

Copyright Reform Act

Prepared on behalf of



Updating 17 U.S.C. § 512's Notice and Takedown Procedure for Innovators, Creators, and Consumers

March 31, 2011

by

**Dena Chen, Musetta Durkee,
Jared Friend, and Jennifer Urban**

BerkeleyLaw
UNIVERSITY OF CALIFORNIA

Samuelson Law, Technology
& Public Policy Clinic

This Report is one of a series related to the Copyright Reform Act, a project created on behalf of Public Knowledge as a client of the Samuelson Law, Technology & Public Policy Clinic at U.C. Berkeley School of Law and the Stanford Cyberlaw Clinic.[†]

Public Knowledge is a Washington, D.C., based public interest organization that works to protect the rights of citizens and consumers to communicate and innovate in the digital age. Ensuring these rights requires a copyright law that does not unduly restrain everyday communications or new sources of creativity, and one that can account for current and future changes in technology.

[†] This Report was developed by Samuelson Law, Technology & Public Policy Clinic, including faculty Jennifer Lynch and Jennifer M. Urban and students Dena Chen, Musetta Durkee, and Jared Friend. The Copyright Reform Act is in large part due to the excellent work of Stanford Cyberlaw Clinic students Jake Freed, Charlin Lu, and Marc Williams. We wish to thank Jonathan Band, Bruce Joseph, Paul Levy, Fred von Lohmann, Aaron Perzanowski, Jason Schultz, and Tara Wheatland for their thoughtful feedback on the CRA and/or these Reports. The opinions herein should not be attributed to them; and mistakes, of course, remain our own.

Disclaimer: The Copyright Reform Act and this Report were created on behalf of Public Knowledge as a client of the Samuelson Law, Technology & Public Policy Clinic at U.C. Berkeley School of Law and the Stanford Cyberlaw Clinic. The opinions in this Report do not necessarily reflect the opinions of other Clinic clients and should not be attributed to them.

Table of Contents

- I. INTRODUCTION 1**
- II. BUTTRESSING § 512’S FOUNDATIONAL PROTECTIONS FOR OSP AND INTERNET INNOVATION..... 4**
 - A. HARMONIZING § 512..... 4
 - B. SIMPLIFYING § 512 TO INCREASE EFFICIENCY FOR OSPs TO DESIGNATE AGENTS 6
- III. REFORMING § 512’S INCENTIVES TO IMPROVE CURRENT USES AND EFFECTS OF THE NOTICE AND TAKEDOWN PROCEDURE TO ADDRESS HARMS CAUSED BY ITS STRUCTURAL SHORTCOMINGS 7**
 - A. REBALANCING § 512’S INADEQUATE INCENTIVES TO SEND ACCURATE AND VALID TAKEDOWN NOTICES AND COUNTER-NOTICES 8
 - 1. Strengthening § 512(f) to rebalance incentives and encourage accurate notices.... 9
 - 2. Increasing notice sender accountability under § 512(c)(3)(A)(vi)’s notice requirement 14
 - B. REFORMING AND STRENGTHENING § 512(G)’S COUNTER-NOTICE PROCEDURES 15
 - 1. Giving users notice of the notice and takedown process and increasing transparency of the notice and takedown procedure..... 16
 - C. ENCOURAGING PROMPT REPLACEMENT OF LAWFUL USES OF CREATIVE AND INFORMATIVE CONTENT 16
 - D. BRINGING TRANSPARENCY TO THE NOTICE AND TAKEDOWN PROCEDURE..... 17
 - 1. Improving transparency and accountability through a centralized repository of notices 18
- IV. CONCLUSION..... 20**

I. INTRODUCTION

In this last installment of our Report series, we suggest reforms to strengthen and reinforce the Digital Millennium Copyright Act (“DMCA”).¹ Since its enactment, § 512² has had a strong positive influence on today’s digital, Internet, and creative content industries.

By providing copyright holders with an efficient method for removing infringing materials from online sites and by giving connectivity, hosting, and other online providers safe harbor from copyright infringement liability, § 512 has encouraged both technological innovation and the dissemination of new creative and informational content—overall, it has played a foundational role in the success of the Internet. Despite § 512’s positive influences on innovation and the dissemination of creative and informational works, however, several flaws in its statutory structure have led to significant unintended and harmful consequences.

Section 512 is intended to accomplish several interrelated goals: to provide a simple way for copyright holders to alert online hosts and other providers to the presence of infringing content and to request its removal; to encourage the development of online services by providing these services with some protection from liability for users’ infringement;³ and to protect users’ free expression interests⁴ by limiting service providers’ incentives to screen materials prior to posting.⁵ It operates by setting out several procedural frameworks for copyright holders, targets of notices, and online service providers (“OSPs”) to follow.⁶ The central procedural framework

¹ See U.S. Copyright Office, *The Digital Millennium Copyright Act Of 1998*, 1 (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>, page 1. The DMCA implemented two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The DMCA includes five sections, including Title II, the Online Copyright Infringement Liability Limitation Act, which includes 17 U.S.C § 512 (2006). “The purpose of the bill . . . [is] to set copyright law up to meet the promise and the challenge of the digital world in the new millennium.” See 144 CONG. REC. S11889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch).

