Public Knowledge

5 March 2021

Ranking Member Thom Tillis
Senate Judiciary Subcommittee on Intellectual Property
113 Dirksen Senate Office Building
Washington DC 20510

Re: Public Knowledge Comments on December 18, 2020 "Digital Copyright Act" Discussion Draft

Dear Ranking Member Tillis,

Public Knowledge (PK) welcomes this opportunity to provide comments on the discussion draft circulated on December 18, 2020.

At the outset, PK welcomes efforts to make the DMCA more responsive to users, particularly in cases of blatant abuse or misuse of copyright enforcement mechanisms. However, the draft fails to strike a meaningful balance between users' rights and the desires of rights holders; instead, it exacerbates some of the worst (and most well-documented) problems facing users under the current system. The DMCA as it exists is an imperfect, but substantial, attempt to safeguard the rights of users; its protections should be strengthened and expanded, not watered down.

While we are unable to comment on the full range of issues presented in the draft, we would like to highlight three areas in particular: the suggestion of an algorithmically-driven, fundamentally unworkable notice-and-staydown framework; the lack of any explicit carve-out for infrastructural services such as ISPs, caching, or private cloud or backend storage services;

and the misguided attempt to condition a user's vindication of basic First Amendment rights contingent upon participation in a "voluntary" closed-door system.

I. NOTICE-AND-STAYDOWN IS UNWORKABLE IN ANY SCENARIO, AND INFRASTRUCTURE SERVICES MUST BE EXEMPT

Notice-and-staydown is unworkable and, to the extent it interferes with fair use, unconstitutional.

Notice-and-staydown requires algorithmic filtering; algorithmic filtering is fundamentally incapable of respecting First Amendment considerations, exceptions, and limitations on copyright law.[1] This reality has been driven home again and again by stakeholders across the spectrum, including the United States Copyright Office,[2] and it is unlikely this undertaking will contribute further insight. Algorithmic shortcomings are acknowledged with a degree of universality almost never seen in copyright debates.[3] Statutorily mandated algorithmic removal is never "appropriate," as it is definitionally binary and necessarily abridges the law itself—including Constitutionally requisite "safety valves" and limitations such as 17 USC §§ 107, 108, and 110. To underscore the point, we are at this moment witnessing a rash of abuse in which automated removal systems are deliberately hijacked to suppress visibility, and prevent documentation, of interactions between police and civilians.[4] The damages done by bad actors

[1] *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).
[2] Congress must "wait until the DSM Copyright Directive has been implemented in many of the EU member states in order to study the real-world impacts of such a requirement." U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* at 193 (May 2020) [hereinafter USCO § 512 Report], https://www.copyright.gov/policy/section512/section-512-full-report.pdf.
[3] 512 Report at 189-192.
[4] *See*, *e.g.*, Dexter Thomas, *Is This Beverly Hills Cop Playing Sublime's 'Santeria' to Avoid Being Live-Streamed?,* Vice News (Feb 9, 2021), https://www.vice.com/en/article/bvxb94/is-this-beverly-hills-cop-playing-sublimes-santeria-to-avoid-being-livestreamed ; Dexter Thomas, *New Video Shows Beverly Hills Cops Playing Beatles to Trigger Instagram Copyright Filter*, Vice News (Feb 11, 2021), https://www.vice.com/en/article/bvxa7q/new-video-shows-beverly-hills-cops-playing-beatles-to-trigger-instagram-copyright-filter.

and automated systems are not theoretical fear-mongering; they are splashed across the front pages of major news outlets.[5]

When combined with the broad swath of liable players covered by this draft language, the resulting schema is contrary to not only sound copyright policy, but numerous legal and policy concerns, including basic privacy. The draft text potentially ropes multiple infrastructural layers of internet service into the 512 framework, from ISPs to private cloud storage providers. This ignores not only the checkered legacy of 512(a), but also ignores the original intent of the 1998 language,[6] the centrality of modern broadband in modern life,[7] and the perverse incentives created by granting private parties the ability to unilaterally demand an entire household be disconnected from the Internet.[8] The act of providing broadband access, as a legal and policy matter, does not (and should not) give rise to any form of secondary liability even requiring a shield. Internet Access Providers provide a conduit akin to a power or gas line. They do not host any material, and do not (and should not) have a general duty to track their users' activity--let alone to terminate a customer's connection to the broader internet over unproven, private allegations of a civil offense. (Similarly, telephone companies are not responsible for what their users say.) The implication that these infrastructure conduits should somehow be pressured to

