



**Statement of**

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**before the  
HOUSE COMMITTEE ON THE JUDICIARY**

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Good afternoon, Chairman Nadler, Ranking Member Jordan and members of the House Judiciary Committee, and thank you for the opportunity to testify at today's hearing titled, *"Copyright and the Internet in 2020: Reactions to the Copyright Office's Report on the Efficacy of 17 U.S.C. § 512 After Two Decades."*

My name is Terrica Carrington and I am VP, Legal Policy & Copyright Counsel at the Copyright Alliance, a non-profit, non-partisan public interest and educational organization dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The Copyright Alliance represents the copyright interests of over 13,000 organizations in the United States, across the spectrum of copyright disciplines, and over 1.8 million individual creators, including photographers, authors, songwriters, coders, bloggers, artists and many more individual creators and small businesses that rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

One of the greatest threats to the welfare of the creative community is piracy. Piracy is a persistent and evolving problem for virtually all types of copyrighted works and copyright owners and undermines the rights of creators and the value of copyright. It is essential that the copyright industries, including the millions of individual creators and small businesses across the country that rely on copyright law, be able to recoup their investments in order to fund the next wave of investment, create and distribute quality content for the public to enjoy, and ensure job stability for the nearly 5.7 million men and women these industries employ in the United States. Piracy poses a threat to those investments by unjustly enriching bad actors who make no investment and take no risk, at the expense of the creators behind those works.

Congress has long recognized the harms of piracy, and in 1998, passed the Digital Millennium Copyright Act (DMCA) as the primary way to combat online piracy. Section 512 of the DMCA includes a notice and takedown process for copyright owners and a safe harbor for

online service providers (OSPs). The safe harbor for OSPs was meant to be a limitation on monetary liability, not an exception to copyright infringement.<sup>1</sup> OSPs were concerned about being party to lawsuits over isolated acts of infringement by their users, even if they were otherwise cooperative in remedying the infringement as soon as they were put on notice.<sup>2</sup> In exchange for OSPs' cooperation in detecting and addressing infringement, Congress created "safe harbors" to minimize the possibility that fear of liability would inhibit technological innovation. Section 512 sought to protect OSPs who work with the copyright community to mitigate and combat online infringement. The inclusion of these safe harbors, along with the other provisions in the DMCA, allowed the DMCA to "provide greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities."<sup>3</sup> Indeed, a review of the legislative history reveals that the intent of the safe harbors was to afford reasonable immunity to reasonable actors; not to create a mechanism by which OSPs could disregard copyright law.<sup>4</sup>

The notice and takedown process is a tool for copyright holders to get user-uploaded material that infringes their copyrights taken down off of websites and other internet sites. The process entails the copyright owner (or the owner's agent) sending a takedown notice to an OSP requesting the OSP to remove material that is infringing their copyright(s). In exchange for taking down infringing content, an OSP who did not upload the infringing material receives a safe harbor from monetary liability—but only if they comply with additional obligations, including: implementing a repeat infringer policy; registering an agent with the Copyright Office; and responding to infringements "expeditiously" once they have actual or apparent knowledge of them. Even if a takedown notice meets all the legal requirements, the OSP still may refuse to takedown the material. However, if they fail to do so, then they open themselves up for potential secondary liability for assisting with copyright infringement.

After a takedown notice is sent to an OSP, the OSP usually notifies the user, subscriber or other person who is responsible for engaging in the infringing activity. If that person – the alleged infringer – in good faith does not think the activity is infringing, he or she can send a counter notice to the OSP explaining why they disagree with the copyright owner. After receiving a counter notice, the OSP forwards that counter notice to the person who sent the original takedown notice. Once the OSP has received a valid counter notice they wait 10-14 days. If the copyright owner sues the alleged infringer in that time frame the material will remain down, but if no suit is filed then the OSP must re-activate or allow access to the alleged infringing activity. This entire process is what is commonly referred to as the notice and

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<sup>1</sup> See *Ellison v. Robertson*, 357 F.3d 1072 (9<sup>th</sup> Cir. 2004) *citing* S. Rep. 105–190, at 19 ("Congress provided that 'limitations of liability apply if the provider is found to be liable under existing principles of law.'"); S. Rep. 105–190 ("The [safe harbor] limitations . . . protect qualifying service providers from liability for all *monetary* relief for direct, vicarious and contributory infringement. Monetary relief is defined in subsection [(k)(2)] as encompassing damages, costs, attorneys' fees, and any other form of monetary payment. These subsections also limit injunctive relief against qualifying service providers to the extent specified in subsection (j).").

<sup>2</sup> See S. Rep. No. 105-190.

<sup>3</sup> S. Rep. No. 105-190, at 20; H.R. Rep. No. 105-551, pt. 2, at 49-50.

<sup>4</sup> See H.R. Rep. No. 105-551.

takedown process. An OSP is not required to take any of these actions unless it wants to avail itself of the DMCA safe harbor.

In passing the notice and takedown provisions in Section 512 of the Act, Congress intended to encourage copyright owners and OSPs to work together to combat existing and future forms of online infringement.<sup>5</sup> This approach was designed to remedy hardships faced not only by large copyright owners and OSPs, but also individual creators who undeniably lack meaningful tools to fight online infringement.

Over two decades have now passed since the DMCA was enacted. Since that time, the interconnectivity provided by the internet has fundamentally changed commerce, communication, and the way the public experiences copyrighted works. Consumers can access and enjoy all sorts of copyrighted works where and when they want, and creators benefit from new platforms that reach new audiences. Although the internet's impact on creativity and interconnectivity have given us much to cheer about over the past two decades, there is also much that is problematic. One of these problems is rampant online piracy. In the past two decades since the DMCA was enacted, online infringement has increased exponentially, causing widespread harm to the economic and creative vibrancy of the copyright community.

Although Section 512 seemed to have achieved Congress's purpose when it was first enacted, over the past twenty-two years, court rulings and other unanticipated changes that have taken place in the online environment have rendered these provisions less effective, creating an ecosystem where mass copyright infringements are an unfortunate and regular occurrence. While Section 512 remains a workable legal framework, it is evident that the statute is under strain and that stakeholder collaboration is needed in order for the statute to live up to its potential as imagined by Congress. And if such collaboration doesn't come to fruition, perhaps it is time for Congress to reconsider this twenty-two-year-old bargain with an eye toward determining what areas of Section 512 may need to be recalibrated in order to rebalance the system.

Members of this Committee will no doubt hear from OSPs who will say that Section 512 is working just fine and recalibration is not necessary. From the perspective of the OSP community, that viewpoint makes sense because the Section 512 safe harbors have routinely protected OSPs from liability. But that is only one half of the Section 512 bargain. While OSPs are routinely shielded from liability under the DMCA, the other half of the bargain remains unfulfilled, as online copyright infringement has grown enormously—leaving copyright owners to bear the brunt of the burden of taking action against infringement—with little to show for it.

