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The Honorable Lindsey Graham
Chairman, Committee on the Judiciary
United States Senate
290 Russell Senate Office Building
Washington, DC 20510

By email

Dear Chairman Graham:

Thank you for the opportunity to answer additional questions from members of the Senate Judiciary Committee's Subcommittee on Intellectual Property following the hearing held on June 2, 2020 on "Is the DMCA's Notice-and-Takedown System Working in the 21st Century?"

Attached please find my answers to the thoughtful questions posed by Subcommittee Chairman Tillis, Subcommittee Ranking Member Coons, and Senator Leahy.

I have tried to provide thoughtful answers in response. If there are any outstanding questions from my testimony and these answers, I would be very happy to work with members of the Subcommittee and staff on these topics.

Sincerely,

David Hansen
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Lead Copyright & Information Policy Officer

Responses to questions from Chairman Tillis

1. Congress intended for section 512 to provide strong incentives for service providers and copyright owners to "cooperate to detect and deal with copyright infringements that take place in the digital networked environment." There have been numerous voluntary initiatives, but many have faded out over the years. What do you think have been the most successful voluntary initiatives, and what areas do you see for future improvement?

The most successful and positive change I have seen has come not come from voluntary efforts or schemes to take down content, but from making it easier for users to obtain legitimate copies under reasonable terms, such as through streaming video services, streaming music services, and the like. This includes development of other markets beyond consumer licenses—such as institutional licensing for video (e.g., Kanopy and Swank), which has made it easier for the organizations like Duke University to also provide access to content for educational purposes, thereby limiting the risk that students will attempt to obtain copies illegally online. Those markets are far from perfect, and specifically for the academic market there are many aspects that are dysfunctional for other reasons (e.g., the consolidation of the textbook market). But, on the whole, we believe these new legitimate routes for licensed access have been a significant factor in reducing takedown notices that we see at Duke on our network. Rather than attempting to build yet another complex regulatory scheme for enforcement, I believe that encouraging the development of such markets, particularly by reducing the transaction costs of licensing, is a preferable route. While such an approach deserves more study, this could include supporting the creation of better, more accessible information about copyright ownership and licensing availability. For major commercially successful works, this information is generally available, but for the majority of creative work produced in the United States, it is not. The U.S. Copyright Office currently collects some relevant information through registrations and recordation, but it is far from complete. The elimination of copyright formalities over the last forty years has greatly degraded incentives to register or record relevant information, limiting the publicly available copyright information available to would-be licensors. Further, there are no incentives in place to ensure that information is up to date and accurate. Beyond encouraging more and better licensing information, other legal and policy tools such as antitrust enforcement could more effectively be applied to ensure that markets are operating efficiently.

2. One of the main goals of the DMCA was to implement a notice-and-takedown system that online service providers and copyright owners would find mutually beneficial. If only one side feels like the current system is working, isn't that a sign of a problem?

The recent U.S. Copyright Office Section 512 Study report came to this conclusion. Unfortunately, that report contains several flaws that I hope you and this subcommittee will take seriously when considering its recommendations. One of the most glaring is that the Office took an extremely narrow view of the interests of rightsholders, focusing primarily on the particular interests of the publishing and entertainment industry.

First, it is important to remember that the copyright system is not meant, ultimately, to benefit those narrow interests. The Constitutional goal of Copyright law is to promote the progress of science and the useful arts.[1] As the Supreme Court has explained "[t]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.' "[2] Of course, some rightsholders will find any system that falls short of absolute control—at the expense of other interests—inadequate.

The goal of copyright law is not to provide maximum benefits to these rightsholders, but to provide adequate incentives to encourage optimal levels of creation and dissemination of creative works, for the promotion of the progress of science and the useful arts. The Copyright Office report explored at length how Section 512 affects the incentives of service providers, but gave very little attention to the main focus of the Copyright Act – incentives for creators. The Office in its Section 512 report did review several empirical studies submitted in response to its notice of inquiry, but little of the resulting report (or evidence submitted) focused on the key question of how Section 512 affects the incentives for creators. The Office also failed to adequately explain how the current system, which it implies is faltering, has produced a creative environment that has resulted in more recorded and distributed creative content produced every year than ever before in human history.

