Statement of

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"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, and Members of the Committee, my name is Matt Schruers, and I serve as President at the Computer & Communications Industry Association (CCIA), which represents Internet, technology, and communications firms.[1] CCIA was founded in 1972 to promote open markets, open systems, and open networks in the computer and telecommunications industry. Today, the Association continues to champion the same principles across these increasingly diverse and important sectors of the global economy.

Thank you for the opportunity to discuss the Copyright Office's report on Section 512 of Title 17. My statement focuses on the economic significance of Section 512, and why the report inadequately reflects the interests of users, particularly when targeted by misuse of the statute to suppress speech and economic activity. It concludes by discussing how promoting lawful alternatives to piracy can achieve more than the unpredictable outcomes that would result from implementing the report's recommendations.

I. History and Economic Significance of Section 512

Section 512 was enacted by Title II of the 1998 Digital Millennium Copyright Act (DMCA). It formed part of a compromise alongside Title I of the DMCA, which attaches civil and criminal penalties to circumventing technological measures that we generally refer to as "DRM" (digital rights management).[2] Service providers agreed to support giving legal force to technological measures, and in turn, rightsholder constituencies endorsed Section 512.

There are also compromises embodied within Section 512. The compromise at the heart of Section 512 imposes upon service providers the responsibility of responding expeditiously to complaints by putative rightsholders in exchange for liability limitations. In turn, Section 512 guarantees to rightsholders rapid, *ex parte* extrajudicial relief from specific acts of alleged infringement upon affirmatively reporting those acts. In order for services to benefit from Section 512, they must satisfy recurring compliance responsibilities. In addition to expeditiously responding to notices of claimed infringement and complying with Copyright Office formalities, Section 512 compliance also includes maintaining and implementing a procedure for terminating repeat infringers, among other requirements.

Section 512 provides critical legal certainty for the digital economy, which according to U.S. government data accounted for 6.9% of U.S. GDP, $1.35 trillion, in 2017.[3] Economic research demonstrates that regulatory certainty about copyright intermediary protections encourages

[1] CCIA is an international, not-for-profit association representing a broad cross section of communications, technology and Internet industry firms. CCIA members employ more than 1.6 million workers and generate annual revenues in excess of $870 billion. A list of CCIA members is available at https://www.ccianet.org.
[2] These provisions, codified primarily at 17 U.S.C. § 1201 *et seq.*, are not otherwise a subject of this testimony.
[3] Bureau of Economic Analysis, *Digital Economy Accounted for 6.9 Percent of GDP in 2017* (Apr. 4, 2019), https://www.bea.gov/news/blog/2019-04-04/digital-economy-accounted-69-percent-gdp-2017.

investment and innovation in this sector.[4] While Section 512's protections are critical for CCIA member companies, they are also essential to economic interests far beyond the tens of thousands of websites and service providers that utilize its protections. An even larger number of small businesses and independent creators utilize Section 512-dependent service providers to engage in communications, commerce, and campaigning, as well as accomplishing their daily activities — a need that is particularly acute when the ongoing public health crisis compels social distancing in so many contexts, including this hearing.

a. Section 512 Balances Not Two, But Three Separate Sets of Interests

Section 512 is often construed as mutually benefiting and burdening two groups: service providers and rightsholders. This is true, but incomplete. Users represent the critical third stakeholder of Section 512's balancing act. Congress acknowledged this in legislative history, noting that it "believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet."[5]

These stakeholders also increasingly overlap and intersect. For example, many CCIA members are highly successful content creators and benefit from copyright protection, in addition to limitations and exceptions like Section 512. Many users are also creators; a 2019 study found that nearly 17 million American creators earned incomes from posting their personal creations on nine platforms in 2017, collectively earning $6.8 billion.[6] Unfortunately, users' interests were largely overlooked by the Office's Section 512 report.

b. "DMCA-Plus" and Voluntary Measures

In addition to general Section 512 compliance, some companies voluntarily invest in offering additional service-specific suites of tools for different types of creators to help prevent

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[4] Survey research found that changing regulations to remove intermediary protections would have a negative effect on venture capital investment. Booz & Company, *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (2011), https://www.strategyand.pwc.com/media/uploads/StrategyandImpact-US-Internet-Copyright-Regulations-Early-Stage -Investment.pdf. Similarly, economic research found that venture capital investment in cloud computing firms increased significantly in the U.S. relative to the EU after a copyright decision involving intermediary liability. Compare Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), *available at* https://www.analysisgroup.com/globalassets/content/insights/publishing/impact-copyright-policy-changes-venture-capital-investment-cloud-computing-companies.pdf; *with* Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), *available at* http://cdn.ccianet.org/wp-content/uploads/library/eu%20cloud%20computing%20white%20paper.pdf.

