

*Before the*  
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Washington, DC 20559

Section 512 Study: Notice and Request  
for Public Comment

Docket No. 2015–7

**Comments of Engine, GitHub, Kickstarter, Medium, and Redbubble**

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## I. Introduction and Summary

Engine, GitHub, Kickstarter, Medium, and Redbubble are pleased to respond to the Copyright Office’s inquiry into the impact and effectiveness of the Digital Millennium Copyright Act’s safe harbor provisions. The parties to these comments represent a key subset of the many entrepreneurs and innovators that have thrived precisely because of the protections within § 512. Engine is a non-profit advocacy and research organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. GitHub is a web-based software hosting service that provides version control systems, task management, and collaboration tools for teams developing projects. Kickstarter is the world’s largest funding platform for creative projects, helping artists, musicians, filmmakers, designers, technologists, and other creators find resources and support to help make their ideas a reality. To date, more than 100,000 creative projects—big and small—have come to life with the support of the Kickstarter community. Medium is a collaborative blogging platform where millions of writers can share their stories and viewpoints with an international audience, building an online community of creators, commenters, and readers. Medium is an online publishing platform that allows anyone to easily read, write, and share stories and ideas that matter to them; tens of millions of users have spent more than 3.5 millennia reading together on Medium. Redbubble is an online marketplace where hundreds of thousands of independent artists and designers share and sell their creative works to a worldwide audience, printed on a variety of high quality products on demand.

The parties to these comments believe that the principles of limited liability and cooperation built into § 512 are responsible for facilitating the growth of their businesses and the broader Internet. Though imperfect, the DMCA has succeeded admirably in balancing the interests of copyright holders and Online Service Providers (“OSPs”) and has helped drive investments in the Internet sector. While reforms to the DMCA (such as restoring sanity to damages awards for secondary infringement claims, imposing meaningful penalties to deter false takedown notices, and clarifying ambiguities inherent in § 512’s safe harbor qualifications) will ensure that the statute continues to promote the

Internet's vitality, it is critical that the Copyright Office strives to preserve the core policy of limited liability for OSPs that is at the heart of § 512. Any shift towards increasing the burden of policing infringing activity or penalties for third party infringements will make it harder for the next generation of OSPs to innovate.

## II. Measuring the Success of the DMCA

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

**Question 3.** *How have section 512's limitations on liability for online service providers impacted the growth and development of online services?*

In just a few decades, the Internet has become the world's dominant medium for communication, economic growth, and cultural development. Almost half of the world's population uses the Internet,<sup>1</sup> and in 2014, it was estimated to have contributed just under \$1 trillion to U.S. GDP<sup>2</sup> and approximately 3.4% of global GDP.<sup>3</sup> A significant portion of the Internet's value as a creative and economic tool derives from the robust market for online platforms that allow users to create and share content—from the independent creators launching projects on Kickstarter to scrappy startups developing the tools that will drive the next iteration of the Internet to the White House itself, which uses GitHub to develop and share policy, data about budget proposals, and build applications.

The proliferation of so-called Web 2.0 companies is attributable in large part to the low cost of innovation in the online space. Unlike in other paradigm-shifting technologies of the past, the critical inputs for Internet-based companies are less capital intensive, allowing individual entrepreneurs to turn small seed investments into global enterprises in a short time. As one investor explained in a Wall Street Journal op-ed, the cost of

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<sup>1</sup> <https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx>

<sup>2</sup> Internet Association, *Measuring the U.S. Internet Sector*, <http://internetassociation.org/wp-content/uploads/2015/12/Internet-Association-Measuring-the-US-Internet-Sector-12-10-15.pdf>

<sup>3</sup> Matthieu Pélissier du Rausas, James Manyika, Eric Hazan, Jacques Bughin, Michael Chui, Rémi Said, "Internet matters: The Net's sweeping impact on growth, jobs, and prosperity," McKinsey & Company (May 2011), available at [http://www.mckinsey.com/insights/high\\_tech\\_telecoms\\_Internet/Internet\\_matters](http://www.mckinsey.com/insights/high_tech_telecoms_Internet/Internet_matters) at p.11-12. (This 2009 estimate is based on a study of 13 countries: G8 countries, as well as China, India, Brazil, Sweden, and South Korea.)