---

[5] *E.g.* Darius Fisher, *The Dark Art of Fake DMCA Takedown Requests*, HuffPost (Aug. 5, 2016), https://www.huffpost.com/entry/the-dark-art-of-fake-dmca-takedown-requests_b_57a4962ae4b034b25894b63f; Brad Stone, *The Inexact Science Behind D.M.C.A. Takedown Notices*, N.Y. Times (June 5, 2008), https://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notices/.

[6] *Testimony of Meredith Rose Before the House Judiciary Committee*, Copyright and the Internet in 2020: Reaction to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades, 3 (Sept. 30, 2020).

[7] *See, e.g. The great broadband divide: Living without high-speed internet access*, CBS News (Aug. 11, 2020), https://www.cbsnews.com/news/the-great-broadband-divide-living-without-high-speed-internet-access/;

[8] John Bergmayer & Adonne Washington, *ISPs Should Not Be Copyright Cops* (Dec. 9, 2019), https://www.publicknowledge.org/blog/isps-should-not-be-copyright-cops/.

monitor private connections for copyright infringement and disconnect users is a historical, legal, and policy anomaly that must be corrected and stopped in its tracks.

Caching services should not need a safe harbor, as they similarly should not be subject to liability in the first place. Like energy companies and broadband providers, they provide an infrastructural function that is causally remote from any alleged infringement, as they lack the volitional action necessary to attach liability.

Storage services that host material non-publicly at the direction of users should in general not be liable for copyright infringements that may be committed by its users. Storage providers do not--and, in many instances, cannot, and *should* not--be required to proactively monitor user activity for copyrighted work. Such monitoring would raise enormous privacy and vulnerability concerns, creating in essence a requirement for email services to read every customer's email; online private storage lockers and cloud backup systems to inspect the contents of every user's account; and would expose an untold volume of highly sensitive data (including medical, financial, and other personal information) to mandatory inspection. This reasoning applies equally to consumer-facing services such as Dropbox, iCloud, or Google Drive, as well as back-end cloud services like Amazon S3 or Backblaze B2. Moreover, such inspections would at best be able to determine whether or not those works were being *stored* on the service; there is no way to determine, absent an independent contextual analysis, whether they are infringing. No "solution" that continues to not only perpetuate, but expand, this most destructive anachronism of Section 512--its application to basic infrastructure--can enjoy any degree of consumer support.

II. FORCING INDIVIDUALS TO SUBMIT TO CCB JURISDICTION IN ORDER TO FILE COUNTER NOTIFICATIONS VIOLATES THE SEVENTH AMENDMENT AND UNDERMINES THE FIRST AMENDMENT.

The Discussion Draft, if adopted as is, would make amendments to §512(g)(3)(D) that violate the Constitution and defeat the "voluntary" essence of the CCB. Under the altered text proposed by the Discussion Draft, defendants wishing to submit a counter notification must submit to the jurisdiction of the CCB if their damages are less than $30,000. If altered the statute would read, that counter notifications must include "a statement that the subscriber consents to the jurisdiction of the Copyright Claims Board, Federal District Court for the judicial district in which the address is located if damages exceed $30,000 under subsection (e) of section 1504, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found…"[9] By limiting the ability of a defendant to submit counterclaims to a Federal District Court only when the damages exceed $30,000, the statute essentially forces defendants with damages below that amount to submit to the jurisdiction of the CCB should they wish to make a counterclaim.

This proposal is problematic because it (A) explicitly violates the 7th Amendment right to a jury trial and (B) limits the ability of Americans to defend their First Amendment right while negating the alleged "voluntary" nature of the CCB.

A. Requiring Counterclaims with Damages Less than $30,000 to Submit to CCB Jurisdiction Violates the 7th Amendment Right to Submit a Controversy Exceeding Twenty Dollars to a Jury Trial.

