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**Modernizing Civil Copyright Enforcement for the Digital Age Economy:
The Need for Notice-and-Takedown Reforms and Small Claims Relief**

by

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Introduction and Summary

Just how valuable are copyrighted goods and services to U.S. economic prosperity in the Digital Age?[†] According to the International Intellectual Property Alliance's 2016 report "Copyright Industries in the U.S. Economy," market participants whose primary purpose is to create, produce, distribute, or exhibit copyrighted materials generated \$1.2 trillion in economic activity and employed 5.5 million workers in 2015. But online infringement is now pervasive on user-upload services, depriving copyright owners of their exclusive right to the proceeds of their property and creative labors. Copyright owners are compelled to issue hundreds of millions of takedown notice requests each year to websites and other online providers.

The harm resulting from online infringement and the difficulties of navigating outdated legal processes to combat it requires that civil enforcement provisions in federal copyright law be updated. In particular, the Digital Millennium Copyright Act of 1998 needs to be revised in order to keep pace with the last two decades of changes in Internet technology and online user habits.

[†] References to the principal authorities upon which we rely are at the end of the paper.

And a U.S. Copyright Office-administered small claims court should be established to resolve disputes over takedowns of infringing online content and other low-value infringement matters.

The case for modernizing civil copyright enforcement is supported by principles of American constitutionalism and by insights drawn from the historical record. According to fundamental principles of American constitutionalism, individuals have a natural right to the fruits of their labor – that is, to the property created by their labor. Governments are established to protect individuals’ natural rights, including their rights in private property. And governments enact civil laws that define the contours of different property rights and provide a means of enforcing them through civil actions brought before courts of law.

At the time the Constitution was adopted the prevailing consensus was that copyrights are unique forms of private property that are rooted in the natural rights of authors to the fruits of their labors. Against that intellectual backdrop, the Constitution’s Article I, Section 8 Copyright Clause provides that “The Congress shall have Power To... promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” In passing the Copyright Act of 1790, the First Congress established the nation’s initial enforcement provisions for copyright protections. The 1790 Act provided copyright holders a civil cause of action for infringement of their copyrighted works. Civil enforcement of exclusive rights in copyrighted works is consistent with the Founding Fathers’ understanding that copyrights are property rights deserving of protection according to the rule of law. And to this day, civil lawsuits for infringement brought by copyright owners remain the primary means for enforcing copyrights.

The history of civil enforcement offers an important frame of reference for reforming and updating enforcement provisions in federal copyright law. Since its inception, federal copyright law has included statutory damage awards as a remedy for copyright owners. This reflects an understanding of the wrongfulness of infringing exclusive rights in copyrighted works and relieves copyright owners of the difficulty of having to establish actual damage amounts. Over time, the amount or range of statutory damage awards has increased, coinciding with increased value of copyrighted works in our economy. The ability to elect statutory damages provides certainty and an incentive for seeking justice for alleged infringements while nonetheless requiring copyright owners to shoulder the burden of proving a defendant’s liability for infringement of their exclusive rights.

Additionally, civil copyright enforcement has always included remedies such as impoundment of infringing copies of protected works and injunctions to prohibit future infringing activities. Civil enforcement provisions have also routinely been amended to reflect new markets and new technologies pertaining to copyrighted works. The opportunities and challenges presented by digital technology and the Internet have merited careful tailoring of enforcement provisions to secure the exclusive rights of copyright holders.

Drawing on those historical insights, Congress should update civil enforcement provisions regarding online infringements of copyrighted content. Existing federal copyright statutes need to be brought into alignment with developments in Internet technology such as user-upload

websites. And copyright owners must be provided with more efficient means for enforcing their exclusive rights and combating online infringement.

The Digital Millennium Copyright Act of 1998 (“DMCA”) is in particularly urgent need of updating. Among other things, the DMCA amended the Copyright Act of 1976 by creating Section 512. This section confers legal immunity on online service providers that meet certain “safe harbor” requirements, including the “notice and takedown” provision. Under Section 512, copyright holders are entitled to give notice to an online service provider when infringing content is posted on its network or website. A provider receives immunity if it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.”

But the DMCA is fast becoming a Digital Age relic. Two decades of developments in Internet technology and online user habits have rendered the DMCA outdated and ineffective in protecting copyrighted works from online infringement. In the late 1990s there were far fewer Internet users and far fewer online platforms for user posting of content. Today, user-upload websites such as YouTube, Vevo, Dailymotion, and SoundCloud make massive amounts of music and video content available. Regrettably, users of those websites and others post far too much infringing content. For example, between 2011 and 2015, the sound recording industry issued over 175 million takedown notices to various online providers.

As a result of mass online infringement and the burdensome nature of the notice and takedown process, copyright owners lose revenues that they would receive otherwise from legitimate sales of copies to consumers. The status quo undermines the ability of copyright owners to secure market royalty rates through licensing agreements with websites and other online providers. No party to negotiations in a free market should have to bargain against the threat that their property rights will be violated on a mass scale. And the prospect of lost or reduced financial returns due to rampant online infringement undermines critical economic incentives for future investment and labor in new creative works. The apparent financial disincentives of online providers to promptly remove infringing content – or at least the ready ability of such providers to generate significant ad revenues from hosting infringing content uploaded by their users – provides an additional reason for reforming the notice-and-takedown process to better secure copyright protections online.

Judicial interpretations of key provisions in the DMCA have reinforced the inadequacies of the statute’s notice-and-takedown process in combating infringement of copyrighted content online. Courts have interpreted key provisions of Section 512 in ways that have over-extended the scope of limited liability protections. Judicial interpretations of Section 512(c) have widened the circumstances in which online providers can claim lack of knowledge of infringing activity and thereby benefit from limited liability protection. Also, court precedents have made it more burdensome for copyright owners to pursue takedowns when the infringing use of the same content takes place across multiple web pages on the same user-upload site. Courts have construed Section 512 provisions to require a takedown notice to identify specific URL addresses where infringing content is posted, leaving online providers with no obligation to remove expeditiously identical or similar copyrighted content posted to their websites and of which they are generally aware. Requiring that each individual URL be included is especially

burdensome because repeat infringers change webpages and immediately repost the infringing content.