running a basic internet application fell from \$150,000 a month in 2000 to \$1,500 a month in 2011—a 99% drop in price.<sup>4</sup>

At the beginning of the Internet’s rise to mainstream adoption, Congress recognized that the ease with which Internet platforms could facilitate web user participation and interaction would also make them targets for ruinous lawsuits. Since imposing liability on OSPs for the copyright infringements of their users would potentially increase the costs of building and operating a platform to an untenable level,<sup>5</sup> Congress determined that “by 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.”<sup>6</sup> In short, Congress’s passage of the “Online Copyright Infringement Liability Limitation Act” in Title II of the Digital Millennium Copyright Act (DMCA) of 1998 made possible the emergence of platform OSPs and the Internet economy we have today.

The massive economic value created by platform OSPs represents only one segment of § 512’s success. Lost in what is often (incorrectly) portrayed as a tradeoff between “content industries” and OSPs is the net increase in creative production enabled by online platforms. Artists that once struggled to find customers can now access a worldwide market on Redbubble, opening up new sources of revenue to support their art. Platforms like Medium allow writers to reach readers without having to break into the elite world of publishers and editors. These OSPs do more than just make it easy for users to share information; they make creative pursuits feasible for millions of artists, musicians, writers, and filmmakers. What were once thought of only as “tech” companies are now more appropriately thought of as “content” companies in their own right.

In light of the creative activity occurring through platform OSPs, it’s evident that § 512 has furthered the fundamental goal of copyright law: to promote the Progress of Science

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<sup>4</sup> Marc Andreessen, “Why Software Is Eating The World,” *The Wall Street Journal*, Aug. 20, 2011, available at <http://on.wsj.com/1gt4wRH>.

<sup>5</sup> Damages for a single copyright infringement could cost a platform up to \$150,000—the same as the entire average monthly cost of running an Internet application in 2000.

<sup>6</sup> S.Rep. 105-190, at 8.

and useful Arts.<sup>7</sup> But, despite the DMCA's broad successes and surprising vitality in a changing technological landscape, some aspects of § 512 are stymieing creative and economic growth. As discussed in sections III and IV, *infra*, the imbalance in §§ 512(f) and (g), along with ambiguities in the application of § 512(c)'s safe harbor requirements inhibit the further growth of platform OSPs and the economic and cultural value they create.

### III. Restoring Balance to the Notice and Takedown Process

***Question 12.*** *Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?*

Section 512 is built on a central bargain: in exchange for protection from secondary liability arising from a user's posting of infringing material, an OSP must, among other things, "expeditiously" remove access to a piece of content stored at the direction of a user if the owner of the copyright to the content in question identifies it as infringing.<sup>8</sup> As the Internet has developed and the amount of content available through OSPs has exploded, the imbalance in the penalties associated with § 512's notice and takedown regime has become ever more prominent and problematic. Because OSPs face significant penalties for failing to process any and all takedown notices they receive, and because takedown notice senders face virtually no penalties for false or deficient removal requests, § 512 incentivizes parties to send as many notices as possible, regardless of their validity, and makes it difficult for OSPs to push back against fraudulent or defective notices. Instead, § 512 requires individual users to shoulder the burden of challenging improper takedown notices, but because challenging an improper notice subjects a user to high legal costs and potentially ruinous damages for a relatively small benefit, few users ever invoke § 512(g)'s counternotice procedures.<sup>9</sup> As a result, OSPs have to spend significant resources processing false or deficient takedown notices and risk losing users who improperly have their content deleted with no meaningful avenue to protect their

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<sup>7</sup> U.S. Const. art I, § 8, cl. 8.

<sup>8</sup> 17 U.S.C. § 512(c)

<sup>9</sup> See Jennifer M. Urban and Laura Quilter, Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act (May 23, 2006). Santa Clara Computer and High Technology Law Journal, Vol. 22, at 621, 679, *available at* SSRN: <http://ssrn.com/abstract=2210935>.

rights. Rebalancing the incentives and penalties in § 512's takedown structure would further copyright law's central purpose by lowering the burden on OSPs and diminishing the number of false notices that target legitimate creative content.

