

**Don Henley –
Is the DMCA’s Notice-and-Takedown
System Working in the 21st Century?
Questions for the Record
Submitted June 9, 2020**

QUESTIONS FROM SENATOR 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?**

As I noted in my testimony, the key beneficiaries of the DMCA – big technology companies - have not meaningfully come to the table to find solutions to digital piracy. They have no incentive to do so. The online platforms don’t believe that the law requires them to establish better piracy fighting tools, and they know they can make more money without them. The digital companies aren’t interested in establishing real standards for blocking infringements, for fear they will be held accountable. Keep in mind, these platforms don’t want to have content – even infringing content – removed from their sites, for fear it will reduce visitors and ultimately reduce their advertising revenue.

Given the focus of this Committee and the Copyright Office, I hope that the tech platforms will do better in the future. We all know that they have the technology and they could deploy it more broadly and effectively with relative ease. The hearing highlighted, for example, that the technology is readily available with products like AudibleMagic and YouTube’s own Content ID. Unfortunately, YouTube imposes limitations on Content ID, both in scope and availability. They act like the Wizard of Oz hiding behind the DMCA curtain pulling levers as they see fit. Congress envisioned that, in exchange for shelter from liability, the digital companies would cooperate in establishing mutually acceptable tools for combatting piracy. I hope that YouTube and others will finally acknowledge that intent but, more likely, Congress will have a role in bringing them to the table.

- 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?

I can't say whether I would implement all of the Copyright Office's recommendations, but I do agree with the report's conclusion: action needs to be taken. The report provides an excellent roadmap by highlighting the areas where the DMCA has been seriously mischaracterized and misused. I hope Congress will give serious consideration to the Copyright Office's suggestion on how to restore fairness to this broken system. Congress intended to provide safe harbor to the platforms only if they contributed to and cooperated on addressing infringing activity. They haven't been meaningfully addressing the problem, and the balance is off. Too many of the platforms' obligations have been watered down, if not eliminated altogether.

In terms of priorities, I believe it is paramount to clarify that safe harbor is only available for the true passive platforms—not sites that curate, target, and promote infringing material. I also believe it is crucial that the burden of removing infringing content from these global platforms must shift from individual creators to the platforms themselves. The current system is akin to asking farmers to stand watch at grocery stores to make sure customers don't steal the produce from the shelves. The platforms need to take responsibility - when they have evidence of infringements, they need to remove them. And they need to keep them down. We need a "notice-and-staydown" system, so that infringing works don't repopulate the moment they are identified and removed. While these are the priorities in my mind, I believe addressing the other issues suggested in the Copyright Office report is important to rebalancing section 512 and setting the DMCA back on the path of its original intent.

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?

It's fine to recognize and accommodate differences among digital stakeholders. To do that, we need them to meaningfully engage and cooperate in removing infringing content. As noted, it has been impossible to get key service providers to voluntarily come to the table.

As you heard at the hearing, the Internet Association likes to talk about the need to protect small start-ups; presumably to draw attention away from the companies generating billions of dollars in revenue. I acknowledge that the capabilities of a start-up company don't compare to those of Facebook and YouTube. However, start-ups should be encouraged to build systems that comply with their "notice and take down" obligations, and we must never bring larger service providers down to the lowest common denominator. Each service provider must always be held to the appropriate standard, and the global platforms that dominate the market should not be allowed to hide behind the lower capabilities of fledgling companies.

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?

We must start by acknowledging that any system that requires creators to spend inordinate amounts of time policing infringements, instead of creating, has failed. The intended bargain was for the parties to share the burden. That, as the Copyright Office noted in its report, is not happening today: “Over the decades, the shift in the balance of the benefits and obligations for copyright owners and OSPs under section 512 has resulted in an increasing burden on rightsholders to adequately monitor and enforce their rights online, while providing enhanced protections for OSPs in circumstances beyond those originally anticipated by Congress.”

To reinstate the intended balance, service providers must be required to do more than merely respond to notices as they come in. To start, they must enforce meaningful terms of service (particularly for repeat infringers, which they absolutely can detect), recognize and act upon red flags, and reject clearly fraudulent counter-notices. Creators must receive more effective assistance from service providers, as Congress originally intended. Part of that is acknowledging that big tech can, and should, use technical measures to block infringing content. Detection tools like Audible Magic and Content ID should be standardized and readily utilized by all services and platforms that host third party content. These tools must be improved in response to creators’ concerns, for example, allowing the tools to be used across the platforms without excluding any channels and allowing for the detection of shorter audio clips. Also, the platforms should not be allowed to revoke access to the tools. I was impressed that Kerry Muzzey testified at the hearing, even though he was justifiably concerned that YouTube would punish him by denying him access to Content ID in response.

It may not be appropriate to standardize every element of the process across all service providers, but there is undoubtedly a baseline that could apply to everyone. The online service providers, however, have proven that they will not voluntarily establish good faith standards for a baseline. As you heard at the hearing, the digital platforms claim that the system works as is. This is not surprising, since, as the Copyright Office noted, the system currently favors service providers. Thus, it is likely necessary for Congress itself to define those standards and to establish a system for enforcement, or for Congress to require the Copyright Office to do so through its rulemaking process.

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 believe that Congress should absolutely consider the notice-and-staydown system. This is perhaps the single most practical and effective solution to today’s digital piracy problem. The greatest complaint of music creators – particularly small independent ones – is the game of “whack-a-mole” they are forced to play every day. Imagine the frustration of wading through

countless websites and noticing thousands of infringements, only to see the same content with the same infringements resurface again and again. Meanwhile content which the digital platforms deem harmful to their business – such as certain types of pornography – is mysteriously absent from these platforms. The digital companies work hard to combat software that removes advertising – so-called “ad blockers” – but they do nothing to prevent “stream ripping” software which allows the audio to be stripped from a video and stored offline. The authors of the DMCA would never have perceived this as a balanced compromise between both sides. We should seek to enforce the actual compromise Congress envisioned and implement a true notice-and-staydown system.

If meaningful penalties were applied to a service provider that failed to prevent the same user from posting the infringing content repeatedly, that would be a positive step; but it would not be enough to restore balance to the system. The block needs to be tied to the work itself. A content owner should not have to send endless notices for the same work on the same site. As I testified, the number of wildfires that firefighters are able to put out is not a measurement of success. Nor are the number of takedowns issued. Instead, we need to focus on prevention and require the digital platforms to ensure infringements do not reignite across their services.