Therefore, Congress should update the DMCA by including the following clarifications:

- Services that regularly receive significant amounts of revenue from advertising to their viewers and who proactively seek to attract viewers by curating content based on popularity or perceived interest have a heightened duty of care to prevent access to infringing online content on their websites and to remove expeditiously infringing content that is made accessible on their websites by users.
- Red flag knowledge is not limited to instances where online providers receive takedown notices of specific infringing URLs when other evidentiary factors of significant infringement taking place generally on their sites are apparent.
- The imputation of knowledge through willful blindness is not limited to instances where online providers receive takedown notices of specific infringing URLs, but extends to when online service providers have a reasonable awareness of significant infringing activity in general taking place on their websites.
- An effective “representative list” is not limited to the specific infringing URLs that the list contains, but should include a representative sampling of infringing content on a given online provider’s network or website.
- The furnishing of such a “representative list” should put online providers on notice of significant infringing activity on their websites, and thereby place a duty on online providers to remove expeditiously all known or reasonably ascertainable infringing URLs that contain the same copyrighted contents that were identified in the list of online providers.

DCMA’s inadequacies and compliance costs also jeopardize the livelihoods of less prominent songwriters and music artists. They are less able to expend time or money patrolling websites for infringement and issuing numerous notices. Further, the DMCA’s provisions relating to counter-notices and disputed takedown requests pose serious hardships on copyright owners with limited resources. Under the DMCA, a user who objects to the takedown notice can file a counter-notice, thereby requiring the online provider to repost the content. And if a counter-notice is filed, copyright holders who still seek to vindicate their rights must hire a lawyer and file a lawsuit in federal court within 10 days.

For many artists, litigation in federal court is especially forbidding. Most creative artists with modest means have no experience with filing lawsuits for copyright infringement. Ten days is an incredibly short window of time for a copyright owner to hire an attorney and file a complaint in federal court. Further, the financial cost in litigating a copyright infringement case in federal court is too heavy for many copyright owners. According to the American Intellectual Property Law Association’s 2015 “Report of the Economic Survey,” the median litigation costs of a

copyright infringement lawsuit valued at less than \$1 million is \$150,000 at the time discovery is concluded. And the median for such a lawsuit, inclusive of all costs, is \$250,000.

Establishment of a Small Claims Board for low-value infringement claims would help secure the rights of copyright owners of modest means. Copyright owners with larger financial resources may also find that a small claims venue would make enforcement of copyright protections economically viable in situations that are decidedly uneconomical under existing law. A Small Claims Board would also provide a less expensive and streamlined venue for many DMCA-related online infringement cases.

In sum, Congress should make updating the DMCA and establishing a Small Claims Board reform priorities. By taking such steps, Congress can modernize civil copyright enforcement provisions and better secure the exclusive rights of copyright owners in the Digital Age economy, while remaining true to principles of American constitutionalism and historical practice.

The Historical Context for Considering Updating Civil Copyright Enforcement

The history of civil enforcement provisions in federal copyright law offers an important frame of reference for reforming and updating enforcement options for copyright holders. A historical perspective reveals that civil lawsuits for infringement brought by copyright owners is the oldest and primary means for enforcing their exclusive rights. Civil enforcement of exclusive rights in copyrighted works is consistent with the Founding Fathers' understanding that copyrights are property rights deserving of protection according to the rule of law.

Since its inception, federal copyright law has included awards of damages in amounts set by statutes, which reflects the wrongfulness of infringing exclusive rights in copyrighted works and relieves copyright owners of the difficulty of having to establish actual damage amounts. Over time, the amount or range of statutory damage awards available to copyright holders who prevail in infringement actions has increased, reflecting increased value of copyrighted works in our economy. The ability to elect statutory damages instead of actual damages also provides certainty and an incentive for seeking justice for alleged infringements, while nonetheless requiring copyright owners to shoulder the burden of proving a defendant's liability for alleged infringement of their exclusive rights. Additionally, civil copyright enforcement always has included remedies other than damages, including impoundment of infringing copies of protected works and injunctions to prohibit future infringing activities.

Furthermore, from the history of federal copyright law it is readily apparent that the types of works that are amenable to civil enforcement actions for infringement has expanded as the scope of copyrightable subject matter has expanded. Civil enforcement provisions have routinely been amended to reflect new markets and news technologies pertaining to copyrighted works. In particular, the opportunities and challenges presented by digital technology and the Internet have merited careful tailoring of enforcement provisions to secure the exclusive rights of copyright holders in new media formats.

Based on those historical insights, Congress should update civil enforcement provisions regarding online infringements of copyrighted content. Existing federal copyright statutes need to be brought into alignment with developments in Internet technology such as user-upload websites and thereby provide copyright owners with more efficient means for enforcing their exclusive rights and combating online infringement.

Civil Copyright Enforcement in Early Congresses

Consistent with its responsibility under Article I, Section 8, Clause 8 “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” the First Congress established the nation’s initial enforcement provisions for copyright protections. In passing the Copyright Act of 1790, the First Congress provided copyright holders a civil cause of action for infringement of their copyrighted works. Legal remedies made available to copyright holders in cases of infringement under Section 2 of the 1790 Act included forfeiture by liable parties of their infringing copies or goods and also included statutory damages. Offending parties were required to pay fifty cents per sheet of copyrighted content found in their possession. Also, Section 6 of the 1790 Act provided that any person who publishes a manuscript without the copyright owner’s consent was liable for “all damages occasioned by such injury.”

Those copyright enforcement provisions were slightly modified by the Copyright Act of 1802. Under the 1802 Act, persons seeking to benefit from the protections of federal copyright law were required to insert or affix a copyright notice to their works, indicating their compliance with registration requirements. Section 4 of the 1802 Act provided that any person who falsely claimed copyright by inserting a copyright notice into a printed work was subject to a fine of \$100, half of which was payable to the party plaintiff and the other half of which was payable to the federal government. Additionally, Section 4 extended from one year to two years the statute of limitations period for bringing copyright infringement actions.