Second, there are many authors who create with the goal of broad, open dissemination of their work. As I testified, academic authors—whose work is in my opinion far closer to the core of copyright's Constitutional objective of promoting the progress of science and the useful arts than that of many other rightsholders—generally aim for the widest possible readership for their work. The economic incentives that copyright provides factors very little into the decision to write the hundreds of thousands of research articles, books, data, and other materials that these authors produce. In the course of creating these works, authors necessarily build on the work of others and incorporate (legally, pursuant to fair use) portions of content for purposes of criticism, commentary, research, scholarship, and so on. From that perspective, a more aggressive notice and takedown system means their work could be caught in a net that takes down materials without sufficient protections. Creative work should only be taken down after due process and substantial certainty that the content is actually infringing, including consideration of fair use.

All of this is to say that the DMCA notice and takedown system affects multitudes of people with a wide variety of interests. It is not a two-sided system, with a unified point of view from "service providers" on one side and "rightsholders" on the other. That kind of reduction unhelpfully ignores the core focus of the Copyright Act (ultimately, to benefit the public), as well as the creative contributions of millions of Americans who want to see their work shared widely without inhibition. Academic authors are one subset of a group of

[1] U.S. Const., Art 1, § 8, Cl. 8.
[2] Twentieth Century Music Corp. v. Aiken, 422 US 151, 157 (1975) (internal citations and quotations omitted).

much larger group of authors who primarily create for the aim of sharing their work with the world. I cannot speak for all of those groups, but I hope their views are taken into account as the subcommittee examines the operation of Section 512. The Copyright Office's Section 512 study did not adequately capture these other points of view. As far as a perspective from a large research university, I can testify that we believe that the balance struck by Section 512 is appropriate and is working.

3. Congress intended for section 512 to provide strong incentives for service providers and copyright owners to "cooperate to detect and deal with copyright infringements that take place in the digital networked environment" and to offer "greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities." If Congress were starting from scratch, should we adopt the same balance as in 1998?

While the DMCA is not perfect, I believe the evidence of the last twenty years speaks for itself. The creative sector in the United States is booming, producing more new creative works than ever before. This includes an entertainment and publishing industry that is flourishing, despite the complaints of representatives of those industries. So is the online service industry. The balance between those sets of interests has worked out remarkably well, probably better than any other similar system in the world. As I state above, missing from consideration are the many, many creators who rely on a free-flowing online environment through which they can effectively share their work without fear of it being removed. Also missing from this balance calculation is the broader public interest, including important cultural institutions such as libraries.

4. The Copyright Office report on section 512 identified 12 different substantives areas, including eligible types of service providers, knowledge standards, repeat infringer policies, and notice form requirements. What do you think are the most significant reforms that Congress could make to section 512? If you had to pick one, what revision or clarification of the statute would do the most good?

I do not believe section 512 merits any major revisions. Of those that the Copyright Office proposes, I believe that clarifying repeat infringer policies could be helpful, as explained below. I also believe that it is useful to put in place stronger disincentives to claimants who make abusive notices, as a way to limit attempts to weaponize the notice and takedown system to harass or otherwise squelch speech. I believe that part of this consideration should include whether the claimant considered fair use when submitting a takedown notice. Congress should affirm and strengthening the holding of *Lenz v. Universal Music Group Corp*., 815 F.3d 1145 (9th Cir. 2016), that claimants must consider fair use in order to have the good faith belief regarding infringement necessary to make a valid takedown notice.

5. You testified about the role that internet service currently plays in people's lives and were critical of section 512 requiring online service providers to terminate the accounts of repeat

infringers. Though data suggests that account termination mostly occurs in only egregious cases, what are your suggestions for keeping account termination as a deterrent but setting it up in a way that you would think better ensures that users don't unduly have their account terminated?

The importance of internet access for everyday life has changed dramatically since the enactment of the DMCA in the late 1990s in several important ways. I do not think I need to give many examples to illustrate this point—everything from banking to higher education has come to rely heavily on users having internet access. Many of those services now depend on users having highspeed network access. Many Americans only have one or two realistic options for broadband. Some populations, such as students on campus, have only one option. So, being locked out of those systems becomes extremely problematic. Of special concern is that deprivation of internet access eliminates one of the most critical pathways for the exercise of one's First Amendment rights. For special populations, such as students, account termination could have other far reaching impacts on their ability to complete their education or obtain essential services.