[5] H.R. Rep. No. 105-551, pt. 2, at 21 (1998).

[6] Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy* (2019), https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf.

infringement online, and in some cases, monetize content. Section 512 makes this voluntary private sector cooperation possible. Providing rightsholders additional tools and services for content protection and monetization is sometimes referred to as "DMCA-Plus" because these service-specific systems exceed the requirements that businesses must meet to qualify for statutory protection under Section 512.[7] These voluntary, additional layers of protection are desirable because they can expedite action, and often provide rightsholders opportunities not just to remove infringing content, but also to track and monetize their works online.

DMCA-Plus systems provide value when deployed voluntarily by firms that have the resources to do so competently. Services without the resources to implement such measures should not be penalized for lacking the capacities of their larger competitors, however. If the Section 512 protections were interpreted otherwise, it would raise barriers to entry for startups, entrenching existing services behind a compliance moat. Section 512 protections were intended to reduce regulatory burdens in order to encourage investment and innovation, not to deter companies from experimenting because of fears of incurring costly new obligations.

The benefits of DMCA-Plus systems include speed, efficiencies of scale and, where automated, lower costs for all parties. However, DMCA-Plus tools are costly to develop,[8] site- and media-specific, and often struggle with false positives. False positives merit particular attention because any unjustified content filtering or takedown may suppress users' lawful free expression — another reason that it is fundamental that users be acknowledged as one of Section 512's stakeholders.[9]

The more powerful the copyright management tool, the bigger the risk of abuse. Companies must therefore balance these concerns so that the risk of abuse and misuse is as low as possible. Companies calibrate access to tools to the needs of different rightsholders and creators, which may differ in, for example, the types of content they own, the volume of requests they submit, their ability to dedicate time and resources, their understanding of copyright law, and the complexity of their licensing arrangements.

In addition to aiding copyright enforcement, DMCA-Plus systems can generate revenue for rightsholders. For example, YouTube's Content ID has paid billions to the content industry,

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[7] *See* Jennifer Urban et al., *Notice and Takedown in Everyday Practice* (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628, at 52.

[8] YouTube has invested more than $100 million building Content ID. Google, *How Google Fights Piracy* (Nov. 2018), https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf.

[9] The Copyright Office noted this in a letter following this report. *See* Letter from Acting Register Maria Strong to Senator Tillis and Senator Leahy (June 29, 2020), https://www.copyright.gov/laws/hearings/response-to-may-29-2020-letter.pdf ("Even the most advanced filtering systems result in a non-negligible number of false positives and cannot identify whether content is protected by fair use.").

including $6 billion to the music industry as of 2018.[10] With Content ID, rightsholders can opt to remove the content, but may also claim the right to monetize it, in which case advertisements are placed adjacent to said content and rightsholders receive a share of the revenue stream associated with those advertisements. The inclusion of an advertising option benefits all of Section 512's constituencies, since users' disputed content remains online, while the rightsholder receives previously unrealized revenue.

As another example, Facebook's Rights Manager tool was first launched in 2015 and has developed in close consultation with rightsholders. Rights Manager identifies millions of pieces of copyrighted content per week and provides rightsholders with the ability to block and disable content, in addition to a variety of other actions. For instance, Rights Manager allows rightsholders who choose not to disable content to obtain various forms of value, including data and insights about how their content is performing, promotional opportunities, and allows rightsholders to claim money from advertisements placed into their content via a streamlined in-product process.

II. The Copyright Office's Report Is of Limited Use for Policymaking

Because it omits a critical constituency, and does not discuss one of the longest standing challenges confronting Section 512, the Copyright Office's report is of limited use. It is encouraging that the Copyright Office recognized wholesale changes to the notice-and-takedown system are not needed. This includes the Office's decision not to recommend importing from abroad controversial proposals like "notice-and-staydown," a policy which has animated the European Union's contentious Directive on Copyright in the Digital Single Market. However, while the Office said it recommended no wholesale changes, it highlights a dozen areas for Congress to fine-tune, which arguably results in broad changes. By suggesting that numerous major cases on Section 512 since 1998 — all defense wins — should be reversed, the consequences of the Office's report would be considerable and unpredictable.

