

**BEFORE THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY**

**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**

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Chairman Nadler, Ranking Member Jordan, members of the Committee, I am counsel to the Library Copyright Alliance (“LCA”), which consists of the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations collectively represent over 100,000 libraries in the United States employing more than 300,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year. U.S. libraries spend over \$4 billion annually purchasing or licensing copyrighted works.

I am grateful for this opportunity to testify on the Copyright Office’s report on section 512 of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. § 512. I will briefly discuss the importance of the section 512 safe harbors to U.S. libraries and the American public. I then will make three points concerning the Copyright Office’s report. First, LCA strongly agrees with the Office’s recommendation that Congress not consider foreign approaches to online infringement such as notice-and-staydown and site blocking. Second, LCA appreciates that the Office recognized that abuse of the notice-and-takedown system is a serious problem requiring Congressional attention. LCA urges this Committee to explore possible solutions to this issue. Third, LCA strongly disagrees with the Office’s conclusion that the balance Congress established in section 512 is askew. To the contrary, the DMCA is working just as Congress intended.

I. The Importance of the DMCA Safe Harbors to U.S. Libraries.

Libraries provide to their users a variety of Internet-related services. As a practical matter, libraries can provide these services only because the DMCA’s safe harbors limit libraries’ liability for their users’ online activities. The “mere conduit” safe harbor in section 512(a) has enabled libraries to provide Internet access to its users; the section 512(c) “hosting” safe harbor has permitted academic libraries to serve as institutional repositories for open access materials; and the section 512(d) “linking” safe harbor has allowed libraries to provide information location services to users.

A. Internet Access

Not only large commercial entities such as Verizon and AT&T act as “service providers” within the meaning of section 512(k)(1)(A). Libraries play this role as well. In the United States, there are virtually no Internet cafes that provide users with the

hardware necessary for Internet access. While Starbucks has Wi-Fi, it does not supply laptops. And although increasingly more Americans at all income levels own smart phones, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare or unemployment benefits, on a smart phone. Libraries are the only source for free Internet connectivity and Internet-ready computer terminals for most Americans.

77% of Americans without Internet access in their homes rely on public libraries for Internet access.¹ Public libraries provide the public with access to over 294,000 Internet-ready computer terminals.² In 2016, there were 276 million user-sessions on these computers. There were 227 computer uses per 1,000 visits to public libraries.³

A Pew Research Center survey revealed that 23% of Americans ages 16 and up went to libraries to use computers, the Internet, or a WiFi network.⁴ 7% of Americans used libraries' Wi-Fi signals outside when the libraries were closed.⁵ (During the covid-19 pandemic, even though many public libraries were—and often still are—closed, the libraries left their Wi-Fi networks on, enabling users without home connectivity to access the Internet from outside the library structure. Indeed, some libraries boosted their Wi-Fi networks to enhance this outside-the-premises access.) Library users who take advantage of libraries' computers and Internet connections are more likely to be young, Black, female, and lower income.⁶ 42% of Black library users used libraries' computers and Internet connections, as did 35% of those whose annual household incomes were \$30,000 or less.⁷

According to the Pew Research Center survey, 61% of library computer users used the Internet at a library in the past twelve months did research for school or work;

¹ Pew Research Center, “Public libraries and technology: From ‘houses of knowledge’ to ‘houses of access,’” <https://www.pewresearch.org/internet/2014/07/09/public-libraries-and-technology-from-houses-of-knowledge-to-houses-of-access/> (2014).

² Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2016* 29 (2019).

³ *Id.*

⁴ Pew Research Center, *Library usage and engagement*, <https://www.pewresearch.org/internet/2016/09/09/library-usage-and-engagement/> (2019).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

53% checked email; 38% received health information; 26% took online classes or completed an online certification.⁸

Libraries' broadband connections are particularly important in rural areas; 58% of rural adults believe that access to high speed Internet is a problem in their community.⁹ Accordingly, public libraries in rural areas have the highest ratio of Internet accessible computers: 23 computers per 5,000 people.¹⁰

Libraries in K-12 schools and institutions of higher learning provide Internet access for students and faculty. Additionally, at many institutions of higher education, the library operates the campus-wide network.¹¹ Academic and school libraries also provide Internet access for students who do not have such access at home. During the covid-19 pandemic, some community colleges that were otherwise closed still allowed students without broadband to use Internet-connected computer terminals in the college libraries.¹²

The section 512(a) safe harbor for "mere conduits" has enabled libraries to provide Internet access without the specter of liability for onerous copyright damages because of infringing user activity.

