

Before the
U.S. COPYRIGHT OFFICE, LIBRARY OF CONGRESS

In the Matter of
Section 512 Study
Docket No. 2015-7

Comments of Electronic Frontier Foundation

April 1, 2016

Submitted by:

Corynne McSherry
Kit Walsh
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
corynne@eff.org

The Electronic Frontier Foundation (EFF) appreciates the Copyright Office's efforts to consider the impact of section 512 of the Digital Millennium Copyright Act. EFF is a member-supported, nonprofit, public interest organization dedicated to ensuring that copyright law advances the progress of science and the arts and enhances freedom of expression. Founded in 1990, EFF represents tens of thousands of dues-paying members, including consumers, hobbyists, computer programmers, entrepreneurs, students, teachers, and researchers, who are united in their desire for a balanced copyright system that provides adequate incentives for creators, facilitates innovation, and ensures broad access to information in the digital age.

EFF has been involved, as amicus or party counsel, in numerous court cases interpreting section 512, including *Lenz v Universal*, *Lessig v. Liberation Music*, *MoveOn v. Viacom*, *Tuteur v. Wesley Corcoran*, *Sapient v. Geller*, *SHARK v. PRCA*, *Viacom v. YouTube*, *UMG Recordings v. Veoh* and *Columbia Pictures v. Fung*. We regularly counsel individuals who have been targeted by takedown notices pursuant to the DMCA regarding their rights and options. We have also represented the interests of users and innovators on multiple formal and informal public processes assessing the notice and takedown system, in the United States and abroad. In particular, we have worked to

highlight the impact of section 512 on online expression and innovation, and to ensure that section 512 is properly understood by courts, policymakers and the public.

Before turning to the questions themselves, we note our dismay that the Copyright Office has chosen not to allow for Reply Comments. In the interests of developing a complete record on these important issues, we urge the Office to amend its Notice of Inquiry to allow for further input directed solely to responding to Comments submitted in this initial round.

Question 1: Are the section 512 safe harbors working as Congress intended?

In order to evaluate whether the safe harbors are working as intended, it is essential to recall what that intent was: to facilitate “the robust development and world-wide expansion of electronic commerce, communications, research, development, and education.”¹

Congress correctly understood that the application of ambiguous copyright doctrines to new Internet technologies would put service providers in an impossible position. In order to provide services to millions of users, service providers necessarily must make, manipulate, and transmit multiple copies of content at several stages of their technical processes. These myriad copies might arguably infringe one or more of the display, performance, distribution, reproduction, or other rights in copyrighted content. Thus, “without clarification of their liability, service providers [would] hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet.”²

During the relevant Senate hearings, Roy Neel of the United States Telephone Association stated the problem as follows:

We have no way of knowing what those trillions of bits of information are flowing over our networks. We simply cannot do it, and to be held liable for those transmissions is simply nonsense and it will tie us up in court, create more litigation and more work for lawyers, but won't do anything to advance the construction and deployment of the Internet, nor will it protect copyright owners to any significant degree.³

¹ S. Rep. 105-190, at 1-2.

² S. Rep. 105-190, at 8.

³ Copyright Infringement Liability of Online and Internet Service Providers: Hearing Before the S. Judiciary Comm. on S. 1146, S. Hrg. 105-366, 105th Cong. 24 (1997), at 29;³ see also *id.* at 30 (Neel testimony noting that “ISPs risk being held liable for massive damages for copyright infringement perpetrated by individuals without the knowledge of the ISP”).

In fact, by the time Congress took up the issue in 1997, online service providers had already been embroiled for some time in copyright litigation over the activities of their users.⁴

Accordingly, Congress passed “Online Copyright Infringement Liability Limitation Act” (OCILLA). OCILLA, now commonly known as section 512 of the DMCA, created a set of “safe harbors” designed to “provide greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” *Ellison v. Robertson*, 357 F.3d at 1076 (quoting S. Rep. 105-190, at 20). The goal was clear: “[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁵

In a nutshell, the statute replaced the murky, judge-made standards that characterize copyright’s secondary liability doctrines with detailed, relatively predictable rules.⁶ The statute creates four statutory safe harbors with detailed provisions setting out “rules of the road” for service providers. So long as their activities fall within one of the four safe harbors, service providers may “opt in” to this alternate, more definite, set of rules by meeting specific statutory prerequisites.⁷ The statute also clarifies the outer limits of a service provider’s obligations—for example, by making it clear that a service provider need not monitor its service or affirmatively seek facts indicating infringing activity in order to enjoy the safe harbor.⁸ Copyright owners, for their part, were given an expedited, extra-judicial “notice-and-takedown” procedure for obtaining redress against alleged infringement.⁹

⁴ See, e.g., Jeffrey R. Kuester & Daniel R. McClure, *SPA v. ISPs: Contributory Copyright Infringement in Cyberspace*, Intellectual Property Today, Feb. 1997, at 8 (describing lawsuits by the Software Publishers Ass’n against online service providers); Joseph V. Meyers III, Note, *Speaking Frankly about Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and The White Paper*, 49 VAND. L. REV. 439, 478-81 (1996) (discussing music publisher suit against AOL bulletin board service for allowing users to upload and download music files).

⁵ S. Rep. 105-190, at 8.

⁶ See 3 NIMMER § 12B.01[A][1] (describing conflicting jurisprudence prior to 1998).

⁷ These statutory prerequisites include registering a Copyright Agent, 17 U.S.C. § 512(c)(2), implementing a notice-and-takedown policy, 17 U.S.C. § 512(c)(1)(C), accommodating standard technical measures, 17 U.S.C. § 512(i)(1)(B), and adopting a policy of terminating repeat infringers, 17 U.S.C. § 512(i)(1)(A).

⁸ See 17 U.S.C. § 512(m)(1).