To be clear, the fact that copyright owners shoulder most of the burden of taking action against infringement is not—standing alone—the only problem with Section 512. An equally significant problem is that, when they do take on that burden and send takedown notices, the notices have little (if any) effect, as the infringing material is often immediately reposted. This results in the burden being placed almost exclusively on the creative community, and that is far from the balance and cooperation that Congress intended. This is a problem that can no longer go unaddressed.

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<sup>5</sup> See H.R. Rep. No. 105-796, at 72 (1998).

When the Committee evaluates the divergent views on the efficacy of Section 512, the primary focus should be whether Section 512 effectively balances the interests of OSPs and copyright owners, and incentivizes cooperation between OSPs and rights holders to detect and address infringement, as Congress intended. Balance would be reflected by the fact that both sides are in agreement that Section 512 is working (or not). Where one side, the OSP community, is pleased with Section 512 but the other side, the copyright community, is not, it is clear that this balance has not been achieved.

We have identified below specific problem areas of Section 512 that the Committee should consider as it moves forward with its evaluation of Section 512.

## **I. The Notice and Takedown Process**

In 1998, the intent of the notice and takedown process was to give copyright owners a faster alternative to filing for a temporary restraining order in court, mostly so they could prevent copies distributed legally on physical goods (DVDs, CDs) from being illegally distributed on the internet for people to download. Today, vastly increased download speeds and instant streaming capabilities have left copyright owners virtually no opportunity to prevent mass unauthorized copying, distribution and performance. The notice and takedown process doesn't work well for any size or type of copyright owner—even when automated technologies are used. As observed by Professor Bruce Boyden,<sup>6</sup> “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. . . . The expenses of locating, identifying, and then sending a notice for that many files is so significant that even large companies must limit their efforts.”<sup>7</sup>

The number of takedown notices sent is staggering, and this number is steadily increasing.<sup>8</sup> The Copyright Office's recently published Section 512 Report recognizes that the massive amounts of notices sent by copyright owners represent a never-ending uphill battle against infringement.<sup>9</sup> The report details the frustrations related to the constant game of “whack-a-mole” as illustrated by the experience of organizations such as the Recording Industry Association of America (RIAA), whose Victoria Sheckler explains, “[w]e have sent over 175 million notices in the past three years to a variety of entities that claim DMCA status, or DMCA

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<sup>6</sup> Professor Bruce Boyden is a Professor at Marquette University Law School and a member of the Copyright Alliance Academic Advisory Board.

<sup>7</sup> See Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution for a Twenty-First Century Problem*, CENTER FOR PROTECTION OF INTELL. PROP. (Dec. 5, 2013).

<sup>8</sup> *Transparency Report*, GOOGLE, <https://transparencyreport.google.com/copyright/reporters/1594?hl=en> (last updated April 8, 2020). As of April 2020, the Recording Industry Association of America (RIAA) and its members have sent nearly 94 million notices to Google alone.

<sup>9</sup> U.S. Copyright Office, *Section 512 of Title 17: A Report of the Register of Copyrights* at p. 81 (May 2020), available at: <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>

safe harbor status. And yet, we continue to see our members' works show up again and again and again on these sites."<sup>10</sup>

Despite these glaring inefficiencies, there are those who believe that the large number of takedowns is evidence that the notice and takedown system is working. That is complete fallacy. The large number of takedown is not a measure of success; it is an indicator of a system-wide failure—especially when those numbers are increasing

There are numerous examples of this failure for both large and small copyright owners. For example, consider a large movie studio's use of the process. For three months during the fall of 2015, Disney sent about 35,000 takedown notices directed to illegal copies of *Avengers: Age of Ultron* – which was still in theaters at the time – to a single site. That's more than 10,000 notices a month, more than 300 a day, directed to a single movie on a single file hosting site. Similarly, in the 3 months in the spring of 2015, Fox sent more than 57,000 takedown notices to a single file-hosting site for the film *Kingsman: The Secret Service*. That's 19,000 notices a month, to one site, for the same movie. Were the DMCA working as intended, one would expect the number of notices to the site to decrease over time. Yet we see the opposite. For instance, in the *Kingsman* example, on April 30, Fox sent 697 takedown notices. On July 21, three months later, it had to send 881 notices to the same site for the exact same work. This is not an effective way to address piracy.

Online infringement is especially problematic for individual creators. Individual creators (who typically have been provided little information and lack meaningful resources) must usually rely on manual web searches, reverse image searches, Google alerts, or word of mouth to discover infringements of their work. In 2017, we conducted a survey of our members to gauge their experiences with the notice and takedown process in Section 512 of the DMCA (2017 Survey).<sup>11</sup> Of the 1,362 respondents who took our survey, 52% said that they currently monitor the internet for copyright infringement of their copyrighted works, or have monitored in the past, while 37% said that they have never monitored for infringement. While it may be surprising that such a significant portion of creators do not monitor for infringement, the reasons why are enlightening. A lack of education and understanding about the DMCA and how to find and report online infringements was the most significant cause for their not monitoring. The second most significant cause was the difficulty and time commitment associated with small creators policing the internet for copyright infringement.

But that is only part of the challenge for the individual creator. According to another survey of our members (2016 Survey),<sup>12</sup> even when a creator does discover an infringement of his or work, many of them do not know how to file a takedown notice or even what the notice and takedown process is; and even when they have participated in the process, they lack access

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<sup>10</sup> *Id.*

<sup>11</sup> <https://copyrightalliance.org/wp-content/uploads/2017/03/Copyright-Alliance-Section-512---Empirical-Research.pdf>

<sup>12</sup> <https://copyrightalliance.org/wp-content/uploads/2016/11/Copyright-Alliance-Section-512-Comments1.pdf>

to the technologies necessary to actually keep infringing content from reappearing.<sup>13</sup> About 70% of the creators responding to the 2016 Survey had never filed a takedown notice before because (1) they had never heard of it; (2) it would take too much effort; (3) the process is too difficult to navigate; or (4) they were skeptical it would do anything to stop online infringement.<sup>14</sup> The 2017 Survey indicated that most creators who monitor for infringement and have discovered infringement online want the material taken down, but only 35% actually send a DMCA takedown notices. The remaining 65% use other means for contacting the site (including “flagging” or “reporting” content) or the user directly.<sup>15</sup> These results illustrate a need for easily accessible educational resources to help creators better understand and avail themselves of the notice and takedown process. These educational offerings will also serve OSPs; better informed copyright owners will ultimately cut down on the number of inappropriate or incomplete DMCA takedown notices filed.

