Statement for the Record of Sandra Aistars, Chief Executive Officer, Copyright Alliance,

Committee on the Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

U.S. House of Representatives

"Section 512 of Title 17"

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The Copyright Alliance is a nonprofit, nonpartisan membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors and small businesses across a diverse range of creative industries – including for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic artists and illustrators, photographers and software developers, as well as artist membership organizations, guilds and unions and corporations and organizations that support and invest in the work of these creative professionals.

The Copyright Alliance and its members embrace all of the new technologies that enable their work to be appreciated by the public in new and innovative ways, including those some may consider "disruptive" of traditional business models. We submit these comments to help the Subcommittee understand the challenges faced by the creative community when relying on the Digital Millennium Act (DMCA) to ensure vibrant and thriving outlets for our creative endeavors.

It is incontrovertible that roughly fifteen years after its passage, the DMCA is not working as intended either for the authors and owners of copyrighted works who rely on its notice and takedown and repeat infringer provisions to reduce infringement of their works, nor for the website operators who must respond to the notices sent. When authors are forced to send upwards of 20 million notices a month to a single company—often concerning the same works and the same infringers—something is amiss.[1]

Academics who have studied Section 512 notices conclude that they are "largely ineffective for most works. Even for the largest media companies with the most resources at their disposal, attempting to purge a site of even a fraction of the highest–value content is like trying to bail out an oil tanker with a thimble."[2]

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[1] As of February 2014, Google stated it removes over 24 million URLs a month from its search engine as a result of DMCA takedown notices. https://www.google.com/transparencyreport/removals/copyright/.

[2] Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem,* December 2013, available at http://cpip.gmu.edu/2013/12/05/the-failure-of-the-dmca-notice-and-takedown-system-2/.

For the hundreds of thousands of independent authors who lack the resources of corporate copyright owners, the situation is even more dire. These entrepreneurs cannot dream of the robust enforcement programs that larger companies can afford. Instead, they pursue issuing takedown notices themselves, taking time away from their creative pursuits, or give up enforcement efforts entirely.

Examples of this are well documented. Kathy Wolfe, owner of a small independent U.S. film-distribution company called Wolfe Video "found more than 903,000 links to unauthorized versions of her films" in a single year—this corresponds to an estimated loss of over $3 million in revenue in 2012 from her top 15 titles alone.[3] In addition to her lost revenues, Ms. Wolfe "spends over $30,000 a year – about half her profit – just to send out takedown notices for her titles."[4] This "very damaging trend" has forced her to halve her marketing budget, cut her employees' pay, and discontinue her own salary.[5]

Sadly, Ms. Wolfe's story is not an uncommon one.

Tor Hansen, co-president and co-founder of YepRoc Records/Redeye Distribution and board member of the American Association of Independent Music ("A2IM"), pointedly summarized this predicament for this Subcommittee earlier in this series of hearings:

> Unfortunately due to the ever-shrinking overall music market revenue base, [independent] music labels like mine as [small- and medium-sized music enterprises] simply do not have the financial means or resources to engage in widespread copyright monitoring on the Internet. The time and capital investment required for our community of like-minded, but proudly Independent small business people to monitor the web for usage and take subsequent legal action simply does not exist. [Independent] music labels do not have the financial means or resources to house a stable of systems people and lawyers to monitor the Internet and bombard users with DMCA takedown notices for seemingly endless illegal links to our musical copyrights. [We] have limited budgets and whatever revenues and profits [we] can eke out are directed toward [our] primary goals, music creation by their music label's artists and then the marketing and promotion of this music to the American public so they are able to continue this creation process.[6]

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[3] Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up*, The Wall Street Journal (Mar. 3, 2013).
[4] *Id.*
[5] *Id.*
[6] *Innovation in America: The Role of Copyrights: Hearing Before the Subcomm. on Intellectual Proper., Competition, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2013) (statement of Tor Hansen, Co-President/Co-Founder YepRoc Records/Redeye Distribution).

The situation is even worse for individual authors and artists. Any time spent fighting infringement of their works takes away from the time they would spend on creating new works for the public to enjoy, and the money needed to enforce must come out of their personal income or savings. As artist Lorene Leftwich Sisk noted in a letter to the Copyright Office, in order to prevent online infringements of her artwork, she either stops selling her art on the Internet, or she ends up sending 50 DMCA takedown notices per year; and in her words, "[I] don't have time to waste [on] all these infringements."[7]