If the desire is to retain account termination as a deterrent, I believe that at a minimum, the statute should be clarified to say that service providers can require more than mere allegations of infringement before eliminating access, effectively clarifying and overturning *BMG Rights Management v. Cox Communications*, 881 F. 3d 293 (4th Cir. 2018). Doing so would allow service providers to insert at least a minimal level of due process for those subscribers whose access is threatened, leaving access elimination as a potential deterrent while giving flexibility to make the process fairer. That said, I believe account termination raises a set of concerns that go far beyond copyright law. Further consultation with a broader set of stakeholders, as well as other regulatory agencies such as the FCC, seems warranted.

Responses to questions from Ranking Member Coons

1. *The Senate Judiciary Committee's 1998 report on the Digital Millennium Copyright Act (DMCA) stated that "technology is likely to be the solution to many of the issues facing copyright owners and service providers in the digital age," and the Committee "strongly urge[d] all of the affected parties expeditiously to commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals." Unfortunately, as noted in the recent Copyright Office report on Section 512, "Congress' vision of broad, open, cross-industry standards-setting for the creation of standard technical measures has not come to pass." Why do you think that is, and do you have any hope that future voluntary standardization of technical measures will combat digital piracy effectively?*

I believe voluntary efforts among the largest service providers (e.g., YouTube's ContentID and Facebook's Rightsmanager) have worked relatively wel,l though I recognize those efforts address only a portion of content on some of the largest platforms. A major headwind for development of true cross-industry standards are the widely diverging priorities that service providers and rightsholders have. As I stated in response to Chairman Tillis's questions, the stakeholders with an interest in Section 512 are widely varied – Section 512 affects the online activity of almost every American across almost every industry.

I am not convinced that standardization of technical measures, even with leadership to address widely varied interests, will be effective to combat online piracy. The most successful and positive change I have seen has come not come from schemes to take down content, but through making it easier for users to obtain legitimate copies under reasonable terms, such as through streaming video services, music services, and the like. This includes development of other markets beyond consumer licenses—such as institutional licensing for video (e.g., Kanopy, or Swank), which has made it easier for the organizations like Duke University to also provide access to content for educational purposes, thereby limiting the risk that students will attempt to obtain copies illegally online. Those markets are far from perfect, and there are many parts of these market that are dysfunctional for other reasons (e.g., the consolidation of the textbook market). But, on the whole, we believe these new legitimate routes of licensed access have been a significant factor in reducing takedown notices that we see at Duke on our network.

2. *The Copyright Office report made several recommendations for possible legislation, including clarifying the scope of eligible online service provider (OSP) activity; promoting clarity and transparency in OSP repeat-infringer policies; clarifying standards like "red-flag knowledge" and "willful blindness"; clarifying the right to submit representative lists of infringing material; increasing penalties for misrepresentations in abusive notices or counter-notices; shifting the notice requirements to a regulatory scheme to provide flexibility; establishing an alternative dispute resolution mechanism; clarifying the right to subpoena OSPs to identify alleged infringers; and considering whether injunctive relief beyond notice-and-takedown is warranted. Do you agree with these recommendations?*

How would you suggest we approach these issues, and how would you prioritize them?

Many of the recommendations of the Office are oriented toward shifting the balance of responsibility to service providers, under the premise that the current system is imbalanced and skewed against rightsholders. As I state in response to the questions from Chairman Tillis, I believe that premise of imbalance is flawed and therefore many of the recommendations of the Office are flawed. Speaking as someone who works with the many thousands of authors who are contributing innovative scientifically relevant research and who want those materials shared widely throughout the world, online, my perspective is that, if anything, the current system makes it too easy for content to be removed from platforms, and too easy for subscribers to lose access. To that end, I suggest prioritizing efforts to clarify repeat infringer policies. I believe that at a minimum, the statute should be clarified to say that service providers can require more than mere allegations of infringement before eliminating access, effectively clarifying and overturning *BMG Rights Management v. Cox Communications*, 881 F. 3d 293 (4th Cir. 2018). Doing so would allow service providers to insert at least a minimal level of due process for those subscribers whose access is threatened, leaving access elimination as a potential deterrent while giving flexibility to make the process fairer. That said, I believe account termination raises a set of concerns that go far beyond copyright law. Further consultation with a broader set of stakeholders, as well as other regulatory agencies such as the FCC seems warranted.

