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The Honorable Thom Tillis
Chairman
Senate Judiciary Subcommittee on Intellectual Property
226 Dirksen Senate Office Building
Washington, DC 20002

The Honorable Chris Coons
Ranking Member
Senate Judiciary Subcommittee on Intellectual Property
226 Dirksen Senate Office Building
Washington, DC 20002

Dear Charmain Tillis and Ranking Member Coons,

Thank you for leading the Senate Judiciary IP Subcommittee's ongoing hearings about revisions to the Digital Millennium Copyright Act (DMCA). Twenty-two years after it became law, the digital media landscape has changed a hundredfold. I hope that my experiences, detailed in this written statement, can help inform your understanding of how the DMCA, as it exists now, is failing independent artists.

The crux of the failure occurs in the notice-and-takedown process.

Before explaining how broken the DMCA is, let me give you some context for my remarks.

My name is Kerry Muzzey, and I am a film and television and modern classical composer.

I am one of the very few independent artists who has access to YouTube's Content ID system; and most of my experience with notice and takedown has been on YouTube. Content ID has become a core piece of my licensing business: it is the x-ray that reveals the theft of my music to me. This is why I am also nervous about speaking out today – because I fear retaliation by YouTube and Google. I am concerned that they may take Content ID away from me for raising my concerns publicly. The technology behind Content ID is nothing short of brilliant, and I don't want to lose access to it.

Growing up, my mom always said: "You're not allowed to complain unless you're gonna do something about it." Senators, my being here today is my "doing something about it." Today, I have the most unique opportunity I have ever had in my lifetime. I have the opportunity to ask Members of my United States Senate to *fix a broken law*.

I never would have imagined, as a kid growing up in small town Illinois, that someday I would achieve my dream of being able to make a living at being a composer – much less that I would ever be sitting at a virtual table with actual Senators, telling my story and having them hear me out.

I began releasing albums of my music in the early days of iTunes back in 2006. My work quickly found an audience. It also found its way into the ears of editors, directors, writers, and producers who wanted to license my music for their documentaries, television shows, commercials and movie trailers, and also led to my writing original scores for their films and documentaries.

My career began to flourish thanks to a robust digital marketplace that put my work in front of anyone who was looking for instrumental music. And one digital outlet in particular – iTunes – fueled the launch of my career. Because I own 100% of all of the rights to my own work, I was able to keep 100% of the sales and licensing revenue from my work. I had become a self-published artist who also functioned as a record label. iTunes sales, licensing revenue, and scoring jobs became my full-time job. This was a dream come true. Technology and the innovation of a brand new digital marketplace made my dream possible. Licensing my music is the core of my business.

That is the good side of the digitization of music. The bad side is enforcing my rights in that music, because of the deep flaws in the DMCA – and that presents an existential threat to my livelihood.

In 2009, I was approached by the music supervisor of the television show *Glee.* Music supervisors, working with producers and directors, select the music that you see in each movie and television show. This supervisor asked me if the show could license one of my pieces for their pilot episode. Ryan Murphy, the show creator, had found my music on iTunes and loved this one particular piece called "Looking Back."

I was thrilled, as it was a healthy license fee and an opportunity to be a part of a groundbreaking television series. The show quickly found an audience and they came back to me again and again to get permission to use my piece as a recurring love theme.

During this same time period, the FOX show *So You Think You Can Dance* approached me for permission to use several of my modern classical pieces on their program. Choreographers wanted to perform to them during the program. My career as a composer and an artist was taking off in a very mainstream way.

This is what led me to YouTube to see if my name turned up in a search. I found a few results: 20 to 40 compilation videos that fans had made using footage from these programs. It was frankly exciting! It meant that my music was resonating with audiences. It was around this time that I learned about YouTube's Content ID tool, which allows copyright holders to fingerprint your content in their system – music or videos, or both. Once fingerprinted, the tool locates uses of your music on its platform. I had had good luck with another, similar technology called Tunesat, which monitored television broadcasts in the European Union for music use.

It would be another four years before I was granted access to YouTube's Content ID and had my entire music catalog fingerprinted by the platform in February 2013. I am seven years into utilizing this technology to locate uses of my music on YouTube. (As I will explain later, not all of the content uploaded to YouTube is monitored by Content ID.)

The results that Content ID quickly yielded were far different than what I had found in years prior when I just searched for my name on the YouTube search engine. In the first hour that my fingerprints were active in the system, Content ID found 200 videos. Eight hours later, it was up to 1000 videos. The next morning, it was up to 2000 videos. By the end of that first week, it had found 10,000 videos. And, by the end of that

first month, Content ID had located *20,000 videos* with my music in them – all of them uses I would never have known about.

