



**House Judiciary Committee Hearing**

**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**

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The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With more than 30,000 dues-paying members, and well over 1 million social network followers, we work to ensure that the use of technology enhances justice and creativity.

As part of that work, we have participated—as party counsel or amicus—in virtually every major case interpreting the Digital Millennium Copyright Act. As a legal service organization, we also field regular inquiries from users who have been targeted by improper takedown notices, helping them respond when we can.

We thank the Committee for providing us an opportunity to share our findings on Section 512 of the Digital Millennium Copyright Act, and the Copyright Office’s report.

### **Notice and Takedown**

One guidepost for EFF’s work is the knowledge that Section 512 of the DMCA is meant to balance the interests of online service providers, rightsholders, *and* users. Congress knew that Section 512’s powerful incentives could result in lawful material being censored from the Internet, without prior judicial scrutiny, much less advance notice to the person who posted the material, or an opportunity to contest the removal.

Accordingly, Congress made sure that the DMCA included a series of checks and balances. First, it included Section 512(g), which creates a counter-notice process that allows for restoration after a two-week waiting period. Second, it included Section 512(c)(3), which sets out clear rules for asserting infringement under the DMCA. Third, it included Section 512(f), which gives users the ability to hold rightsholders accountable if they send a DMCA notice in bad faith.

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.

S. REP. NO. 105-190 at 21 (1998).

Specifically, Section 512(f) creates a cause of action against “[a]ny person who knowingly materially misrepresents under this section [i.e., under Section 512] – (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification.” By its clear language, Section 512(f) refers back to Section 512(c)(3), which outlines the specific affirmations required to allege infringement under the DMCA. *See id.* § 512(c)(3)(A); *see also id.* § 512(b)(2)(E) & (d)(3). A mere statement that material is “infringing” does not suffice; to allege infringement under the DMCA the complaining party must state that it “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). As the district court explained in this case, “both [the statute and the applicable case law] frame the [Section 512(f)] inquiry in terms of whether the party that issued the takedown notice had a ‘good faith belief’ that use of the copyrighted work was unauthorized.” Pet. App. 46a (citations omitted). Taken together, Sections 512(c) and (f) deter improper notices: 512(c) by requiring a notice sender to properly consider whether her notice targets actual infringement; 512(f) by imposing a penalty if she fails to do so.

### **Takedown Abuse Is Common**

Unfortunately, those provisions have not curbed abuse. 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.<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup>

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.<sup>4</sup>

Here are just a few of many examples:

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<sup>1</sup> 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).

<sup>2</sup> Jennifer Urban et al., *Notice and Takedown in Everyday Practice* (2016), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628)

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

<sup>4</sup> 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/>

- 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.<sup>5</sup>
- Baseless copyright claims caused a service provider to disable access to a political debate.<sup>6</sup>
- A Wall Street Journal investigation revealed that Google had been tricked into deleting links to critical articles;<sup>7</sup>
- Media personality and addiction specialist Dr. Drew Pinsky asserted copyright to remove a video which compiled a number of clips of the doctor’s incorrect or misleading statements about COVID-19, despite the video being a clear example of criticism.<sup>8</sup>
- Journalists uncovered a well-funded and sustained campaign by the government of Ecuador to abuse the DMCA to silence criticism of President Rafael Correa.<sup>9</sup>
- 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.”<sup>10</sup>
- Artist Jonathan McIntosh found his remix video Buffy vs. Edward: Twilight Remixed — which was mentioned by name in official recommendations from the Copyright Office regarding DMCA exemptions for transformative noncommercial video works — subject to a DMCA takedown notice.<sup>11</sup> 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

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<sup>5</sup> 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>

<sup>6</sup> 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>

<sup>7</sup> 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>

<sup>8</sup> Mike Masnick, *Dr. Drew Pinsky Played Down COVID-19, Then Tries To DMCA Away The Evidence*, Techdirt (April 6, 2020), available at <https://www.techdirt.com/articles/20200404/23222044237/dr-drew-pinsky-played-down-covid-19-then-tries-to-dmca-away-evidence.shtml>

<sup>9</sup> 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](http://www.buzzfeed.com/jamesball/ecuadors-president-used-millions-of-dollars-of-public-funds)

<sup>10</sup> 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/>

<sup>11</sup> 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>

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-notice.<sup>12</sup>

- Similarly, in early 2020, an NYU Law School panel about how one proves similarity in music in infringement cases was removed from YouTube because the music triggered the filter. Not even the copyright law experts could figure out what would happen to their account if they disputed the filter match—if it would count as a DMCA takedown, how many “strikes” the account would get, etc.—and the account was only restored through backchanneling.<sup>13</sup>
- Musician James Rhodes put a video of himself playing Bach on Facebook. Sony Music Entertainment claimed that 47 seconds of that performance belonged to them, and rejected Rhodes’ disputation of the claim.<sup>14</sup>

We included more in our comments to the Copyright Office for the 512 study<sup>15</sup> and collect even more in our Takedown Hall of Shame.<sup>16</sup> 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.

