



**Notice and Takedown Mechanisms:
Risks for Freedom of Expression Online**

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As Legal Director for the Electronic Frontier Foundation (EFF), I am grateful for this opportunity to share EFF’s views on how the use of notice and takedown processes and filtering technologies to police copyright infringement can have collateral effects on free expression.

For 30 years, EFF has represented the public interest in ensuring that law and technology support human rights and innovation. As part of that work, we have been involved in virtually every major case interpreting the notice and takedown system in the United States. In the US and abroad, we work to ensure that copyright policy, legislation, and practice appropriately balance the rights of artists, authors, and the general public. As a legal services organization, we also counsel users who have been improperly accused of copyright infringement, and help them respond.

I am not an expert on Mexican law, so my remarks will focus on the U.S. experience, with the goal of helping others learn from that experience and, hopefully, avoid repeating our mistakes.

Misuse of the Notice and Takedown System

Two decades ago, the U.S. Congress created the notice and takedown system as part of one of the most important provisions of US copyright law, Section 512 of the Digital Millennium Copyright Act (DMCA). Section 512 was designed to give rightsholders, service providers and users relatively precise “rules of the road” for policing online copyright infringement. The center of scheme is the “notice and takedown process.” In exchange for substantial protection from liability for the actions of their users, service providers must promptly take offline content on their platforms that has been identified as infringing, as well as several other prescribed steps. *See* 17 U.S.C. § 512. Copyright owners, for their part, are given an expedited, extra-judicial procedure for obtaining redress against alleged infringement, paired with explicit statutory guidance regarding the process for doing so, and provisions designed to deter and ameliorate abuse of that process. *See id.* § 512(c)(3)(A).

Without Section 512, the risk of crippling liability for the acts of users would have prevented the emergence of most of the social media outlets we use today. Instead, the Internet has become the most revolutionary platform for the creation and dissemination of speech that the world has ever known. Thousands of companies, big and small, rely on it every day, including interactive platforms like video hosting services and social networking sites that have become vital not only to democratic participation but also to the ability of ordinary users to forge communities, access information, and discuss issues of public and private concern.

However, those safe harbors come at a high price for free expression. Section 512 gives intermediaries powerful incentives to take offline any content flagged in a DMCA notice. Thanks to those incentives, as a practical matter they will take down virtually any content identified in a compliant notice. That means Section 512 also gives purported rightsholders the ability to shut down lawful expression—videos, blog posts, criticism, political advertising, even news articles



that contain snippets or quotes from other sources—without far too little accountability.

The problem of false and abusive takedown notices is well documented. Service providers have confirmed that unfounded DMCA notices are common and significantly burdensome.¹ Indeed, one study revealed that, in a sample of automated takedown notices, 4.2% (nearly 4.5 million takedown requests), “targeted content that clearly did not match the identified infringed work” and 7.3% involved potential lawful expression.² For example, Automattic Inc. reported that “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 misrepresentations regarding copyright ownership.”³

And the collateral damage gets worse when takedown notices target, not specific user-uploads, but upstream network providers. In one case, for example, a takedown notice targeted at silencing a parody website, sent to the site’s upstream network provider, resulted in the removal of 38,000 websites from the Internet.⁴

To give just a few examples, encompassing a range of circumstances:

- An unknown copyright holder claimed the Trump campaign had infringed copyright with a video addressing the unjustified killing of George Floyd, and demanded Twitter take the video down.⁵
- Baseless copyright claims caused a service provider to disable access to a political debate.⁶

¹ 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> (giving numerous examples and describing the resulting burden).

² Jennifer Urban et al., *Notice and Takedown in Everyday Practice* (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628

³ Comments of Automattic, Inc., *In the Matter of Section 512 Study*, U.S. Copyright Office Docket No. 2015-7, March 31, 2015.