Section 2 of the 1802 Act extended copyright protections beyond maps, charts, and books, so as to include etchings, engravings, and prints. Accordingly, Section 3 imposed penalties of forfeiture of offending copies as well as plates used to make offending copies. Also, Section 3 imposed statutory damages of one dollar for every print of copyrighted content found in the offender’s possession.

The 1790 and 1802 Acts provided for civil enforcement of copyright protections in any court of competent jurisdiction. In the early decades under the Constitution, state courts provided convenient venues for hearing copyright cases. Subsequently, the Copyright Jurisdiction Act of 1819 expressly conferred on U.S. circuit courts: “jurisdiction as well in equity as at law of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries.” Importantly, a circuit court’s equitable jurisdiction implicitly included authority to issue injunctions prohibiting future copyright infringing activities by offending parties.

The same basic civil enforcement provisions adopted in the 1790 and 1802 Acts were carried over into the Copyright Act of 1831 – the second major revision of U.S. copyright law. Section 9

of the 1831 Act expressly provided that the equitable powers of U.S. courts to grant injunctions “to prevent the violation of the rights of authors and inventors” similarly extended to restrain the publication of manuscripts. Additionally, Section 11 of the 1831 Act provided that recovery of costs was allowed to copyright owners who sought to enforce their rights against infringing parties. By recognizing a public performance right for dramatic compositions, the Copyright Act of 1856 included a civil cause of action for infringing public performances. Also, the International Copyright Act of 1891 expanded remedies beyond limited statutory damages to actual damages – or to “such damages as may be recovered in a civil action” – in cases of copyright infringement by persons who, without authorization, print, publish, dramatize, translate, import, sell, or expose to sale any copy of a copyrighted book.

Civil Copyright Enforcement in the 20th Century

The Copyright Act of 1909 – the third major revision of U.S. copyright law – similarly retained upon the basic civil enforcement provisions established through prior Acts of Congress and judicial interpretations. Section 25’s provision regarding copyright infringement allowed copyright holders to recover actual damages as well as any profits received by an infringing party – or “such damages as to the court shall appear to be just.” Matching Section 5’s expansion of copyrightable classes of works, Section 25 also specified statutory damage amounts in cases involving infringement of certain classes of copyright works, such as photographs, paintings, lectures, or dramatic compositions. Additionally, Sections 31 through 33 of the 1909 Act prohibited importation of “piratical copies” of works copyrighted in the U.S. and empowered the Secretary of the Treasury and Postmaster General to enforce such prohibitions. Sections 26, 27, and 34 through 38 delineated the jurisdictional, procedural, injunctive, and appellate powers of the federal courts in cases involving copyright infringement. And Section 40 allowed for recovery of attorney’s fees as part of the costs allowed to prevailing parties in copyright infringement civil actions.

Subsequent amendments to the 1909 Act provided for civil enforcement of specific types of copyrightable works. For instance, the Townsend Amendment Act of 1914 expressly included motion pictures as copyrightable subject matter. The 1914 Act set damages for infringement of an “undramatized or nondramatic work by means of a motion picture” to a maximum of \$100 where the infringer showed that “he was not aware that he was infringing and that such infringement could not have been reasonably foreseen.” The so-called Statute of Limitations Amendment of 1957 provided for a three-year statute of limitations on civil actions, measured from the date the “claim accrued.” Additionally, the Sound Recording Act of 1971 recognized federal copyright protections in sound recordings fixed after February 15, 1972. The 1971 Act provided that “unauthorized manufacture, use, or sale interchangeable parts, such as discs or tapes, used for reproducing copyrighted sound recordings “shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright.”

The Copyright Act of 1976 – the fourth major revision of U.S. copyright law – broadly extended copyright protections to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Section 102 of

the 1976 Act included in its definition of “works of authorship” several broad categories, such as literary works, dramatic works, motion pictures and other audiovisual works, as well as sound recordings. Section 501 of the 1976 Act likewise established a broad definition of a “copyright infringer” as any person who “violates any of the exclusive rights of the copyright owner” provided by federal copyright law. Under Section 501(b) of the 1976 Act, “legal or beneficial owner or an exclusive right” are empowered to bring suit for “any infringement of that particular right committed while he or she is the owner of it.” A “beneficial owner” would include, for example, an author who had parted with legal title to the copyright in exchange for a percentage of royalties based on sales or license fees.

Importantly, Section 504 of the 1976 Act granted to copyright owners the right to elect statutory damages rather than actual damages and profits prior to a final judgment in infringement actions. This election of remedies provision marked a change from the 1909 Act, which left awards of statutory fees to the discretion of the courts. The choice to receive statutory damages made civil enforcement actions more economically viable for copyright owners where actual damages are smaller or uncertain, thereby better enabling them to secure protections in their works. Additionally, copyright owners are spared the hardships of proving actual damage amounts. As amended by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Section 504(c) currently sets statutory damages for non-willful infringers “at a sum of not less than of \$750 or more than \$30,000, as the court deems just,” for each work infringed. In cases in which a copyright owner establishes the infringement was willful, “the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.” And in cases where the defendant establishes lack of awareness that his or her acts were infringing, “the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.”

The 1976 Act retained the basic provisions previously established in copyright law regarding exclusive federal court jurisdiction, injunctions, impoundment of infringing articles, and statute of limitations. But whereas the 1909 Act attached copyright protections to the publication of works affixed with a copyright notice, the 1976 Act attached protections to original works when fixed in a tangible medium. (The Berne Convention Implementation Act of 1988 made affixing of copyright notices a voluntary matter.) Further, Section 411(a) of the 1976 Act restated the pre-existing requirement of registration before a copyright infringement lawsuit could be instituted. But copyright owners whose works were infringed prior to registration would only be entitled to injunctive relief and to actual damages plus any applicable profits to the infringer not used as a measure of damages. Under Section 412, remedies of statutory damages and awards of costs including attorney’s fees are generally available to authors and proprietors who register prior to or within three months of publication.

Civil Copyright Enforcement in Recent Decades

Although a primary impetus for the 1976 Act was to update federal copyright law to reflect changes in markets and technological advancements, the 1976 Act did not anticipate the rise of digital technologies or the remarkable changes enabled by the digital revolution. Thus, Congress has passed several amendments to the 1976 Act in order to address such changes. The Digital Performance Right in Sound Recordings Act of 1995, for instance, granted copyright owners in sound recordings the exclusive right “to perform the copyright work by means of a digital audio

transmission.” The 1995 Act thereby made infringements of performance rights in digital audio transmissions subject to infringement actions along with other copyrightable works.

