

Oral Statement of Don Henley  
before the  
Committee on the Judiciary, United States Senate  
Subcommittee on Intellectual Property  
on  
Section 512 of the  
Digital Millennium Copyright Act  
June 2, 2020

Chairman Tillis, Senator Coons, and Members of the Subcommittee:

Thank you for inviting me to participate in today's hearing. My name is Don Henley.

I come here, today, with a heavy heart, mindful of the chaos and pain that has engulfed this nation. I am aware that many in my industry have chosen this date to observe a day of inactivity and quiet contemplation. In being present, here, I mean no disrespect to those who have chosen to set aside this day. I wish to state, for the record, that I stand in solidarity with my brothers and sisters in the creative community, and with all my fellow citizens who seek a better, more just world, for everyone.

As a 55-year veteran of the music industry, I was asked, by the chairman of this Senate subcommittee, to come here and testify, today on behalf of the creative community – songwriters, musicians, music publishers – also known, in today's digital world, as "*content providers*." I am present, today, not to be contrary, not to advance a personal agenda (at age 73, and indefinitely homebound by the Covid-19 pandemic, I am in the final chapter of my career), but I come here out of a sense of duty and obligation to those artists, those creators who paved the road for me and my contemporaries, and for those who will travel this road after us. It is truly unfortunate – and patently unfair – that the music industry is perceived only in terms of its most successful and wealthy celebrities, when in fact there are millions of people working in the industry, struggling in relative obscurity; people whose voices would never be heard were it not for hearings such as this one being held, today. So, I am compelled to seize this rare opportunity to discuss aspects of the fundamental issues that are foremost in the national conversation, at this anxious moment – fairness, rights, mutual respect and ... in this case, economic justice and equal opportunity.

But, the smear campaign has already begun. I have been targeted by the digital gatekeepers and their many shells and surrogates. It began last Friday in the newspaper that belongs to Mr. Bezos, and it continues, today. Big Tech was probably hoping that this hearing would be canceled, or that I would be intimidated to the extent that I would not testify. But, I will not be silent on this issue. I want to do everything in my power to strengthen the property rights of music creators of all ages, races and creeds; all styles, from hip-hop to honky-tonk, from rock, to rap, to rhythm & blues. From jazz to folk, to heavy metal. To change or improve outdated laws and regulations that have been abused for over 20 years by Big Tech ... the enormous digital platforms that facilitate millions of copyright infringements, monthly.

So, let me directly answer the question at hand: the notice and takedown system of the DMCA does not work for artists and songwriters.

- When a simple online search for a song returns an endless list of sites that never asked the copyright owner for permission, never received a license and never passed on a penny to the artist for use of their music – the system is not working.
- Today, when the marketplace has matured, and digital platforms continue to use section 512 as a negotiating leverage to pay license fees which are well below market – the system is not working.
- When the burden of policing copyright infringements on global platforms lies with the artists instead of the massive technology companies who own and operate the platforms – the system is not working.

The system is antiquated and badly broken. And the creative community is paying a very steep price. I have worked hard to establish my career and reputation, and I have enjoyed success. For me, this is a matter of principle. I am speaking out for those songwriters and recording artists who are struggling to make a living. Particularly now, as our industry has been decimated by the pandemic, we need equitable compensation for the rights guaranteed to authors under the Constitution. Given the current ban on large social gatherings and the indefinite pause in live performances, income from licensed digital music services may be the only real source of revenue music creators can rely on the foreseeable future. So, it is imperative that the devaluation of music - which is a direct result of the DMCA - ceases. And, as a result, creators be paid a market rate for their music across all platforms.

At the dawn of the Internet age, the DMCA was supposed to provide digital platforms with safe harbor from liability in exchange for cooperation in protecting creators' works. It was meant to provide a proper balance and symbiotic relationship that benefitted all participants and strengthened the legitimate online marketplace.

Two decades later, the balance is decidedly off.

In a world where more than 500 hours of video are uploaded to YouTube every minute, more than 1 billion videos are viewed on TikTok per day, and there are over 500 million daily active users on Instagram, it is clear that the massive online services are flourishing while artists have no ability to combat the rampant infringement that occurs on these platforms. As the U.S. Copyright Office said in its recent Report, "the balance Congress intended when it established the section 512 safe harbor system is askew."

Content owners send hundreds of millions of takedown notices annually. And often, for each infringing link or file taken down, a dozen more pop up in its place. But even worse, due to the antiquated procedures dictated by the DMCA, internet services with clear oversight and control

of content posted on their websites are continuing to monetize and collect advertising revenue on videos containing music, even after that music has been flagged by the music creator as infringing. How is that a fair bargain?

The astronomical number of infringement notices sent by creators is not a sign that the system is working – as some defenders of the DMCA suggest. That would be akin to measuring our country’s success in fighting wildfires by measuring the number of attempts to extinguish them; instead, we need to seek out the root causes of those fires, implement preventive measures, and ensure that they don’t reignite. Many of the enormous tech companies who benefit from the “safe harbor” provisions of the DMCA have the tools to do just that: they have the capability to monitor infringements on their platforms and provide enhanced tools for content owners. They just choose not to. They are capable of understanding and tracking the individual likes and dislikes of the fans who visit the platform with frightening accuracy, and yet we are supposed to believe that putting in place a meaningful barrier to infringement is beyond their capabilities?!? More accurately, it’s beyond their desire. These tech giants are afraid that blocking infringing content will reduce traffic, and reducing traffic decreases their ad revenue. Instead of focusing on platform improvements that drive consumer satisfaction, they rely on copyrighted material – whether licensed or not – to keep consumers engaged. With the DMCA as cover, these companies simply have no incentive to improve technological protection measures.

The courts have facilitated this worldview, broadening application of the safe harbor provision, watering down obligations of online services, and eliminating consequences. The result is an anemic notice and takedown system that still allows Big Tech to rake in revenue by monetizing access to our unlicensed works, despite being notified of the infringements, even repeat infringements.

We simply cannot continue like this.

I applaud and I thank this Subcommittee for shining a light on the damage caused by the unfulfilled promise of a meaningful and effective notice and takedown system. Creators need recourse for the unlicensed, illicit use of their valuable works online. The DMCA is not providing that to them.

Like a classic song, album, or band, some creations stand the test of time, resonating across generations. Other products of the past are best left there – or updated to reflect the modern era. The DMCA has shown its age – it is a relic of a MySpace era in a TikTok world. Our nation’s countless creators, most of them small businesses, deserve a system that recognizes the needs of online participants, a procedure that properly applies the rules, and implements today’s technology with an eye toward tomorrow. Only then can we truly achieve the proper balance and the thriving legitimate online marketplace this institution envisioned so many years ago. Thank you.