The 7th Amendment guarantees Americans the right to a jury trial for civil claims. It states "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." The Supreme Court has held that this right applies to

[9] Discussion Draft at 7 lines 15-18.

copyright infringement cases even when statutory damages are sought.[10] In *Feltner v. Columbia Pictures*, after Columbia won a partial summary judgment on its copyright infringement claim it chose to pursue statutory damages under 17 U.S.C. § 504(c). In response, Feltner requested a jury trial to determine the amount of statutory damages which was denied. The Supreme Court found that § 504(c) ran afoul of the 7th Amendment because it was "not possible" to interpret the statute as allowing a jury to decide the amount of statutory damages.[11] As the Court explained, "there is overwhelming evidence that the consistent practice at common law was for juries to award damages."[12]

Additionally, a party defending against a copyright infringement claim has an equal right to a jury trial as the plaintiff who brought the claim in the first place. As the 7th Circuit explains "when there is material dispute of fact to be resolved or discretion to be exercised in selecting financial award in copyright infringement action, then *either side* is entitled under Seventh Amendment to jury trial on that issue...."[13]

Under the DMCA, an alleged infringer must submit a counter notification in order to refute the material basis of a take down action.[14] The counter notification requirements include a jurisdictional consent statement. If altered as proposed by the Discussion Draft, a victim of an improper take down will have the option to consent to the federal courts "if damages exceed $30,000[.]"[15] Anyone with damages less than the requisite $30,000 is only left with the

---

[10] Feltner v. Columbia Pictures Tv, 523 U.S. 340, 355 118 S. Ct. 1279 (1998).
[11] *Id.* at 346.
[12] *Id.* at 353.
[13] BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005) (emphasis added). *See also* Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 644 (8th Cir. 1996) ("either party in a copyright infringement suit is entitled under the Seventh Amendment to a jury trial on demand.").
[14] Section 512(g)(3)(C) requires a counter notification to contain "a statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake because the material is licensed to the user or otherwise authorized by law or misidentification of the material to be removed or disabled."
[15] Discussion Draft at 7, lines 15-18.

jurisdictional option of the CCB, which cannot offer a jury trial. The $30,000 cap imposed by this provision far exceeds the $20 "amount in controversy" minimum imposed by the 7th Amendment. Just as §504(c) did in *Feltner*, this adaptation to §512(g)(3)(D) runs afoul of the 7th Amendment and will not withstand a constitutional challenge.

The DMCA take down and counter notice process is already significantly flawed and stacked against those subject to invalid takedowns.[16] As it stands, the Discuss Draft tips the balance even further against the victims of the bad take down notices by forcing them to consent to the jurisdiction of the CCB in violation of their 7th Amendment rights to jury trial.[17] This cannot stand, any attempt at updating the DMCA must balance *all* the interests at stake, including those of internet users, independent creators, and the public at large, not just the interests of those most likely to abuse the take down process.

B. The Discussion Draft Undermines the Balance Between the First Amendment Rights of Users and those of Copyright Holders while also Defeating the Voluntary Nature of the CCB.

The tension between the First Amendment right of free expression and limiting public access to copyrighted material is a tale as old as time. Exceptions to copyright serve a critical role in maintaining this delicate balance. The Supreme Court states that "[t]he traditional contours of copyright protection, i.e., the idea/expression dichotomy and the fair use defense, moreover, serve as built-in First Amendment accommodations."[18] As the 11th Circuit explains "[t]he exceptions carved out for these purposes are at the heart of fair use's protection of the First Amendment, as they allow later authors to use a previous author's copyright to introduce new ideas or concepts to the public."[19]

---

[16] *See* Testimony of Meredith Rose, *supra* note 6.
[17] *See* Feltner, 523 U.S. 355; BMG Music, 430 F.3d 892; Cass County Music Co., 88 F.3d 644.
[18] Golan v. Holder, 565 U.S. 302, 305 (2012) (internal quotations omitted). *See also*
[19] SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264 (11th Cir. 2001).

As written, the Discussion Draft requires those on the wrong side of the take down process to opt in to a "voluntary" system in order to exercise a statutory right that is rooted in First Amendment protection. This undermines the First Amendment while also completely negating the voluntary nature of the CCB.