In terms of civil enforcement, significant post-1976 Act copyright legislation passed by Congress include the Digital Millennium Copyright Act of 1998 (“DMCA”), the Anti-Counterfeiting Amendments Act of 2004, and the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (“PRO-IP Act”). Of these legislative measures, the DMCA is the most important as well as the one most in need of updating – and therefore will be discussed in the next section.

The Anti-Counterfeiting Amendments Act of 2004 rewrote federal criminal statutes prohibiting the trafficking of counterfeit labels attached to copies of copyrighted works and the trafficking of counterfeited documents relating to such copyrighted works. The 2004 Act provided a civil cause of action to copyright owners who are injured or threatened with injury from the violation of those prohibitions.

With respect to civil enforcement of copyright, the PRO-IP Act empowered courts to impound, as they deem reasonable, records relating to violations of the exclusive rights of copyright holders while infringement actions are pending. Courts were also authorized to issue protective orders to prevent improper disclosure or use of confidential, private, proprietary information that is impounded while infringement actions are pending. Previously, courts were only expressly authorized to impound copies claimed to have been made or used without authorization and the articles by means of which such copies are reproduced. The amendment was intended to prevent possible destruction of evidence that may be relevant to alleged infringing activity. Additionally, the PRO-IP Act established that exportation of copies or phonorecords without a copyright owner’s authority constitutes an infringement. Federal copyright law previously deemed only the importation of copies or phonorecords without a copyright owner’s consent to be an infringement.

Civil Copyright Enforcement and the Digital Millennium Copyright Act (DMCA)

The DMCA served, in part, as implementing legislation for the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. Title I of the DMCA, which implemented the WIPO treaties, established so-called “anti-circumvention” prohibitions against certain technologies, products, services, devices, or components intended “to avoid, bypass, remove, deactivate, or impair a technological protection measure” that controls access to a copyrighted work. Additionally, Title I protected copyright management information, commonly used for tracking and monitoring usage of copyrighted works, and also for identification of licensing rights as well as attribution of authorship and ownership. The DMCA provided that violations of those prohibitions constitute infringement, and it makes damages and other remedies available through civil actions. (Anti-circumvention-related enforcement issues are beyond the purview of this paper.)

Title II of the DMCA addressed the scope and limits of legal liability for online providers that transmit potentially infringing material over their network. According to the Senate Report that accompanied the DMCA, the act was intended to ensure that “the Internet will continue to

improve and that the variety and quality of services on the Internet will continue to expand” by “limiting the liability of service providers” by creating a series of “safe harbors,” for certain common activities of such service providers. Under the DMCA, if an online provider’s conduct satisfies one or more of the safe harbors, they would be protected from liability “for all monetary relief for direct, vicarious and contributory infringement” that would otherwise result from copyrighted content being posted on their network or website by a user of that service. The DMCA was intended to incentivize online provider cooperation with copyright owners to detect and remove online infringement of copyrighted content, and simultaneously offer increased certainty for service providers regarding their legal liability for their service operations.

Significantly – and as will be discussed in more detail in the next section – the DMCA established a notice-and-takedown process. Under Section 512, copyright holders are entitled to give notice to an online provider when infringing content or activity takes place on that service provider’s network or website. An online provider falls within one of the DMCA’s safe harbors and thereby receives immunity from liability for infringement if it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.” An online provider’s noncompliance with Section 512, including refusals to expeditiously remove online content identified in takedown notices it receives from copyright owners, will subject it to civil liability for infringement.

DMCA’s notice and takedown process was intended to result in prompt removal of infringing content from the Internet. Such removal would prevent or render it more difficult to widely disseminate copyrighted content while copyright owners subsequently pursue copyright infringement claims in court. At the same time, by limiting the liability of online providers for infringing posts by their users, the statute, rightly, was intended to *not* to restrict lawful speech and expression online.

The DMCA’s “Notice and Takedown” Process Needs to Be Updated

Although existing civil and criminal law provisions are critically important to securing copyright protections, those provisions are increasingly inadequate to address infringement of copyrighted works. Copyright enforcement mechanisms are in urgent need of updating to address changes brought about by digital technologies and the Internet. In particular, the DMCA’s Section 512 “notice and takedown” system for removing copyright-infringing content from the Internet is now severely strained, and, in its current form, it poses obstacles to copyright holders needing protection from online infringement.

As described previously, Section 512 confers legal immunity on online providers that meet certain “safe harbor” requirements, including the “notice and takedown” provision. Under Section 512, copyright holders are entitled to give notice to an online provider when infringing activity takes place on its network or website. An online service receives immunity if it “responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.”

But the DMCA is becoming a relic of the Digital Age. Although Section 512’s core principles of protection for copyright holders and immunity for online service providers who expeditiously

remove infringing content are solid, the implementation of those principles needs revamping in order to provide copyright holders with a more rapid and efficient mechanism for addressing online infringement. Two decades of developments in Internet technology and online user habits have rendered the DMCA outdated and ineffective in protecting copyrighted works from online infringement. In the late 1990s there were far fewer Internet users and far fewer online platforms for user posting of content. Today, user-upload services websites such as YouTube, Vimeo, Dailymotion, and SoundCloud make massive amounts of music and video content available. Regrettably, users of those websites and others post lots of infringing content. Between 2011 and 2015, the music recording industry sent takedown notices for over 17 million infringements. During those five years, the Recording Industry Association of America (RIAA) issued over 175 million takedown notices to various online service providers. The DMCA's notice and takedown process, at least as it is currently constituted, appears inadequate by itself to secure protections for copyright holders given the massive volume of infringing activity.