⁹ 17 U.S.C. § 512(c)(1)(C),

Almost two decades later, it is abundantly clear that the safe harbors paved the way for an economic explosion. Thanks to the safe harbors, new services and businesses have emerged, from YouTube to eBay, Etsy and so on, which in turn have become platforms for individuals and small businesses to reach customers. Artists – from musicians to filmmakers to comedians – can reach fans directly, and many have become wealthy in the process. Indeed, the entertainment industry has continued to grow over the past decades because of, not in spite of, the development of new technologies and platforms.¹⁰

It is also clear that free expression and creativity are thriving. The Internet has become the most revolutionary platform for the creation and dissemination of speech that the world has ever known. Interactive platforms like video hosting services and social networking sites have become vital not only to democratic participation but also to the ability of users to forge communities, access information instantly, and discuss issues of public and private concern. With the help of online service providers like Wikipedia, the Internet Archive, Google, YouTube, Automattic, Twitter, Facebook, and many others, individuals with little technical knowledge or money can today find, create, reproduce, disseminate, and respond to content, interacting with a global audience.

Without the predictability provided by section 512, though, the Internet would be a much less hospitable place for free speech and entrepreneurship.

First, if a service provider faces the possibility of potentially unlimited legal liability for content hosted, transmitted, or disseminated through its services by a small minority of users, it will feel compelled to scrutinize and limit all user activities. This is likely to lead to over-blocking, sacrificing lawful content in an effort to limit potential litigation. The incentive to over-block is especially strong (and can cause particular harm to free speech) where, as is often the case, service providers are not able to easily determine if the content is unlawful on its face. And because the cost to investigate each allegation of infringement will almost always be greater than the cost of simply removing the content, intermediaries who fear liability have a financial incentive to err on the side of removing content. This, in turn, will only encourage abuse on the part of the governments or private litigants seeking to take down materials for censorial, rather than infringement, reasons.

Second, if service providers face potentially huge legal liabilities for the unlawful activities of a tiny minority of users, they may simply decide that it is impossible to offer certain kinds of online services, even where those services are used predominantly for lawful purposes. For example, users post more than 400 hours of video to YouTube *every*

¹⁰ See generally, Floor 64, *The Sky is Rising*, available at <https://www.techdirt.com/skyisrising/> (collecting examples)

minute, the vast majority of which is noninfringing and perfectly lawful.¹¹ If liability concerns arising from a minority of these videos compelled a service provider to examine each video before allowing a user to post it online, the service simply could not continue to operate as an open forum for user expression. The same is true of the countless online forums and blogs where users post hundreds or thousands of comments every hour. In the absence of the DMCA safe harbors, fear of liability would likely lead online service providers to adopt the same “clearance culture” that characterizes television, radio, and other mass media outlets—where even entirely law-abiding creators cannot find an audience without first satisfying a gauntlet of lawyers and insurers.

Given the explosion of the Internet economy and online speech under section 512, and the predictable chill that would result from undermining its safe harbors, Congress should resist any imprecation to reverse course on intermediary liability.¹²

Question 7: How efficient or burdensome is section 512’s notice and takedown process for addressing online infringement?

As noted, rightsholders also benefitted from the DMCA bargain. In addition to fostering new platforms for rightsholders to share their work with new audiences in new ways, section 512 gave rightsholders an expedited process for effectively removing content from the Internet. Complaints that the takedown process is an inefficient or burdensome way to remove infringing material from the Internet should recall what the process looked like before the DMCA. In 1997, a rightsholder who wished to take allegedly infringing material offline quickly would have to go to court, obtain a temporary restraining order, and then ensure that a service complied. Today, a rightsholder can get the same relief by simply sending an email or filling out a form. This is an extraordinary power that is too often discounted.

Some rightholders have suggested that service providers should be required to do more to police infringement using their systems, in particular that they should take additional measures to ensure that any content that has been identified as infringing be

¹¹ See *Vidcon 2015 Haul: Trends, Strategic Insights, Critical Data, and Tactical Advice*, Reelseo, available at <http://www.reelseo.com/vidcon-2015-strategic-insights-tactical-advice/>

¹² See generally, e.g., Fifth Era, *The Impact of Internet Regulation on Early Stage Investment*, available at <https://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/5487f0d2e4b08e455df8388d/1418195154376/Fifth+Era+report+lr.pdf> at 23 (investors discouraged by uncertain legal environment)

permanently removed from all of their platforms. Some call this “notice and staydown,” others call it “filter everything.”¹³

We would strongly oppose any legislation to that effect. The existing safe harbors were carefully crafted to ensure that service providers could play a important role in policing infringement while providing powerful platforms for free expression and innovation. Conditioning liability limitations on a service provider’s ability to actively police potential infringement would likely lead to over-blocking and/or aggressive filtering of user-generated content. For the reasons discussed in the previous section, that would make the Internet would be a much less hospitable place for free speech and innovation.

It could also undermine user privacy. Congress recognized the importance of protecting user privacy, which is why it included section 512(m):

(m) Protection of Privacy. — Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on —

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i)¹⁴

It is difficult to imagine how an ordinary service provide could ensure allegedly infringing content was never re-posted without engaging in precisely the kind of monitoring the section 512(m) excludes as a safe harbor requirement.

In addition, while some service providers are sufficiently well-resourced that they *might* be able to comply with such a requirement, most are not. In practice, a “filter-everything” would prevent many valuable and innovative services from ever launching, to the detriment of commerce and free expression.

Finally, any proposal that would amount to an Internet blacklist would suffer the same problems as the unconstitutional legislative proposals that were soundly defeated in

¹³ Elliot Harmon, “*Notice-and-Stay-Down*” Is Really “*Filter-Everything*”, EFF DEEPLINKS BLOG, (Jan. 21, 2016) <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything>

¹⁴ EFF will not focus here on the questions related to standard technical measures, except to observe that we are not aware of any technical measures that meet the definition set forth in section 512(i).

2012.¹⁵ EFF hopes that all stakeholders would prefer to focus the discussion on positive steps, rather than reviving old debates.

Question 9. Please address the role of both human and automated notice and takedown processes under section 512, including the respective feasibility, benefits and limitations.