Individual creators who file notices lack the resources of larger copyright owners to make a meaningful impact. Creators report that sending takedown notices takes time from their creative pursuits, which pushes many to give up enforcement efforts all together. These creators are defenseless against the volume and reach of online infringement, especially given the speed at which content is reposted anew by users. For example, Keith, a writer from Austin, has never personally posted his work on social media sites, but still spent four hours on Tumblr trying to locate 50 of the 2000+ URLs that contained re-postings of his work: “I can’t afford the time to find the full 2000 [that Tumblr asked for],” he said. He has also found his work on numerous other sites, including Twitter, Facebook, and Instagram.<sup>16</sup>

The consensus from our individual creator membership is that online infringement has reached a point where content can be posted on hundreds of online infringement sites within days, and where individual creators—without access to effective tools—are unable to make any real impact in protecting their work. Online infringement has become so commonplace that it destroys once legitimate markets for creators’ works. For example, Susan, an audio producer from California, was told by a radio station that they saw no point in paying her for her work because they could “get it for free.”<sup>17</sup>

The impact of online infringement on a creator’s livelihood has been thoroughly documented in testimony, news articles, and blog posts over the past several years. Here are just a few of the many stories told by creators:

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> <https://copyrightalliance.org/wp-content/uploads/2017/03/Copyright-Alliance-Section-512---Empirical-Research.pdf>

<sup>16</sup> *Id.* And online infringement does not just stop at loss of compensation or control; it also can damage the professional integrity of creators. For example, Melissa, a photographer from California, was horrified to learn that her Victoria Secret style bridal photos were stolen and used on pornography sites. “This has been horrible!” she said. “I’ve been in business for 32 years. Married for 35 years and would never create anything for porn!”

<sup>17</sup> *Id.*

- Maria Schneider, a Grammy award winning composer, testified before the House Judiciary Committee that she invested \$200,000 of her own money into a new album to only discover her song had quickly been pirated all over the Internet.<sup>18</sup> “The resulting loss of income, combined with the cost of monitoring the Internet and sending takedown notices, threatens her ability to continue creating her award-winning music.”<sup>19</sup>
- Kathy Wolfe, the owner of the independent film company Wolfe Video, lost \$3 million in revenue in 2012 from the excessive pirating of her top 15 film titles.<sup>20</sup> She “found more than 903,000 links to unauthorized versions of her film” in a single year, spending “over \$30,000 a year—about half of her profits— just to send out takedown notices.”<sup>21</sup> With losses this large, she was forced to cut her marketing budget in half, cut employees’ pay, and discontinue her own salary.<sup>22</sup> Making art is often expensive, and most artists already sacrifice paying themselves to keep the art going; this should not be exacerbated by online infringement.
- Tor Hanson, co-founder of YepRoc Records/Redeye Distribution, testified in 2013 at the House Judiciary Committee hearing on *Innovation in America: The Role of Copyrights* on this very point: “[We] have limited budgets and whatever revenue and profits [we] can eke out are directed toward [our] primary goals, music creation by [our] music label’s artists and then the marketing and promotion of this music to the American public so they are able to continue this creative process.”<sup>23</sup>
- Jonathan Yunger, Co-President of Millennium Media, an independent film production company, testified on March 10, 2020 at the Senate Committee on the Judiciary, Subcommittee on Intellectual Property hearing on *Copyright Law in Foreign*

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<sup>18</sup> *Section 512 of Title 17: Hearing Before the Subcomm. of Courts, Intell. Prop., and the Internet of the Comm. on the Judiciary* (2014) (statement of Maria Schneider).

<sup>19</sup> *Id.*

<sup>20</sup> Christopher S. Stewart, *As Pirates Run Rampant, TV Studios Dial Up*, WALL STREET JOURNAL, Mar. 3, 2013.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Innovation in America: The Role of Copyrights: Hearing Before the Subcomm. On Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 113<sup>th</sup> Cong., 6 (2013) (statement of Tor Hansen, Co-President/Co-Founder YepRoc Records/Redeye Distribution).

*Jurisdictions: How are other countries handling digital piracy?* that despite Millennium Media’s investment in film security, piracy continues to affect its box office revenue and distributors.<sup>24</sup> “[I]n 2014, our film, *Expendables 3*, was stolen by an employee of one of our vendors and released online a month before it could open in theaters. By opening day, the movie had been downloaded 60 million times. It was calculated that we lost about \$250 million in box office revenue.”<sup>25</sup>

Individual creators face numerous other significant barriers to the effective use of the notice and takedown process, include the lack of uniformity and consistency from one OSP’s web form to the next, and the practice by some OSPs of imposing requirements beyond those prescribed under the law. In addition, these individual creators and small businesses cite as barriers difficulty locating web forms and designated agents due to inconspicuous placement—since the DMCA only requires the information to be “in a location *accessible* to the public,” but not conspicuously placed.

Numerous individual creators also voiced safety and privacy concerns about backlash from notice recipients. They are sometimes reluctant to send notices which require them “to reveal their personal information, including phone numbers and a home address” due to safety concerns and fear of retaliation.<sup>26</sup> Concerns over safety and privacy caused Blake Morgan, a musician and owner of the record label ECR Music Group, to stop sending takedown notices altogether because “it simply was not worth it.”<sup>27</sup> Photographer Yunghi Kim’s decided not to send a takedown notice to a website where her image had been used without permission because the group appeared to endorse violence and, in light of that, she was uncomfortable revealing her personal information to the group via a takedown notice.<sup>28</sup> Other individual creators have similar experiences. At least one Copyright Alliance member has even reported receiving death threats as a result of sending a takedown notice.

## II. The Repeat Infringement Problem

No one in the notice and takedown ecosystem likes spending time and money to send or process the millions of takedown notices that are sent daily. This is time and money that the

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<sup>24</sup> See *Copyright Law in Foreign Jurisdictions: How are other countries handling digital piracy?* Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary, 116<sup>th</sup> Cong. 1, 4 (2020) (statement of Johnathan Yunger, Co-President of Millennium Media).

<sup>25</sup> *Id.* at 4.

<sup>26</sup> The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Comment on Section 512 Study (Apr. 7, 2016), at 10, <https://www.regulations.gov/document?D=COLC-2015-0013-90145>.

<sup>27</sup> *Id.* at 12.

<sup>28</sup> *Id.* at 12.



individual or company could have spent innovating and creating instead, which is bad for the U.S. economy. Congress clearly did not intend such outcomes when it passed the DMCA—Section 512 was designed to protect copyrights, to protect non-culpable OSPs from liability when users uploaded infringing files, and to maintain many of the traditional contours of secondary liability in the digital environment.<sup>29</sup> Congress understood that internet enforcement could not be solved unilaterally through government regulations. And so Congress created Section 512 with the intent that the law would bring OSPs and copyright owners together to cooperate to detect and eliminate infringing material before that material was illegally distributed widely.

Today, not only are stakeholders grappling with tens of millions of notices a year,<sup>30</sup> but even worse, the business models employed by certain bad actors actually take advantage of judicial interpretations of this statutory scheme. As a result, uploaders repost infringing content within seconds, and these bad actors profit from having millions of infringing files shuffle off and back onto their website. After all, an OSP can obtain revenues even when copyrighted content stays up only for a brief time. If copyrighted content receives just one viewing or download before being taken down, in the aggregate of millions of works, that adds up to millions of ad revenue-producing views for the OSP.<sup>31</sup> Congress did not envision this type of abuse when it enacted the DMCA; such abuse needs to be addressed.