My music was not being used by amateurs to make cute little kitten videos. There were car commercials, ads for luxury hotel chains, pharmaceutical and biotech companies, airlines, Fortune 500 companies, banks, and dozens upon dozens of international television shows that had used my music without licensing it from me. To date, YouTube Content ID has located about **110,000 unlicensed** uses of my music in videos hosted on its platform.

This was not individuals innocently using bits of my music. This was theft. The amount I discovered knocked the wind out of me.

I began to send DMCA takedown requests on these tens of thousands of uses, and I quickly learned just how broken the DMCA was. As I filed takedowns, I began receiving counter-notifications forwarded by YouTube. These notifications were from the companies and organizations using my music, as well as individual YouTube users – all of whom said that their use of my music in their ads, commercials, and fundraisers was fair use under US Copyright Law. I was stunned.

I am quite familiar with fair use given my background working in the Business Affairs department at a television network. I was absolutely certain that these uses were not in any way "fair use," as defined by the fair use doctrine. So I can comfortably assert that in 100% of these counter-notifications, **the "fair use" assertion was false**.

With each counter-notification, YouTube's instructions were clear. I was given 10 days from the date of the counter-notice during which I could file a lawsuit against that uploader and show proof of that filing to YouTube. If I did not do so, YouTube would reinstate the content.

For an infringing uploader in this situation, "getting the video reinstated" is not the goal. What they want is for YouTube to remove the "copyright strike" against their account, which a counter-notification accomplishes. Why? Because the strike does several things.

Most importantly, if the uploader's channel is enabled for monetization with YouTube (via ads being placed on your videos), a "copyright strike" disables monetization for 90 days and turns off the uploader's ability to livestream. This is a significant penalty – if only it were not so easily defeated by simply lying! A second strike will limit how often the uploader can post, and shorten the allowable length of each post. If an uploader receives a third strike, YouTube will delete their channel entirely.

This is why false counter-notifications are so often employed by YouTube uploaders. By filing one, the uploader gets the copyright strike removed, and YouTube lets them keep making money.

The scam seems pretty obvious. So why does YouTube let them get away with it?

If you search YouTube or Google for "how to get out of a copyright strike on YouTube," you will find plenty of videos and blog posts that say: "Just file the counter-notification: they can't afford to sue you and the big labels won't even bother." Sadly, this is true: I am not a large company, I am just a guy. I do not have a team of lawyers and I cannot file multiple federal lawsuits every month.

The end result for me, in almost every case, is that the strike is removed from the uploader's account, the video goes back online, and both YouTube and the uploader can continue to co-monetize the video, with my music still in it. At that point, I have lost. I have no recourse other than a federal lawsuit. It is infuriating and it is disheartening. YouTube's response to me each time has been: "We are acting in accordance with the DMCA." And they are not lying when they say that they *are* acting in full accordance with the DMCA.

This is why I assert that the notice-and-takedown process in the DMCA is broken. The remedy it provides to me, the copyright owner, is not an actual remedy. I cannot file lawsuits against every video uploader that falsely files counter-notifications against my rightful takedowns. If I have a right but I do not have a remedy, then I do not actually have a right.

Also, in direct conflict with the DMCA's requirements, YouTube is not a neutral party in many of these false counter-notifications. YouTube directly benefits financially from the reinstatement of the infringing content, especially where YouTube's premium partners (which can include major networks, products, brands, and broadcasters) are concerned. YouTube has a financial incentive to reinstate infringing content because they have ad revenue at stake. In these cases, where it co-monetizes content with an uploader, it is not acting as a neutral platform – it is the uploader's financial partner.

And if I do not file a lawsuit against each of these infringements within the legally required 10-day period, YouTube (or any other platform such as Vimeo or Facebook) continues to have safe harbor under the DMCA and can operate with impunity.
Technically, YouTube is following the letter of the law, but not the spirit. The original DMCA assumed that all parties involved would be good-faith actors. YouTube – which did not even exist in 1998 – took that presumption of good faith and turned it into a loophole that has been the foundation of its business model. That apparently toothless good-faith clause became the hole in the DMCA large enough for YouTube to drive a truck through.

When I explain my situation to people who do not have a Ph.D. in Content ID, this is usually the part where they say, "Wait a second: you're not famous. I've never heard of you. How do you have this much theft of your work? Why is this only happening to you?"

My answer is this: It is not only happening to me, it is happening to everyone who creates. I am one of the few individuals who have access to this powerful detection technology, so I have the ability to find these uses of my music on video platforms.