Automated processes can play a role in identifying *potentially* infringing content. However, such processes cannot substitute for human review. Indeed a recent study of takedown notices using automated processes identified serious problems. For example:

- 4.2% (approximately 4.5 million) were fundamentally flawed because they targeted content that clearly did not match the identified infringing work.
- Nearly a third (28.4%) had other characteristics that raised questions about their validity.
- Greater than 15% of takedown requests appeared not to comply with most substantive statutory requirements: sufficiently identifying the allegedly infringing work or the material alleged to infringe.
- 7.3% involved potential fair uses.
- 2.3% were based on legal complaints other than copyright, such as trademark or defamation.¹⁶

This empirical work is consistent with EFF’s practical experience. To take just a few examples: in 2013, Fox Broadcasting sent a takedown notice targeting author Cory Doctorow’s book, *Homeland*, because the book shares a title with a popular television show. In 2014, court documents in the case of *Disney v. Hotfile* revealed that Warner Bros used “robots” (the company’s own term) to send thousands of infringement accusations without human review, based primarily on filenames and metadata rather than inspection of the files’ contents. The documents also showed that Warner knew its

¹⁵ *SOPA/PIPA: Internet Blacklist Legislation*, available at <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill>

¹⁶ See Jennifer Urban, Joe Karaganis and Brianna L. Schofield, *Notice and Takedown in Everyday Practice* (“Urban Study”), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628, at 88

automated searches were too broad and that its system was taking down content in which Warner had no rights.¹⁷

EFF has itself been a target. In 2015, German-based Total Wipes Music Group issued series of takedown notices targeting, among other things, an EFF webpage describing how to use PGP for Mac OS X—a webpage within our Surveillance Self-Defense guide. The notice that cites the EFF webpage as an “allegedly infringing URL” purports to protect an album called “Cigarettes” on Spanish music label Mona Records. But *not one* of the seven allegedly infringing URLs listed in the notice even refers to the album, let alone in an infringing way. Another notice issued by Total Wipes to Google two days earlier purports to target pirates of the album “In To The Wild – Vol.7” on music label Aborigeno Music. None of the 95 allegedly infringing URLs had anything to do with music. The notice instead listed generic download pages for some of the world’s most popular online services, including Skype, Tor, Dropbox, LibreOffice, Python, and WhatsApp.¹⁸

Total Wipes, which represents 800 international labels, stated in an email to Ars Technica that the recent notices were the result of a bug in their automated anti-piracy script. According to the email, “several technical servers [sic] problems” during the first week of February caused their automated system to send “hundreds” of DMCA notices “not related at all” to any of their copyrighted content.

But “bugs” are only part of the problem. According to the DMCA, a takedown notice must be based on a “good faith belief” that the targeted content’s use of copyrighted material is not authorized by law. Automated processes, without any human review, cannot satisfy this standard.

In light of the foregoing, we are pleased that a recent study suggests that many rightholders recognize the important of human involvement in the takedown process, and the need to avoid user communities and fan bases by misidentifying transformative uses.¹⁹ Unfortunately, that recognition has not prevented a raft of abusive takedowns.

¹⁷ Mitch Stoltz, *In Hotfile Docs, Warner Hid References to “Robots” and Its Deliberate Abuse of Takedowns*, EFF DEEPLINKS BLOG, (Oct.9, 2014), <https://www.eff.org/deeplinks/2014/10/hotfile-docs-warner-hid-references-robots-and-its-deliberate-abuse-takedowns>

¹⁸ Jamie Williams, *Absurd Automated Notices Illustrate Abuse of DMCA Takedown Process*, EFF DEEPLINKS BLOG (Feb. 24, 2015) <https://www.eff.org/deeplinks/2015/02/absurd-automated-notices-illustrate-abuse-dmca-takedown-process>

¹⁹ See Urban Study, *supra* n. 16, at 35.

Question 12: Does the notice-and-takedown process sufficiently protect against abusive or unfounded notices?

No. Takedown abuse is much too common. For example:

- Journalists uncovered a well-funded and sustained campaign by the government of Ecuador to abuse the DMCA to silence criticism of President Rafael Correa.²⁰
- Gannett Co. Inc., a massive media conglomerate that owns, among many other publications, the *Courier-Journal* in Kentucky. The *Courier-Journal*'s editorial board interviewed a Democratic candidate for Senate, Alison Lundergan Grimes, and streamed the interview live. That stream included 40 uncomfortable seconds of the candidate apparently trying to avoid admitting she voted for President Obama. A critic posted a video clip of those 40 seconds online — and Gannett promptly took it down.²¹
- Artist Jonathan McIntosh found his remix video *Buffy vs. Edward: Twilight Remixed* — which was mentioned *by name* in official recommendations from the U.S. Copyright Office regarding DMCA exemptions for transformative noncommercial video works — subject to a DMCA takedown notice.²² It took three months of intense legal wrangling before Lionsgate finally relinquished its claim.
- An Australian music publisher used YouTube's automated takedown process, Content ID, and the DMCA to force the takedown of an entire lecture delivered and posted by Professor Lawrence Lessig because it included illustrative clips of a number of videos set to a piece of music in which the company held copyright. When Professor Lessig counter-noticed pursuant to Section 512(g), the publisher, Liberation Music, threatened to take legal action within 72 hours if Professor Lessig did not withdraw his counter-

²⁰ James Ball & Paul Hamilos, *Ecuador's President Used Millions of Dollars of Public Funds to Censor Critical Online Videos*, BuzzFeedNews (Sept. 24, 2015), available at www.buzzfeed.com/jamesball/ecuadors-president-used-millions-of-dollars-of-public-funds

²¹ Corynne McSherry, *For Shame: Gannett Abuses DMCA to Take Down Political Speech*, EFF DEEPLINKS BLOG (Oct. 10, 2014), available at <https://www.eff.org/deeplink/s/2014/10/shame-gannett-abuses-dmca-take-down-political-speech>

²² See Jonathan McIntosh, *Buffy vs. Edward Remix Unfairly Removed by Lionsgate* (Jan. 9, 2013), available at <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

notice.²³ Unfortunately, this was not the first time Professor Lessig had seen his lectures taken down due to a copyright claim.²⁴

- BMG Rights Management send a takedown targeting an official Romney campaign ad that showed President Obama singing a line from the Al Green song “Let’s Stay Together.”²⁵
- Radio host Rush Limbaugh sent a DMCA notice to YouTube demanding it take down a seven-minute montage of Limbaugh's "most vile smears."²⁶
- The Alberta tourism bureau, Travel Alberta, sent a takedown notice targeting a satirical video that happened to use four seconds of a Travel Alberta advertisement.²⁷ The video was tied to a fundraising campaign by Andy Cobb and Mike Damanskis, Los Angeles-based satirists who have authored over 100 political comedy videos.
- Film critic Kevin B. Lee found his entire account removed from YouTube in response to takedown notices complaining of clips Lee used in the criticism he posted there.²⁸

²³ See, e.g., Michael B. Farrell, *Online Lecture Prompts Legal Fight on Copyright*, BOSTON GLOBE (Aug. 26, 2013), available at <http://www.bostonglobe.com/business/2013/08/26/harvard-law-professor-sues-record-company-over-phoenix-lisztomania/jqYkgFaXSgGpd2hL2zsXsK/story.html>.