² In 1998, Congress passed the Online Copyright Infringement Liability Limitations Act (OCILLA), codified in § 512 and passed as Title II of the Digital Millennium Copyright Act (DMCA). OCILLA added § 512 to Title 17 of the United States Code, Chapter 5, Copyright Infringement and Remedies. Pub. L. No. 105–304, 112 Stat. 2860, 2877.

³ “The OSPs and the ISPs need more certainty in this area [referring to liability] in order to attract the substantial investments necessary to continue the expansion and upgrading of the Internet.” 144 CONG. REC. S11889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch).

⁴ “The WIPO treaties and the DMCA will protect the property rights of Americans in their work as they move in the global, digital marketplace, and, by doing so, continue to encourage the creation of new works to inspire and delight us and to improve the quality of our lives.” *Id.*

⁵ David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 918 (2002). See also, H.R. REP. NO. 105–796, at 72 (1998) (Conf. Rep.), available at <http://www.copyright.gov/legislation/hr2281.pdf> (“Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”).

⁶ In § 512, Congress announced four categories of OSPs that may receive safe harbor from copyright infringement liability. These four categories are: transitory communications, system caching, storage of information on systems or networks at direction of users, and information location tools. See U.S. Copyright Office, *The Digital Millennium Copyright Act Of 1998*, *supra* note 1, at 8.

is § 512’s “notice and takedown” procedure.⁷ Under this procedure, copyright owners send OSPs notices⁸ requesting that the OSPs⁹ remove or disable copyright-infringing material. In exchange for OSP compliance with this procedure, OSPs receive safe harbor from some forms of liability arising from users engaging in infringing activity.¹⁰ To police against overreaching or ill-considered complaints, § 512 includes a counter-notification procedure that allows the target of a notice to contest the takedown by sending a counter-notice to the OSP that asks it to reinstate the material.¹¹

Given the complexity of the statute and the diversity of competing interests and parties involved, Congress’s attempt to balance the needs of copyright owners and OSPs with those of online users and new content creators was a difficult task. Unfortunately, while § 512 has enjoyed the notable successes described above, statutory inconsistencies and procedural imbalances in § 512 have also caused significant problems. Most generally, the process is skewed in favor of takedown, leaving its procedural safeguards limited in effect. To address these concerns, Congress should reform § 512 to restore balance in the notice and takedown procedure, protect the rights of copyright owners, encourage OSP innovation, and respond to the needs of online users, content creators, and the public at large.

To accomplish these goals, Congress should remedy several statutory inconsistencies and procedural imbalances in § 512. For example, gaps in OSP safe harbor protections and overly burdensome administrative requirements expose OSPs to liability in ways that Congress did not intend.¹² Additionally, procedural imbalances, such as inadequate safeguards against inaccurate or reckless notices, encourage poor-quality notices,¹³ which can result in erroneous takedowns of

⁷ By complying with § 512(c)’s notice and takedown requirements, OSPs can qualify for safe harbor protections. See Jonathan Band, *A Legislative Analysis of the DMCA*, SPECIAL LIBRARIES ASSOCIATION, <http://www.sla.org/content/SLA/advocacy/infobank/dmcaanalysis.cfm> (last visited Mar. 28, 2011). However, failure to comply does not automatically make the OSP liable; OSPs can still challenge infringement assertions generally and can still assert copyright defenses, such as fair use or non-copyrightable subject matter. See U.S. Copyright Office, *The Digital Millennium Copyright Act Of 1998*, *supra* note 1, at 9.

⁸ See 17 U.S.C. § 512(c).

⁹ Pursuant to § 512(k), the term “service provider” “means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” See 17 U.S.C § 512(k).

¹⁰ See 17 U.S.C. § 512(c).

¹¹ See 17 U.S.C. § 512(g).

¹² Congress enacted § 512, in part, and the DMCA more generally, to encourage OSP and ISP innovation by providing them with safe harbors from liability. “Congress explained that . . . [§ 512] safe harbor is designed specifically ‘to promote the development of information location tools generally, and Internet directories such as Yahoo!’s in particular, by establishing a safe harbor from copyright infringement liability for information location tool providers if they comply with the notice and take-down procedures and other requirements.” Nimmer, *supra* note 5, at 945.