This viewpoint is supported by Professor Sean O’Connor, who explained that:

The highest volume of notices seems to be for reposted works, i.e., ones that have already been taken down on notice, yet reappear within hours often on the same site. Further, many of these do not even purport to be transformative or non-infringing. They are not mash-ups, remixes, covers, etc. They are simply the original work reposted repeatedly by an unauthorized person. That the posters do not seem to believe they have any real rights to the works seems supported by the surprisingly low number of counter notices submitted (relative to the enormous number of takedown notices).<sup>32</sup>

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<sup>29</sup> *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1039–40 (9th Cir. 2013) (noting that “the DMCA’s legislative history confirms that Congress intended to provide protection for at least some vicarious and contributory infringement,” and explaining that inquiries into contributory copyright infringement and the prerequisites for one or more of the DMCA safe harbors should be conducted independently); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993); S. Rep. No. 105-190 at 19, 20 (1998); Boyden, *supra* note 7.

<sup>30</sup> Boyden, *supra* note 7.

<sup>31</sup> David Newhoff, *THE ILLUSION OF MORE, Copyright Office to Review Safe Harbor in DMCA* (Jan. 6, 2016), <http://illusionofmore.com/copyright-office-to-review-safe-harbor-in-dmca/>.

<sup>32</sup> *Section 512 of Title 17 Hearing Before the Subcomm. Of Courts, Intell. Prop., and the Internet of the Comm. on the Judiciary* 14 (2014) (testimony of Sean O’Connor).

### III. DMCA Provisions Interpreted Contrary to Congressional Intent

One of the most significant problems with Section 512 stems from incorrect court interpretations and applications of the statutory text. When this occurs it results in Section 512 falling short of the goals Congress had for Section 512 and dramatically shifts the balance between the burdens and responsibilities of copyright owners and OSPs. The area where this is most evident is in court interpretations of red flag knowledge, contributory and vicarious liability and willful blindness, as well as the provision of Section 512(c) that the copyright owner’s notice may include a “representative list” of the infringements.

#### a. Red Flag Knowledge and Willful Blindness

An OSP will lose safe harbor protection by failing to act when confronted with actual or apparent knowledge. Copyright owners can provide the OSP with actual knowledge by sending a notice, or they can prove the OSP has apparent knowledge<sup>33</sup> of infringement under the “red flag knowledge” standard.<sup>34</sup> Once aware, the OSP is required to “act expeditiously to remove, or disable access to, the material” to remain eligible for safe harbor protections.<sup>35</sup>

Under the red flag knowledge standard, a copyright owner can prove an OSP has knowledge by showing it was aware of facts or circumstances that make infringement apparent. The court asks whether (1) the OSP was aware of the circumstances of infringement (the so-called “subjective prong”); and (2) the “infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances” (the so-called “objective prong”).<sup>36</sup> However, the Second Circuit in *Viacom v. YouTube*<sup>37</sup> and the Ninth Circuit in *UMG Recordings v. Shelter Capital Partners*<sup>38</sup> and *Perfect 10 v. CCBill*<sup>39</sup> arguably made the OSPs only responsible for responding to the infringement explicitly identified in takedown notices.<sup>40</sup> These decisions were exacerbated by the recent decision in *Ventura Content, Ltd. v. Motherless, Inc.*<sup>41</sup> which held that “even if it were obvious to a reasonable person that some of the material on the site must be infringing, that is not enough to lose the safe harbor. It must be obvious that the particular material that is the subject of the claim is infringing.” These courts’ interpretation

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<sup>33</sup> 17 U.S.C. § 512(c)(1)(A)(ii) (“red flag knowledge”).

<sup>34</sup> H.R. Rep. No. 105–551 (II), pt. 2, at 58 (1998).

<sup>35</sup> 17 U.S.C. 512(c)(1)(A)(iii).

<sup>36</sup> H.R. Rep. 105–551, pt. 2, 61 (1998).

<sup>37</sup> 676 F.3d 19 (2d Cir. 2012).

<sup>38</sup> 106 U.S.P.Q.2d 1253 (9th Cir. 2013).

<sup>39</sup> *Perfect 10 v. CCBill*, 488 F.3d 1102, 1113 (2007)

<sup>40</sup> See Boyden, *supra* note 7.

<sup>41</sup> *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 611 (9th Cir. 2018).

of the red flag standard is so restrictive that it has basically eliminated the carefully balanced burden allocation that Congress intended and effectively written the red flag knowledge standard out of the statute.

Some courts have also incorrectly applied the concept of willful blindness in the safe harbor context. Knowledge of infringing activity will be imputed to an OSP who has consciously avoided obtaining actual knowledge under a theory of willful blindness.<sup>42</sup> In *Viacom v. YouTube*, the Second Circuit articulated that willful blindness is triggered when the OSP is “aware of a high probability of the fact [of infringement] and consciously avoid[s] confirming that fact.”<sup>43</sup> The willful blindness doctrine provides courts with additional guidance and effectuates Congress’s intent to “discourage today’s common ‘do not look’ policy.”<sup>44</sup> But in *Capitol Records v. Vimeo*, the court shielded the OSP from liability despite a record that showed the OSP and its employees turned a blind eye to infringement. The court determined that any conscious avoidance by the OSP needs to be “tailored” to the “specific infringing content at issue in the litigation,” and that the knowledge demonstrated in the record “did not relate to the Videos-in-Suit.”<sup>45</sup> However, the hallmark of a willfully blind defendant is that the defendant has affirmatively avoided acquiring specific knowledge about infringing material or activity on its system. By definition, then, an OSP that is willfully blind to infringing activity on its system has ensured that it will not have knowledge that is “tailored to” the “specific infringing content at issue,” because that is the very knowledge the service provider has consciously avoided.

As a practical matter, if improper court decisions like these continue to proliferate, OSPs will effectively have no obligations other than to react to DMCA notices. Congress envisioned the DMCA as creating a regime of joint responsibility, in which OSPs would act reasonably and proactively in the face of actual or apparent knowledge. Coupled with the existing practical limitations of the notice and takedown process, copyright owners would have little meaningful protection against online infringement. When there is no meaningful “red flag” knowledge requirement, the result is a toothless statute.

## **b. The “Representative List” Requirement**

The Section 512 notice and takedown process, as often interpreted by the courts, has largely placed the burden on copyright owners to list every instances of infringement on an OSP’s website. The “representative list” requirement in provision 512(c)(3)(A)(ii) specifies that a takedown notice must identify the “copyrighted work claimed to be infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a *representative list*

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<sup>42</sup> *Viacom*, 676 F.3d at 35 (quoting *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109 (2d Cir. 2010)).

<sup>43</sup> 676 F.3d 19 (2d Cir. 2012).

<sup>44</sup> Steven Tjoe, *Taking a Whack at the DMCA: The Problem of Continuous Re-Posting*, CENTER FOR PROTECTION OF INTELLECTUAL PROPERTY (Mar. 14, 2014), <http://cpip.gmu.edu/2014/03/14/taking-a-whack-at-the-dmca-the-problem-of-continuous-re-postings/>.