²⁴ Lawrence Lessig, *Update on Warner Music (UPDATED) (AGAIN)*, LESSIG (Apr. 30, 2009), available at <http://www.lessig.org/2009/04/update-on-warner-music/>.

²⁵ Timothy B. Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, Ars Technica (July 16, 2012), available at <http://arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/>

²⁶ See *Rush Limbaugh Demands YouTube Remove Daily Kos Video . . . Watch It Here*, Daily Kos, (Apr. 23, 2012), available at <https://www.dailykos.com/story/2012/4/23/1085791/-Rush-Limbaugh-demands-YouTube-remove-Daily-Kos-video-watch-it-here>

²⁷ See Mitch Stoltz, *Using Copyright to Silence Oil Sands Satire? How Crude.*, EFF DEEPLINKS BLOG (Aug. 20, 2013), available at <https://www.eff.org/deeplinks/2013/08/using-copyright-silence-oil-company-satire-how-crude>.

²⁸ See Nate Anderson, *What Fair Use? Three Strikes and You’re Out... of YouTube*, Ars Technica (Jan. 15, 2009), available at <http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars>.

- News organizations have repeatedly used the DMCA takedown process to target political ads that contain clips of news broadcasts as part of their commentary.²⁹
- As part of a larger crusade to censor its music from YouTube videos, even when those activities would clearly qualify as fair use, Warner Brothers targeted new parody video genre pioneered by YouTube creator that goes by the moniker Dust Films: the “literal video.” The idea is to change the lyrics to famous music videos to describe what is actually going on in the video itself. The results are hilarious. Two examples, both of which were removed on YouTube (but still available at FunnyOrDie.com), are Under the Bridge and Take on Me.³⁰
- The musician Prince sent a series of takedown notices targeting fan videos—even though he did not own the music in question.³¹

The above is just a tiny sample of the abuses we hear about every day. Many more are documented at the EFF’s Takedown Hall of Shame.³²

In addition, in order to improve public participation in this study, EFF asked readers of our blog to share their recent experiences with DMCA takedowns. Here is some of what they described:

- A videomaker who uses iMovie has had numerous videos taken offline because he uses the audio tracks included with the iMovie package, something expressly permitted by the iMovie license agreement.

²⁹ See, e.g., *Center for Democracy & Technology, Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, available at http://www.cdt.org/files/pdfs/copyright_takedowns.pdf (describing how broadcasters sent DMCA takedown notices to remove political ads from a number of campaigns without considering fair use and finding that such removal chilled political speech).

³⁰ See *Red Hot Chili Peppers-Under the Bridge: Literal Video Version* http://www.funnyordie.com/videos/16e4ead1dc/under-the-bridge-literal-video-version-from-dustfilms?_cc=d_&_ccid=false

³¹ See *Prince vs. Prince Fan Sites*, DIGITAL MEDIA LAW PROJECT (Jan. 25, 2008), available at <http://www.dmlp.org/threats/prince-v-prince-fan-sites> (collecting Prince’s threats).

³² *Takedown Hall of Shame*, Electronic Frontier Foundation, available at www.eff.org/takedowns

- The maker of several acclaimed noncommercial mashups has been the target of so many takedown notices that he has been forced to self-host his videos, including a mashup of The Beach Boys “God Only Knows” and the Beatles “And I Love Her.”³³
- A videomaker had his video targeted based on the audio track – but that track was in fact an original composition
- A YouTube creator had his video targeted based on the audio track. Not only was the use a fair use (it was a small snippet, played backwards), the sender of the notice was not the rightsholder – it represented another YouTube creator who had used the same snippet in a different video.

Each of these takedowns sent a message that our nation’s traditional reverence for free expression does not apply if that expression happens to make use, even lawful use, of a copyrighted work.

EFF is aware that some rightsholders claim that improper and unfounded takedowns are rare, and that stories like these are merely anecdotal evidence of a minor problem.

That claim should hold little weight. If even a small percentage of the millions of takedown notices sent each year are improper, that percentage still represents a significant swath of lawful speech. Moreover, “anecdotes” like these have been confirmed not only by the comprehensive study discussed above, but also by reports from service providers such as Google, Twitter, Automattic and Tumblr.³⁴ Indeed, service providers have confirmed that unfounded DMCA notices are common and significantly burdensome.³⁵ For example, Automattic Inc.’s more recent transparency report states that 11% of the takedown notices it received between July and December, 2015, were abusive. In comments filed in this proceeding, Automattic reports that of the takedown notices received in 2014 and 2015, “about 10% of the notices of claimed infringement we received contained the elements of notification required by section 512(c)(3), but were directed at clear fair uses, clearly uncopyrightable content, or contained clear

³³ *Beach Boys v. The Beatles-And I Love Her? God only Knows (BRAT Mashup)*, Brat Productions, http://bratproductions.com/mixes/mashups/brat_andiloveher_godonlyknows.html

³⁴ See Urban Study, supra n. 16; Brief of Amici Curiae Automattic, Inc., Google, Inc., Twitter, Inc., and Tumblr, Inc., Supporting Petition for Rehearing En Banc, available at <https://www.eff.org/document/amicus-brief-automattic-google-twitter-tumblr-iso-petition-rehearing>

³⁵ *Id* at 3-12 (giving numerous examples and describing the resulting burden).

misrepresentations regarding copyright ownership.”³⁶ That represents hundreds of notices, and, by extension, hundreds of unfairly targeted uses.

In short, improper takedowns are a real and persistent problem.