Independent authors often find themselves in a never-ending battle with unscrupulous website operators who pay mere lip-service to obligations of the DMCA while enjoying its safe harbors. Author and publisher Morris Rosenthal testified in a submission to the Copyright Office that file-sharing networks "hide behind the DMCA and links to pirated books are often reposted on the same site within hours of processing a DMCA complaint."[8] He observed that "content farm" websites that post stolen content claim DMCA safe harbor protection while at the same time "syndicate the plagiarized material to hundreds or thousands of other sites, all of whom claim DMCA protection, making it impossible for an author to have all of the infringements removed."[9] In one instance, he "found [his] book . . . [online illegally] within a day of it being posted [for sale], and not only were there already a thousand downloads, there were over fifty comments posted by different people thanking the individual who posted the file."[10] Mr. Rosenthal told the Copyright Office that, as a result of the efforts required to fight the tsunami, he has "dropped all attempts at writing new books in an attempt to fight copyright infringements and preserve the core of [his] publishing business."[11]

Artist and designer Christine Filipak has had similar experiences. As the de facto copyright enforcer for popular gothic rock duo Nox Arcana, she has collected over five gigabytes of screenshots and unanswered DMCA notices over the past several years, showing hundreds of commercial websites where the band's music is copied and distributed illegally. Her experience demonstrates that the DMCA process has become far more difficult than it need be.

From these examples it is clear that the volume of infringement individual authors and small businesses must manage online is having a chilling effect on artistic expression. To make matters worse, many recipients of takedown notices, supported by organizations

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[7] Letter from Lorene Leftwich Sisk, to U.S. Copyright Office (2012) (on file with U.S. Copyright Office) (submitted in response to solicitation from U.S. Copyright Office re copyright small claims).

[8] Letter from Morris Rosenthal, to U.S. Copyright Office, at 2 (2012) (on file with U.S. Copyright Office) (submitted in response to solicitation from U.S. Copyright Office re copyright small claims).

[9] *Id.* at 3.

[10] *Id.* at 2.

[11] *Id.* at 1.

such as the Electronic Frontier Foundation, attempt to intimidate and bully those artists who do stand up for their rights. The site Chillingeffects.org, for example, bills itself as a "clearinghouse" for DMCA notices. It publishes notices forwarded to the site by recipients such as Google, leaving intact information that directs readers to the infringing URLs. Until recently the site also publicized the names and personal information of any artist sending a notice to seek the removal of an infringing URL.

The activities of chillingeffects.org are repugnant to the purposes of Section 512. Data collected by high-volume recipients of DMCA notices such as Google, and senders of DMCA notices such as trade associations representing the film and music industries demonstrate that the overwhelming majority of DMCA notices sent are legitimate[12], yet the site unfairly maligns artists and creators using the legal process created by Section 512 as proponents of censorship. Moreover, by publishing the personal contact information of the creators sending notices (a practice which Chilling Effects only recently discontinued), it subjects creators to harassment and personal attacks for seeking to exercise their legal rights. Finally, because the site does not redact information about the infringing URLs identified in the notices, it has effectively become the largest repository of URLs hosting infringing content on the internet.

Several steps could be taken to improve the situation. First, stakeholders, including representatives of search engines, online service providers, website operators, vendors that issue DMCA notices on behalf of rightsholders, and rightsholders of all varieties (including representatives of individual artists and small businesses) should be required to confer with the encouragement of Congress or an expert agency with the goal of identifying technologically reasonable steps that can be taken to minimize the occurrence and recurrence of infringements online. These discussions should also include means of streamlining the sending and receipt of Section 512 notices so that the burden is reduced on both issuers and recipients of notices. The stakeholder consultation process the United States Patent and Trademark Office has announced it will begin next week offers a promising opportunity for having such discussions.

Second, these same entities should work cooperatively to elaborate repeat infringer policies. Some useful progress has already been made in this regard by multi stakeholder groups such as the Center for Copyright Information. Such efforts should be expanded to include other stakeholders and additional categories of creative works.

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[12] MPAA, for example, reports that its companies sent a total of 25,235,151 notices regarding infringing URLs to site operators and search engines in the time period between March 2013 and August 2013. In response, they received a grand total of 8 counter notices. Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem,* December 2013, available at http://cpip.gmu.edu/2013/12/05/the-failure-of-the-dmca-notice-and-takedown-system-2/.

Finally, Congress should question the motives of groups such as those that back Chilling Effects and attempt to shift focus away from the flood of takedown notices going to service providers to little effect and toward the rare and isolated notice sent in error or bad faith. Members of the Copyright Alliance and other good faith participants in the internet ecosystem want to minimize the need to send DMCA notices. No creator wishes to devote time directing notices at the wrong targets, especially when, as detailed above, they don't have enough time to go after all the right targets. The DMCA already provides relief for bad-faith takedowns.[13] There is simply no evidence that such takedowns warrant placing additional burdens on already overburdened creators.

The DMCA's goal of encouraging "service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment" remains a vital one. The Copyright Alliance appreciates the efforts of this Subcommittee to ensure that the tools created by Section 512 can be used effectively, without fear of retaliation, and without imposing undue burdens either on those who send or those who receive such notices. We stand ready to assist in any stakeholder effort the Subcommittee or an expert agency may convene in this regard.

[13] 17 U.S. Code § 512(f).