⁴ Rashmi Rangnath, *U.S. Chamber of Commerce uses the DMCA to silence critic*, Public Knowledge (Oct. 27, 2019), *available at* <https://www.publicknowledge.org/blog/u-s-chamber-of-commerce-uses-the-dmca-to-silence-critic/>

⁵ Matt Schruers, *Claims Against Trump Campaign Video Call for Revisiting Intersection of Speech and Copyright*, Disruptive Competition Project (June 6, 2020), *available at* <https://www.project-disco.org/intellectual-property/060620-claims-against-trump-campaign-video-call-for-revisiting-intersection-of-speech-and-copyright>

⁶ Charlie Hall, *Report: Phony DMCA claims nuked Twitch streams of the Democratic debate*, Polygon (Feb 28, 2020), *available at* <https://www.polygon.com/2020/2/28/21155955/twitch-streamers-banned-democratic-debate-phony-dmca>.

- A Wall Street Journal investigation revealed that Google had been tricked into deleting links to critical articles;⁷
- Journalists uncovered a well-funded and sustained campaign by the government of Ecuador to abuse the DMCA to silence criticism of President Rafael Correa.⁸
- A political candidate used the DMCA to force the takedown of an unfavorable video that included 40 uncomfortable seconds of the candidate apparently trying to avoid admitting how she had voted in a previous election.⁹
- 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.¹⁰ It took three months of intense legal wrangling before Lionsgate finally relinquished its claim.
- BMG Rights Management sent a takedown targeting an official Romney campaign ad that showed President Obama singing a line from the Al Green song “Let’s Stay Together.”¹¹
- Radio host Rush Limbaugh sent a DMCA notice to YouTube demanding it take down a seven-minute montage of Limbaugh’s “most vile smears.”¹²
- 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.¹³ The video was tied to a fundraising campaign by Andy Cobb

⁷ Andrea Fuller, Kirsten Grind & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), available at

<https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001>

⁸ James Ball & Paul Hamilos, *Ecuador’s President Used Millions of Dollars of Public Funds to Censor Critical Online Videos*, BuzzFeed News (Sept. 24, 2015), available at

www.buzzfeed.com/jamesball/ecuadors-president-used-millions-of-dollars-of-public-funds

⁹ Corynne McSherry, *For Shame: Gannett Abuses DMCA to Take Down Political Speech*, EFF DeepLinks Blog

(Oct. 10, 2014), available at <https://www.eff.org/deeplinks/2014/10/shame-gannett-abuses-dmca-take-down-political-speech>

¹⁰ Jonathan McIntosh, *Buffy vs. Edward Remix Unfairly Removed by Lionsgate*, Ars Technica (Jan. 9, 2013), available at

<https://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/>

¹¹ 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/>

¹² *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>

¹³ 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>

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.¹⁴
- News organizations have repeatedly used the DMCA takedown process to target political ads that contain clips of news broadcasts as part of their commentary.¹⁵
- The musician Prince sent a series of takedown notices targeting fan videos—even though he did not own the music in question.¹⁶

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.¹⁷

The majority of DMCA notices appear to target infringing content. But when they don't, they cause enormous collateral damage to free expression. Such a powerful tool requires equally powerful mechanisms for accountability, which are sadly lacking in the United States. Others can and should do better.

Filtering Failures

Equally and perhaps even more problematic are “filters” that some service providers employ to help prevent copyrighted content from being uploaded at all (and/or to monetize that content). *First*, while filters may be able to flag *potentially* infringing uses, they cannot reliably determine whether those uses are *actually* infringing. Leaving such determinations to an algorithm will therefore inevitably lead to suppression of lawful expression – indeed it already has. Google's

¹⁴ Nate Anderson, *What Fair Use? Three Strikes and You're Out... of YouTube*, Ars Technica (Jan. 15, 2009), available at <https://arstechnica.com/tech-policy/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube/>

¹⁵ *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, Center for Democracy & Technology (Sept. 2010), 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).

¹⁶ *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).

¹⁷ *Takedown Hall of Shame*, Electronic Frontier Foundation, available at www.eff.org/takedowns

Content ID system, for example, regularly targets lawful expression,¹⁸ ranging from scholarly works to casual videos to timely political commentary. Here are just a few examples:

- An Australian music publisher used Content ID, and the DMCA, to force the takedown of an entire lecture because it included illustrative clips of a number of videos set to a piece of music in which the company held copyright.¹⁹
- English rapper and songwriter, Dan Bull received multiple Content ID matches for a video he made criticizing a trade agreement. 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.
- The company Rumblefish has claimed copyright in many recordings of ambient birdsong, with the effect that videos of people walking outdoors get taken down because there was a bird singing in the background.²⁰
- Documentation of Black Lives Matter protests and interviews with protestors have been flagged because there is incidental amplified music in the background.²¹