One does not need to be famous to find their music used in thousands or even tens of thousands of videos on YouTube. It is notoriously difficult to be admitted into YouTube's Content ID program, and this is by design – the fewer people whose music is recognized in videos, the more videos YouTube is able to monetize. Fewer music detections in videos equals more videos that YouTube and its uploaders can co-monetize.

As I mentioned above, there are ways around Content ID. YouTube offers a Premium Uploader paid service to major networks and large brands and corporations – the primary benefit of which is that those uploaders' videos bypass the Content ID database entirely. This means that their videos are never scanned for music. By not being scanned against Content ID, these companies completely evade music detection.

I have discovered many of my works used in videos by these "VIP Uploaders," but only after hiring a 3rd-party fingerprinting service to scan YouTube for me. Some of the usages that have been found this way include:

- Two luxury hotel chains in the EU/Middle East/Asia
- One of the largest hotel brands in the world
- Three luxury car commercials
- Three commercials by one of the largest food brands in the world
- One of the top 10 largest companies in the world (& based in the US)
- China's five largest television networks
- Land Rover Spain/UK (they continue to ignore my attorney and my claim)
- Chevrolet Brazil (they ignored my claims)
- Largest television network in the Middle East
- Series of five luxury tourism commercials that ran on U.S. cable for five years before I discovered them
- Three web ads for a weight loss drug by one of the largest pharma and biotech companies in the world

In these cases, YouTube's neutrality as a platform is further compromised. It not only receives upfront fees from the uploader for the privilege of using their Premium Uploader tier, but it also receives additional revenue via advertising sales, because both parties know that they are able to monetize all uploaded content from view number one, without any interference from music detection.

This is especially beneficial to businesses operating in China, where once a television program airs, the network will hand the content to a Digital Management Service who will then upload it to YouTube, where advertising has been pre-sold and committed to on the web streaming of that series. These Digital Management Services are VIP Uploaders.

Filing DMCA takedowns against these companies once I have found their uses (via the 3rd-party company I hired to locate them) is a bit more complicated. The takedowns cannot be done through my usual Content ID dashboard; they must be done manually through YouTube's web takedown form. They are then eyeballed by YouTube's legal department. The process normally takes a few days, because YouTube is always hesitant to process a takedown against one of their VIP Uploaders, for obvious reasons. The legal department takes extra steps to ensure the veracity of the claim before processing the takedown. And, when one of these VIP Uploaders files a false counter-notification (which has happened to me numerous times) – often *admitting* in the body of the counter-notification itself that their music use is unlicensed – YouTube still processes the admittedly-false counter-notification. Once the 10-day counter-notification period has expired, it reinstates the infringing video.

Aside from YouTube's own financial benefit – on two fronts – from the reinstatement of that infringing content, it is definitely not abiding by the spirit of the DMCA. Like the other major web platforms, YouTube sees the current counter-notification process as a get-out-of-jail-free card because, for all intents and purposes, that is exactly what it is.

Of course, this is not strictly a financial issue for me. It is also a moral one. I frequently find my music used

as underscore in videos for which I never would have approved the use: political ads, social issue videos, extremist propaganda videos, hate videos – uses of my music in contexts to which I have a strong moral objection.

When the DMCA was originally created, “safe harbor” was based on an expectation of good faith from both sides – copyright owners and fledgling internet startups. Safe harbor assumed honest intentions from both parties. Back in 1998, no one could have foreseen how the internet would change, and how it would change the entire world in the process. Piracy went from being a niche activity for college kids to being the business model for some of the world’s biggest internet players.

However, the safe harbor language also made an incorrect assumption: that music copyright owners would have the practical ability to locate and take down infringing uses of their works. No one ever envisioned a video streaming service like YouTube with two billion active users: a service to which 500 hours of video are uploaded *every 60 seconds*.

If someone were to ask me: “What is one solution you would propose: one solution that would change your world?” That solution would be what is commonly called “takedown and stay down.” This simply means that if I issue a takedown notice on an unlicensed use of my music, the onus would be on anyone seeking to upload the video again to demonstrate that they are entitled to do so.

There is zero skin in the game for the individuals and uploaders. The investment, the legal bills, the losses, and the sleepless nights are exclusively mine to bear. I never invited myself and the use of my work into this uploader ecosystem, but I and my work are trapped inside of it, playing whac-a-mole against all of the individuals and companies that have chosen to steal my work. This flies in the face of the balance that Congress tried to strike with the DMCA in 1998.