#### 1. Reforming Statutory Damages Penalties Will Encourage Investment in OSPs and Promote Efficiency and Cooperation in the Takedown Notice Process

The immense statutory damages penalties available in copyright litigation compel platform OSPs to build their businesses around compliance with § 512's safe harbors, even though such compliance can be rather burdensome for startups without vast resources given the obligations involved (e.g., expeditiously processing requests for removal of content,<sup>10</sup> establishing and implementing a reasonable repeat infringer policy,<sup>11</sup> designating and registering an agent to receive notices of infringement,<sup>12</sup> etc.) Failing to expeditiously remove a single infringing work can lead to a statutory damages penalty of up to \$150,000 regardless of the actual damages incurred.<sup>13</sup> Thus, a single judgment can be enough to bankrupt many startups, but for platforms that facilitate the distribution of large amounts of information, damages awards can quickly reach absurd levels; indeed, in one suit against a platform OSP, the plaintiff asked the court for a damages award that would have granted them “more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877.”<sup>14</sup> The threat of such absurd damages awards undermines the purpose of § 512. To help ensure that § 512 encourages investment in Internet platforms and to incentivize OSPs and copyright owners to cooperate in addressing online infringement rather than simply engaging in a war of attrition that ultimately hurts users and startups, the Copyright

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<sup>10</sup> 17 U.S.C. § 512(c)(1)(A)(iii)

<sup>11</sup> 17 U.S.C. § 512(i)

<sup>12</sup> 17 U.S.C. § 512(c)(2)

<sup>13</sup> 17 U.S.C. § 504; *See also, Viacom Int'l Inc. v. YouTube, Inc.*, 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013) (granting summary judgment on secondary infringement action seeking statutory damages)

<sup>14</sup> *Arista Group LLC v. LimeWire LLC*, No. 06 CV 5936 (S.D.N.Y. Mar. 10, 2011)

Office should support reforms that disallow statutory damages awards in secondary infringement actions in favor of an actual damages regime.<sup>15</sup>

Under the current system, platform OSPs face a stark choice: either process every takedown notice received and risk alienating users that have their content removed because of fraudulent notices or commit resources to reviewing takedown notices for accuracy and risk a lawsuit that could easily shut down the company. Several OSPs have spent considerable time and money building internal systems to verify the validity of the takedown notices they receive. Kickstarter, for example, reviews each takedown notice for completeness and accuracy and rejects those that appear to be targeting fair uses or are otherwise illegitimate. GitHub, which must not only examine each takedown notice on its face but also consider issues such as which open source license may be governing the use of the work, also has trained a specialized team to review and verify each notice it receives.

But, such internal review is only possible for OSPs that either receive a relatively small number of takedown notices or have resources well beyond what the typical startup can afford. Building a system like YouTube's Content ID program—an automated digital “fingerprinting” system that compares the content of files uploaded to the site against a list of copyrighted material to identify infringements—costs more than the entire value of most startups. And even with such a sophisticated system, YouTube recently announced that it was creating a dedicated team to review takedown claims to address the growing number of complaints from users that their legitimate content was being misidentified as copyright infringing.<sup>16</sup> Needing to hire a dedicated team to monitor takedown notices for accuracy would significantly increase the cost of starting and operating a platform OSP, which would in turn limit competition in the sector and ultimately harm the economic and creative potential of the Internet. In fact, requiring a system as robust as Content ID, as some rights holder organizations have suggested, would do nothing more than entrench

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<sup>15</sup> The rationale behind statutory damages for direct infringement (difficulty in quantifying the harm of any individual infringement (*see* note 32 *infra*)) does not apply as strongly to secondary infringement claims, where plaintiffs typically seek recovery from a single OSP for numerous user infringements.

<sup>16</sup> [https://productforums.google.com/forum/#!topic/youtube/x3aGmn\\_MsqI](https://productforums.google.com/forum/#!topic/youtube/x3aGmn_MsqI)

the dominant players' position in the market and drive out any competitors, as no new entrants to the market could afford such an obligation.

