that go beyond the traditional contours of copyright law such as fair use.

Section 7: Copyright Alternative in Small-Claims Enforcement Act

Give that the CASE Act has already been enacted, though an undemocratic and ill-considered process, EFF will not comment further here except to observe that tying DMCA counternotices to CASE jurisdiction would (1) make the counter-notice process even less useful; and (2) undermine any claim that the CASE process is voluntary.

Section 19: Copyright Office Public Advisory Board

It would certainly be wise and appropriate for the Copyright Office to seek the advice of stakeholders. However, the board membership description is troubling in two ways. First, we note that the "copyright community" includes a variety of interests. For example, independent Internet creators also hold copyrights—often in works that make fair use. Second, the Copyright Office should seek input from other communities as well. Copyright policy also affects far more public interests than many realize—it largely determines what we can and cannot share and do, especially online, if that communication involves copyrighted works. Given the huge range and number of works subject to copyright, that covers an extraordinary amount of expression and activity. Any advisory board must include members that reflect myriad public interests copyright affects.

Respectfully,

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