The DMCA's Inadequacies Reduce Market Returns for Copyright Owners

Of course, major online providers do respond to notice and takedown requests from copyright owners as a condition for receiving safe harbor under Section 512. But responses to takedown requests that satisfy existing judicial interpretations of Section 512 nonetheless can result in infringing content remaining accessible online for several days or even weeks. And – as will be discussed – given that effective takedown notices must include specific web page addresses where infringing content is posted, even when online service providers expeditiously comply with such notices, the same infringing content may remain posted or immediately re-posted on numerous other web pages that are hosted on the same service provider's website.

Thus, mass-scale online infringing activity enabled by user-upload services and the inadequacy of the notice and takedown process hurts the ability of copyright owners to reap the financial rewards from their creative works. As a result of unauthorized streams and downloads of copyrighted content online, copyright owners of music compositions, sound recordings, photographs, motion pictures, as well as drawings and paintings, lose revenues that they otherwise would receive from legitimate sales of copies to consumers. Due to such infringement, copyright owners also lose royalties they otherwise would obtain from consumers' licensed usage of their content through subscription services. And the prospect of lost or reduced financial returns due to rampant online infringement undermines critical economic incentives for future investment and labor in new creative works.

Moreover, the status quo of pervasive online infringement and an outdated notice and takedown process undermines the ability of copyright owners to secure market royalty rates through licensing agreements with online providers. Online infringement and the threat of steep resulting losses looms in the backdrop of royalty rate negotiations between copyright holders and online providers. That backdrop inevitably reduces the bargaining leverage of copyright holders to secure market rates.

For example, copyright owners in the sound recording and motion picture markets bargain with and grant YouTube, Vevo, and other ad-supported online services permission for streaming of copyrighted content in exchange for royalties. But it's out of apparent necessity to secure even

meager returns for their creative work – rather than no returns at all – that copyright holders consent to low rate deals with ad-based streaming services.

A heated debate now exists over a perceived “value gap” resulting from non-subscription-based streaming services receiving significant ad revenues tied to user-uploaded copyrighted content while paying copyright holders only paltry royalties – particularly when compared with royalties paid by subscription-based streaming services.

According to a 2017 report by IFPI, an international music industry organization, “User upload video streaming services” are “conservatively estimated at more than 900 million users” but returned only \$533 million in revenue to rights holders in 2016. “By contrast, a much smaller user base of 212 million users of audio subscription services (both paid and ad-supported), that have negotiated licenses on fair terms, contributed over US\$3.9 billion.” IFPI “estimated that YouTube returned less than US\$1 for each music user” compared to \$20 per user paid by Spotify in 2015.

Research by RIAA indicates that revenues paid by subscription-based services totaled \$1.7 billion or 43% of music industry total revenues during the first half of 2017. But despite hundreds of billions of audio and video streams through ad-based streaming services, royalties received by copyright holders from ad-based services contributed only \$273 million or 7% of total music industry revenues during that same period. Although revenues paid to copyright holders by ad-based user upload services have increased in the last few years, those revenues constitute a disproportionately small amount given the volume of usage of copyrighted content.

In response to public criticisms over low royalty rates and lackluster policing of infringement on its website, YouTube owner Google has pointed out that copyright owner interests have agreed to those rates. It also has claimed that, “At over \$3 per thousand streams in the US, YouTube is paying out more than other ad supported services.” However, this figure has been sharply contested by songwriters, recording artists, and music industry organizations. For example, RIAA Chairman and CEO Cary Sherman responded: “Last year’s actual payout per 1,000 streams was closer to half that amount, according to industry data and Nielsen and BuzzAngle estimates, and seven times less than Spotify, which also is both an ad-supported and subscription service.”

Copyright owners in the sound recording and motion picture industries apparently have opted to accept bad deals with low revenues rather than accept no revenues and never-ending recourse to the DMCA’s ineffectual notice and takedown process. Not surprisingly, songwriters and sound recording artists are among the most outspoken critics of the “value gap” and of how the DMCA’s lack of effectiveness has harmed their financial returns. A June 2016 open letter to Congress signed by more than 180 major songwriters and recording artists declared that the DMCA “has allowed major tech companies to grow and generate huge profits... while songwriters’ and artists’ earnings continue to diminish.” The open letter called on Congress “to enact sensible reform that balances the interests of creators with the interests of the companies who exploit music for their financial enrichment.”

Importantly, one need not definitively pinpoint the extent of the value gap to recognize the imperative for DMCA reform. No party to negotiations in a free market should have to bargain against the threat of their property rights being violated on a mass scale. Certainly, the law must be updated to prevent current scenarios in which copyright owners are faced with the necessity of choosing below-market rates as the “less-bad” alternative to sustaining even heavier losses from copyright infringement taking place on the same user upload services with whom they are effectively forced to negotiate.

Indeed, user-upload services that draw revenues from Internet ads may have financial disincentives to comply expeditiously with takedown requests. High website traffic – even if prompted by access to infringing content – boosts online ad revenues. Popular sites such as YouTube, Vimeo, Dailymotion, and SoundCloud, for instance, generate tremendous ad revenues from user-uploaded music as well as other media content. Also, Internet search engines drive added traffic by linking to infringing content. The apparent financial disincentives of online service providers to promptly remove infringing content – or at least the ready ability of such providers to generate significant ad revenues from hosting infringing content uploaded by their users – provides an additional reason for reforming the notice-and-takedown process to better secure copyright protections online.

Judicial Interpretations Have Rendered the DMCA Increasingly Inadequate

Judicial interpretations of key provisions in the DMCA have reinforced the inadequacies of the statute’s notice-and-takedown process in combating infringement of copyrighted content online. Courts have interpreted key provisions of Section 512 in ways that have over-extended the scope of limited liability protections. And judicial interpretations have made the process a more irksome and time-consuming process for copyright holders than Congress likely intended.

Over-Extending Protections to Online Service Providers?

At the outset, it is at least questionable as to whether the DMCA’s limited liability has been conferred on “service providers” offering online functions or activities that were not intended to benefit from the safe harbor provisions. Rather than provide blanket immunity from liability for hosting infringing content online, the DMCA arguably was intended to confer limited protections from legal liability on service providers operating as passive or neutral conduits or publishers of user-supplied content online.