¹³ See e.g., Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effect”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 666 (2005) (finding, in a study the authors note is limited to notices from Google, Inc.—and therefore skewed toward § 512(d) sender notices—and voluntary submissions that at least a third of the notices collected contained at least one major flaw).

lawful materials.¹⁴ Further, the counter-notice process, meant to protect accused infringers from these types of erroneous notices,¹⁵ is likely underused.¹⁶ Moreover, even when the target of a takedown notice sends a counter-notice, erroneously disabled material is likely to remain inaccessible for at least ten business days.¹⁷ This lag between counter-notice and put-back has the potential to cause great harm for time-sensitive materials like news information, political campaign materials,¹⁸ or public health information. Finally, because notices and counter-notices are sent as private communications,¹⁹ the notice and takedown procedure lacks transparency and public accountability. As such, there is little to no centralized way to identify structural inefficiencies and misuse of the notice and takedown procedure.

In light of these statutory shortcomings and their resulting harms, we recommend in this Report that Congress adopt a series of targeted reforms. These reforms, found in Appendix A, include revising § 512 to:

- harmonize its protections across all copyright-based statutes,
- remove unnecessary burdens on OSPs in the agent designation process,
- reduce and discourage misrepresentations in notices by revising the standard for actionable misrepresentations to include *reckless* misrepresentations,
- reduce and discourage misrepresentation in notices by requiring notice representations to be submitted under penalty of perjury,
- further reduce and discourage misrepresentations in notices and help all parties evaluate risk by adding statutory damages for knowing or reckless misrepresentations,
- buttress protections for notice targets by requiring clear notice of takedown requests, and clear notice of their existing counter-notice rights,

¹⁴ For example, in 2003, the Recording Industry Association of America (RIAA) sent a notice to Penn State University's Department of Astronomy and Astrophysics concerning allegedly illegal copying of an Usher song. In fact, the actual video related to a faculty member, Peter Usher, and an a cappella song about gamma rays. The RIAA notice was generated because of its automated copyright crawlers, which looked for words including "Usher" and ".mp3." The RIAA explained that they try to safeguards errors like these by having individuals review each notice, however their policy does not require listening to the full song on the allegedly infringing file. See ELECTRONIC FRONTIER FOUNDATION, *Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands* (Sept., 2003) http://www.eff.org/files/20030926_unsafe_harbors.pdf.

¹⁵ See 17 U.S.C. § 512(g)(3)(C).

¹⁶ Because use of the notice and takedown procedure occurs in private channels, it is difficult to access accurate data about use of the notice and takedown procedure. See Urban & Quilter, *supra* note 13. In addition, some lay and unsophisticated users are clearly intimidated by takedowns and the possibility of takedowns. See Corynne McSherry, *Hey, Warner, Leave Those Kids Alone*, ELECTRONIC FRONTIER FOUNDATION (Feb. 26, 2009), <http://www.eff.org/deeplinks/2009/02/hey-warner-leave-those-kids-alone>.

¹⁷ See § 512(g)(2)(C).

¹⁸ See Andrew McDiarmid, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech*, CENTER FOR DEMOCRACY & TECHNOLOGY, 15 (Oct. 6, 2010) http://www.cdt.org/files/pdfs/copyright_takedowns.pdf (discussing recent uses of the notice and takedown procedure to take down online political campaign messages).

¹⁹ There is no statutory requirement for notice and counter-notice senders to send a copy of the notice or counter-notice to any publicly accessible or transparent domain.

- reduce and discourage the prolonged silencing of speech by allowing for prompt replacement of erroneously or mistakenly removed materials, and
- increase transparency and accountability in the notice and takedown process by requiring a Repository of notices and counter-notices.

By enacting these targeted reforms, Congress can remedy some of the structural inconsistencies and procedural imbalances in the current § 512, as well as continue to support the lawful creation, access, and dissemination of online creative and informative content.

II. BUTTRESSING § 512’S FOUNDATIONAL PROTECTIONS FOR OSP AND INTERNET INNOVATION

Under § 512, OSPs receive safe harbor protection from claims of liability by complying with § 512’s notice and takedown procedure and by designating agents to manage and respond to notices and counter-notices.²⁰ In part because of this protection, OSPs have developed an incredible array of innovative platform and connectivity services that connect Internet uses to everything from user-generated content to Hollywood films, and that support the explosion of Internet creativity occurring on platforms readily accessible to millions of users worldwide.²¹ In most instances, § 512 protections work well for OSPs—however, harmonizing its protections across the copyright landscape, and lowering the costs of compliance by making it easier to designate agents, would solidify § 512’s benefits without harming copyright holders or users.

Currently, OSPs are only granted safe harbor for claims arising from their users’ copyright infringement and not for related claims, such as users who unlawfully upload bootlegged music videos, circumvention mechanisms, or false copyright management information.²² In addition, the current requirements for designating agents—a threshold requirement for safe harbor protection—are overly burdensome and easily overlooked. Therefore, this Report suggests reforming these requirements to lessen the legal and administrative burdens on OSPs, while retaining the benefits to of the agent system to notice senders and targets.