B. Institutional Repositories

With the growth of open access scholarly communications, libraries increasingly host online institutional repositories where academic authors can post papers, articles, and theses.¹³ The section 512(c) safe harbor shelters libraries from liability for infringing material that may be contained in the materials posted by third parties. Elsevier, for

⁸ *Id.*

⁹ Pew Research Center, Digital gap between rural and nonrural America persists, <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/> (2019).

¹⁰ Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2016-2017* (2019).

¹¹ At many colleges and universities, the libraries participate in the administration of campus-wide Internet access services. Under the Higher Education Opportunity Act, educational institutions have significantly more obligations to address copyright infringement by subscribers than do commercial Internet service providers. See <http://www.educause.edu/library/higher-education-opportunity-act-heoa>.

¹² Lauren Lumpkin, *A community for students' needs*, Washington Post, B1, April 2, 2020.

¹³ See Brianna Schofield and Jennifer Urban, *Takedown and Today's Academic Digital Library*, November 2015, available at file:///Users/jband/Downloads/SSRN-id2694731.pdf.

example, sent thousands of takedown notices to websites hosted by Harvard University, University of California, Irvine and academia.edu, a social networking site for academics. The articles targeted by these Elsevier notices typically had been posted by their authors, who may have transferred their copyright to Elsevier in the publication agreements. The publication agreements often allow authors to post their final, peer-reviewed manuscript of the articles, but not the final published version, i.e., as formatted by the publisher. Elsevier asserted that it pursued only final versions of published journal articles posted without their authorization. The section 512(c) safe harbor provided a mechanism for libraries to avoid getting caught in the middle of a dispute between the authors and their publishers.

C. Information Location Tools

Libraries also rely on the section 512(d) safe harbor for information location tools. Librarians prepare directories that provide users with hyperlinks to websites the librarians conclude in their professional judgment to contain useful information. Section 512(d) shelters a library from liability if the website linked to, unbeknownst to the library, contains infringing material.

II. The Importance of the DMCA Safe Harbors to the U.S. Public

The Section 512 safe harbors have enabled the Internet to expand into a global communications medium that allows any speaker to reach a worldwide audience. It is section 512 that facilitates the Committee live-streaming this hearing across the country and around the world. It enables people watching the hearing to post responses online in real time. It permits experts and ordinary citizens to upload blog posts and videos tomorrow dissecting my testimony and that of my fellow panelists. Some of these videos might include mashups of our testimony. It allows Committee staffers next week to find and access all this this material and troves of other information concerning section 512 available online. Without the safe harbors of section 512, the providers of the services that enable all these activities would have to find alternative means of limiting their liability for the statutory damages available under the Copyright Act. This would involve filtering or limiting posting privileges to preapproved entities and individuals. Either alternative would in effect constitute censorship.

The pandemic has made us increasingly dependent on the Internet, and by extension on section 512. It is no exaggeration to say that section 512 has enabled millions of Americans to survive the pandemic by working, shopping and studying from home; communicating with friends and family; and accessing a bounty of entertainment content during these difficult times. To be sure, businesses and individuals pay for Internet access, but the cost would be far greater if the Internet access service providers had to contend with the cost of copyright infringement liability for their subscribers' actions.

III. The Copyright Office's Section 512 Report

Turning to the Copyright Office's section 512 report, we acknowledge the Office's effort to solicit the views of all stakeholders and agree with its conclusion that Congress should not adopt a notice-and-staydown regime. Additionally, the Copyright Office correctly recognized that abuse of the notice-and-takedown system by rights holders, or people claiming to be rights holders, is a serious problem. At the same time, we disagree with the Copyright Office's conclusion that the balance Congress intended in section 512 is "askew."

A. Notice-and-Staydown and Site-Blocking

LCA strongly agrees with the Copyright Office's recommendation that Congress not pursue foreign approaches such as notice-and-staydown or site-blocking. The Office stated:

There are important reasons to proceed cautiously when considering any of the proposed international solutions. While the Office has received submission from thousands of rightsholders, users, OSPs, academics, and others arguing for or against adoption of the international models below, much of the evidence is anecdotal or conflicting. The Office still has relatively little data on how well these international regimes are working in practice, or even how a notice-and-staydown requirement will ultimately be implemented in the European Union. To make the most informed decision possible, it will be necessary for Congress to consider many factors beyond simply the copyright law—questions of economics, competition policy, fairness, and free speech, to name but a few. It is the opinion of the Office that the international approaches discussed below should be adopted, if at all, only after significant additional study, including evaluation of the non-copyright implications they would raise.¹⁴

¹⁴ U.S. Copyright Office, *Section 512 of Title 17* 185 (2020).

