

Statement of Morgan Kibby
Before the
Committee on the Judiciary
U.S. House of Representatives

on

Copyright and the Internet in 2020:
Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512
After Two Decades

September 30, 2020

Chairman Nadler, Ranking Member Jordan, and Members of the Committee:

I want to thank you for inviting me here today to talk about the Copyright Office's report on section 512 of the DMCA. I appreciate you including me because the heart of this discussion is not legal jargon or market analysis or political calculations. It is the real and profound effect section 512's failings have on everyday people like myself.

The Copyright Office's report is confirmation of what creators and copyright owners have been saying for years about section 512: it's just not working the way it's supposed to. But that's too benign a way to describe the situation. It's worse than just broken. It is undermining creativity, and more alarmingly, quietly undercutting our next generation of artists. It is jeopardizing livelihoods for working class musicians, obliterating healthy monetary velocity in our creative community. It is rewarding unscrupulous services that deal in the unauthorized trade and use of

our works. It is fundamentally sabotaging the legitimate online marketplace that we all rely on and that Congress envisioned.

As a self-employed creative, I've dedicated my life to my craft. Through studying voice, piano and cello, working and touring with groups like M83 & Lady Gaga, 16 hour days for months on end meeting deadlines while scoring for film and television, writing and producing for other artists, vigorously hustling to promote my work, and navigating a music industry that is in constant structural flux— I have passionately and methodically committed the time, sweat, and tears required in order to make a living doing what I love, coupled with a desire to produce art that moves people. It's no secret that the creative life can sometimes have little payoff beyond that exchange, and so it is this very dedication that is robbed of agency when there is a clear expectation that I now spend hours in front of a computer screen looking for violations of my work.

The popular mantra of working 10,000 hours to achieve mastery, (which, with the benefit of two decades in my field, I would amend to 100,000 hours) should apply to my craft, not to the protection of my own content. I can't afford to spend even a fraction of that time monitoring and noticing infringements as it's time spent away from my work – creating. So, the truth is, I just don't do it. Spending my time enforcing my work within section 512's notice and takedown system is a futile endeavor, even with the backing of a large management company. I can monitor for infringements and send notices all day long, but more unauthorized works will just keep popping up. It's like digging in the sand at high tide. That may sound to some like

defeatism, but it's the immediate reality that if dwelled on, feels insurmountable. The Copyright Office report itself stated that, "despite the advances in legitimate content options and delivery systems, and despite the millions of takedown notices submitted on a daily basis, the scale of online copyright infringement and the lack of effectiveness of section 512 notices to address that situation, remain significant problems."

Unfortunately, it remains problematic for millions of creators and it's existential. When artists, especially nascent ones, don't see a viable path forward in a career already laden with inherent and nebulous challenges, they simply won't continue. More alarmingly, some may not choose to walk a creative path. Perpetuating an ineffective enforcement system means fewer creative works, shrinking cultural identity, and fewer creators who cannot afford to stay in our business. That's not how it's supposed to be. The intention of the DMCA's drafters was to decrease infringement, not to decrease production of creative works themselves.

I've heard some claims that implementing a system that takes down infringing copies promotes censorship. However stripping creators of their fundamental rights, their livelihood, and ultimately their creative contributions is the real censorship. I am frustrated by how much the existing system devalues creators such as myself, and in turn weakens our very culture. I recognize that creative fields occupy an odd place in the consciousness of priorities, especially in this chaotic and challenging year. But culture is art, defined by systemic empowerment of already inherently courageous creators. How many of today's voices and bright creative futures are we willing to sacrifice because we can't come together to get this right?

Unfortunately, many short-sighted service providers have no desire to shift our current paradigm. Why? Because the status quo under section 512 is simply more lucrative. Commercial works like mine drive online traffic, which in turn generates advertising revenue. In a system that allows for perpetual removal of works after the fact, instead of requiring proactive licensing, there is simply no incentive to secure those licenses or stop the infringement. In fact, there is a financial incentive to do exactly the opposite. This is the flawed system established by section 512 and online services must be required to do their part to resolve it. If you have water pouring into your home, you don't resign yourself to endlessly cleaning up the puddles, you fix the leak where the water is streaming in.

The Copyright Office report understood this and provided some guidelines, including clarifying who actually qualifies for the safe harbor, strengthening policies on repeat infringers, and requiring more awareness and action by services. Clearly, service providers can do more. My area of expertise is art; theirs is technology. They can create algorithms to help you discover new artists or predict what song you want to hear next; surely they can find ways to curtail the flow of infringing works on their platforms.

I know some artists are ok with their works being distributed freely across these platforms. They see it as promotion, perhaps even a means to go viral, and that's fine as long as that is their choice and they can afford to do that. But as a solidly working/middle-class musician who is lucky enough to make a living solely doing what I love, every dollar counts. \$100 here and there

may not seem like much, but sometimes even this small amount keeps the lights on in my studio. Sweat equity is not a factor to discount, but it should also be a choice, not an unspoken mandate to participate. Ultimately my work and my time are not simply investments: this is my occupation, my career. In the shadow of an industry transformed overnight with peer to peer sharing, and with the recent obliteration of one of the last remaining bastions of income in light of Covid-19, touring, my works on these platforms generate income; they're not a loss-leader for other revenue streams. Undoubtedly, technology can be used to distinguish between those artists who are ok with their unauthorized works on these platforms and those who aren't. There are programs already in use to monitor and filter unauthorized content. Even YouTube has its Content ID (though it remains inexplicably inaccessible to many and inadequate for others). And so I have to ask the most basic and obvious of questions: with the capable minds of tech, how hard can it be to present users with questions to confirm they have the authorization to upload content?

I am grateful that Congress recognizes what we are attempting to fix and is pushing service providers to participate in finding solutions. As the Copyright Office put it, "the degree and breadth of cooperation between OSPs and rights holders that was anticipated in 1998 has not come to full fruition." That's absolutely true and it's a shame, because that's what was intended – a balance of interests and a balance of responsibility. We've been at the table waiting – perhaps a little less patiently every day, but we are here. We are hopeful our tech partners and will join us to finally achieve a fair and effective DMCA for all.

Thank you.