A. HARMONIZING § 512

OSPs provide essential services that support the hosting, disseminating, and publishing of new creative and informative material in today’s digital landscape. At the same time, in providing these services, OSPs can unwittingly host material, posted by their users, that infringes

²⁰ See 17 U.S.C. § 512(c), (g); *see also* Band, *supra* note 7.

²¹ For example, OSPs like YouTube.com, Bing.com, Facebook.com, and Hulu.com provide services that allow users to access materials online. *See also* K.C. LAUDON & C.G. TRAVER, *E-COMMERCE: BUSINESS, TECHNOLOGY, SOCIETY* 23 (Prentice Hall 2010).

²² Furthermore, even though some OSPs may have the infrastructure to screen every piece of content prior to enabling online access to the content, certain legal issues, such as fair use, are complex and fact-specific. As such, even armed with adequate legal expertise, some OSPs may misinterpret the scope of copyright protection and thereby face, in some instances, crippling liability for copyright infringement. Therefore, without strong safe harbor provisions, OSPs face risk and uncertainty in moving forward with innovations that may expose them to secondary liability for users’ uploading material that violates §§ 1101, 1201, and 1202.

others' copyrights. As described above, Congress recognized the need to protect OSPs from liability in such situations. However, in crafting the § 512 safe harbors, Congress neglected to clearly cover claims closely related to, or a subsidiary of, copyright—especially situations in which users post bootlegged music videos, circumvention mechanisms, or false copyright management information.²³ As such, there are gaps in current safe harbor protections under § 512 that could expose OSPs to liability—or at least create the perception of risk, adding unreasonably to OSP costs and perhaps stifling further OSP innovation in areas that can implicate any of these activities. Though some courts view § 512 safe harbor protections as flexible and expandable,²⁴ there is no case that clearly applies § 512's safe harbor protection to these types of claims. Similarly, it is presently unclear that copyright holders can use the inexpensive and quick takedown process to address these types of claims, though there is evidence that they send notices that relate to at least some of them.²⁵ As such, amending § 512 to clarify that these claims are covered by its safe harbor, without superseding existing defenses, would make it more consistent with both OSPs' and copyright holders' needs and expectations.

Specifically, it is not currently clear that § 512 protects OSPs from users who upload bootlegged audio or video recordings of live performances, thereby violating § 1101,²⁶ who circumvent copyright protection systems, thereby violating § 1201,²⁷ or who provide, distribute, or import false copyright management information, thereby violating § 1202.²⁸ To be sure, these are likely less common claims—the vast majority of user infringements are likely to fall within traditional copyright law. However, because § 512 lacks protection for these closely related user transgressions, OSPs are effectively burdened with categorizing each copyright-related claim and then separately assessing the lawfulness of every piece of posted content that might run afoul of these closely related statutes.²⁹ As such, OSPs are likely either to spend valuable resources sifting through every piece of content to reject materials that violate the provisions, or simply err

²³ Section 512 is intended to provide safe harbor for copyright infringement liability. 17 U.S.C. § 512(a) (“A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright.”). Currently, there is some debate over whether §§ 1101 and 1201 are copyright. *See* U.S. v. Martignon, 492 F.3d 140, 150–53 (2d Cir. 2007). *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT (Prometheus Books 2001).

²⁴ *See e.g.*, *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (describing, in dicta, safe harbor as a “floor, not a ceiling, of protection” and thereby suggesting that safe harbor reforms may be flexible in scope).

²⁵ *See* Urban & Quilter, *supra* note 13, at 666 (finding, in a study the authors note is limited to notices from Google, Inc.—and therefore largely limited to § 512(d) search notices—and voluntary submissions, that at least a third of notices of the notices collected contained at least one major flaw).

²⁶ *See* 17 U.S.C. § 1101.

²⁷ *See* 17 U.S.C. § 1201. *See e.g.*, *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 217 (S.D.N.Y. 2000) (holding that § 512(c) does not apply to § 1201(a)(2) claims and thus is not a valid defense).

²⁸ *See* 17 U.S.C. § 1202.

²⁹ For some small OSPs this may be feasible. However, for OSPs like YouTube.com, whose users upload over thirty-five hours of video every minute, this would be an extremely burdensome, if not impossible, task. *Great Scott! Over 35 Hours of Video Uploaded Every Minute to YouTube*, BROADCASTING OURSELVES (:): THE OFFICIAL YOUTUBE BLOG (Nov. 10, 2010), <http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html>. *But cf.* Jonathan Band, *The Digital Millennium Copyright Act: A Balanced Result*, Policybandwidth.com, at 3, <http://www.policybandwidth.com/doc/JBand-DMCABalancedResult.pdf> (last visited Mar. 28, 2011) (stating that “§ 1201, in contrast, does not share . . . principles” with Title II of the DMCA).

in favor of caution and respond to each notice by taking down material, regardless of the type of claim and regardless of safe harbor protection. This likely leads to the types of harms Congress intended to prevent with § 512, in microcosm—lack of clarity for copyright holders, fear of liability that may create barriers to new OSP services,³⁰ and unwanted chilling effects on the creation and dissemination of creative and informational content.