And those OSPs that can afford to review takedown notices still face the threat of costly secondary infringement lawsuits that can have a significant chilling effect on innovation. A study that Engine co-wrote earlier this year surveying early stage investors in eight countries regarding their investment activity in digital content intermediaries (DCIs) found that 78 percent said that they would be deterred from investing in DCIs that offer user generated content if new anti-piracy regulations would expose such companies to increased secondary infringement liability.<sup>17</sup> The threat of large statutory damages awards for failing to expeditiously remove content that arguably qualifies as a fair use or is otherwise non-infringing harms startup investment; imposes undue costs on content owners, OSPs, and users; and undermines § 512's stated purpose of encouraging cooperation between OSPs and content owners in addressing online copyright infringement and providing OSPs with "more certainty ... in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet."<sup>18</sup> Reforming the copyright damages regime to limit claimants to recovering actual damages—particularly in secondary liability cases where the defendant can demonstrate a good faith basis for believing the activity at issue to be non-infringing—will help de-escalate the takedown process and allow OSPs to thoughtfully and efficiently participate in the removal of infringing material online.

## 2. Section 512(f) is Ineffective at Deterring False Notices

***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?*

In the two decades since the DMCA was passed, the number of takedown notices sent to OSPs has increased exponentially. While the incredible growth of content available via

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<sup>17</sup> Engstrom, Evan, Matthew Le Merle, and Tallulah Le Merle, "The Impact of Internet Regulation on Early Stage Investment," Fifth Era and Engine Advocacy, (November 2014), at 5. <http://engine.is/wp-content/uploads/EngineFifthEraCopyrightReport.pdf>.

<sup>18</sup> 144 CONG. REC. S11,889 (daily ed. Oct. 2, 1998) (statement of Sen. Hatch)

the Internet explains a significant part of this increase, § 512's permissive approach to takedown notices has contributed to the ever-expanding volume of notices. And, most problematically, the lack of meaningful penalties for false notices, combined with an impossibly high legal standard for holding the senders of false takedown notices liable, has prompted a rise in fraudulent notices.

Compared with what an OSP must do to avail itself of § 512's safe harbor, the compliance burden on the sender of a takedown notice is relatively low (e.g. ensure that the takedown notice includes statutorily defined information, such as an identification of the work at issue and a statement that the posting of the work was not authorized or otherwise legal<sup>19</sup>). As a result, many copyright owners use unreliable automated systems to identify allegedly infringing material and send removal requests.<sup>20</sup> These systems often consist of crude keyword searches, generating takedown notices for files that match keywords of copyrighted titles without any human review of the content.<sup>21</sup>

Consequently, deficient and fraudulent notices are commonplace. A 2006 study found that 31 percent of the takedown notices in its sample were defective—either because the complained of material was non-infringing due to the existence of a legitimate fair use defense, was non-copyrightable altogether, or not subject to the control of the claimant.<sup>22</sup> Data from OSPs suggests that this false identification rate is relatively consistent across the Internet. Data from blogging platform WordPress shows that it removes “some or all content” in response to 61 percent of DMCA notices, indicating that around 39 percent of notices it receives are defective or fraudulent.<sup>23</sup> Similarly, in 2015, Kickstarter rejected approximately 39 percent of the DMCA notices it received. A recent academic study of

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<sup>19</sup> 17 U.S.C. § 512(c)(3)(A)

<sup>20</sup> Joe Karaganis and Jennifer Urban, “The Rise of the Robo Notice,” *ACM*, Vol 58, No. 9, 28-30, <http://cacm.acm.org/magazines/2015/9/191182-the-rise-of-the-robo-notice/abstract>.

<sup>21</sup> Mike Masnick, “Another Day, Another Bogus Set Of DMCA Takedowns Based Solely On Keywords (This Time Hiding Legit GitHub Projects)” *Techdirt*, (Jan 7, 2015). <https://www.techdirt.com/articles/20150107/06350229618/another-day-another-bogus-set-dmca-takedowns-based-solely-keywords-this-time-hiding-legit-github-projects.shtml>

<sup>22</sup> Jennifer Urban and Laura Quilter, “Efficient Process or ‘Chilling Effects’? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act,” 22 *Santa Clara Computer & High Tech. L.J.* 621 (2005) at 667 et seq. <http://lquilter.net/pubs/UrbanQuilter-2006-DMCA512.pdf>.