Question 15: Please describes and assess the effectiveness voluntary measures and best practices, including financial measures, filtering and takedown procedures.

A. Filters Do Not Substitute for Human Review

As noted, automated systems for sending DMCA takedown notices are a serious problem. Equally problematic are “filters” that some service providers employ to help prevent copyrighted content from being uploaded at all (and/or to monetize that content). The most well-known example of this is YouTube’s ContentID system. The system has been plagued with problems from the beginning, but here are just a few more recent examples of improper flags:

- A YouTube user uploaded a 12-second loop of his cat purring, which the ContentID system mistakenly matched to content owned by EMI Publishing and PRS.³⁷
- *The Daily Conversation*, a YouTube channel that seeks to present independent news, received multiple ContentID matches based on a compilation video looking at 10 years of viral video on the site.
- English rapper and songwriter, Dan Bull received multiple Content ID matches for a video he made in in 2010 criticizing the Anti-Counterfeiting Trade Agreement (ACTA), an onerous trade agreement negotiated in secret between counties that was precursor to the Trans Pacific Partnership (TPP). One of the ContentID matches was from an entity that *itself* sampled the background vocals and music, and *does not* hold rights to enforce them via ContentID.

And so on.³⁸ Users can appeal ContentID matches. But users report that the process can both challenging and confusing.

³⁶ Comments of Automattic, Inc., In the Matter of Section 512 Study, Docket No. 2015-7, March 31, 2015

³⁷ *YouTube Flags Cat Purring as Copyright Infringing Music*, Torrent Freak (Feb. 11, 2015), available at <https://torrentfreak.com/youtube-flags-cat-purring-as-copyright-infringing-music-150211/>

And Content ID is not the only filtering system with problems. In 2012, UStream blocked a NASA video of the Curiosity landing on Mars was automatically blocked due to a mistaken copyright claim.³⁹ More recently, a group of musicians reported that a song they independently produced and licensed, on nonexclusive terms, to a movie studio released a song that was licensed for use in a movie and the soundtrack to a major motion picture, was flagged and then blocked on Soundcloud (which uses Audible Magic).

To help mitigate these kinds of issues, EFF and other public interest groups have endorsed a set of parameters for filtering technologies.⁴⁰

- **Three Strikes Before Blocking:** The use of “filtering” technology should not be used to automatically remove, prevent the uploading of, or block access to content unless the filtering mechanism is able to verify that the content has previously been removed pursuant to an undisputed DMCA takedown notice or that there are “three strikes” against it:
 1. the video track matches the video track of a copyrighted work submitted by a content owner;
 2. the audio track matches the audio track of that same copyrighted work; and
 3. nearly the entirety (e.g, 90% or more) of the challenged content is comprised of a single copyrighted work (i.e., a “ratio test”).

If filtering technologies are not reliably able to establish these “three strikes,” further human review by the content owner should be required before content is taken down or blocked.

- **Humans Trump Machines:** Human creators should be afforded the opportunity to dispute the conclusions of automated filters. If a user’s video is “matched” by an automatic filter, the user should be promptly notified by the service provider of the consequences of the “match” and given the opportunity to dispute the conclusions of the filtering process. Notice should be provided

³⁸ *YouTube’s Content-ID Piracy Filter Wreaks Havoc*, Torrent Freak (Sept. 8, 2011), available at <https://torrentfreak.com/youtubes-content-id-piracy-filter-wreaks-havoc-110908/>

³⁹ Parker Higgins & Kurt Opsahl, *Copyright’s Robot Wars Heat Up as Algorithms Block Live-Streams First and Ask Questions Later*, EFF DEEPLINKS BLOG (Sept. 7, 2012), available at <https://www.eff.org/deeplinks/2012/09/copyrights-robot-wars-heat-algorithms-block-live-streams-first-and-ask-questions>

⁴⁰ Fair Use Principles for User-generated Content, available at <https://www.eff.org/pages/fair-use-principles-user-generated-video-content>

to the user whether or not the “match” results in the blocking of content (e.g., a parodist may not want the target of the parody receiving a share of revenues generated by it). If the user disputes a “match” pursuant to the above dispute mechanism provided by the service provider, the provider should promptly notify the relevant content owner. The service provider may choose to impose a brief “quarantine” period on the content (no more than three business days), in order to afford content owner an opportunity to issue a DMCA takedown notice after human review of the disputed content.

- **Minimization:** In applying automated filtering procedures, service providers should take steps to minimize the impact on other expressive activities related to the blocked content. For example, automated blocks should not result in the removal of other videos posted by the same user (e.g., as a result of account cancellation) or the removal of user comments posted about the video.

The above parameters are intended to help ameliorate the harms of over-filtering. They should not be taken to suggest that EFF endorses the use of filters, much less that we believe they should be mandatory. Instead, we agree with many service providers that filtering technologies are an expensive approach to policing infringement, and one that is likely to lead to collateral damage to free speech and innovation.⁴¹

B. “Voluntary” Agreements Must Not Be Used to Create a System of Private Law

In recent years we have seen a series of “best practice” agreements, such as an agreement between Internet ad networks regarding how they will treat “pirate sites.” According to that agreement, the ad networks will follow a process similar to the DMCA notice and takedown scheme. The process itself is not unreasonable, at least on paper. Ad networks say they will require real evidence that the website is principally dedicated to infringing activity, with no substantial noninfringing uses, before they take action. Actions taken may include simply requesting the customer cease its allegedly infringing activity. In other words, an automatic chokehold is not required. The complaining copyright or trademark holder also has to show that they reached out to the site itself with a DMCA notice or cease and desist letter before asking the ad network to target the site.

However, EFF remains concerned that these kinds of agreements effectively create a system of private law, without the checks and balances we expect from a real legal system, much less public input from the Internet users who will be affected by these private rules. The DMCA takedown process is already abused to censor legitimate content. Entirely extralegal procedures make it harder to punish that kind of abuse.

⁴¹ See Urban Study, *supra* n. 16, at 58-59

Moreover, these “voluntary” measures never seem to be sufficient. For example, several months after the ad network agreement mentioned above was announced, a group of United States Senators and Representatives called on advertising networks to create a blacklist of alleged “piracy sites” and refuse to serve ads to those sites. Letting commercial companies with their own competitive motivations decide which sites are “rogue” or “pirate” sites is a recipe for abuse. Law-abiding site owners could find themselves placed on a blacklist, with no easy way to get off of it.