### **Counternotifications Are Not a Meaningful Check on Abuse**

The counter-notification process is rarely used, even when a user is relatively confident they have not infringed copyright.<sup>17</sup> Counter-notices are confusing and intimidating for the average user, requiring a lot of information and making clear the chance of a lawsuit that a regular person cannot hope to afford.

The amount of personal information required by a counter notice is of particular note. Just last

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<sup>12</sup> 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>

<sup>13</sup> Engelberg Center on Innovation Law & Policy, *How Explaining Copyright Broke the YouTube Copyright System*, NYU School of Law, available at

<https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown?fbclid=IwAR1ruv0KnYwVawITN1uEv9J5FCxzVkJPEUySSVEEZ7S78eeKFRmOX2tefnNA>

<sup>14</sup> See, EFF, *Sony Finally Admits It Doesn’t Own Bach and It Only Took a Bunch of Public Pressure*, available at <https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure>

<sup>15</sup> Corynne McSherry and Kit Walsh, *Comments of the Electronic Frontier Foundation*, EFF (April 1, 2016), available at <https://www.eff.org/document/eff-512-study-comments>

<sup>16</sup> *Takedown Hall of Shame*, Electronic Frontier Foundation, available at <https://www.eff.org/takedowns>.

<sup>17</sup> See Jennifer Urban, Joe Karaganis and Brianna L. Schofield, *Notice and Takedown in Everyday Practice*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628), at 44.

month, journalist Luke O’Neil received a takedown notice from Ryan Hintze, a self-described Twitter troll whom O’Neil had interviewed for a Vice.com article in 2018. The takedown was for a link to that article in a tweet. When O’Neil shared a screenshot of the DMCA takedown he had received on Twitter, Hintze sent a takedown for that as well.<sup>18</sup>

O’Neil explained that he didn’t want to send a counter notice because he’d have to “send the guy harassing me my full name and address.”<sup>19</sup>

YouTube recently sued Christopher Brady under section 512(f) of the DMCA. Brady was allegedly abusing the notice and takedown regime and YouTube’s repeat infringer policy to extort creators. When one creator correctly used a counter-notice to challenge the false takedowns, Brady allegedly used the information in the counter-notice to swat the creator. (Swatting is harassment technique that consists of calling in a fake emergency to 911, resulting in a large number of police officers, often with guns drawn, showing up to the target’s home.) Brady and YouTube settled, with Brady apologizing and admitting to sending false takedowns. The amount of identifying information required by counter-notices is a strong disincentive for users to send them, even when the takedowns are illegitimate. And, as the Brady case and cases where abusive spouses used the DMCA to find their victims<sup>20</sup> show, that fear is not unwarranted.

Finally, even if a user sends a counter notice, they could end up waiting far too long for their content to be restored. The Copyright Office noted in both the report and its subsequent letter to Senators Tillis and Leahy that users suffer from the 10-to-14-day window for works to be restored<sup>21</sup>. The Letter points out that, in the context of the Internet, the timeframe “does not sufficiently reflect the time-sensitive nature of content on the internet or comport with current business models.”<sup>22</sup>

We agree.

### **Section 512(f) Has Been Misinterpreted by the Courts**

The Copyright Office report expressed reservations about the Ninth Circuit’s interpretation of Section 512(f) in *Lenz v Universal*, 815 F.3d 1145 (9th Cir. 2016). We also have reservations – but they are quite different in nature.

As a cause of action enacted to protect users’ speech, Section 512(f) should be construed broadly to ensure that it provides users with the recourse Congress intended. *See Tcherepnin v. Knight*,

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<sup>18</sup> EFF, *Self-Described Twitter Troll Ryan Hintze Discovers New Way to Troll Twitter: the DMCA*, EFF Takedown Hall of Shame, available at <https://www.eff.org/takedowns/self-described-twitter-troll-ryan-hintze-discovers-new-way-troll-twitter-dmca>

<sup>19</sup> Tweet from Luke O’Neil available at <https://twitter.com/lukeoneil47/status/1278062014661828608>.

<sup>20</sup> See Jennifer M. Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown in Everyday Practice* 44 UC Berkeley Public Law Research Paper No. 2755628, (Mar. 29, 2016), available at <https://ssrn.com/abstract=2755628>

<sup>21</sup> Copyright Office Report at 159.