The report also conspicuously overlooked the problem of Section 512 misuse. It is disappointing that the report said so little about fraudulent use of takedown demands to suppress speech, particularly as it came on the heels of a major Wall Street Journal investigation that uncovered serious cases of abusive takedowns aimed at disappearing legitimate information from public view.[11] The Washington Post also recently covered how Section 512 misuse and overclaiming

[10] Google, *How Google Fights Piracy* (Nov. 2018), https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf.

[11] Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001.

harms creators, and the New York Times just covered how easily Section 512 can be "maliciously" "weaponized by authors seeking to take down their rivals."[12]

However, in a June 29 letter responding to an inquiry from Senator Tillis and Senator Leahy regarding the report, the Copyright Office acknowledged concerns regarding the impact of abusive takedowns on speech, among other important considerations affecting users. The Office wrote that "[t]he 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."[13] CCIA shares this view. The recognition of the seriousness of Section 512 misuse is significant, and the report should therefore be read in conjunction with the Copyright Office's June 29 letter.

a. Section 512 Misuse Disrupts Speech and Commerce

Although the Office subsequently recognized that Section 512 misuse is a serious problem, the omission of this subject from the report itself is a significant deficiency. Misuse of Section 512's extremely powerful takedown remedy is a well-documented, long-standing challenge. A decade ago, the Center for Democracy & Technology authored a report documenting Section 512 abuse in political campaigns, and the concerns it identified then remain equally salient today.[14] Campaigns supporting the late Senator McCain and former President Obama were prominent victims of dubious takedown demands by copyright owners.

Takedown abuse persists this campaign season; in 2020, multiple CCIA member companies have received false Section 512 notifications in connection with the Presidential debates and campaign videos on social media.[15] Committee members can imagine what it would be like to have their most effective campaign ad temporarily forced offline on the eve of an election by dubious copyright claims, just as it was gathering steam. The same can happen to individual creators, when the viral success of their work is cut short by someone who doesn't like their message, or a small business whose e-commerce site is struck down by a competitor on Black Friday.

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[12] Michael Andor Brodeur, *Copyright bots and classical musicians are fighting online. The bots are winning.*, Wash. Post (May 21, 2020), https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-th e-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html; Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html.

[13] Letter from Acting Register Maria Strong to Senator Tillis and Senator Leahy (June 29, 2020), *supra* note 9.

[14] Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), https://cdt.org/wp-content/uploads/pdfs/copyright_takedowns.pdf, at 1.

[15] Charlie Hall, *Report: Phony DMCA claims nuked Twitch streams of the Democratic debate*, Polygon (Feb 28, 2020), https://www.polygon.com/2020/2/28/21155955/twitch-streamers-banned-democratic-debate-phony-dmca; Matt Schruers, *Claims Against Trump Campaign Video Call for Revisiting Intersection of Speech and Copyright*, Disruptive Competition Project (June 6, 2020), https://www.project-disco.org/intellectual-property/060620-claims-against-trump-campaign-video-call-for-revisiting-intersection-of-speech-and-copyright/.

As an association executive, I frequently hear from industry about fraudulent and abusive takedown demands that stifle speech and disrupt commerce. Most of these incidents do not receive the media attention they deserve. Abusive behavior includes fraudulent notices, as well as over-reaching reports purportedly based on copyright that in fact are attempts to censor legitimate speech, even complete fabrications to remove content considered undesirable by the claimant.

Publicly documented examples of Section 512 misuse that CCIA member companies have experienced include extortion schemes tied to the Section 512 takedown process;[16] blatant disregard for fair use;[17] Section 512 abuse as a business model, such as reputation-related removals masquerading as copyright;[18] abuse to target competitors in online marketplaces;[19] and flawed automated systems that broadly target unrelated content.[20] Some companies receive floods of batch notices from large rightsholders directed to short clips of content in which music is incidental as a means to force them to negotiate.[21]

Any review of Section 512 needs to account for these challenges. Section 512(f)'s penalties, designed to deter misuse, are obviously inadequate, but strengthening this provision is an incomplete solution, and is unlikely to resolve all of the scenarios described above.

b. Promoting Lawful Alternatives to Piracy Can Achieve More than Implementing the Report Recommendations

In the sense that "the best defense is a good offense," the most effective way to prevent the infringement of copyrights is to ensure that members of the public, most of whom want to pay for content, can lawfully consume works digitally whenever and wherever they want. As the Commerce Department has noted, the digital distribution of content is a crucial component to ensuring Internet users consume lawfully licensed content.[22]

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[16] Julia Alexander, *YouTube gets alleged copyright troll to agree to stop trolling YouTubers*, The Verge (Oct. 15, 2019), https://www.theverge.com/2019/10/15/20915688/youtube-copyright-troll-lawsuit-settled-false-dmca-takedown-christopher-brady.