<sup>45</sup> *Vimeo*, 972 F. Supp. 2d at 524–25.

of such works at that site.” This is paramount, given the volume of online infringement, because creators too often lack the time, money, and resources to list with specificity every single URL containing infringing copies of their work. Notwithstanding this language, many courts have placed the sole burden of tracking, identifying, and “adequately documenting” infringements squarely on the copyright owner, which makes little sense in practice and discourages individual creators from enforcing their rights.<sup>46</sup>

Congress did not intend this high degree of specificity for notices. As noted in the legislative history, the “representative list” requirement is satisfied,

[f]or example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead it is sufficient for the copyright owner to provide the service provider with a *representative list* of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.<sup>47</sup>

The legislative history demonstrates that the interpretation of the “representative list” standard in Section 512 is yet another example of the courts misinterpreted the language of Section 512 in a manner that directly contradicts the intent of Congress, makes the notice and takedown process ineffectual and harms the creative community.

#### **IV. Repeat Infringer Policies**

Section 512(i) provides that to be eligible for the DMCA safe harbor, an OSP must adopt and reasonably implement “a policy that provides for the termination in appropriate circumstances of subscribers and account holders... who are repeat infringers.” What constitutes a reasonably implemented repeat infringer policy has been interpreted as being highly fact specific and may vary from one context to another. But any interpretation regarding a user’s status as a repeat infringer or whether a policy has been reasonably implemented has to align with the purpose and intent of the statute. Congress intended Section 512 to encourage cooperation between OSPs and copyright owners in combating online infringement. As such, 512(i) incentivizes OSPs to cooperate by conditioning the benefit of the DMCA safe harbor on implementation of a policy that would help to *deter* infringement.<sup>48</sup>

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<sup>46</sup> See *Perfect 10 v. CCBill*, 488 F.3d 1102, 1113 (2007); *Viacom Int’l v. YouTube, Inc.*, 940 F.Supp. 2d 110, 115 (S.D.N.Y. 2013).

<sup>47</sup> H.R. Report No. 105–551 (emphasis added).

<sup>48</sup> “[T]hose 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.” S. REP. NO. 105-190, at 52 (emphasis added).

Repeat infringer policies are “fundamental safeguard[s] for copyright owners ... essential to maintain[ing] the strong incentives for [OSPs] to prevent their services from becoming safe havens or conduits for known repeat copyright infringers.”<sup>49</sup> The problem is not in the legal framework drafted by Congress, but instead in how OSPs choose to implement policies. As illustrated in *Capitol Records v. Escape*, some OSPs are fully capable of identifying works and tracking repeat infringers, but instead choose to craft a repeat infringer policy in a way that makes enforcement nonexistent.<sup>50</sup> As the court found, the online music service provider Grooveshark, owned by Escape, had two policies for removing content: One Strike and DMCA Lite.<sup>51</sup> Under the One Strike policy, content would be removed and the user would be banned from re-posting content.<sup>52</sup> On the other hand, under the DMCA Lite policy—which made up 94% of all Grooveshark takedowns—any takedown notice that Grooveshark decided did not perfectly comply with the DMCA’s requirements would only result in the content being removed. The user’s account would remain active.<sup>53</sup> In denying Grooveshark immunity under the safe harbor, the court noted that “[a]dopting a repeat infringer policy and then purposely eviscerating any hope that such a policy could ever be carried out is not an ‘implementation’ as required by § 512(i).”<sup>54</sup> Yet because Grooveshark publicly claimed it complied with the DMCA (even though it did not) it was able to operate for 8 years.<sup>55</sup> For nearly a decade, Grooveshark profited from massive copyright infringement, misled users into thinking that they were a legitimate music service, and competed unfairly with other legitimate and licensed music services.

More recently, in *Sony Music Entertainment v. Cox Communications, Inc.*,<sup>56</sup> a jury in the United States District Court for the Eastern District of Virginia found Cox liable for contributory and vicarious copyright infringement, and ineligible for the DMCA safe harbors because it did not implement measures required by the DMCA to fight against infringement. Specifically, Cox would limit the number of infringement notices to get through, effectively allowing infringement to continue. Importantly, it also failed to discontinue service for its customers who pirated

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<sup>49</sup> *Capitol Records, Inc v. MP3Tunes, LLC*, 821 F.Supp.2d 627, 637 (S.D.N.Y. 2011).

<sup>50</sup> Copy L. Rep. (CCH) P30, 744 (S.D.N.Y. 2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Letter from Paul Geller, Grooveshark’s Executive Vice President (“There does appear to be some confusion about whether Grooveshark is a legal service. So let’s set the record straight: there is nothing illegal about what Grooveshark offers to consumers. ... First, there is a distinction between legal and licensed. Laws from Congress. Licenses come from businesses. Grooveshark is completely legal because we comply with the laws passed by Congress, but we are not licensed by every label (yet). We are a technology company, and we operate within the boundaries of the Digital Millennium Copyright Act of 1998.”) Digital Music News has since removed the open letter from their website.

<sup>56</sup> *Sony Music Entertainment v. Cox Commc’ns, Inc.*, 426 F.Supp.3d (D.E.D.Va. 2019).

content. The complaint stated at least 20,000 Cox subscribers are repeat offenders. Ultimately, Cox's malfeasance led the jury to find that Cox's conduct was willful, awarding the plaintiffs \$1 billion in damages for the 10,017 sound recordings and musical compositions at issue.

Similarly, in *UMG v. Grande Communications*,<sup>57</sup> the court concluded that not only did Grande ignore over a million copyright infringement notices that were sent to it, it did not even have an existing repeat infringer policy. The court referred to this behavior as "the complete abdication of responsibilities to implement and enforce a terminating policy."<sup>58</sup>

On the other hand, the Ninth Circuit in *Motherless*<sup>59</sup> held that Motherless, a pornography site, was eligible for the Section 512 safe harbor even though it lacked a formal repeat infringer policy. The evidence showed that repeat infringers continued posting infringing material, and the website maintained insufficient records from which failures to terminate could be gleaned.

While there have been some helpful decisions relating to the "repeat infringer" standard, the outcomes have not been uniform, and the positive decisions are not the panacea that some would make it out to be. First, as *Cox* and similar cases illustrate, large and sophisticated companies may pay only lip service to the requirement of a "repeat infringer" policy. Second, it's important to understand that lawsuits like *Grande* and *Cox* are expensive to bring – only a few can afford to bring them. Third, the OSP's actions in cases like *Grande* and *Cox* were so egregious and offensive that on a practical level those cases are not very helpful. Lastly, it's important to note that even where an OSP does reasonably implement a repeat infringer policy and terminates a subscriber under that policy, it is very simple for that person to circumvent the termination by signing up with a different OSP or re-subscribing with the same OSP under an alias.

That is why OSPs and copyright owners, with the assistance of government, need to work together to ensure that that repeat infringers policy are effective and being implemented as intended. Through such cooperation, OSPs should be able to adopt more acceptable repeat infringer policies.

## **V. Information Location Tools**

When the DMCA was drafted, search engines already played a significant role in the internet ecosystem. In the years following its enactment, that role grew exponentially. Today

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<sup>57</sup> *UMG Recordings, Inc. v. Grand Commc'ns Networks, LLC*, 384 F.Supp.3d 743 (D.W.D.Tex. 2019).