For purposes of the DMCA’s primary safe harbor in Section 512(c), a “service provider” is defined as “a provider of online services or network access, or the operator of facilities therefor.” Courts have interpreted this definition “to encompass a broad set of Internet entities.” And more than one court has concluded that the statute’s “service provider” definitions reach “so broadly that we have trouble imagining the existence of an online service that *would not* fall under the definitions.”

But major online providers that now benefit from DMCA’s safe harbor provisions perform proactive roles in drawing viewers by arranging, presenting, and otherwise curating user-uploaded content – which often include large volumes of infringing content. And, as indicated

earlier, user-upload services that draw revenues from Internet ads may have financial disincentives to comply expeditiously with takedown requests.

Knowledge Requirements Let Online Service Providers Off the Hook Too Easily

Judicial interpretations of Section 512(c) have widened the circumstances in which online service providers can claim lack of knowledge of infringing activity and thereby benefit from limited liability protection. Under Section 512(c)(1)(A), online service providers receive immunity from liability – and therefore have no duty to remove infringing content – when they have no “actual knowledge that the material or an activity using the material is on the system or network is infringing.” Similarly, no duty to remove infringing content arises under Section 512(c)(1)(A) when an online service provider has “red flag” knowledge – that is, when it is aware of “facts or circumstances from which infringing activity is apparent.”

The “red flag” provision’s broad references to “infringing activity” that is “apparent” suggests that awareness of general infringing activity is sufficient to trigger a duty to remove infringing content. But the Second and Ninth Circuit Courts of Appeals – the two most significant federal appeals courts for copyright cases – have instead concluded that awareness of general infringing activity is not enough and that the “red flag” standard requires an online service provider have subjective awareness of facts that make a specific infringement of particular copyrighted content on a particular web page objectively obvious.

Additionally, although courts will regard an online service provider’s “willful blindness” to infringing activity as sufficient to trigger knowledge requirements, the willful blindness doctrine has been rendered exceedingly difficult to satisfy. Courts have recognized that there will seldom, if ever, be evidence of an online service provider’s conscious avoidance of probable infringing activity to support a willful blindness context. Nonetheless, just as courts have concluded that red flag knowledge must be tied to specific instances of infringement, they have similarly concluded that willful blindness must be tied to specific instances of infringement. An online service provider’s general avoidance of infringing activities taking place generally on its site is therefore insufficient to impute knowledge triggering a duty to remove infringing content.

Barriers to Combating Repeat Infringers

Judicial interpretations have also made it more burdensome for copyright holders to pursue takedowns when the infringing use of the same content takes place across multiple web pages on the same user-upload site.

For instance, courts have offered an unduly narrow interpretation of the DMCA’s “representative list” provision for takedown notices. Although the statute provides that “if multiple copyrighted works at a single online site are covered by a single notification” an effective takedown notice may include “a representative list of such works at that site,” courts have construed this provision to require a takedown notice to identify specific URL addresses where infringing content is posted. In other words, even when infringement of a particular copyrighted work is clearly known to be rampant across a given online service’s website, copyright holders must provide notice and identification for each individual webpage address. Thus, if an online service

impermissibly is hosting a copyrighted sound recording or movie on four dozen different web pages, a takedown notice must identify all four dozen web links in order to be effective. Such judicial demands for specificity effectively read the idea of a “representative list” right out of the statute.

Requiring that each individual URL be included in a takedown notice is especially burdensome when considering that repeat infringers often change webpage addresses and immediately repost the infringing content that has previously been removed. But under existing judicial interpretations of Section 512, new notices must be issued if the infringing user reposts the copyrighted music or other copyrighted content using new web addresses.

Further, courts have offered relaxed interpretations of DMCA’s safe harbor requirement that online services have repeat infringer policies. Under Section 512(i)(A), limited liability protections apply online when an online service provider “has adopted and reasonably implemented” a policy providing for “termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” According to the House Report accompanying the DMCA, the repeat infringer policy requirement for receiving safe harbor “emanates from Congress’ concern that those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.” Yet Courts have concluded that the language in 512(i)(A) is broad and they have emphasized the discretion of online service providers in “reasonably implement[ing]” their repeat infringer policies and in determining “appropriate circumstances” in terminating users who are repeat infringers.

Moreover, copyright holders who attempt to prove that an online service provider failed to reasonably implement its repeat infringers policy faces an expensive and time-consuming task in civil litigation. This includes making and reviewing discovery requests on online providers for records of their repeat infringers implementation and compliance activities. As a result, except in rare instances where an online provider categorically or clearly disregards repeat infringers, the DMCA’s repeat infringer policy requirement provides minimal protections to copyright holders.

Proposals for Updating the DMCA

DMCA reform shouldn’t be about taking sides in the disputes between the owners of copyrighted content and online providers. First and foremost, reform should be about bringing the law up to date to account for the realities of today’s Internet ecosystem, including the proliferation of high-speed broadband and user-upload services. At the outset, this requires recognition that mass infringement online and the DMCA’s outdated and limited process for combating it is distorting free market negotiations for making available music and other copyrighted content.

Further, reform should be intended to make copyright enforcement provisions clearer and more predictable. Both copyright owners and online service providers stand to benefit from such improvements in the law. As the Supreme Court stated in *Fogerty v. Fantasy, Inc.* (1994):

Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.

Online providers should retain a safe harbor for good faith efforts to remove infringing content. But songwriters, recording artists, and other copyright owners deserve an easier and more efficient means for curtailing online posting of copyrighted content.

A modernized updated DMCA should include the following clarifications:

- Services that regularly receive significant amounts of revenue from advertising to their viewers and that proactively seek to attract viewers by curating content based on popularity or perceived interest have a heightened duty of care to prevent access to infringing online content on their websites and expeditiously to remove infringing content that is made accessible on their websites by users.
- Red flag knowledge is not limited to instances where online service providers receive takedown notices of specific infringing URLs when other evidentiary factors of significant infringement taking place generally on their sites are apparent.
- The imputation of knowledge through willful blindness is not limited to instances where online providers receive takedown notices of specific infringing URLs, but extends to when online providers have a reasonable awareness of significant infringing activity in general taking place on their websites.
- An effective “representative list” is not limited to the specific infringing URLs that the list contains, but should include a representative sampling of infringing contents on a given online service provider’s network or website.
- The furnishing of such a “representative list” should put online providers on notice of significant infringing activity on their websites, and thereby place a duty on online providers expeditiously to remove all known or reasonably ascertainable infringing URLs that contain the same copyrighted contents that were identified in the list on online providers.