The issue of bad take down notices is well documented.[20] DMCA takedown notices are extraordinarily powerful tools with a documented history of abuse. A DMCA takedown has unparalleled power in the online ecosystem—the power to unilaterally, and nearly instantaneously, erase speech from the internet. The lack of good governance has made it easy for artists to weaponize the process to take down competitors,[21] allowed big content to remove obvious cases of fair use,[22] and has even been co-opted by police to limit public accountability.[23]

Creators, internet users, and the public at large have all suffered from bad take down notices. Their only form of redress is to submit a counter notification. This form of redress as it currently stands is already problematic.[24] There are no disincentives, either in the statute or the common law, against filing malicious notices. Section 512(f), which Congress included to deter abuse ex ante by providing penalties for bad notices, has been rendered dead letter—an outcome which, it is worth noting, is endorsed with some enthusiasm in the Copyright Office's 512 Report.[25] Users whose speech has been improperly removed lack any meaningful redress ex post

---

[20] *See* Testimony of Meredith Rose, *supra* note 6 at 5-8.
[21] *See* 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.
[22] Timothy Geigner, *Disney Sending Out DMCA Notices Over Pictures Fans Took Of Their Legally Purchased Star Wars Toy*, TechDirt (Dec. 10, 2015), https://www.techdirt.com/articles/20151210/05200333046/disney-sending-out-dmca-notices-over-pictures-fans-took-their-legally-purchased-star-wars-toy.shtml.
[23] Dexter Thomas, *Is This Beverly Hills Cop Playing Sublime's 'Santeria' to Avoid Being Live-Streamed?*, Vice (Feb. 9, 2021), https://www.vice.com/en/article/bvxb94/is-this-beverly-hills-cop-playing-sublimes-santeria-to-avoid-being-livestreamed.
[24] Testimony of Meredith Rose, *supra* note 6 at 9.
[25] The Copyright Office believes that the only case which provides even a modest nod toward § 512(f)'s enforceability—Lenz v. Universal Music Group Corp., 815 F.3d 1145 (9th Cir. 2016)—was wrongly decided for placing potential liability on rightsholders. See USCO § 512 Report at 5.

as well. Counter-notices are subject to a waiting period of up to 14 days, a duration that can be lethal to time-sensitive speech including news reporting, documentation of human rights abuses, political speech, public debate, and critique.

Instead of addressing these issues, the Discussion Draft further complicates the redress problem by forcing those who have suffered from a bad take down notice to submit to the jurisdiction of the CCB when their damages fall below $30,000. By using this monetary delineator to justify forcing those who do not meet the threshold to submit to the CCB, the Discussion Draft places a higher value on monetary stakes of copyright holders than the constitutionally rooted rights of all others at risk under the DMCA notice and takedown process. This undermines the delicate balance between the rights of copyright holders and the first amendment rights of users by forcing them to submit to an untested court in order to vindicate their constitutionally rooted rights.

Moreover, Congress intended that the CCB remain *voluntary*—not just for the party bringing an initial infringement claim, but also for those who must respond to a claim. By forcing those who wish to respond to a DMCA take down notice to submit to the CCB, the Discussion Draft makes the CCB mandatory for everyone subject to a bad take down notice without high stakes damages—completely ignoring the voluntary nature of the CCB.

The DMCA needs reform, but this is not it. Moving forward with the Discussion Draft as it currently stands further aligns the copyright system with the commercial interests of rights holders and those smart enough to abuse it, moving even further away from the public interest purpose of Copyright and stepping on the toes of important constitutional rights.

III. CONCLUSION

As much as PK welcomes the opportunity to reform the DMCA and make it more responsive to users, the proposals included in the Discussion Draft not only fall short, they

further inflame many of the well-known pitfalls of the DMCA. There are many problems with the proposed draft, but the most egregious are the notice-and-staydown provision, the lack of safe harbor for ISPs, and the changes to the counter notice jurisdiction statement which clearly violates important constitutional rights. Any changes to the DMCA must strengthen the rights of users not further dilute their potency.

Respectfully submitted,

/s/ Meredith Rose
Senior Policy Counsel

/s/ Kathleen Burke
Policy Counsel

Public Knowledge
1818 N. Street NW Ste 410
Washington, D.C. 20036