<sup>23</sup> Automattic, “Report: Intellectual Property,” Last accessed March 30, 2016. <https://transparency.automattic.com/intellectual-property/>.

takedown notices produced similar results, finding that in a 30 million takedown notice sample, nearly 30 percent were of questionable validity.<sup>24</sup> GitHub has also had to parse through complex open source licensing issues to investigate takedown notices that claimed infringement, but were actually within the scope of the open source license chosen by the author, resulting in GitHub restoring the improperly deleted content.<sup>25</sup> These false takedown notices are not limited to overzealous enforcement actions by content industries uninhibited by the fear of legal reprisal; some studies show that a majority of all takedown notices are sent by businesses targeting competitors.<sup>26</sup>

Copyright owners (and bad actors imitating copyright owners) are emboldened to send false or deficient notices because § 512 fails to provide any effective deterrent to such behavior. Section 512(f) purports to establish a cause of action against “Any person who knowingly materially misrepresents...that material or activity is infringing,” but in practice, § 512(f) has been entirely ineffective at punishing or deterring false notices because most courts require a § 512(f) plaintiff to prove that the defendant subjectively knew that it sent a false takedown notice before liability can attach.<sup>27</sup> This means that an objectively unreasonable takedown notice targeting clearly non-infringing material will not support a § 512(f) claim unless the defendant admits that it knew it sent a false notice or the plaintiff can produce some smoking gun evidence showing the defendant’s bad faith. The time and effort it would take an aggrieved party to locate evidence demonstrating the defendant’s subjective bad faith makes § 512(f) litigation untenable for most parties. Indeed, the most prominent recent case involving a false takedown notice, *Lenz v. Universal Music Corp.*, has been pending for almost a decade.<sup>28</sup>

Though the latest decision in *Lenz* helps move the § 512(f) analysis in a more sensible direction by obligating the sender of a takedown notice to consider fair use before requesting the removal of content, it remains unclear how this requirement will operate in

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<sup>24</sup> Jennifer Urban, Joe Karaganis, and Briana L. Schofield, “Notice and Takedown in Everyday Practice,” (Mar. 29, 2016). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2755628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628).

<sup>25</sup> See, e.g., <https://github.com/github/dmca/pull/611/files>

<sup>26</sup> Mike Masnick, “Google Provides Numbers On Just How Often DMCA Takedown Process Is Abused,” *Techdirt*, (Mar. 18, 2009). <https://www.techdirt.com/articles/20090315/2033134126.shtml>.

<sup>27</sup> See, e.g., *Rossi v. Motion Picture Ass’n of Am.*, 391 F.3d 1000 (9th Cir. 2004)

<sup>28</sup> *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015)

practice under the “subjective good faith belief” standard that still permits objectively unreasonable and fraudulent takedown notices.<sup>29</sup> So long as the sender of fraudulent takedown notices can avoid liability by simply alleging that he or she subjectively believed that the notice was valid, takedown abuse will proliferate. To help curb abuse of § 512’s takedown process, the Copyright Office should encourage the adoption of an objective standard for determining whether a takedown notice was sent in good faith for purposes of § 512(f).

Of course, even if a plaintiff can prove that the sender of a takedown notice subjectively knew that its request contained misrepresentations, § 512(f) would fail to adequately prevent fraudulent notices because the damages available under the statute are insufficient to encourage plaintiffs to pursue expensive lawsuits to vindicate their rights or deter bad actors from abusing the system. Section 512(f) allows for the recovery of “any damages” attributable to the false takedown notice—“actual expenses or economic losses of some minimum value are not necessary under the statute.”<sup>30</sup> But, even under an expansive reading of the available damages, the economic injury attributable to any individual takedown is unlikely to justify the costs of bringing a lawsuit under § 512(f). The history of § 512(f) litigation demonstrates this fact. The only plaintiff to prevail on a § 512(f) claim in the past decade (in a default judgment, no less) was awarded just over \$25,000 in damages, \$22,264 of which consisted of attorneys’ fees.<sup>31</sup> Though it is unquestionably damaging to an OSP if its users lose content through fraudulent takedown notices (YouTube would never have created a dedicated team to address false notices if they were harmless), it is impossible to quantify the economic harm that any individual false takedown notice causes to a user or OSP. The lack of meaningful penalties for § 512(f) violations seems particularly imbalanced considering the statutory damages regime in infringement actions was created precisely because damages were difficult to quantify:

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<sup>29</sup> *Id.* at 1129 (“We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that failure to do so raises a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law.”)