By leaving possible gaps in § 512’s protections, Congress has created these problematic inconsistencies. Therefore, Congress should adopt our proposed reform—Section 9 in Appendix A—to harmonize § 512 protections by explicitly covering §§ 1101, 1201, and 1202 claims. This harmonization is consistent with current copyright principles and the goals behind § 512, would clarify that copyright holders can request the takedown of materials covered by §§ 1101, 1201, and 1201, would clarify that OSPs are protected by the safe harbors for such claims, and would rationalize the law.

B. SIMPLIFYING § 512 TO INCREASE EFFICIENCY FOR OSPs TO DESIGNATE AGENTS

To enable copyright owners and online users to easily use the notice and takedown procedure, § 512 requires OSPs to designate agents responsible for managing notice and counter-notice requests.³¹ Among other requirements, OSPs must make the contact information for these agents publicly available on their websites³² and must register agent information with the Copyright Office.³³ These requirements add useful transparency to the process, and allow copyright owners and targets of notices to easily determine where to send notices and counter-notices. Easy access to the contact information of these designated agents is important to enable easy use of the notice and takedown procedure; however, some of the current requirements are overly burdensome and redundant. At worst, these administrative requirements may create a “trap for the unwary,” denying smaller or less-sophisticated OSPs safe harbor protection for failing to comply with technical requirements because of an accidental oversight, rather than a purposeful lack of cooperation with the notice and takedown procedure.

Currently, OSPs must make “the name, address, phone number, and electronic address of the agent,” as well as any other information “deem[ed]” appropriate by the Copyright Office, publicly accessible on its website and must also send this information to the Copyright Office.³⁴ Requiring every OSP to file its agent’s contact information with the Copyright Office³⁵ and pay

³⁰ See Jonathon J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP. 1, 33 (2007) (arguing that “copyright law must allow breathing room for technologies that dramatically increase the ease with which works can be accessed and exchanged”).

³¹ See 17 U.S.C. § 512(c)(2).

³² *Id.*

³³ *Id.*

³⁴ See 17 U.S.C. § 512(c)(2)(A).

³⁵ In sending the agent information to the Copyright Office, OSPs must: (1) complete the Office’s interim designation template, which contains the require agent contact information, (2) pay a \$105 filing fee and an additional \$30 per group of ten or fewer filing fee, and (3) mail the filing fees and form to the Copyright Office. *Online Service Providers*, U.S. COPYRIGHT OFFICE (last updated Feb. 23, 2011), <http://www.copyright.gov/onlinesp/>; *Interim Designation of Agent to Receive Notification of Claimed Infringement*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/onlinesp/agent.pdf> (last visited Mar. 28, 2011).

associated filing fees, in addition to making the agent’s contact information publicly accessible on the OSP’s website, exposes the OSP to the risk of mistake in following procedure, merely to create two reference points for the same information. Further, any failure to comply with § 512 requirements could potentially result in the OSP losing safe harbor protection, even over something as small as forgetting to file an amendment with the Copyright Office when an agent changes.³⁶ Transparency is an important aspect of any process, as we describe further, *infra* Section III(d). In this case, however, the benefits of these more onerous requirements—especially the separate requirement to file with the Copyright Office and pay a \$105 fee—are outweighed by the possible trap created for unwary or unsophisticated OSPs.

To avoid penalizing OSPs for such low-value administrative oversights, Congress should revise § 512(c)(2) to allow OSPs to publicize agent information either on their website *or* with the Copyright Office, and to clarify that website publication must be *conspicuous*. This modest reform provides copyright holders and targets access to information about designated agents where they are most likely to need it—on the website of the OSP to which they wish to send a notice or counter-notice—while reducing unnecessary costs and burdens for OSPs and limiting the risk that OSPs will lose safe harbor protection simply due to failure to comply with redundant and costly publication requirements.