As a federal law, a blacklist could create serious First Amendment and due process problems. As a private agreement among competing ad networks, it could raise other legal problems. Under the Sherman Antitrust Act, companies that compete with each other aren’t allowed to make a pact amongst themselves about who they will refuse to do business with. In 2003, for example, the Motion Picture Association of America decided that its members, major movie studios who compete with one another, would no longer send pre-release “screener” copies of films to members of awards committees like the Motion Picture Academy. According to the MPAA, the group boycott of awards committees was needed to stop infringement of pre-release movies. But the group ban put smaller studios at a huge disadvantage in getting award nominations and votes. In just two months, a court decided that the MPAA’s screener ban was likely illegal.

Question 16: How effective is the counter-notification process for addressing false and mistaken assertions of infringement?

Not very, for several reasons. First, there is the process itself. Filing a counter-notice can be confusing and difficult, and many users are intimidated by the requirement that they affirmatively agree to be sued in federal court if the rightsholder wants to pursue the matter. Users also may fear the significant expense of mounting a copyright defense, allowing themselves to be silenced rather than facing the cost of vindicating their speech in courts. As one service provider observed, the language in a typical takedown notice is so threatening that users are “afraid” to counternotice. And filing a counternotice requires a user to reveal personal information to the sender of the takedown notice. Where the video in question involves criticism, a user may fear reprisals well beyond a copyright lawsuit if she reveals her identity.

Second, the 10-14 day waiting period before a service provider can restore the content means an easy path to two weeks of censorship. For videos that are connected to news items or political activities that temporary shutdown can mean the difference between a major impact and total obscurity. What is worse, the shutdown can involve not just a video, but an entire account, because many services will suspend an account that has received three takedown notices until the counter-notice process is complete. For example, former Navy chaplain and Colorado Assembly candidate Gordon Klingenschmitt launched a campaign to use the DMCA to shut down the YouTube account of People for the American Way’s Right Wing Watch (“RWW”) project. RWW reports and comments on the political views of folks like Klingenschmitt, using their own words. Klingenschmitt sent a series of takedown notices claiming that RWW’s use of clips of his program infringed his copyrights — never mind that RWW was obviously

posting them as part of its critical work. Because YouTube had a policy of shutting down accounts after three takedown notices, Klingenschmitt’s bogus complaints caused RWW’s entire account to be taken offline — twice. The harassment finally stopped only when PFAW, also with EFF’s help, threatened to take Klingenschmitt to court.⁴²

Question 22: Describe and address the effectiveness of repeat infringer policies as referenced in Section 512(i)(A).

EFF will not attempt to offer detailed comments on the effectiveness of repeat infringer policies. However, we take this opportunity to note that while we generally do not believe Congress should disturb section 512, if Congress does contemplate modifying this provision it should no longer condition the safe harbor for Internet providers, particularly providers of basic Internet access, on the termination of repeat infringers.

The loss of Internet access imposes First Amendment harms grossly disproportionate to alleged copyright infringement, impeding freedoms of speech, association, and the ability to petition the government. Even if such a remedy were ever appropriate following a judicial determination adhering to First Amendment principles, due process does not permit section 512 to promote the extra-judicial deprivation of Internet access.

A. The First Amendment Protects Internet Access

As early as 1997, the Supreme Court held that expression on the Internet is entitled to the same First Amendment protection as other forms of speech. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) The Court recognized that the Internet was not only protected, but was assuming a central role in disseminating speech protected by the First Amendment. *Id.* (citations omitted); *see also* 47 U.S.C. § 230(a)(1) (Congressional finding that “[t]he rapidly developing array of Internet and other interactive computer services available to Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens”). Indeed, the Court observed, the Internet was already “the most participatory form of mass speech yet developed.” *Reno*, 521 U.S. at 863.

That protection extends to Internet access. Just as the First Amendment protects a speaker’s right to communicate ideas, it also protects the right to *seek* and to *receive* ideas and information. As the Supreme Court recognized that “[i]t is now well established that the Constitution protects the right to receive information and ideas,” observing that this right “is fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁴² Corynne McSherry, *No More Downtime for Free Speech: EFF Helps People for the American Way Challenge DMCA Abuser*, EFF DEEPLINKS BLOG (Dec. 8, 2013), available at <https://www.eff.org/deeplinks/2013/12/no-more-downtime-free-speech-eff-helps-people-american-way-challenge-dmca-abuser>

This right to receive information “follows ineluctably from the sender’s First Amendment right” and “is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.” *Board of Education v. Pico*, 457 U.S. 853, 867 (1982).

While freedom of expression has a unique importance in American life, both freedom of expression and the role of the Internet in promoting free expression have also been recognized by the United Nations. In the May 16, 2011 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the United Nations’ Special Rapporteur recognized the important of the Internet to the availability and exercise of this fundamental right:

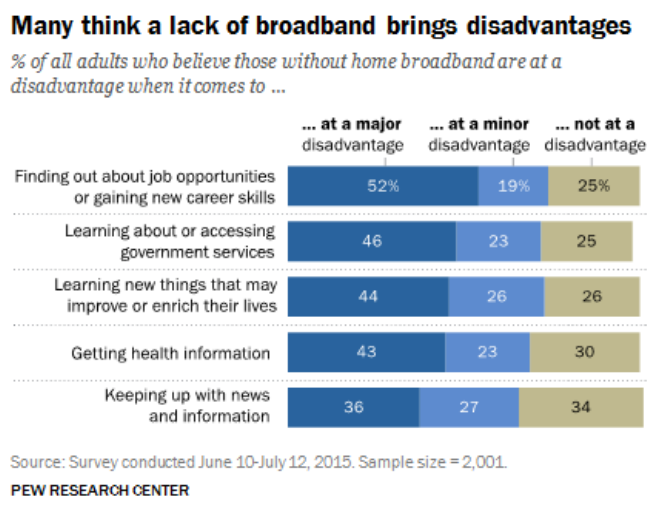
The framework of international human rights law remains relevant today and equally applicable to new communication technologies such as the Internet. . . . The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. *Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights.*⁴³

The Special Rapporteur’s conclusions in his Report are consistent with the conclusions reached by American courts, including the Supreme Court, about the central role of the Internet now holds in preserving the right to free expression.