I also believe that it is useful to put in place stronger disincentives to claimants who make abusive notices, as a way to limit attempts to weaponize the notice and takedown system to harass or otherwise squelch speech. I depart from the Office in believing that a crucial consideration that a claimant must make is whether the objected to use is fair use or otherwise permitted by law. Affirming and strengthening the holding of *Lenz v. Universal Music Group Corp*., 815 F.3d 1145 (9th Cir. 2016), that claimants must consider fair use in order to make the good faith belief regarding infringement necessary to make a valid takedown notice.

3. *The Copyright Office also recommended that we reject a one-size-fits-all approach to modern internet policy. How would you suggest that we accommodate differences among stakeholders as we evaluate the DMCA?*

I do agree that a one-size-fits-all approach to *internet* policy is increasingly difficult to maintain, and that Congress should consider whether policies and laws should be put in place to protect the interests of smaller, more vulnerable internet users. However, I believe that copyright law is a wholly inadequate and inappropriate tool for enactment of most internet policy. While copyright law certainly plays a role, I believe policy recommendations regarding broader internet policy—e.g., questions about what incentives laws such as the Copyright Act should ever put in place to encourage service providers to terminate subscriber's accounts—deserve broader input and consideration of factors that go beyond the scope of copyright interests.

4. *How can the notice-and-takedown process be improved, particularly for small creators? Would you recommend standardizing the process across service providers? If so, who should be responsible for establishing and enforcing those standards?*

In my experience with small creators, such as the thousands of Duke University faculty and graduate students I work with, the current system works well and is standardized enough that most are able to adequately navigate the system on most platforms.

5. *The Copyright Office declined to make recommendations regarding a "notice-and-staydown" system. Should Congress consider this alternative to the "notice-and-takedown" framework? Why or why not? Would you support a middle ground that would require OSPs to ensure that once infringing content has been removed pursuant to Section 512, the same user cannot repost the same content on any platform controlled by that provider?*

I do not believe that a notice-and-staydown system is desirable nor do I believe it would be effective or efficient, particularly given the costs it would impose on the many medium and small service providers, such as Duke, to technically monitor and filter content through new systems. Even with a network of its size, serving tens of thousands of users, Duke predominately relies on human review to process DMCA claims. On average, we process just a few hundred each month. Requiring automated review across our entire network would impose costs for new technology that are largely unnecessary. More importantly, such monitoring systems would also impose social costs that are hard to quantify but are likely to be significant. Duke, like most academic institutions, highly values academic freedom and free inquiry. Many other service providers of similar orientation do the same. The Copyright Office includes citations to several studies documenting the chilling effects that the notice and takedown system already has on users who seek to share content with the world, even without such monitoring systems in place. Any such system that indicates to users that the network, especially a network hosted by a service provider like a university, is monitoring their online activity or filtering their stored content sends a disturbing message about surveillance that will likely have the effect of chilling legitimate research and educational activity.

Responses to questions from Senator Leahy

1. *The White House Office of Science and Technology is considering a policy change that would require the immediate and free distribution of any peer-reviewed journal article that discusses medical or scientific research funded through a government grant.* ***What concerns, if any, would you have with this proposal?***

I strongly support OSTP's efforts to make federally funded published research available immediately, for free to the public. In response to OSTP's call for comments, Duke University submitted comments reflecting these views. Duke University is a major research university and economic engine for our region, with about $500 million per year in funding from federal government agencies. Duke supports about 8,000 faculty and staff and an additional 7,500 graduate and professional students also engaged in research, and produces over 10,000 research articles every year. One of Duke University's key strategic goals is putting knowledge in the service of society. We encourage Duke authors to make the results of their research (publications, data, and code) as broadly available as possible, and to translate their research into modes that can be effectively consumed by the public and quickly generate practical benefit as well as economic and social value. As an institution, we have put in place a number of services to support this, including an open access policy, multiple open repositories and staff to provide support in using them, and funding to assist with open access article processing charges. Duke is pleased that the OSTP is seeking to expand public access and benefit for more federally funded research, and believes it would provide great benefit to taxpayers, benefit the progress of science and research and education more broadly, and provide the basis for more rapid innovation and economic development.

The key concerns about this proposed policy are that it might provide a disincentive to publishers or authors, or be unsustainable financially. However, these concerns do not stand up to scrutiny.