III. REFORMING § 512’S INCENTIVES TO IMPROVE CURRENT USES AND EFFECTS OF THE NOTICE AND TAKEDOWN PROCEDURE TO ADDRESS HARMS CAUSED BY ITS STRUCTURAL SHORTCOMINGS

Section 512’s protections for copyright owners, OSPs, and online users have been fundamental to encouraging Internet innovation for over a decade.³⁷ However, despite these important successes, § 512 contains several structural problems that have led to significant harms. First, § 512 provides insufficient safeguards when the notice and takedown procedure is misused to demand the takedown of material that does not infringe copyright. Second, § 512 provides inadequate protections when targeted users are wrongfully accused of posting infringing material. Third, § 512 burdens interests in free expression and creative works by requiring OSPs to keep removed material inaccessible for ten to fourteen business days, even in instances where the OSPs receive valid counter-notices. Fourth, § 512 lacks adequate requirements for documenting and tracking the uses, successes, and failures of the notice and counter-notice procedures, leaving the system opaque and making public accountability difficult. These procedural problems can cause the § 512 procedure to chill free speech and expression,³⁸ quash political and commercial competition,³⁹ and disincentivize the creation or dissemination of

³⁶ In the case of amendments or changes to the designation of agent information, OSPs must re-file with the Copyright office by filling out a new form and paying a new \$105 filing fee. *The Amended Interim Designation of Agent to Receive Notification of Claimed Infringement*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/onlinesp/agenta.pdf> (last visited Mar. 28, 2011).

³⁷ See 144 CONG. REC. S11889 (daily ed. Oct. 8, 1998) (statement of Sen. Orrin Hatch).

³⁸ See McDiarmid, *supra* note 18, at 15 (explaining that online user-generated content platforms like YouTube have strong incentives to not second-guess takedown notices).

³⁹ See Urban & Quilter, *supra* note 13, at 655–56.

innovative, non-infringing materials.⁴⁰ Therefore, in the interest of preserving the balance among copyright owners, OSPs, and online users originally intended by Congress in passing § 512, this Section identifies some major procedural problems with § 512 and some resulting harms, and then suggests targeted, modular reforms.

A. REBALANCING § 512'S INADEQUATE INCENTIVES TO SEND ACCURATE AND VALID TAKEDOWN NOTICES AND COUNTER-NOTICES

The § 512 notice and takedown procedure provides a quick and low-cost solution that allows copyright owners to control the use of their copyrighted works. Especially given the ease of dissemination and access to materials on the Internet, Congress's decision to provide copyright owners with an expeditious procedure for removing infringing materials was a sensible one. At the same time, the efficiency and fairness of the notice and takedown procedure depend on the accuracy of notices sent by copyright owners and the existence of robust procedures for targets to use in combating erroneous notices. While § 512 provides a counter-notice procedure for targets of notices, in its current form, this procedure provides inadequate protections: the takedown process is presently heavily biased toward takedown, the standard that an alleged infringer must meet to obtain relief for problematic takedowns is too high, and the remedies available are unclear. As a result, there is little to deter careless, unscrupulous, or simply mistaken notice senders from sending inappropriate takedown notices.⁴¹ Because OSPs are unlikely to have the resources or the inclination to deeply investigate the underlying merits of a notice, and because they risk copyright liability if they incorrectly decide to leave material up, such notices are likely to result in takedowns of non-infringing material.

As such, the notice and takedown procedure can—purposefully or inadvertently—suppress political, commercial, or online speech. In the realm of political speech, for example, some political campaigns and news organizations have successfully sent takedown notices claiming copyright infringement where fair use was likely, effectively censoring political speech in the midst of a campaign.⁴² As politicians, advocacy organizations, and political movements are increasingly turning to the Internet to communicate messages and garner votes, threats to

⁴⁰ Cf. Darrow & Ferrara, *supra* note 30, at 33 (proposing, because of YouTube's public benefit, especially in enabling the easy exchange of informational and personally meaningful content, that "there is a strong public policy argument that favors the continued development of YouTube and similar platforms.").

⁴¹ See Urban & Quilter, *supra* note 13, at 667 (finding, in a study the authors note is limited to notices from Google, Inc.—and therefore largely limited to § 512(d) search notices—and voluntary submissions, that at least a third of the notices collected contained at least one major flaw); see also CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org/index.cgi> (last visited Mar. 28, 2011).

⁴² For example, in the 2008 Presidential Election Campaign, CBS News sent a takedown notice to YouTube to remove a pro-McCain campaign ad that used a clip of news anchor Katie Couric describing the continued role of sexism in American politics. CBS's takedown notice alleged copyright infringement, even though the clip was most likely fair use. See McDiarmid, *supra* note 18. YouTube removed the ad. However, statements made by CBS suggest that they knew the ad was not infringing and that they were instead using the notice and takedown procedure, not to exercise copyright rights, but rather to preserve journalistic objectivity. CBS stated, in explaining the reasons behind issuing the takedown notice, that "[a]ny use of CBS personnel in political advertising that suggests" endorsement of any political candidate "is misleading." Ben Smith, *CBS Takes Down McCain Webad, Suggests It's 'Misleading,'* POLITICO (Sept. 10, 2008, 3:04 PM), http://www.politico.com/blogs/bensmith/0908/CBS_takes_down_McCain_webad_suggests_its_misleading.html; see also McDiarmid, *supra* note 18.