<sup>30</sup> *Lenz v. Universal Music Corp.*, 2010 WL 702466, at\* 12 (N.D. Cal. Feb. 25, 2010)

<sup>31</sup> *Automattic vs. Steiner*, 2015 WL 1022655 (N.D. Cal. March 2, 2015)

[Statutory damages are meant] to give the owner of a copyright some recompense for injury done him in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect, the old law was unsatisfactory. In many cases, plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged willful and deliberate infringement.<sup>32</sup>

OSPs and users face the exact same problem in establishing damages, resulting in copyright owners deluging OSPs with overbroad, deficient, or fraudulent notices.

Of course, as explained *supra*, § 504's statutory damages regime itself poses serious problems for the copyright system, particularly in the secondary infringement context, so allowing plaintiffs to seek statutory damages for § 512(f) violations is likely not the best solution. Rather, the Copyright Office should reject statutory damages for both secondary infringement actions and § 512(f) claims and instead support a system that deters false notices without unduly raising the stakes of copyright litigation. Just as OSPs are obligated to terminate "repeat infringers" under § 512, an OSP should be legally permitted to ignore notices sent from "repeat false senders" that routinely abuse the system with false or unreasonably deficient notices without losing the protection of the safe harbor. Such a non-monetary deterrent will encourage copyright owners and OSPs to cooperate to ensure that legitimate notices get processed quickly by weeding out notices from bad actors who routinely bombard OSPs with false requests that slow down the process for removing actually infringing material. In turn, minimizing the total pool of notices by removing the false notices (around a third of all requests)<sup>33</sup> will lower the cost of § 512 compliance for OSPs, which will increase competition and economic growth in the sector.

### 3. Section 512(g) Is Insufficient to Protect Users From Improper Takedowns

**Question 16.** *How effective is the counternotification process for addressing false and mistaken assertions of infringement?*

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<sup>32</sup> See, e.g., *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935)

<sup>33</sup> See notes 22-24 *supra*

Because § 512(f) has been rendered toothless by impossibly high liability standards and prohibitive litigation costs, the only tool users have to fight false notices is § 512(g)'s counternotification procedure, which allows a user to challenge the validity of a takedown notice and restore access to the disabled content at issue.<sup>34</sup> To invoke § 512(g), a user must submit personally identifying information and consent to jurisdiction for purposes of the lawsuit the takedown notice sender must then file to rebut the counter notice.<sup>35</sup> Essentially, to restore access to a single file, a user must publicly invite a lawsuit that could cost up to \$150,000 in damages (with attorneys' fees on top of that). It is no surprise, then, that § 512(g) is rarely invoked. Despite the prevalence of false notices, most OSPs see only a handful of § 512(g) counter notices every year. Even though many of the takedown notices sent to Redbubble relate to arguable fair uses by artists on the platform, less than one percent of the removal requests Redbubble receives are subject to counternotices. Surely, many of these notices targeted legitimate fair uses, but because of the legal threat involved, users did not challenge the removals. Similarly, Twitter received only 121 counternotices for more than 19,000 takedown requests in the second half of 2015, and all 121 counternotices resulted in restoration of the disabled content.<sup>36</sup> Clearly, users only invoke § 512(g) when it is unquestionably clear that the deletion was improper. Consequently, § 512(g) has proven to be totally ineffective at mitigating erroneous and fraudulent takedown notices.

By essentially forcing parties into litigation, § 512(g) also frustrates the cooperation that § 512 was meant to facilitate. Section 512(g)(2)(C) specifically provides immunity for an OSP that, upon receipt of a counternotice, replaces content that had been removed pursuant to a takedown notice within 10 – 14 business days, unless the provider receives notice that the sender of the takedown notice “has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity.”<sup>37</sup> This has generally been interpreted as a requirement for the first party to send a takedown notice; the second party

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<sup>34</sup> 17 U.S.C. § 512(g)

<sup>35</sup> *Id.*

<sup>36</sup> Twitter Transparency Report, *available at* <https://transparency.twitter.com/copyright-notices/2015/jul-dec>

<sup>37</sup> 17 U.S.C. § 512 (g)(2)(C).

to send a counternotice; and the first party to respond with a federal lawsuit.<sup>38</sup> By its structure, the provisions of the DMCA require rights holders to proceed directly from notice to federal suit, with no time or ability to pursue mediation or other alternate dispute resolution.