Such a policy would have almost no effect on academic authors' incentives to do research or disseminate results. Academic authors are not paid any royalties on research articles—they are incentivized by recognition of their peers, citation by other researchers, and by others building on their work in new research. These incentives are all enhanced by broad and free access to research, not hindered by it. At universities, faculty have been actively engaged in self-imposing open access policies at many institutions for quite some time because they want to make their work widely available immediately, and many other funding agencies have also begun to require immediate open access. Registries like http://roarmap.eprints.org/ show the number and scope of such policies globally. Institutions like Duke have set up repositories to provide this access, but the federal government could do better, for example by requiring the journals themselves to make these articles freely available.

The movement toward Open Access (OA) for scientific publications began over 20 years ago, but it is not yet a full reality. There are many reputable OA journals, preprint services like arXiv.org, and portals like PubMed Central. However, many of the journals considered "high impact" (valuable in the metrics for faculty promotion and tenure) are controlled by long-standing commercial scholarly publishers who have benefited from dominating the field of scientific publishing. These publishers resist models that might result in decreasing the revenue by sharing a larger portion of the publishing landscape with new entrants. Their dominance, combined with misperceptions that open scholarship options are lower in quality and value, makes it difficult for innovative entrants to move into the marketplace to compete effectively. This market dominance also means that these large publishers are able to charge high prices for access, and so profit substantially off of federal research funding. Some of the biggest companies, like the Netherlands-based Elsevier, have profits in the range of 30-40%. This amounts to over a billion dollars in operating profit each year for Elsevier, much of it derived from federal funding but with limited benefit to American public.

Despite the resistance to such change, other entrants to the market have proven that new OA business models are financially viable and can provide the same high-level quality of publication at a much lower cost, all while making the research available freely to anyone with an internet connection. Some examples of these are PLoS (Public Library of Science), BioMedCentral, Hindawi, and PeerJ. The OSTP policy will nudge established publishers to innovate in similar ways, while providing benefit to the public and maximizing the benefits to taxpayers of the investment they have made in research.

2. *Stream-ripping is the illegal practice of pulling audio or video from a streaming platform for permanent download. This practice is obviously damaging for creators.*

    a. **How often is this delivery method used by consumers?**

I cannot speak to how often this delivery method is used by consumers, and am unaware of empirical evidence of the practice. That said, I believe there are many instances where downloading streams is legitimate and poses no harm to creators.

For libraries and archives, one of our primary missions is to preserve cultural content for posterity, so that future generations of researchers can read, watch, listen to, and understand the world that came before them, and to use those materials in research and teaching. Increasingly, the cultural record of our world is delivered via streaming media platforms. Without downloading, libraries have no good ways of preserving content that is available exclusively through streaming services. This includes programs like Netflix Originals and Amazon Prime Exclusives. Through the Section 1201 regulatory process, the Library of Congress has affirmed that circumvention of technological protection measures

is permissible for certain types of educational use, some of which libraries can also rely upon. For the most part, libraries do not engage in this practice widely because of concerns about violating license terms of use or circumventing technology protection measures put in place by streaming platforms. Unfortunately, that means that much of this content is at risk of being lost from the preserved cultural record. Beyond library preservation uses, downloading streams can be important for other legitimate uses, such as for academic researchers who are engaged in text and datamining, seeking to better understand more deeply through computational analysis trends and patterns across creative works.

b. How do platforms block this activity?

I am not familiar with the technical process of blocking streams and as a rightsholder, Duke generally does not employ technology to prevent such activity for our own works.

3. **Given the difficulties of monitoring online piracy for individual creators and smaller ISPs, should we consider a bifurcated system that treats individual creators and smaller ISPs differently than large studios and platforms? What would be the potential benefits and concerns?**

It is hard to ignore that the very largest service providers—Google, Facebook, and others—as well as large studios operate with a very different set of concerns, resources, and technical capabilities than most other rightsholders or service providers. As other witnesses have testified in earlier hearings, there are great risks with modifying the balance of Section 512 in a way that could stifle competition and further entrench those large stakeholders as forever dominant over the internet economy. I am not convinced that creating a bifurcated system of enforcement within copyright law is the right solution to address the differences between those large stakeholders and smaller ones, but other approaches—such as positive incentives for large stakeholders to develop voluntary systems, or develop better, more efficient licensing markets, may be viable. I do believe it is important that changes for the benefit of those large commercial interests be tailored in a so they do not further negatively impact the many millions of creators, such as academic authors, for whom the current system works relatively well.