<sup>22</sup> U.S. Copyright Office Responses to Additional Questions Regarding Section 512 (June 29, 2020) at 4-5

389 U.S. 332, 336 (1967); 3 Norman J. Singer, *Sutherland Statutory Construction* § 60.02 (7th ed. 2014). The Ninth Circuit Court of Appeals did not do so. Instead, it held that a jury could find—as a factual matter—that the defendant’s procedures were “sufficient to form a subjective good faith belief about the video’s fair use or lack thereof.” *Lenz*, 814 F.3d 1154. In holding that a purely subjective good faith belief would suffice, the circuit court relied on its prior mistaken conclusion, in *Rossi v. Motion Picture Association of America, Inc.*, that “the ‘good faith belief’ requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective standard.” 391 F.3d 1000, 1004 (9th Cir. 2004).

In *Rossi*, the Ninth Circuit relied on three cases interpreting the bare phrase “good faith.” *Rossi*, 391 F.3d at 1004. But Section 512(c)(3)(A)(v) does not use the bare phrase “good faith”—it requires a good faith *belief*. The word “belief,” on its own, already requires a subjective state of mind; if *any* subjectively held viewpoint is a “good faith belief,” the words “good faith” become superfluous. Instead, context demands that the phrase “good faith belief” requires a subjectively held viewpoint (a “belief”) that is also *reasonably* held (in “good faith”), even if it is wrong. This means that a representation of a good faith belief is a “knowing misrepresentation” actionable under Section 512(f) if it is *either* not subjectively held (there is no “belief”) *or* unreasonably held (the belief is not held in “good faith”). See *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884) (“a statement recklessly made, without knowledge of its truth, [is] a false statement knowingly made, within the settled rule”).

In addition, a reasonable belief requirement helps reconcile the DMCA and the First Amendment. The Supreme Court has repeatedly affirmed that while Congress has broad latitude to exercise its power under Article I, section 8, it goes too far when it alters the traditional contours of copyright. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). Mindful of this balance, courts hesitate to restrain speech where a party has raised a colorable fair use defense. In *Suntrust v. Houghton-Mifflin*, 268 F.3d 1257 (11th Cir. 2001), for example, the court explicitly recognized fair use’s “constitutional significance as a guarantor to access and use for First Amendment purposes.” *Id.* at 1260. Because a viable fair use defense was available, the court concluded that “the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech . . . .” *Id.* at 1276-77.

In *Suntrust*, of course, the defendant had an opportunity to plead her fair use case. The DMCA contemplates a scheme where by the secondary user has no opportunity to even raise a fair uses defense before her speech is restrained. A law that grants a private actor the power to do what even a court cannot—cause the prior restraint of speech based on a purely *ex parte* review—alters not only the traditional contours of copyright protection but of our fundamental free speech doctrines. See *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 184-85 (1968) (holding that *ex parte* review offers “insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication”).

The Ninth Circuit has placed the burden on the person whose speech was taken down to prove to a jury the subjective belief of the censor—a standard that will be all but impossible for most to meet, particularly if they lack the deep pockets necessary to litigate the question. As one

commentator has noted, requiring a plaintiff to “demonstrate[e] the subjective belief of the copyright owner not only is inconsistent with the statutory language, but . . . would thwart the purpose of including the misrepresentation claim within the statutory scheme.” Lydia Pallas Loren, *Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously*, 46 WAKE FOREST L. REV. 745, 774 (2011).

It gets worse: If the sender of an improper takedown cannot suffer liability under Section 512(f) no matter how unreasonable its belief, the decision below effectively eliminates Section 512(f) protections for even classic fair uses upon which creators rely. *Lenz*, 815 F.3d at 1160 (M. Smith, J., dissenting) (concluding that the Ninth Circuit’s “construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices”). For example, some rightsholders unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to make sure such beliefs don’t thwart new creativity. Allowing a copyright owner to hide behind unreasonable beliefs undermines this crucial protection for online expression.

By contrast, requiring a rightsholder to form a reasonable good faith belief as to whether the use she is targeting is unlawful or not comports perfectly with Congress’ intent to “ensure that material is not disabled without proper justification.” S. REP. NO. 105-190 at 21 (1998). To be clear, in many instances this task will not be difficult. In many cases, a reviewer will be confronted with facts that make the legal conclusion of infringement simple. In other instances, a reviewer will be confronted with facts that make the legal conclusion of non-infringement equally simple. As for the edge cases, where it is not immediately clear whether the uses is lawful for not, the reviewer is obligated only to form a reasonable belief—one that is defensible, even if it turns out to be incorrect. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (a good faith belief “need not be correct,” but it must “be defensible”).