<sup>58</sup> *Id.* The court found that even if the Grande had a policy of terminating repeat infringers—based on an assessment of its internal emails, statements by employees and utter lack of terminating even one customer—it certainly did not reasonably implement that policy from 2010 through 2016. The facts showed that prior to 2010 Defendant had terminate repeat infringer accounts. But from that time through May 2017, not a single subscriber account was terminated despite receiving over a million copyright infringement notices from Plaintiffs and tracking 9,000 customers in its DMCA "Excessive Violations Report." It wasn't until this suit was filed that Grande terminated a subscriber, and even then it was only 11 customers.

<sup>59</sup> *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 611 (9th Cir. 2018).

when someone is looking for something on the internet, the first place they go to is a search engine. While search engines often direct people to lawful sources of content, too often they also direct users to illegal content. It is imperative that search engines and other OSPs who provide information location tools work with copyright owners find ways to work together to effectively address these infringement problems.

While the copyright community appreciates many of the additional steps these search engines have taken, it is important that the steps be effective and not just symbolic. For example, Google has implemented a policy whereby it demotes sites based on the number of takedown notices that Google receives in conjunction with other factors. Unfortunately, the demotion policies, and other policies, have largely been ineffective because infringing content still shows up near the top of search results. One solution would be for search engines to place less weight on the infringing site's traffic and more weight on the number of takedown notices the site receives. Another solution would be for search engines and copyright owners to jointly enlist the support of independent third parties to evaluate the effectiveness of particular measures, develop ways to improve their efficiency and effectiveness, and to highlight best practices.

Problems also remain with the autocomplete features of Google's search bar. While efforts have been made to remove piracy device terms like "Kodi" from autocomplete, the feature continues to steer users towards illicit websites and infringing content.<sup>60</sup> An example of these enduring shortcomings is evident by simply typing "watch f" into the search bar. A user may be trying to find a legitimate way to watch the movie *Frozen*, and yet the search bar autocompletes to "watch free movies," and the results display links to pirate websites.

## **VI. The Counternotification Process**

Despite clear evidence that the notice and takedown system is stacked against creators and copyright owners, some claim that OSPs bear a heavier burden by having to process a disproportionate amount of "bad faith" notices.<sup>61</sup> A 2016 report describes OSPs as being inundated by "mistaken and abusive takedown demands," but a closer look at the data reveals that these notices are not what the study claim them to be. A response to the study by the Center for the Protection of Intellectual Property (CPIP) explains:

*The majority of the "questionable" notices come from those notices that raise "questions about compliance with the statutory requirements" (15.4%, about 281 notices) or raise "potential fair use defenses" (7.3%, about 133 notices). As to the statutory requirements issue, the authors argue that these notices make it difficult for Google to locate the material to take down. This claim is severely undercut by the fact that, as they acknowledge in a footnote, Google complies with 97.5% of takedown notices overall.*

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<sup>60</sup> Dani Deahl, *Google Removes 'Kodi' from Search Autocomplete in Anti-Piracy Effort*, THE VERGE (March 29, 2018), <https://www.theverge.com/2018/3/29/17176894/google-removes-kodi-search-autocomplete-anti-piracy>

<sup>61</sup> Jennifer M. Urban, Joe Karaganis, and Brianna Schofield, *Notice and Takedown in Everyday Practice*, UC Berkeley Public Law Research Paper No. 2755628 at p. 87 (March 22, 2017). Available at SSRN: <https://ssrn.com/abstract=2755628> or <http://dx.doi.org/10.2139/ssrn.2755628>

*Moreover, it wades into the murky waters of whether copyright owners can send service providers a “representative list” of infringing works. Turning to the complaint about potential fair uses, the authors argue that copyright owners are not adequately considering “mashups, remixes, or covers.” But none of these uses are inherently fair, and there’s no reason to think that the notices were sent in bad faith just because someone might be able to make a fair use argument.<sup>62</sup>*

In the rare circumstance where a copyright owner sends a notice by mistake or in “bad faith,” the counter notification procedure<sup>63</sup> offers an adequate remedy. In reality, very few counter notices are ever filed as compared to the number of DMCA notices sent because the content targeted by most takedown requests is clearly infringing, or is posted by users who do not wish to reveal their identity or location. However, when counternotices are filed without basis, they effectively stifle the enforcement efforts of copyright owners because they cannot afford or it is impractical for them to file suit in federal court.

Where a counternotice is filed, and there is no basis for it, the copyright owner has only ten days to bring suit against the alleged infringer before the infringing material or link is re-posted.<sup>64</sup> Bringing a federal lawsuit is a significant burden, especially for individual creators; and the ten-day requirement is, as a practical matter, virtually impossible to satisfy for even the larger, more sophisticated copyright owners.

Making matters worse, the U.S. Supreme Court’s recent decision in *Fourth Estate v. Wall-Street.com*,<sup>65</sup> holding that registration, under section 411 of the Copyright Act, occurs when the Register acts to either complete a registration or refuse it, effectively makes it impossible for copyright owners to satisfy the ten-day window for filing suit as set forth in the 512(g), unless they have previously registered their work. The *Fourth Estate* decision means that if a work has not been previously registered with the Copyright Office the copyright owner must wait for Copyright Office action before filing a lawsuit for copyright infringement, and that action may take many months. Pendency of copyright applications with the U.S. Copyright Office is measured in months, not days. So, unless a copyright owner is willing and able to pay the fee for expedited handling—a fee that is roughly over ten times the normal application filing fee—there is no way the copyright owner file a lawsuit before the ten-day window expires. And even if they can afford to and pay for expedited handling, there is no assurance that the Office will act on the application before the ten-day window expires. So, in effect, the *Fourth Estate* decision has created a new requirement for using the notice and takedown system—the requirement that the work be registered with the U.S. Copyright Office before a notice is sent (i.e., well in advance of any infringement).

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<sup>62</sup> Devlin Hartline and Kevin Madigan, *Separating Fact from Fiction in the Notice and Takedown Debate*, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY (CPIP) (April 25, 2016). Available at: <https://cpip.gmu.edu/2016/04/25/separating-fact-from-fiction-in-the-notice-and-takedown-debate/>

<sup>63</sup> See 17 U.S.C. § 512(g) (2012).

<sup>64</sup> 17 U.S.C. § 512(g)(2)(C).

<sup>65</sup> *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019).



One approach to solving this problem would be to extend the ten-day window. But that does little for those copyright owners who lack the financial resources to afford to litigate in federal court, so extending the period of time in which they may file a lawsuit before the infringing material is restored, alone, fails to adequately address the issue.

One way to help these creators is to pass the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), H.R. 2426 and S. 1273, a bill that would create an optional small claims tribunal within the U.S. Copyright Office. The Copyright Claims Board created by the CASE Act would be able to hear claims of infringement brought by copyright owners as well as declarations of non-infringement brought by users (as well as claims of misrepresentation under Section 512(f), discussed below). Consequently, the small claims court created by the CASE Act would benefit both copyright owners and those who file counter-notices but cannot afford to bring their claims or defenses in federal court.