Internet political speech are especially harmful.⁴³ Other realms—notably, commercial speech and innovation—have also suffered. For example, businesses have used takedown notices to assert claims over pricing information, forms, methods, recipes, and formulas, all of which are unlikely to be strongly protected by copyright, if at all.⁴⁴ One affected party recently complained to a court that the raft of takedown notices sent by a competitor were so harassing as to risk destroying its entire business.⁴⁵ Notice senders have targeted public records,⁴⁶ attempted to enforce trademark rights,⁴⁷ and claimed trade secret rights—all inappropriate uses of the § 512 notice and takedown procedure.⁴⁸ Given the demonstrated potential for harm from inaccurate or invalid uses of the notice and takedown procedure, § 512 needs reform that will increase accountability in the notice and counter-notice procedure and that will encourage accurate notices that make legitimate copyright infringement claims.

1. Strengthening § 512(f) to rebalance incentives and encourage accurate notices.

As a threshold matter, § 512(f) offers victims of misrepresentations in the notice and takedown process a claim for relief.⁴⁹ Congress intended § 512(f) as a safeguard against the harms caused by problematic takedowns, but § 512(f)'s currently high standard needs to be reformed. Presently, a copyright owner or agent is only liable under § 512(f) if he or she knowingly makes a *material misrepresentation* in a takedown notice.⁵⁰ This is a very high standard for any notice target to meet in challenging a takedown under § 512(f). As such, § 512(f)'s high standard of “actual knowledge”⁵¹ and material misrepresentation have been

⁴³ See McDiarmid, *supra* note 18. (identifying at least twelve incidents in which notice senders misused the notice and takedown process to silence political speech during the 2008 campaigns); see also Ben Sheffner, COPYRIGHTS & CAMPAIGNS, <http://copyrightsandcampaigns.blogspot.com> (last visited Mar. 28, 2011).

⁴⁴ Researchers using the Chilling Effects database revealed various notices relating to claims concerning noncopyrightable material. There were notices filed for recipe instructions, pricing information, forms, methods, and formulas. While mathematical algorithms to calculate prices may be creative, pure pricing information is not likely copyrightable. See Urban & Quilter, *supra* note 13, at 668 n.170; see, e.g., *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1260–61 (9th Cir. 1999).

⁴⁵ See, e.g., *Design Furnishings, Inc. v. Zen Path, LLC*, No. Civ. 2:10-02765, 2010 WL 4321568, *1 (E.D. Cal. Oct. 21, 2010) (accused infringer alleged a § 512(f) violation relating to at least sixty-three notices and successfully received a temporary restraining order against the notice sender's notices by arguing that if the notice sender “[was] not stopped from submitting repeated notices of claimed infringement . . . then [the user's] entire business [would] cease to exist”).

⁴⁶ See ELECTRONIC FRONTIER FOUNDATION, *supra* note 14.

⁴⁷ See Urban & Quilter, *supra* note 13.

⁴⁸ See *id.*

⁴⁹ 17 U.S.C. § 512(f) (“Any person who knowingly materially misrepresents” that material is infringing or material was removed by mistake liable for damages).

⁵⁰ See *id.* According to the Copyright Office's December 1998 Summary, “[a]ny person who knowingly materially misrepresents that material is infringing, or that it was removed or blocked through mistake or misidentification, is liable for any resulting damages (including costs and attorneys' fees) incurred by the alleged infringer, the copyright owner or its licensee, or the service provider” under § 512(f). U.S. COPYRIGHT OFFICE, *supra* note 1, at 12.

⁵¹ See *Cabell v. Zimmerman*, 09 Civ. 10134, 2010 U.S. Dist. LEXIS 25486, at *10 (S.D.N.Y. Mar. 12, 2010).

difficult for targets to prove⁵² and narrowly construed.⁵³ This leaves targets without appropriate remedies for inappropriate takedowns, and notice senders who are aggressive or inclined to overclaim without strong incentives to review the accuracy of their infringement claims.

For example, in *Rossi v. Motion Picture Association of America, Inc.*,⁵⁴ a case involving a website that claimed to allow downloading of full movies but did not in fact enable such downloading, the Ninth Circuit stated that § 512(f) required merely “good faith” representations on the part of copyright owner that “[a] copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted *unreasonably* in making the mistake.”⁵⁵ In this interpretation of § 512(f), the Ninth Circuit weakened incentives for copyright owners to perform due diligence or to take reasonable precautions against sending inaccurate or erroneous notices.