A Small Claims Tribunal for Copyright Infringement

While major creative artists and companies might suffer the most harm in total dollars lost from infringement, DCMA’s inadequacies and compliance costs also jeopardize the livelihoods of less prominent songwriters and music artists. They are less able to expend time or money patrolling websites for infringement and issuing and re-issuing numerous notices. Further, the DMCA’s provisions relating to counter-notices and disputed takedown requests pose serious hardships on copyright owners with limited resources who seek to combat online infringement of their works.

Under the DMCA, if a copyright holder submits a takedown notice to an online provider, the provider must make the takedown notice available to the user who posted the alleged infringing content. A user who objects to the takedown notice can file a counter-notice, thereby requiring the online provider to repost the content. And if a counter-notice is filed, copyright holders who still seek to vindicate their rights must hire a lawyer and file a lawsuit in federal court within 10 days.

Litigation in federal court is forbidding and overwhelming for creative artists who have no experience with filing lawsuits for copyright infringement. Ten days is an incredibly short window for a copyright owner to find and hire an attorney, receive advice, weigh the prospective costs and benefits of a lawsuit, and then file a complaint in federal court.

Furthermore, the financial cost in litigating a copyright infringement case in federal court is too heavy for many copyright owners. As of 2018, the filing and administrative fees for merely opening a civil action in federal district court are \$400. And court fees make up only a fraction of the costs involved in bringing copyright cases to court. Attorneys' fees, discovery costs, and the costs of experts can be steep. According to the American Intellectual Property Law Association's 2015 "Report of the Economic Survey," the median litigation costs of a copyright infringement lawsuit valued at less than \$1 million is \$150,000 at the time discovery is concluded. And the median for such a lawsuit, inclusive of all costs, is \$250,000.

To better secure copyright protections for creative artists of more modest means, Congress should establish a simpler and less expensive legal process for resolving disputes over online infringement and takedown notices. One approach would be a federal small claims court for adjudicating copyright claims, modeled after local small claims courts that exist throughout the fifty states. Those specialized state courts typically feature reduced fees, limited discovery, informal rules of procedure and relaxed evidence requirements, and bench trials rather than jury trials. These features lend themselves to self-representation.

However, Congress faces apparent constitutional constraints as to the types of legal structures that it may employ in establishing an alternative adjudicatory process for takedowns and small copyright claims. The most relevant constraint is the Supreme Court's conclusion in *Feltner v. Columbia Pictures Television, Inc.* (1998), that a party to a copyright infringement in which statutory damages are sought has a Seventh Amendment right to a jury trial. The *Feltner* decision effectively precludes Congress from establishing any federal small claims court without juries as a mandatory venue for addressing low-value infringement claims. Instead, Congress should establish a small claims tribunal as a voluntary venue for resolution of takedown notices and other copyright infringement claims for low value.

The Copyright Office's Small Claims Report

In September 2013, the Copyright Office released its "Copyright Small Claims" report, in which it recognized "federal court is effectively inaccessible to copyright owners seeking redress for claims of relatively low economic value, especially individual creators who are of limited resources." The Copyright Office report concluded that "the most promising option to address

small copyright claims would be a streamlined adjudication process in which parties would participate by consent.”

The Copyright Office report maintained that a small claims tribunal should be focused primarily on infringements of exclusive rights under Section 106 of the Copyright Act. Powers to make damage determinations as well as declaratory judgments regarding infringement or noninfringement of copyrighted works were also deemed necessary for the small claims tribunal. Moreover, the Copyright Office report identified the need for an alternative venue to address certain claims involving notice-and-takedowns:

[T]he Office recommends that any small copyright claims system include the ability to review claims of misrepresentation in DMCA takedown notices or counter notifications under section 512(f) and that proceedings before it should qualify to prevent the reposting of removed material pursuant to section 512(g). These infringement-related matters can be quite frustrating for those involved and exceptionally uneconomical to litigate in federal court. The Office therefore believes that the ability to address takedown-related disputes through a streamlined proceeding would provide significant benefits for both copyright owners and online users.

However, the Copyright Office report acknowledged that not all DMCA-related claims could properly be addressed by a small claims tribunal, such as certain “cases involving secondary liability under theories of contributory or vicarious infringement.” For instance, in situations where users of an online service committed copyright infringement and are directly liable, the online service provider may have knowingly enabled and directly benefitted from their users infringing conduct. On the one hand, the report stated:

[T]he Office does not see a reason for blanket exclusion of all secondary liability claims at this time. In some cases where a direct infringer is unknown or unwilling to participate in the small claims process, the claimant may be limited to proceeding against a secondary infringer who is profiting from or facilitating the infringement of the claimant’s work.

And on the other hand, the Copyright Office report recognized:

[M]any potential secondary liability claims involving online uses will likely be barred by one of the DMCA safe harbors set forth in section 512. To ensure against inappropriate actions, the Office therefore proposes that any claim potentially subject to a DMCA safe harbor be excluded unless it is demonstrated that a DMCA takedown notice was provided and was unsuccessful. And finally, as a more general matter, the tribunal should retain the discretion to dismiss without prejudice any secondary liability (or other) claim that cannot appropriately be adjudicated within the constraints of its streamlined process.

Given the safe harbor-related limits identified in the Copyright Office’s report, establishment of a small claims tribunal, by itself, is not sufficient to modernize the DMCA and protect copyright

holders from online infringement. But a small claims tribunal is a reform imperative. It would provide a less expensive and simpler process for addressing many DMCA-related online copyright infringement claims.

The Copyright Office Report’s Legislative Proposal for a Small Claims Board

Importantly, the Copyright Office report included a draft legislative proposal for a small copyright claims tribunal – a “Copyright Claims Board” – to be administered by the Copyright Office as a voluntary alternative to federal courts. According to the Copyright Office report’s legislative proposal, an appointed three-member small claims tribunal would be empowered to hear infringement cases involving registered copyrighted works valued at \$30,000 or less. Two of the tribunal adjudicators would have experience in copyright law representing owners and users, and the third adjudicator would have a background in alternative dispute resolution. Copyright owners would be able to recover actual or statutory damages up to \$15,000 per timely registered work.