This “go directly to court, do not pass Go” pipeline defies the intention of the Federal Arbitration Act (FAA). The FAA, passed in 1925, was enacted to counteract a trend of disfavor towards arbitration agreements,<sup>39</sup> and to ensure that agreements to arbitrate were “valid, irrevocable, and enforceable.”<sup>40</sup> Since its passage, the Supreme Court has upheld the FAA as creating a “national policy favoring arbitration,”<sup>41</sup> which applies to both federal and state courts. Further, Congress has strengthened the arbitral process by creating additional alternative dispute processes for litigants, in order to achieve efficient settlements and ease the burden on federal courts.<sup>42</sup> While these processes instruct that federal court litigants must consider the use of alternate dispute resolution, the fact that litigants are already in federal court is burdensome on the courts and burdensome on the litigants. By failing to allow disputing parties to participate in mediation or other alternate dispute resolution *prior* to filing an action in federal court, § 512(g)(2)(C) places an unfair burden<sup>43</sup> on rights holders, on secondary users, and on the federal court system.

Ultimately, § 512(g) has totally failed as a means to deter fraudulent takedown notices and for aggrieved users to vindicate their rights. It essentially forces parties into litigation, raising the stakes of what should be a relatively straightforward process into a high-stakes court battle and runs counter to longstanding federal policy.

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<sup>38</sup> See, e.g., *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153 (N.D. Cal 2008), considering whether the duty to consider fair use arises when sending a takedown notice or “after a copyright owner receives a counternotice and considers filing suit.”

<sup>39</sup> See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

<sup>40</sup> 9 U.S.C.S. § 2

<sup>41</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); see also 563 U.S. 333 at 339.

<sup>42</sup> See, e.g., Alternative Dispute Resolution Act of 1998, § 2, Pub. L. 105-315, 112 Stat. 2998; Judicial Improvements and Access to Justice Act, Pub. L. 100-702, §§ 901-07, 102 Stat. 4642, 4659-64.

<sup>43</sup> This burden is one that the Copyright Office has tried to address in its recommendation to create a Small Claims Court, but even that report did not consider the implications of § 512(g)(2)(C) in light of the FAA’s mandate towards arbitration.

#### IV. The Ambiguous and Problematic “Repeat Infringer Policy”

**Question 23.** *Is there sufficient clarity in the law as to what constitutes a repeat infringer policy for purposes of section 512’s safe harbors? If not, what should be done to address this concern?)*

To qualify for § 512’s safe harbor, an OSP must “adopt[] and reasonably implement[]...a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”<sup>44</sup>

The DMCA itself provides little guidance in its text or legislative history as to what, precisely, a reasonable repeat infringer system looks like—or, for that matter, what a “repeat infringer” is or what “appropriate circumstances” for termination look like or how an OSP can “reasonably implement” such a program. And while the most common judicial formulation holds that a repeat infringer “policy is unreasonable only if the service provider failed to respond when it had knowledge of the infringement,” and OSPs need not “affirmatively police its users for evidence of repeat infringement,” there is ample ambiguity in the case law as to when a policy is actually “reasonable.”<sup>45</sup>

Perhaps most problematically, the relevant case law suggests that a mere accusation of infringement in the form of a takedown notice is sufficient to brand a user as a “repeat infringer,” even though, as discussed *supra*, the existence of a takedown notice is hardly proof of actual infringement.<sup>46</sup> While takedown notices subject to § 512(g) counternotifications do not count as “strikes” for purpose of repeat infringer policies, the deficiencies of §§ 512(f) and (g) effectively mean that a “reasonably implemented” repeat infringer policy will result in user accounts being deleted after they receive a certain number of infringement accusations, regardless of their validity. Unless and until §§ 512(f) and (g) become effective at deterring false and deficient takedown notices, requiring OSPs to terminate users that receive some specified number of takedown notices will result in the deletion of users subject to false takedown notices. Such

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<sup>44</sup> 17 U.S.C. § 512(i)(1)(A)

<sup>45</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

<sup>46</sup> See *BMG Rights Management (US) LLC et al v. Cox Communications, Inc.*, 2015 WL 7756130 (E.D.Va. Dec. 1, 2015) (“[T]he Court disagrees that a repeat infringer policy applies only to those who have been held liable in a copyright suit.”)

improper user deletions damage both users and OSPs, causing direct financial and reputational harms.