Likewise, in its June 29, 2020, letter to Chairman Tillis and Senator Leahy, the Office noted that a notice-and-staydown filter might prevent future uploads that “differ in significant respects from the subject of the takedown notice,” such as a sample of a song being used as background music for different content. A staydown filter could also prevent the incorporation of a song into a political ad. The Office correctly asked, “how do you comply with staydown request requirements while also protecting legitimate speech?” Notice-and-staydown could have a particularly chilling effect on scholarly communications. A professor’s fair use inclusion of an audio or video clip in an online article could result in the blocking of that article.

B. Abuse of the Notice-and-Takedown System

The Copyright Office report itself did not give sufficient weight to the problem of the abuse of the notice-and-takedown system. Despite evidence that as many as 30 percent of notices are defective in some manner, the Office did not recommend any concrete action by Congress to protect fair use and free speech. In a footnote, it did acknowledge that “abuses of the DMCA system do call for some enforcement mechanism.”¹⁵ It questioned the effectiveness of private actions under section 512(f) in deterring such abuses. Instead, the Office suggested that “to the extent that such tactics represent ongoing patterns of abusive business practices, governmental enforcement outside the context of section 512 would appear to be a better avenue for addressing their proliferation.” However, the Office did not specify what sort of “government enforcement” would be appropriate, and by what agency.

The Office was stronger on this issue in the Tillis-Leahy letter: “The issue of abusive allegations of copyright infringement is serious, and congressional attention to the broader question of how to best discourage such uses of the copyright system could provide more effective mechanisms to address the problem.” The Office still provided no specific course of action, perhaps feeling that this was outside the scope of its expertise. But anticompetitive conduct is very much within the expertise of this Committee, and LCA urges the Committee to explore possible solutions to the anticompetitive misuse of the notice-and-takedown system. Perhaps the Federal Trade Commission should provide additional tools to address this problem.

¹⁵ *Id.* at 148 n.790

Abuse of the notice-and-takedown system threatens not only fair uses; it can stifle any form of speech. Simply by sending a takedown notice, a person can cause the removal of speech with which he disagrees.

C. The Balance in the Safe Harbors

While the Copyright Office section 512 report got many things right, it got one very important thing wrong: it concluded that the balance Congress intended to strike in section 512 is askew. It reached this erroneous conclusion because it did not appreciate the interconnected structure of the DMCA. Contrary to the suggestion of some that the “grand bargain” of the DMCA is to be found within section 512 itself, the DMCA’s “grand bargain” was the adoption of the section 512 safe harbors in exchange for the enactment of the prohibition on the circumvention of technological protection measures (“TPMs”) in section 1201. As the Committee examines this issue, it must always bear in mind that section 1201, dealing with TPMs, and section 512, dealing with safe harbors, were enacted together to create a balanced approach to copyright enforcement in the Internet environment. Thus, the effectiveness—and fairness—of the safe harbor system should not be considered in isolation, but in relation to the effectiveness and fairness of the anti-circumvention provisions.

What became section 512 and 1201 were originally introduced as separate bills in the 105th Congress. The TPM bill was supported by the entertainment industry and opposed by sectors of the technology industry. The safe harbor bill was supported by the online service providers and opposed by the entertainment industry. In the face of this opposition, both bills stalled. Chairman Hatch, in a bold legislative move, merged the two bills into one. He calculated that the entertainment industry would be willing to accept the safe harbors in exchange for TPM protection. This calculation proved correct.

The entertainment industry believes that section 1201 has benefitted it enormously. In response to a notice of inquiry issued by the Copyright Office concerning section 1201, the Association of American Publishers, the Motion Picture Association of America, and the Recording Industry Association of America filed joint comments stating that “the protections of Chapter 12 have enabled an enormous variety of flexible, legitimate digital business models to emerge and thrive....” Likewise, the tech industry, libraries, and consumer groups believe that the section 512 safe harbors have “allowed

the Internet to become what it is today—a worldwide democratizing platform for communication, creativity, and commerce.”¹⁶ Although Congress attempted to achieve a degree of balance within each title—each title contains internal compromises—at the end of the day, the grand bargain of the DMCA was the marriage of the TPM and the safe harbor bills.

Significantly, these titles are working just as Congress intended. To be sure, one can disagree with some of the policy choices Congress made in each title.¹⁷ But Congress made these policy choices with open eyes and a clear understanding of where the technology was headed. The courts generally have applied the DMCA in a manner consistent with Congress’s intent. The overall balance struck in 1998 remains in place today.