A subjective standard also hurts law-abiding rightsholders by forcing service providers to devote resources to addressing improper notices. As some of the largest intermediaries in the U.S., including Google and Twitter, explained in their amicus brief in support of *Lenz*’s Petition of certiorari, those resources could be devoted instead to efficiently processing valid notices. *See* Brief of Amici Curiae Automattic Inc., Google Inc., Twitter Inc., & Tumblr, Inc. in Support of the Petitioner at 6-11. Wordpress, for example, reported that 10% of the notices it receives are abusive. Google and Twitter also offered a host of examples of abuse. Nonetheless, they must respond. Indeed, in comments filed before the Copyright Office, the Computer and Communications Industry Association noted that “99% of DMCA response resources are spent on 1% of the takedowns,” and that part of the problem is that “penalties for incompetence and malicious takedowns are trivial.”<sup>23</sup>

Ultimately, as a White House Report observed, the “misidentification of non-infringing content as infringing risks affecting the integrity of the notice-and-takedown regime for rights holders,

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<sup>23</sup> *See* Comments of the Computer & Communications Industry Association at 10-11, 512 Study, Docket No. USCO-2015-7, Before the United States Copyright Office Washington, D.C., <http://www.cciainet.org/wp-content/uploads/2016/04/CCIA-Section-512-NoI-Comments-2016.pdf>



Internet intermediaries, and users.”<sup>24</sup>

### **Threats to Anonymous Speech**

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.<sup>25</sup> But not every speaker has the opportunity or ability to protect themselves.

### **The Report Recommends Cutting Off Internet Access Based on Mere Allegations of Infringement, While Recognizing the Danger of Such a Policy in Other Contexts**

In order to take advantage of the safe harbor included in section 512, companies must have a “repeat infringer” policy. This requirement is fairly flexible, since different companies offer different products and services, but in all cases, the service provider must have procedures in place to terminate users who have repeatedly infringed. Perhaps the most famous iteration of this requirement is YouTube’s “Three Strikes” policy: If a user gets three copyright strikes in ninety days on YouTube, their account is deleted, all videos are removed, and they cannot create new channels.<sup>26</sup> Fear of getting to three strikes has not only made YouTubers very cautious; it has also created a landscape where extortion can flourish.<sup>27</sup> And that is just the landscape for YouTube.

The Report suggests that the real problem of repeat infringer policies is that courts are not requiring service providers to create and enforce stricter ones, kicking more people off the Internet entirely.<sup>28</sup> Many millions of Americans use the Internet for work, career building, education, communication, and personal purposes.<sup>29</sup> The Internet is vital to people’s everyday

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<sup>24</sup> U.S. Joint Strategic Plan on Intellectual Property Enforcement FY 2017-2018 at 71, <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf>

<sup>25</sup> *Reddit Wins Fight to Stay Anonymous*, EFF Press Release (March 3, 2020), available at <https://www.eff.org/press/releases/redditor-wins-fight-stay-anonymous>

<sup>26</sup> Copyright Strike Basics, YouTube, <https://support.google.com/youtube/answer/2814000?hl=en>

<sup>27</sup> Jack Hauen, *A Scammer Used YouTube’s Copyright System to Ransom Creator*, Vice.com (Feb. 7, 2019), [https://www.vice.com/en\\_us/article/evevdk/scammer-used-youtube-copyright-system-to-ransom-creators](https://www.vice.com/en_us/article/evevdk/scammer-used-youtube-copyright-system-to-ransom-creators)

<sup>28</sup> Copyright Office Report at 100-09.

<sup>29</sup> Ernesto Falcon, *New FCC Data Indicates Future Broadband Access for Most Americans Will Be a Monopoly*, EFF (Dec. 12, 2018), <https://www.eff.org/deeplinks/2018/12/new-fcc-data-indicates-future-broadband-access-most-americans-will-be-monopoly>

lives. To lose access because of an unproven accusation of copyright infringement would be, as the Copyright Office briefly acknowledges, “excessively punitive.”<sup>30</sup>

The Office does suggest that a different approach might be needed for students and universities, because students need the Internet for “academic work, career searching and networking, and personal purposes, such as watching television and listening to music,” and students living in campus housing would have no other choice for Internet access if they were kicked off the school’s network.<sup>31</sup> However, these uses do not meaningfully distinguish the populations of universities from the general population.

### **Conclusion**

Section 512 has played an essential role in the development of the Internet as a platform for expression and innovation. 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.

But that growth has come at a high price, because it also gave notice-senders the effective power of a temporary injunction. In any other area of law, we would require a judge to determine whether speech should be silenced. When we allow one category of speech to sidestep traditional safeguards, we need meaningful mechanisms to protect against abuse, beginning with requiring notice senders their obligations seriously and learn the tool that they are using, and helping users fight back when that tool is abused.

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<sup>30</sup> Copyright Office Report at 98.

<sup>31</sup> *Id.* at 109-10.