⁴³ A/HRC/17/27 ¶¶ 21-22 (emphasis added).

B. Internet Access Is Essential to Modern Life, Including Political, Social, and Economic Activity.

Today, the right to seek and to receive information, like the right to convey information, is centered on access to the Internet. Conversely, terminating Internet access imposes a serious burden. Indeed, according to Pew Research, two-thirds of Americans believe “that lacking a home [broadband Internet] subscription is a *major disadvantage* when it comes to accessing government services, searching for employment, following the news, learning new things, or getting health information.”⁴⁴ The following chart details Pew’s findings regarding each of those categories of information:⁴⁵



That public perception is well-founded. Terminating Internet access impedes a person’s ability to receive and publish information such as news or commentary via online reports, social media, and communications media such as chat, email, or VoIP phone. It impedes a person’s ability to apply for a job online, advertise goods or services, or locate timely information about markets. It impedes the ability to interact with and petition the government at all levels. It also impedes associational freedom, by eliminating access to online communities, to entire media of interpersonal

⁴⁴ Home Broadband 2015, Pew Research Center, December 2015 (available at <http://www.pewinternet.org/2015/12/21/home-broadband-2015/>) (emphasis in original).

⁴⁵ *Id.* at 3.

communication, to contact information stored online, and to online fora such as message boards, multiplayer games, and dating sites.

Depriving a person of Internet access is therefore an extreme measure impacting fundamental freedoms of speech and association.

C. Termination of Internet Access Would Not Be a Proper Judicial Remedy

Because termination of Internet access constitutes a prior restraint on speech implicating the First Amendment, compelled termination would only be permissible if it constituted a narrowly tailored means to achieve a compelling government interest. *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). There are several conditions that will cause a government action to fail the “tailoring” element. Of note here, the government violates the First Amendment under this test if it does not use the least-restrictive means available or if the measure burdens substantially more speech than is necessary to vindicate the interest. *E.g. id.*; *see also R. A. V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

Given that removal of Internet access burdens countless legitimate activities related to freedoms of speech and association (and completely unrelated to copyright interests), it is not the kind of tailored restraint on speech that may satisfy First Amendment scrutiny, even for an adjudicated or admitted infringer. Indeed, burdening those protected First Amendment activities, particularly noninfringing activities, would harm the government’s interest in promoting the generation and dissemination of knowledge and culture.

Further, under general principles of equity, “injunctive relief should be no broader than necessary to provide full relief to the aggrieved party.” *Meyer v. CUNA Mut. Ins. Soc’y*, 648 F.3d 154, 170 (3d Cir. 2011); *see also, PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011) (observing that an injunction may “address only the circumstances of the case”).

In the context of section 512, equity forbids terminating a person’s Internet access because it is both overbroad and disproportionate to the harm. It is one thing to say that a user’s dissemination of particular infringing material can be enjoined based on a proper judicial order. In that circumstance, the infringer has lost only an ability to engage in the conduct that has been adjudicated to be a violation. It is quite another to terminate *all* Internet access, depriving the user of a host of other rights and abilities that have nothing to do with the objectionable conduct.

In any other context, no one could seriously suggest that a person’s unlawful (but not criminal) conduct should mean losing the ability to publish original material on the web, to file taxes online, to video chat with family, or to retrieve contact information

stored in the cloud. Yet those are precisely the consequences that follow from termination.⁴⁶

D. Section 512 Should Not Promote the Extra-Judicial Termination of Internet Access.

Whether or not a judge may order the termination of Internet access, the government should not delegate such a decision to an ISP. Section 512 creates a statutory financial incentive (namely, the maintenance of a safe harbor) that weighs in favor of removal of access. This creates a bias in favor of removal. A biased adjudicator is contrary to fundamental principles of American law. *See, e.g.*, Federal Code of Judicial Conduct, Canon 3(C)(1)(c) (requiring recusal in the event of a financial interest); 9 U.S.C. § 10(a)(3) (Federal Arbitration Act allowing vacatur of award in the event of a biased arbitrator). Thus, to the extent that termination of access is ever an appropriate remedy, that decision should be made by a court of competent jurisdiction with due process of law, not an ISP.

Moreover, because of the nature of the rights that are in jeopardy, significant process is required. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 3 (1976) (quantum of process that is “due” depends on the private interest involved, the risk of erroneous deprivation and the potential benefits of additional protection, and the government interest and burdens of additional procedural protection). Requiring an ISP to act on mere allegations by an interested party falls far short of satisfying that standard. This is particularly true given the significant number of improper notices discussed above and in other comments filed in this proceeding.

The Special Rapporteur’s report has a well-reasoned discussion of these issues, making several key points: (1) the Internet has flourished mainly *because* of the protections from liability afforded by provisions like section 512(a); (2) there is a continuing threat that might limit these protections, to the detriment of free expression; (3) “notice and takedown” provisions are subject to abuse; and (4) Internet service providers and other intermediaries should not be assigned responsibility for decisions such as service denial that can lead to deprivation of rights without due process:

⁴⁶ Rightsholders might suggest that an infringer whose account is terminated could obtain service from another provider and avoid such consequences. To the extent this were true, it would suggest that the remedy is ineffective, which equally would be a basis for its removal from the statute. *See, e.g., Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 226, 228-29 (1989). And for many Americans, there simply is not adequate competition among broadband providers. The FCC noted in 2015 that only 39% of Americans have multiple options for broadband Internet service. Federal Communications Commission, *Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5631 n.134 (2015).

[W]hile a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by overcensoring potentially illegal content.⁴⁷

The Special Rapporteur concludes: “[I]ntermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.”⁴⁸ Based on these considerations, the Special Rapporteur was “alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights. This also includes legislation based on the concept of ‘graduated response’, which imposes a series of penalties on copyright infringers that could lead to suspension of Internet service.”⁴⁹

Given all of the considerations discussed above, section 512 should not condition its liability limitations on a service provider’s termination of Internet access for any user.