As evidence of the imbalanced application of section 512 by the courts, the Copyright Office cited the concerns raised by the entertainment industry. But the entertainment industry has always opposed safe harbors for Internet service providers. The entertainment industry agreed to the safe harbors in 1998 as the price of obtaining the TPM provisions. As soon as the DMCA was signed into law, the entertainment industry reverted to its complaints about the safe harbors and how the Internet service providers were not doing enough to combat online infringement. While the rights holders did receive some benefit from the safe harbors—the automatic injunctions of a takedown in response to a mere notice of infringement—section 512 was never intended to provide

¹⁶ Matthew Schruers, “Music Industry DMCA Letter Seeks to Turn Back Clock on Internet,” *Disruptive Competition Project* (June 21, 2016), <http://www.project-disco.org/intellectual-property/062116-music-industry-letter-seeks-to-turn-back-clock-on-internet/#.WHQCArYrK15>.

¹⁷ In my view, the theory underlying Title I remains fundamentally flawed. While TPMs have been extremely helpful to the development of legitimate digital business models, the critical element has been the technological protection provided by TPMs, not the legal prohibition on circumvention and circumvention tools. Section 1201 is overbroad; because it is not limited to acts of circumvention (and circumvention tools) that facilitate infringement, it interferes with lawful uses. Further, the triennial rulemaking is not a nimble enough process to address these many lawful uses inhibited by section 1201. The number of these uses continues to grow as more devices are controlled by software, which in turn is protected by TPMs. These TPMs interfere with repair, maintenance, and customization. The Copyright Office through the triennial rulemaking in effect regulates vast swaths of the U.S. economy.

a complete solution to the problem of infringement. Section 512 was adopted to help the service providers, not the content providers.

Unfortunately, the Copyright Office conducted two separate studies, one of section 512, the other of section 1201. It suggested amendments of both sections. The Office looked at each section in isolation, and thus did not consider whether the overall balance Congress struck in 1998 was still intact.

LCA urges the Committee to view the issue of copyright and the Internet through an appropriately wide lens. The question is not whether some individuals, or even some industries, are disadvantaged by online infringement, and could be benefited by imposing greater burdens on service providers through amendments to section 512. Rather, the question should be whether the goals of the copyright system—promoting the creation and distribution of works for the public benefit—would be best served by recalibrating the balances established in the DMCA.

In LCA's view, this is not even a close call. The amount of information individual users can access from home, the office, or the road, is astounding.¹⁸ Much of this information, posted with the authorization of the rights holder, is free. Similarly, the Internet enables these users to upload their own creations to social media platforms where they can be accessed by a global audience. If the safe harbors limiting the copyright liability of the websites hosting this content were contracted, then the Internet could not be as open. Web hosts would only make available material from trusted sources or would have to impose higher fees. Resources such as Wikipedia might disappear or greatly diminish.

At the same time, it is entirely speculative whether changing the safe harbors would benefit copyright owners economically. The majority of infringing content available online is hosted overseas, beyond the reach of U.S. law. The large service providers have automated the process of submitting takedown notices, and have developed other tools content providers can use to combat infringement. Most content industries have adjusted their business models towards streaming to take advantage of the low distribution costs and enormous audiences of the Internet while minimizing the risk

¹⁸ See Techdirt, *The Sky Is Rising*, <https://skyisrising.com/>.

of infringement. While the transparency reports released by Internet companies indicate a large number of takedown notices, this volume is a function of a number of factors: the automation of the process; rights holders sending notices to search engines on the assumption that the search engines are indexing the infringing content, even if they are not; governments and corporations realizing they can use the DMCA process to censor legitimate speech; and the enormity of the Internet, social media platforms, and search engines. While 75 million takedown notices a month may seem like a large number, it is a tiny fraction of the content available on the Internet.

At the same time, this volume of automated notices indicates that fair use is not considered before notices are sent, which in turn suggests that far more content is being removed than should be.

Because we disagree with the Copyright Office's assessment that section 512's balance is askew, we oppose the various amendments the report proposed, such as amending the red flag knowledge framework or adjusting the standards for terminating the accounts of repeat infringers. Section 512 is by no means perfect. We too could propose various changes, such as eliminating the requirement of every service provider registering its DMCA agent with the Copyright Office. But overall, section 512 works in the manner Congress intended.

We live in a golden age of content creation and distribution. The DMCA is in large measure responsible for this golden age. It is a shining example of enlightened legislation for the public good. We disturb it at our peril.