There are many more examples or filtering failures, and more emerge every day.²²

And Content ID is not the only filtering system with serious flaws. For example, UStream blocked a NASA video of the Curiosity landing on Mars was automatically blocked due to a mistaken copyright claim.²³ Facebook effectively disabled a classical performance because its

¹⁸ Chris Sprigman & Mark Lemley, *Why Notice-and-Takedown is a bit of Copyright Law Worth Saving*, LA Times (Jun. 21, 2016) available at <http://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html> (The authors note that in order for Google to launch its own content filtering system the company has incurred a cost of \$50 million).

¹⁹ 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>.

²⁰ "Matched third party content. Entity: rumblefish Content Type: Musical Composition", but no music in the video, Youtube Help (Feb. 24, 2012), available at <https://support.google.com/youtube/forum/AAAiueErobUeSjKSGBrFMo/?hl=en&gpf=d/category-topic/youtube/how-to-use-youtube-features/eSjKSGBrFMo>

²¹ Nick Simmons & Adam Holland, *Algorithmic Copyright Management: Background Audio, False Positives and De facto Censorship*, Lumen (July 21, 2020), available at https://www.lumendatabase.org/blog_entries/background-audio-takedowns

²² Ernesto van der Sar, *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/>; see also <https://www.techdirt.com/articles/20160216/06452033610/cbs-streaming-service-chokes-grammys-youtube-takedown-apparatus-works-just-fine.shtml>

²³ 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>

filtering technology concluded that a small portion of an hour-long Mozart performance infringed copyright.²⁴ A “content protection service” called Topple Track²⁵ sent a slew of abusive takedown notices to have sites wrongly removed from Google search results, including improper notices targeting an EFF case page, the authorized music stores of both Beyonce²⁶ and Bruno Mars,²⁷ a New Yorker article²⁸ about patriotic songs. Topple Track even sent an improper notice targeting an article²⁹ by a member of the European Parliament that was *about* an improper automated copyright notice.

What is worse, while algorithms work at the speed of data, their mistakes are corrected in human time (if at all). If an algorithm is correct even 99 percent of the time, that means it is wrong one percent of the time – and that means millions of mistakes that have to be reviewed by the company’s employees to decide whether the content should be reinstated.

That also means that the line to have your case heard may be long, and even if you win, correction will come too late. For example, Jamie Zawinski, a nightclub owner in San Francisco, posted an announcement of an upcoming performance by a band at his club in 2018, only to have it erroneously removed by Instagram. Zawinski appealed. More than two years after the event had taken place,³⁰ Instagram reversed its algorithm’s determination and reinstated his announcement.

Second, filtering systems are ruinously expensive. YouTube’s “Content ID” filter had cost the company more than \$100 million dollars as of 2018.³¹ Few companies have equivalent funds to spend on filtering technology, especially if they have to find a way to take content offline permanently. That is one reason EFF has always opposed filtering requirements as a threat to expression as well as competition: such requirements mean even fewer competitors in the

²⁴ Michael Andor Brodeur, *Copyright bots and classical musicians are fighting online. The bots are winning*, Wash. Post (May 21, 2020), available at https://www.washingtonpost.com/entertainment/music/copyright-bots-and-classical-musicians-are-fighting-online-the-bots-are-winning/2020/05/20/a11e349c-98ae-11ea-89fd-28fb313d1886_story.html

²⁵ Symphonic Distribution, available at <https://symphonicdistribution.com/>

²⁶ *Songs*, Beyonce, available at <https://www.beyonce.com/track/>

²⁷ *Top Songs and Discography*, Bruno Mars, available at <https://www.brunomars.com/music>

²⁸ Daniel A. Gross, “*Deutschland über Alles*” and “*America First*,” in *Song*, The New Yorker (Feb. 18, 2017), available at <https://www.newyorker.com/culture/culture-desk/deutschland-uber-alles-and-america-first-in-song>

²⁹ Julia Reda, *Out-of-control censorship machines removed my article warning of out-of-control censorship machines*, (Aug. 17, 2018), available at <https://juliareda.eu/2018/08/censorship-machines-gonna-censor/>

³⁰ Jamie Zawinski, *Fucking Facebook*, jwz.org (May 2020), available at <https://www.jwz.org/blog/2020/05/fucking-facebook-3/>

³¹ Paul Sawers, *YouTube: We’ve invested \$100 million in Content ID and paid over \$3 billion to rightsholders*, VentureBeat (Nov. 7, 2018), available at <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/>



already monopolized online world and, therefore, fewer places where users may communicate with one another.