Ever since the DMCA was passed, some groups have voiced concerns about the notice and takedown process being used to harass users, suppress speech and remove material posted by users who have valid fair use defenses. Such instances of alleged abuse of the notice and takedown process by rights holders, even if true, are vastly outnumbered by legitimate efforts to enforce copyright. To the extent that abusive and misleading notices occur, the DMCA adequately guards against this sort of abuse. The DMCA protects against such misuse by, among other things, requiring the sender of a DMCA takedown notice to assert under penalty of perjury that the material is infringing. Consequently, sending a takedown notice for the sole purpose of stifling speech opens that person up to a perjury charge.

Another way the DMCA protects against misuse is found in Section 512(f) of the DMCA, which makes “any person who knowingly materially misrepresents ... that material or activity is infringing” liable for the damages suffered as well as for attorneys’ fees. Section 512(f) applies misrepresentation claims under a subjective standard, placing the burden on the alleged infringer to show that the copyright holder believed that the content subject to its takedown notice was non-infringing.<sup>66</sup>

Some groups suggest that the protections afforded by section 512(f) are essentially ineffective because most of the recipients of takedown notices are individuals who do not have the money to sue in federal court<sup>67</sup> and because these recipients are often too afraid to file

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<sup>66</sup> In *Rossi v. Motion Picture Ass’n*, 391 F.3d 1000, 1004–05 (9th Cir. 2004), *cert denied*, 544 U.S. 1018 (2005), the Ninth Circuit articulated, “[w]hen enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement ... Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner’s notification is a “knowing misrepresentation. A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”

<sup>67</sup> Parker Higgins, Corynne McSherry, and Daniel Nazer, *Who Has Your Back: Protecting Your Speech from Copyright & Trademark Bullies*, at p. 7, ELECTRONIC FRONTIER FOUNDATION (Oct. 27, 2014) [https://www.eff.org/files/2014/10/27/who-has-your-back-2014-copyright-trademark\\_0.pdf](https://www.eff.org/files/2014/10/27/who-has-your-back-2014-copyright-trademark_0.pdf). The EFF report says that “Users also may fear the significant expense of defending even a winning copyright case, allowing themselves to be silenced rather than facing the expense and risk of vindicating their speech in courts.” (emphasis added); *See*

DMCA counter notices because of the requirement in the DMCA that the counter notice include a “statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located...”<sup>68</sup> As a result, these groups argue that, despite the statutory protections and defenses afforded to recipients under the DMCA, the DMCA takedown process is being misused because users with meritorious fair use and misrepresentation claims are not able to avail themselves of them.

To the extent these claims have any validity, the CASE Act addresses them by creating a low-cost, efficient, and streamlined way to resolve copyright disputes that is accessible and affordable to individuals and small businesses and is a viable alternative to federal court. Furthermore, if, in fact, users with meritorious defenses or viable misrepresentation claims are not using the counter-notice process because they are intimidated by having to agree to litigate in federal court, the CASE Act provides an ideal alternative by allowing them to assert their claims and defenses without the complexity and trepidation they associate with federal court.

Copyright owners already bear the burden for enforcing their copyrights on the internet, so if there were legislative changes to expand 512(f), it would potentially open these owners up to “limitless lawsuits just [for] policing [their] copyrighted material on the Internet.”<sup>69</sup> The overwhelming majority of takedown notices are legitimate; lowering the threshold for what is considered an illegitimate notice, or increasing penalties would severely undermine the statutory scheme with little positive benefit. As such, any effort to expand the scope of 512(f) liability or otherwise legislate new penalties is unwarranted, and would effectively create more barriers to enforcement for copyright holders.

## VII. Standard Technical Measures

The House Judiciary Committee’s 1998 report on the DMCA stated that “technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age,” and the Committee “strongly urge[d] all of the affected parties expeditiously to

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Sherwin Siy, *Court Says Fair Use Still Matters in Takedowns: Here’s Why That’s a Real Victory*, PUBLIC KNOWLEDGE (Sept. 16, 2015); <https://www.publicknowledge.org/blog/court-says-fair-use-still-matters-in-takedowns-heres-why-thats-a-real-victory/>. Public Knowledge (PK) says states that “bringing a 512(f) case is still an expensive proposition” (emphasis added); *See also*, Comments of Engine, GitHub, Kickstarter, Medium, and Redbubble, Section 512 Study: Notice and Request for Public Comment (April 1, 2016). Available at: <http://static1.squarespace.com/static/571681753c44d835a440c8b5/t/573d28927c65e401e66176df/1463625874743/Engine-Copyright-Office-512-NOI-Comments.pdf>. Engine says “...the economic injury attributable to any individual takedown is unlikely to justify the costs of bringing a lawsuit under §512(f).” (emphasis added)

<sup>68</sup> 17 U.S.C. 512(g)(3)(D); *See* Higgins, McSherry, and Nazer, *supra* note 65. The EFF says “many users are intimidated by the requirement that they agree to be sued in federal court if the rightsholder wants to claim copyright infringement”; *See also* Comments of Engine, *supra* note 65. Engine states that “§ 512(g)’s requirement that senders of counter-notices consent to jurisdiction where they are located and agree to accept service of process can be intimidating to many users. ...Even users who strongly (and correctly) believe their use is fair or otherwise lawful may lack the legal sophistication to feel confident about making such a sworn commitment.”

<sup>69</sup> *Ouellette v. Viacom Int’l, Inc.*, No. CV-10-133-M-DWM-JCL, slip op. (D. Mon. Mar. 13, 2012).

commence voluntary, interindustry discussions to agree upon and implement the best technological solutions available to achieve these goals.”<sup>70</sup> This rationale led Congress to include 512(i) in the DMCA, specifically conditioning eligibility for safe harbor protection on whether a service provider “accommodates and does not interfere with standard technical measures,” (STMs) which are to be developed based on “a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.”

Unfortunately, since the inception of the DMCA nearly 22 years ago, there have yet to be any standard technical measures adopted, effectively rendering the provision useless. *This is one of the most significant drawbacks to the effective application of the notice-and-takedown process*, as it nullifies a provision which is designed to facilitate cooperation between OSPs and copyright owners. To date, platforms like YouTube, Facebook, Scribd, and Dropbox have implemented technology capable of identifying and removing unauthorized copyrighted material posted by their users. Technologies like these should be shared with other OSPs in the context of 512(i), which specifies that STMs must be made “available to any person on reasonable and nondiscriminatory terms.”

As written, there is enormous potential for the STM provision to incentivize new technologies and encourage stakeholder collaboration. However, to satisfy the requirements of the statute, stakeholders would need to come together “in an open, fair, voluntary, multi-industry standards process.”<sup>71</sup> And that is not happening, thereby making the STM provision in Section 512(i) irrelevant. That is clearly not what Congress intended. Congress did not include 512(i) in the DMCA to see it go unused for 22 years. Reviving 512(i) may be the easiest and most important thing that could result from Congressional review of Section 512.

