

Committee on the Judiciary
U.S. Senate

Subcommittee on Intellectual Property

Hearing:

Is the DMCA's Notice-and-Takedown System Working in the 21st Century?

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Testimony of Jeffrey Sedlik

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Chairman Tillis, Ranking Member Coons, and other Members of the Intellectual Property Subcommittee, thank you for the opportunity to testify today on Section 512 of the Digital Millennium Copyright Act.

My name is Jeffrey Sedlik. I have been a professional advertising photographer for 35 years and am the author and owner of hundreds of thousands of copyrighted photographs. I am also the president of the PLUS Coalition, a global non-profit organization in which diverse stakeholders from 140 countries are collaborating to develop systems to ensure that the public can access and understand rights information for visual artworks.

I make a living creating and licensing photographs to appear in all manner of media. The photographs that I create and license are protected under U.S. copyright law, at least in theory. In reality, my photographs receive very little protection because of the rampant infringement of my work that is knowingly permitted by online service providers on their platforms and websites.

Instead of using readily available technologies to identify and mitigate copyright infringement, service providers hide in the safe harbor of 512, ignoring illegal activity, allowing infringers to infringe, exploit, and monetize my work with impunity, unless and until I submit a DMCA takedown notice. As a result, I am forced to dedicate my days and nights to searching for infringements, making screenshots to document infringing material, collecting hundreds or thousands of infringement URLs, combing through obscure website menus to find DMCA agent information, drafting and submitting takedown notices, and responding to inane, unnecessary follow-up questions from service providers. Once the infringement is taken down, it will inevitably return, often the same day, because service providers uniformly fail to effectively implement and enforce repeat infringer policies.

Enforcing rights under the DMCA is an impossible task, not just for me, but for my fellow creators across this nation. Most visual artists operate as micro-businesses, often with no employees. Like other creators, in order to feed my family, I must generate revenue by creating and licensing new works. But in attempting to license my works, I find that I am forced to compete with hundreds of thousands of unlicensed, unpaid, infringing uses of my works on service providers' platforms and websites. If I do not enforce my copyrights, my work has no value, and my business is not sustainable. But if I dedicate the time and effort required to identify and repeatedly enforce my copyrights with takedown notices, I have no time left to create new works. It is an untenable situation – one that I and innumerable other visual artists and other small businesses are forced to confront on a daily basis.

If my takedown notice is met with a counternotice, 512 allows me just ten days in which to interview and retain an attorney and file a complaint in federal court, or the infringement will be back online. If I do not have a copyright registration for the photograph in question, I face the prospect of paying the Copyright Office more than ten times the normal registration fee in order to expedite processing of my application under its special handling procedures, with no

guarantee that the Copyright Office will actually process and approve my registration within ten days.

Certainly, this is not the effective, balanced system envisioned by Congress when it enacted the DMCA. The fact that millions of takedown notices are issued each day is not a sign of success. It is a sign of an unbalanced system, under strain and on the verge of failure, if not beyond.

I respectfully suggest the following revisions to 512, to achieve a balanced, effective system:

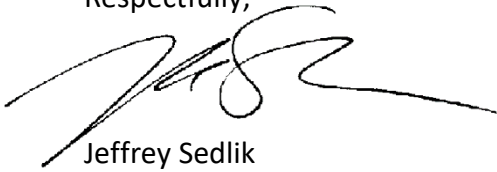
1. Revise and clarify the knowledge requirements, recognizing the right and ability to control infringing activity, and deeming that willful blindness and negligent blindness are the equivalent of actual knowledge.
2. Encourage service providers to collaborate with creators and other stakeholder groups to implement non-proprietary, opt-out and opt-in registries, available for voluntary use by creators and rights holders. With the exception of small service providers, require that service providers check all uploaded works against those registries prior to reproduction, storage, or display. For visual works, image recognition technology is readily available, scalable, highly accurate, and perfectly suited for this task. In addition, service providers should be required to search embedded metadata to identify infringing works.
3. Require that upon receipt of a representative list of links to infringing material, service providers must employ available technologies to identify and remove not only those representative examples, but all other existing infringements of a copyrighted work.
4. Require that service providers implement a “notice and staydown” procedure, replacing the ineffective “notice and takedown” requirement.
5. Define “repeat infringer” as a user who receives two or more takedown notices. Require that service providers implement and strictly enforce a repeat infringer policy.
6. Recognize embedded metadata and digital watermarks as Standard Technical Measures. Require that service providers maintain and preserve all metadata and digital watermarks in all files uploaded to their platforms, as a condition of eligibility.
7. Grant the Register of Copyrights the authority to establish and maintain a list of additional Standard Technical Measures.
8. Either waive the registration requirement for filing infringement claims in response to a 512 counternotice, or toll the counternotice period during the pendency of the standard copyright registration application processing period.
9. Prohibit service providers from publishing a creator’s name, street address, phone, and email address, to stop the current practice of shaming creators and threatening their privacy and security.
10. Clarify that “infringement by reason of the storage” excludes the distinct, exclusive rights to display, distribute, perform, and create derivative works under Section 106.
11. Require, as a condition of eligibility, that service providers must disclose the identity of infringers so as provide rights holders with an affordable and practical procedure to discover that information without resorting to filing a legal action.

12. As a condition of eligibility, require service providers to allow rightsholders to conduct image recognition searches and metadata searches against databases of uploaded works, to identify any infringing works.

Lastly, I agree with and recommend the additional solutions proposed in the Section 512 Report issued by the Copyright Office.

Thank you for your efforts to improve the Copyright Act, and for the opportunity to share my experience and suggestions in my testimony today.

Respectfully,

A handwritten signature in black ink, appearing to read 'Jeffrey Sedlik', written in a cursive style.

Jeffrey Sedlik
Photographer

On Behalf of:
American Photographic Artists
American Society for Collective Rights Licensing
American Society of Media Photographers
Digital Media Licensing Association
Graphic Artists Guild
National Press Photographers Association
North American Nature Photographers Association
PLUS Coalition
Professional Photographers of America