[17] Brief for Amici Curiae Automattic Inc., Google Inc., Twitter Inc., and Tumblr, Inc., *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2015) (No. 13-16106), *available at* https://www.eff.org/files/2015/10/30/lenz-automattic_google_twitter_tumblr_amicus.pdf.

[18] Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), *supra* note 11.

[19] Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, N.Y. Times (May 23, 2020), *supra* note 12.

[20] Ernesto Van der Sar, *Bizarre DMCA Takedown Requests Censor EU 'Censorship' News*, TorrentFreak (Aug. 11, 2018), https://torrentfreak.com/bizarre-dmca-takedown-requests-censor-eu-censorship-news-181011/.

[21] *See* Jennifer Urban et al., *Notice and Takedown in Everyday Practice* (2016), *supra* note 7, at 72.

[22] Department of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (July 2013), at 77-78, http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf.

Research consistently shows that piracy rates fall when consumers have broad access to lawful means of digital media consumption,[23] such as when legitimate services such as Spotify and Netflix enter markets.[24] A copyright system with robust protection and flexibilities is essential, but ultimately, access to legitimate alternatives is the best way to fight online piracy, and CCIA members are playing an increasingly important role in this space.[25] Digital services enable creators, ranging from the largest content producers in the world to the individual artist working from home, to reach a worldwide audience online. Because Section 512 facilitates the provision of many such services, it remains a crucial aspect of U.S. copyright policy.

IV. Conclusion

The Copyright Office's report largely ignored one of Section 512's three constituencies, as identified by Congress; called for the rejection of decades of settled case law; and failed to address the critical issue of abuse of the processes that Section 512 established. As such, it is of limited value in assessing the current copyright landscape. Past experience teaches that the twin goals of ensuring creators are compensated and that the public can access creative works are best served by promoting a diversity of legitimate options for accessing media.

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[23] Karl Bode, *Studies Keep Showing That the Best Way to Stop Piracy Is to Offer Cheaper, Better Alternatives*, Vice (Feb. 26, 2019), https://www.vice.com/en_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives.

[24] *See, e.g.*, Scoop Media, *Netflix is killing content piracy* (Feb. 26, 2019), https://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm; Copia Institute, *The Carrot Or The Stick? Innovation vs. Anti-Piracy Enforcement* (Oct. 8, 2015), https://copia.is/library/the-carrot-or-the-stick/; Sophie Curtis, *Spotify and Netflix Curb Music and Film* Piracy, The Telegraph (July 18, 2013), http://www.telegraph.co.uk/technology/news/10187400/Spotifyand-Netflix-curb-music-and-film-piracy.html.

[25] *See, e.g.*, Dave Axelgard, *Helping Creators and Publishers Manage Their Intellectual Property*, Facebook (Sept. 21, 2020), https://about.fb.com/news/2020/09/helping-creators-and-publishers-manage-their-intellectual-property/; Leo Olebe, *Making Music & Streaming Easier* (Sept. 14, 2020), https://www.facebook.com/fbgaminghome/blog/making-music-and-streaming-easier ("Instead of suggesting you go to music law school to figure it all out, we want to make the whole process a lot easier so you can focus on being a great streamer, and not a rights specialist. That's why we're partnering with the music industry to open up a vast catalogue of popular music for Facebook Gaming Partners to play while livestreaming games."); Tatiana Cirisano, *Amazon Music Will Now Let Artists Integrate Twitch Livestreams: Exclusive*, Billboard (Sept. 1, 2020), https://www.billboard.com/articles/business/streaming/9442797/amazon-music-twitch-livestream-artists; Sam Byford, *Google Images is making it easier to license photo rights*, The Verge (Aug. 31, 2020), https://www.theverge.com/2020/8/31/21408305/google-images-photo-licensing-search-results.