Question 28. Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?

This remains an open question. As explained above, fraudulent and abusive notices are all too common, which suggest that section 512(f) needs to be strengthened. However, proper interpretation by the courts has helped improve this provision’s deterrent force, and EFF remains hopeful that further jurisprudence will continue down that path. If not, it may be necessary for Congress to weigh in.

⁴⁷ A/HRC/17/27 ¶¶ 39-42 (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 49.

A. Section 512(f) Has Been Properly Interpreted to Require Fair Use Review

Congress knew that online intellectual property enforcement should not come at the expense of stifling lawful speech.⁵⁰

Section 512 can result in expressive material being taken down from the Internet, without prior judicial scrutiny. To help make up for that lack of scrutiny, Congress laid out an alternative system of checks and balances to protect lawful speech and accomplish the goal of “carefully balanc[ing] the First Amendment rights of users with the rights of a potentially injured copyright holder.” *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003).

Specifically, Congress crafted section 512(f), which allows lawful users of copyrighted works to hold copyright owners accountable if they send a takedown notice without properly considering whether the use was in fact authorized by the copyright owner or the law. As the Senate Report on section 512(f) explained:

The Committee was acutely concerned that it provide all end-users . . . with appropriate procedural protections to ensure that material *is not disabled without proper justification*. The provisions in the bill balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.⁵¹

Section 512(f) imposes liability on “[a]ny person who knowingly materially misrepresents under this section [(i.e., under Section 512)] . . . that material or activity is infringing.” 17 U.S.C. § 512(f). To represent “under this section . . . that material or activity is infringing,” the copyright owner must invoke section 512(c)(3)’s notice-and-takedown process. *See id.* § 512(c)(3)(A). That provision requires a statement that “the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” *Id.* § 512(c)(3)(A)(v) (emphasis added).

The notice requirements are not to be taken lightly:

The DMCA requires a complainant to declare, under penalty of perjury, that he is authorized to represent the copyright holder, and that he has a good-faith belief that the use is infringing. This requirement is not superfluous. Accusations of alleged infringement have drastic

⁵⁰ 144 Cong. Rec. H10618 (daily ed. Oct. 12, 1998) (Rep. Barney Frank stating, “As Members have mentioned, we have a tough situation here in which we want to protect intellectual property rights but not interfere with freedom of expression.”).

⁵¹ S. Rep. No. 105-190 at 21 (1998) (emphasis added).

consequences: A user could have content removed, or may have his access terminated entirely. *If the content infringes, justice has been done. But if it does not, speech protected under the First Amendment could be removed.* We therefore do not require a service provider to start potentially invasive proceedings if the complainant is unwilling to state under penalty of perjury that he is an authorized representative of the copyright owner, and that he has a good-faith belief that the material is unlicensed.

Perfect 10 v. CCBill, 488 F.3d 1102, 1112 (9th Cir. 2007) (emphasis added)

Taken together, the requirements of 512(c) and (f) (supplemented by the counter-notice provisions of section 512(g)) are crucial safeguards for online expression. In particular, several courts, including the Ninth Circuit Court of Appeals, have correctly held that the DMCA requires the sender of a takedown notice to form a good faith belief as to whether or not the use in question is authorized *by the law*, including section 107 of the Copyright Act. *See Lenz v. Universal Music Group*, 2016 WL 1056082, (Sept 15, 2015, amended Mar 17, 2016); *see also Does 1-4 v. Arnett*, Case No. SACV 12-96-JST, 2012 WL 3150934 at *3 (C.D. Cal. Aug. 1, 2012); *Ouellette v. Viacom Int'l, Inc.*, Case No. CV 10-133-M-DWM-JCL, 2012 WL 850921 at *3-*4 (D. Mont. Mar. 13, 2012); *Shropshire v. Canning*, 809 F. Supp. 2d at 1148 n.3 (N.D. Cal. 2011); *Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1200 (N.D. Cal. 2004).

Requiring rightsholders to consider whether a given use is a lawful fair use, as Congress intended, helps give meaning to both section 512(c) and section 512(f) and maintain the balance the safe harbors were intended to strike. In particular, it helps ensure that rightsholders make an effort to avoid taking down lawful uses – a small price to pay for the extraordinary censorial power the DMCA otherwise offers them.

B. Section 512(f) Has Been Misinterpreted To Potentially Bless An Ignorant Review

However, significant obstacles to true accountability for takedown abuse remain. The majority decision in *Lenz* has made it challenging to prove liability in many circumstances. In particular, we are concerned about the Ninth Circuit's holding that copyright holders should be held to a subjective standard. Ultimately, that standard may reward sloppiness and creates a perverse incentive for copyright owners not to learn about the law before sending a takedown.

As a cause of action designed to protect users' speech, section 512(f) should be construed to ensure that it actually provides users with the recourse Congress intended. We fear the Ninth Circuit's decision will have the opposite effect. The Ninth Circuit has improperly placed the burden on the person whose speech was taken down to prove to a jury the subjective belief of the censor—a standard and process that will be all but impossible for most. Discovery becomes a nightmare, fraught with investigations into subjective beliefs about the law that likely will draw privilege objections. As one commentator has noted, “Requiring that a plaintiff may only prove a misrepresentation

was made ‘knowingly’ by demonstrating the subjective belief of the copyright owner not only is inconsistent with the statutory language, but application of such a standard also would thwart the purpose of including the misrepresentation claim within the statutory scheme.”⁵²

It gets worse: if the sender of an improper takedown cannot suffer liability under section 512(f), no matter how unreasonable its belief, the Ninth Circuit’s ruling may undermine section 512(f) protections for even classic fair uses. Many copyright owners unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to make sure such unreasonable beliefs don’t thwart new creativity. In particular, it protects uses, such as parody and criticism, that copyright owners are unlikely to license. Allowing a copyright owner to hide behind unreasonable beliefs undermines this crucial protection.

The Supreme Court may choose to correct the Ninth Circuit’s misinterpretation. If not, it will be left to Congress to clarify that it did not intend to bless unreasonable takedowns.

Respectfully submitted,



Corynne McSherry
Kit Walsh
Electronic Frontier
Foundation
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
corynne@eff.org

⁵² Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 774 (2011).