Just as the high penalties associated with failing to expeditiously delete all content subject to takedown notices regardless of their validity incentivizes OSPs to err on the side of deleting content, the high penalties associated with failing to terminate repeat infringers incentivizes OSPs to terminate users that may not be infringers. OSPs that fail to terminate certain repeat infringers will lose all the protections of § 512's safe harbor, not just as to those specific users. That is, if a court finds that an OSP's failed to delete a "repeat infringer" responsible for ten copyright infringements, the OSP will potentially face liability for all the infringements on the site, not just that user's ten infringements. Moreover, there is ambiguity as to whether an OSP that failed to reasonably implement a repeat infringer policy for some subset of time can ever recover and claim the safe harbor after implementing such a policy.<sup>47</sup> Such expansive penalties for failing to comply with an incredibly ambiguous statute—even if the failure to comply is inadvertent—undermines § 512's purpose of providing "certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities."<sup>48</sup>

Ultimately, guidance is needed to provide OSPs with certainty as to how to reasonably implement a repeat infringer policy consistent with § 512's obligations. But, because of deficiencies of §§ 512(f) and (g), a system that requires OSPs to delete user accounts due to mere allegations of infringement risks improper deletions that harm users and OSPs. Making §§ 512(f) and (g) more reasonable and effective will also help make repeat infringer policies more reasonable and effective.

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<sup>47</sup> See *Disney Enterprises, Inc. v. Hotfile Corp.*, Case No. 11-20427-Civ (S.D. Fla. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment Sept. 20, 2013) ("This request to limit liability raises questions of whether a party can ever regain the protections of the DMCA")

<sup>48</sup> See H.R. Rep. No. 105-551, at 49-50 (1998)

V. Dangers of increasing the burden on OSPs to monitor infringing material

**Question 5.** *Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?*

The incredible growth of the Internet—and of platform OSPs in particular—strongly suggests that the DMCA has been effective at balancing the interests and burdens of copyright owners and OSPs. The economic value the Internet has created in a few short decades would have been impossible without the DMCA’s limited liability regime. Section 512 has facilitated the development of tens of thousands of companies; according to the Copyright Office’s records, more than 66,000 OSPs today rely on § 512’s notice and takedown process and safe harbor protection.<sup>49</sup>

In limiting OSP liability for user infringements to situations where the OSP has knowledge of the infringing activity and by “plac[ing] the burden of policing copyright infringement...squarely on the owners of the copyright,” the DMCA has sensibly apportioned the duties of limiting online infringement between OSPs and copyright owners.<sup>50</sup> Copyright owners are in a far better position to determine what infringes their copyrights than OSPs that have little insight into copyright ownership and licensing. Surveys of investors show that any change in OSP’s monitoring obligations will inevitably make it more difficult for the next generation of OSPs to receive the funding they need to launch and grow.<sup>51</sup> And, because OSPs are ill-equipped to know what is infringing and what is authorized, shifting the burden of policing infringements will lead to more incorrect deletions, as OSPs will have a strong incentive to err on the side of removing content.

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<sup>49</sup> U.S. Copyright Office, Directory of OSP Designated Agents, [http://www.copyright.gov/onlinesp/list/a\\_agents.htm](http://www.copyright.gov/onlinesp/list/a_agents.htm)

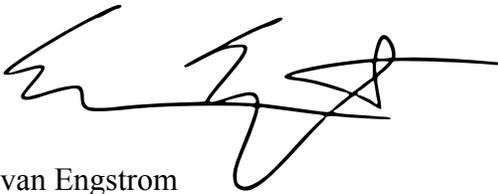
<sup>50</sup> *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007).

<sup>51</sup> See Engstrom, *supra* note 17.

## VI. Conclusion

Considering the major technological changes that have occurred since the DMCA was first enacted, it is incredible that the statute continues to work well in facilitating the growth of the Internet sector and promoting creativity through the 21st century's dominant medium. Maintaining the central limitations on liability that make the DMCA work while rebalancing § 512's notice and takedown provisions will help ensure that the DMCA continues to help the next wave of innovators and entrepreneurs build world changing companies.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Evan Engstrom', with a stylized, overlapping flourish at the end.

Evan Engstrom

Executive Director

Engine

*On behalf of Engine, GitHub, Kickstarter, Medium, and Redbubble*