## **VIII. Next Steps and Possible Solution**

While there is much in Section 512 that is not working as Congress intended, the notice and takedown process can provide a workable legal framework for OSPs and copyright owners to protect against infringement of copyrighted content on the internet. What needs to be improved is the implementation and application of the process to better respond to highly advanced online infringement tactics and the limited resources of smaller creators and OSPs.

There is no silver bullet solution to fix what ails Section 512. Instead, we must consider a host of different options, some of which include:

### **a. Technological Solutions**

Automated technologies—available to copyright owners and OSPs no matter their size—must be an integral part of any forward-looking solution. Because of the explosion of infringing content online, it is essential that such solutions to the extent reasonable, include the use of

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<sup>70</sup> See H.R. Rep, *supra* note 4, pt. 2 at 61.

<sup>71</sup> 17 U.S.C. § 512(i)(2)(A).

automated technologies. Automated technologies can intervene during the upload process, and can simplify the takedown process to effectively shorten the time that infringing content remains available for consumption. The vast majority of notices issued by reputable rights owners are legitimate. Even though the occasional so-called “bad notice” may slip through using automated technologies, the benefits of such services far outweigh the rare cases of “bad notices.” And while we recognize that these automated technologies may not work for all OSPs, we remain optimistic that investment in new technologies and collaborative agreements are essential to a healthy online ecosystem.

Proper implementation and interpretation of all of the Section 512 provisions will also incentivize OSPs to invest in automated technologies for copyright owners and their users. That means, as explained in more detail above, finally implementing STMs under section 512(i).

It has been said that section 512(m), which relieves OSPs of any duty to monitor, in conjunction with section 512(c)(1)(A)(ii), which permits an OSP to be held liable for “red-flag” knowledge, discourages ISPs from adopting certain technologies for fear that if they do, they may be liable under section 512(c). OSPs that reasonably implement effective filtering systems to monitor for and take affirmative action against piracy should be rewarded, not penalized. Consequently, we would be interested in exploring this dynamic further with the OSP community to determine the viability of eliminating the potential for liability through “red-flag” knowledge for those OSPs that effectively monitor for and take action against infringement.

Individual creators would benefit from greater access to automated technologies to ease the burden of filing takedown notices. The biggest hurdle is cost: many automated technologies are not yet affordable for the average individual creator, but further discussions of the interested parties could reveal at least some solutions to the problem. Generally, OSPs (at least the larger entities) are better equipped to implement and extend access to automated technologies than individual creators.

#### **b. Private Sector Voluntary Agreements**

We enthusiastically support the use of voluntary, collaborative efforts to address the problem of online infringement. Such initiatives reduce and equitably apportion the burden of reducing infringement, removing profit from infringement, and educating users about legal alternatives. Any initiative, whether voluntary or statutory, cannot be considered effective if the burden of action falls primarily on the creator; everyone in the online ecosystem has a role to play in creating a fair and sustainable marketplace. We also believe that these efforts should complement the DMCA rather than supplement where the legislation falls short. For example, while a growing number of ISPs are voluntarily implementing content filtering technology, if STMs had been adopted in a collaborative manner pursuant to section 512(i), there would be less of a need for independently developed technology to balance the burden where the law has failed to.

There is a long and successful history of stakeholders developing voluntary agreements to further mutual objectives. Some examples include:

- The Trustworthy Accountability Group (TAG) initiative, launched in February 2015 validates tools and services that take measures to prevent advertisements from running on pirate sites.<sup>72</sup> According to the Digital Citizens Alliance, ad-supported pirate sites can be extraordinarily profitable, with many displaying ads from “blue chip premium brands.”<sup>73</sup>
- In 2007, various stakeholders agreed upon the Principles for User Generated Content to eliminate infringing content, while still taking into account fair use considerations. This informal understanding at least illustrates a willingness of OSPs and copyright owners to agree on a middle ground.<sup>74</sup>
- And finally, collaboration between copyright owners and payment processors like Visa, Mastercard, and PayPal—encouraged by the Intellectual Property Enforcement Coordinator—has led to a process that prevents known infringing sites from access to payment networks. This helps cut off the revenues that such sites rely on to operate.

Private-sector voluntary agreements are a critical tool for addressing online infringement. It is time that the stakeholders in the internet ecosystem explore what mutually beneficial agreements may be possible moving forward.

### c. Legislation

Legislative proposals could be enacted to help address some of the problems with Section 512, without the need for amending section 512. The CASE Act is a good example of this type of initiative. Copyright Office Modernization legislation could also address some of the problems discussed above that was created by the *Fourth Estate* decision. For example, modernization legislation could provide that when a counter notice is filed, the copyright owner is allowed to institute a civil action for infringement of the copyright against the filer immediately (without waiting for the Office to act on the registration application) once the registration application is filed that meets the statutory requirements and other requirements are met.

In addition, Congress should enact legislation to align criminal penalties for infringement of the public performance right, currently at most a misdemeanor, with those for infringement of

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<sup>72</sup> TAG, a coalition of online advertising stakeholders, including advertising agencies, ad placement networks, media companies, and consumer protection organizations. Press Release, Advertising Industry Launches Initiative to Protect Brands Against Piracy Websites, Trustworthy Accountability Group (February 10, 2015), <https://www.tagtoday.net/advertising-industry-launches-initiative-to-protect-brands-against-piracy-websites/>.

<sup>73</sup> DIGITAL CITIZENS ALLIANCE, GOOD MONEY GONE BAD: DIGITAL THIEVES AND THE HIJACKING OF THE ONLINE AD BUSINESS (Infograph) (2014), available at <http://www.digitalcitizensalliance.org/cac/alliance/resources.aspx>.

<sup>74</sup> The agreement was made by CBS, Disney, YouTube, and other copyright owners and OSP entities.

the reproduction and distribution, which can result in felony charges for willful and egregious infringement. Although criminal enforcement of copyright infringement is a small portion of federal law enforcement overall, the presence of criminal penalties plays a significant role in deterring willful and egregious infringement. By deterring this criminal conduct, legislation to close the streaming loophole would therefore help reduce some of the strain on the notice and takedown system.

#### **d. Amending Section 512**

If technological solutions, voluntary agreements and other legislative proposals prove to be unavailing or ineffective, then Congress should consider other alternatives, such as amending section 512. While copyright owners collectively value the same end result—a digital environment that neither supports, nor cultivates piracy—different groups have different ideas about how best to achieve that end. One recommendation that is strongly supported by many Copyright Alliance members, but not all, is implementation of a “notice and staydown” system. Before the possibility of a “notice and staydown” provision can be fully considered we all need to have a better (and common) understanding of what that means and how that would be implemented. In concept, a “notice and staydown” system makes a tremendous amount of sense, but neither legislation nor voluntary measures can be implemented based solely on a broad concept. We think the concept of a notice and staydown system is ripe for discussion between the copyright and OSP communities to better determine next steps.

Further, as explained above, the courts can alleviate some of the burden felt by individual creators by properly adhering to the red flag knowledge standard laid out in Section 512. Congress may want to consider fine-tuning this provision so that when courts consider the red flag knowledge standard in the future they interpret it correct and as Congress intended.