Third, as the above examples suggest, overreliance on filters creates an unstable, unsafe environment for small independent Internet creators who depend on platforms to share their work and educate others. Videos, music, and art that depend on limitations and exceptions vanish in the rigid system of a filter.³² For example, YouTube’s filter has flagged a recording someone made of their own voice,³³ and a video using a two-second guitar riff as an example in an instructional video.³⁴ Rather than protect and promote creativity, filters concentrate it in the hands of current rightsholders.

Threats to Anonymous Speech

One final point of concern is the intersection between privacy and free expression. The ability to speak anonymously is protected under U.S. and international human rights standards because many people may hesitate to speak and share information if they fear exposure and retaliation.

The DMCA includes a specific provision allowing purported rightsholders to obtain a subpoena for the identity of an alleged infringer, without meaningful judicial supervision or a determination that the claim is legitimate. At EFF, we have repeatedly seen rightsholders use baseless copyright allegations to unmask critics or target people for harassment. For example, we recently defended the anonymity of a member of a religious community who questioned a religious organization, when the organization sought to abuse copyright law to learn their identity.³⁵ But not every speaker has the opportunity or ability to protect themselves.

Counternotice procedures may present a similar problem, because they ostensibly require users to provide identifying information. Users may be afraid to do so, for fear of retaliation. For example, a journalist Luke O’Neil received a takedown notice for a link to a critical article, from the subject of the criticism. But he was afraid to send a counter notice because he’d have to “send the guy harassing me my full name and address.”³⁶ There are good reasons for that fear. For example, an individual took advantage of the notice and takedown system to extort YouTube

³² Eliot Harmon, *Don’t Sacrifice Fair Use to the Bots*, EFF Deeplinks Blog (Mar. 1, 2019), available at <https://www.eff.org/deeplinks/2019/03/dont-sacrifice-fair-use-bots>

³³ Katharine Trendacosta, *The Mistake So Bad, That Even YouTube Says Its Copyright Bot ‘Really Blew It*, Takedown Hall of Shame, <https://www.eff.org/takedowns/mistake-so-bad-even-youtube-says-its-copyright-bot-really-blew-it>

³⁴ Julia Alexander, *YouTubers and Record Labels Are Fighting and Record Labels Keep Winning*, The Verge (May 24, 2019), available at <https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-co-ver>

³⁵ *Reddit Wins Fight to Stay Anonymous*, EFF Press Release (March 3, 2020), available at <https://www.eff.org/press/releases/reddit-wins-fight-stay-anonymous>

³⁶ Tweet from Luke O’Neil, available at <https://twitter.com/lukeoneil47/status/1278062014661828608>



users by sending false takedowns, putting users perilously close to losing their whole channels, audiences, and videos. When one user used the counter-notification system, the harasser allegedly retaliated by “swatting” them, i.e., he called emergency services, resulting in a large number of police officers, often with guns drawn, showing up to the target’s home.

Conclusion

The DMCA safe harbors have played an essential role in the development of the Internet as a platform for expression and innovation. Without those safe harbors, the risk of crippling liability for the acts of users would have prevented the emergence of most of the social media outlets we use today. Instead, the Internet has become the most revolutionary platform for the creation and dissemination of expression that the world has ever known.

But that growth has come at a high price, because it also gave rightsholders (and their impersonators) the power to easily silence online expression, without real accountability for abuse. The adoption of filters has only exacerbated the problem.

Copyright law and policy inevitably implicates free expression, privacy and innovation, and must seek to balance those competing interests. Based on the U.S. experience, notice and takedown systems and filtering technologies are upending that balance, to the detriment of human rights. Policymakers can, and must, do better.