Copyright owners would initiate small claim proceedings by providing notice to the responding parties. Respondents who agree to join the process would be able “to assert all relevant defenses, including fair use, as well as limited counterclaims arising from the infringing conduct at issue.” As indicated, the small claims tribunal would be able to consider at least some DMCA-related matters, such as bad faith or misrepresentation claims under Section 512(f).

Both parties before the small claims tribunal would make written submissions and hearings would be conducted remotely through telecommunications facilities, such as livestreaming via the Internet. Similar to a typical small claims court, the small claims tribunal for copyright infringement would feature simplified procedures with limited discovery. In rendering its decision, the small claims tribunal would be able to take stock of a responding party’s agreement to cease infringing activities in rendering its decision. The tribunal would retain the discretion to dismiss without prejudice any claim that it did not believe could be adjudicated fairly through the small claims process.

Decisions by the small claims tribunal would be binding only on the parties before it and therefore would not constitute legal precedent. The report provides that small claims tribunal decisions would be subject to limited administrative review by the Register of Copyrights for “abuse of discretion.” And their decisions could be “challenged in federal district court for fraud, misconduct, or other improprieties.” Also, small claims tribunal decisions could be filed in federal court for enforcement, similar to mediation or arbitration agreements.

Small Copyright Claims Legislation in Congress

Legislation based on the Copyright Office’s proposal has been introduced in Congress. For example, House Resolution 3495, the “Copyright Alternative in Small-Claims Enforcement Act of 2017” or “CASE Act” was introduced during the first session of the 115th Congress. The CASE Act tracks closely with the Copyright Office’s proposal, providing for a Copyright Claims Board as a voluntary, alternative forum to federal courts for alleged copyright infringements where total recovery does not exceed \$30,000, exclusive of any award of attorneys’ fees and

costs. Under the CASE Act, the Board would consist of three appointed Copyright Claims Officers serving six-year terms. Additionally, the CASE Act specifies that copyright owners could initiate proceedings before the Board by providing notice to respondents, upon which respondents would have 30-days time to consent to the proceeding or to opt-out. And failure to timely respond could result in a default against the respondent. Importantly, the Copyright Claims Board that would be established by the CASE Act would provide a venue for copyright holders – including those of modest means – to seek relief for DMCA-related claims involving online infringement on user-upload services.

Establishment of a small claims tribunal within the Copyright Office was also a part of the House Judiciary Committee’s December 2016 “Proposal on Copyright Office Reform.” Although the House Judiciary Committee has yet to release a bill on the subject, the “Small Claims” section of its proposal states:

The Copyright Office should host a small claims system consistent with the report on the issue released by the Copyright Office. The small claims system should handle low value infringement cases as well as bad faith Section 512 notices. The Register should be given the authority to promulgate regulations to ensure that the system works efficiently.

Conclusion

Just as advancements in digital technology, including the Internet, provide tremendous growth opportunities for copyright-intensive industries, those same advancements pose serious challenges realizing and securing the highest potential value in copyrighted goods and services. Online infringement of copyrighted is now pervasive on user-upload services, depriving copyright owners of their exclusive right to the proceeds of their property and creative labors. To remove their protected content, copyright owners are compelled to issue hundreds of millions of takedown notice requests to online providers each year.

The harm resulting from online infringement and the difficulties of navigating outdated legal processes to combat it requires that civil enforcement provisions in federal copyright law be updated. Given the massive volume of infringing activity, the Digital Millennium Copyright Act of 1998 (DMCA) is in particularly urgent need of updating. The DMCA’s Section 512 “notice and takedown” system for removing copyright-infringing content from the Internet is now severely strained, and, in its current form, appears inadequate to secure protections for copyright holders. Apparent financial disincentives of online service providers to promptly remove infringing content – or at least the ready ability of such providers to generate significant ad revenues from hosting infringing content uploaded by their users – provides an additional reason for reforming the notice-and-takedown process to better secure copyright protections online.

Judicial interpretations of key provisions in the DMCA have reinforced the inadequacies of the statute’s notice-and-takedown process in combating infringement of copyrighted content online. DCMA’s inadequacies and compliance costs also jeopardize the livelihoods of smaller songwriters and music artists. They are less able to expend time or money patrolling websites for

infringement and issuing numerous notices. Furthermore, litigation in federal court is especially forbidding for smaller artists.

Congress should therefore update the DMCA by clarifying that services that regularly receive significant amounts of revenue from advertising to their viewers and who proactively seek to attract viewers by curating content based on popularity or perceived interest have a heightened duty of care to prevent access to infringing online content on their websites and to remove expeditiously infringing content. Further, red flag knowledge is not limited to instances where online service providers receive takedown notices of specific infringing URLs when other evidence of significant infringement occurring generally on their sites is apparent. Further, the imputation of knowledge through willful blindness should not be limited to instances where online service providers receive takedown notices of specific infringing URLs, but should extend to when online service providers have a reasonable awareness of significant infringing activity in general taking place on their websites.

Also, an effective “representative list” should not be limited to the specific infringing URLs that the list contains, but should include a representative sampling of infringing contents on a given online provider’s network or website. Instead, the furnishing of such a “representative list” should put service providers on notice of significant infringing activity on their websites, and thereby place a duty on online service providers of expeditiously removing all known or reasonably ascertainable infringing URLs that contain the same copyrighted contents that were identified in the list.

Finally, establishment of a Small Claims Board for low-value infringement claims would help secure the rights of copyright owners of modest means. Copyright owners with larger financial resources may also find that a small claims venue would make enforcement of copyright protections economically viable in situations that are decidedly uneconomical under existing law. A Small Claims Board would also provide a less expensive and streamlined venue for many DMCA-related online infringement cases.

In sum, Congress should make updating the DMCA and establishing a Small Claims Board reform priorities. By taking such steps, Congress can modernize civil copyright enforcement provisions and, consistent with the Constitution’s intent, better secure the exclusive rights of copyright owners in the Digital Age economy.

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