YouTube will tell you that it provides several different kinds of tools to users to track their copyrighted material online, the best of which is Content ID. But as I noted, it is near-impossible to get access to. I am one of three independent artists I know who have it. YouTube does make it available through 3rd-party companies like AdRev, but there is a catch: it is free provided that you choose to *monetize* the infringing uses that you find, not take them down. As I noted, for me and for others, there are many, many uses that we would never choose to monetize, for commercial as well as moral reasons.

I cannot speak about the material and financial effects of my experiences with this broken DMCA without also addressing the very human toll it has taken on my mental health and my state of mind. The anger, the depression, the sleepless nights, the constant feeling of helplessness that I experience trying to protect what I created – it is inescapable and there is no rescue in sight. I am a small business whose government has left him out to dry. I have no remedy for the constant and relentless theft of my work. I feel exhaustion and defeat in equal measures.

What is more, the countless hours that I have spent every day for the last seven years policing a global internet platform are hours I will never get back. These are hours I could have spent making music. Creating. Living my life. I will never know what creativity was lost while policing these thefts.

I have frequently seen anti-copyright groups insist that the DMCA works just fine. I do not understand for

whom, though. There are countless hypotheticals thrown around by Big Tech and the anti-copyright-rooted think tanks that they fund. They ask: What about fair use? What about free speech? Doesn't copyright stifle innovation?

These hypotheticals fly in the face of something that is not a hypothetical – the very human, very quantifiable, and very frustrating experiences of me, a self-employed creative who lives this nightmare every single day. My experiences are not hypothetical. They are empirical and evidenced.

As for fair use, it has not changed. It is exactly the same as it ever was, except it is being deployed as a bad-faith, get-out-of-jail-free card far more often than it ever was in the pre-YouTube era.

The ease of employing a fair-use defense is made possible by YouTube. When one goes to file a counter-notification against a takedown, YouTube gives you a drop-down menu with only two options in it. One says: "I have a license for this copyrighted work" and the second says: "This is a fair use under U.S. Copyright Law." Then, there is a space provided to add text or an explanation. It is easy to find the magic words.

In fact, if you go to Google and search "fair use language," you will find a multitude of websites and YouTube videos that tell you what language to use, as though using the words somehow magically pardons your copyright infringement. Fair use is a very nuanced and complex legal concept. Most people do a Google search for "fair use language" and then simply cut and paste this into the text box: "*Copyright **Disclaimer** under section 107 of the Copyright Act of 1976, allowance is made for "**fair use**" for purposes such as criticism, comment, news reporting, teaching, scholarship, education and research."*

This strategy, and this language, has been employed in countless false counter-notifications that I have received for unlicensed commercial uses of my work.

It strikes me as disingenuous that YouTube seems to think its users should not be expected to understand the concept of licensing and asking permission, but that, at the same time, those same users can be expected to really understand when they are asserting a "fair use." That's why we all know this is just a game.

I am exhausted by the anti-copyright crowd's assertions that actually protecting copyright on the internet will destroy free speech, stifle creativity, and undermine fair use. When someone uses my instrumental music in a video, that is not free speech – that is using music creatively as underscore to add value to their visuals, almost always for commercial benefit. That is theft. I invite anyone to explain why it is not.

The DMCA, as it exists now, is so very broken – at the expense of individual and independent creators like me. I am one person, and too small an entity to go up against the Goliaths that are YouTube, Facebook, and Vimeo. I need my government's help. We need for the law to be revised to reflect the current state of affairs in our digital world. I hope that you will consider making changes to the DMCA that will level the playing field and bring some balance back for individuals like me.

I understand that today's panel includes representatives from tech companies and digital services that will argue the current system is working. I challenge them to consider the maddening routine experience I have described today and tell me – with a straight face – that the system is working.

I am just one of hundreds of thousands who go through this every day. The operations of YouTube and other platforms are dysfunctional at best, obstructionist at worst. If they want to do what is expected of them under the DMCA, to be true partners in making the online space lawful, then they need to tear down this facade, face reality, and dedicate themselves to fixing this problem.

Senators, please realize that there are many tiny Davids out there who need the government's help protecting their work by holding the Goliaths accountable for the theft that they have so easily enabled, incentivized, and profited from with impunity. We need practical and accessible remedies when our works are infringed – especially when bad-faith actors exploit the DMCA's loopholes to deny us our legal remedies.

If the world's most technologically savvy companies will not voluntarily help artists like me, then Congress must hold them accountable. Please tell Google, YouTube, and the other massive platforms to do what you told them to do in the first place: work with creatives like me to use the best technology to make protection of our rights more effective, in exchange for the special gift of safe harbors.

Thank you for letting me tell my story.

Sincerely,

Kerry Muzzey