The disincentives created by this high standard for relief under § 512(f) persist even in light of case law encouraging notice sender accountability through the good faith notice requirement in § 512(c)(3). For example, the court in *Lenz v. Universal Music Corp.*,⁵⁶ held that, to proceed under § 512’s good faith belief requirement,⁵⁷ a notice sender must make “an initial review of the potentially infringing material prior to sending a takedown notice”⁵⁸ and evaluate whether the material makes fair use of the copyrighted material.⁵⁹ However, *Lenz* applies to establish the validity of the notices and not necessarily to the liability notice senders may face for sending notices containing misrepresentations under § 512(f). Furthermore, though there have been cases where parties harmed by poor notices found relief,⁶⁰ these cases are few in number relative to the number of non-compliant notices documented thus far⁶¹ and are limited to factual scenarios that can overcome the overly high § 512(f) standard. The high standard targets must meet to hold notice senders liable for sending notices containing misrepresentations emboldens notice senders to send invalid and inaccurate notices without making reasonable efforts to review

⁵² See e.g., *Dudnikov v. MGA Entm’t, Inc.*, 410 F. Supp. 2d 1010, 1018 (D. Colo. 2005) (failing to find evidence that the notice sender did not have good faith subjective belief that infringement had been committed).

⁵³ See 2010 U.S. Dist. LEXIS 25486, at *10–11 (finding that § 512(f) is limited to actual knowledge of material misrepresentations and does not punish “negligence.”). *But cf.* *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (holding that, for a notice sender to proceed under § 512’s good faith belief requirement, the notice sender (copyright owner) must evaluate whether the material makes fair use of the copyright and that a bad faith allegation is sufficient to state a §512(f) misrepresentation claim).

⁵⁴ *Rossi v. Motion Picture Ass’n of America, Inc.*, 391 F.3d 1000, 1004–05 (9th Cir. 2004).

⁵⁵ *Id.* at 1005.

⁵⁶ *Lenz*, 572 F. Supp. 2d 1150.

⁵⁷ See 17 U.S.C. § 512(c)(3)(A)(v).

⁵⁸ *Lenz*, 572 F. Supp. 2d 1150.

⁵⁹ *Id.*

⁶⁰ See, e.g., *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004) (finding a § 512(f) violation, at least with respect to cease and desist letters aimed at portions of an email archive clearly subject to the fair use exception).

⁶¹ See *Urban & Quilter*, *supra* note 13.

the material targeted by the notice.⁶²

An important example of the harm caused by the high “material knowing” standard in § 512(f) is its failure to protect against reckless uses of automated tools that crawl websites to automatically identify infringing works. These kinds of automated tools amplify the potential for takedown mistakes. Not only are these tools sometimes inaccurate in discerning whether copied material is being reproduced lawfully in a specific context (for example, in cases of fair use⁶³), these tools sometimes misidentify the copyrighted work in question altogether.⁶⁴ For example, notice senders seeking to identify a potentially infringing work can use automated tools to search for file names that match a title of a popular, copyrighted song. These tools can identify hundreds, if not thousands, of alleged infringing files, which then become targets of takedown notices, often sent absent human review. Through this process, these automated tools facilitate the sending of notices en masse, without review or verification beyond the original query of the automated search. Absent any statutory requirement or court ruling requiring reasonable efforts to verify the legitimacy of these claims, copyright holders understandably use available tools or protocols to exercise their copyrights, even if these tools result in thousands of unverified takedown notices.⁶⁵

In sum, the combination of the high § 512(f) standard and the lack of liability for failing to comply with the good faith requirement under § 512(c)(3) provide little deterrence against notice senders sending invalid and erroneous notices, give little incentive for notice senders to review results identified by automated technologies, and fail to guard against notice senders using the notice and takedown procedure to remove material for purposes other than copyright infringement. Given this procedural imbalance, the notice and takedown process has sometimes chilled free speech, censored lawful uses of materials, and quashed political and commercial competition. To avoid these unintended consequences, this Report suggests the following reforms.

- i. Reforming the § 512 standard for actionable misrepresentations to encourage accuracy and due care.*

Through the notice and takedown procedure, copyright owners can demand removal of potentially infringing material without proving an underlying infringement claim. Ensuring that

⁶² For example, a group of individuals, including Ronald S. Federici, sent takedown notices alleging copyright infringement concerning a list of cited quotes, likely permissible under fair use, targeting ProjectDoD, its users, and a group called Advocates for Children in Therapy (“ACT”). When ACT filed a counter-notice and the material was re-instated, Federici and others continued to send incomplete and non-compliant takedown notices. As a result, ProjectDoD has filed a complaint alleging § 512(f) violations to the District of Maine. Christopher Mooney, *DMCA Abuse Challenge Rejected in Maine*, CHRISTOPHER MOONEY (Jan. 1, 2010), <https://chris.dod.net/?p=387>.

⁶³ See e.g., *Lenz*, 572 F. Supp. 2d 1150.

⁶⁴ See e.g., Mike Masnick, *News.com Prevents Falsely Accused Grandmother Of Getting Kicked Off The Internet By The MPAA*, TECHDIRT (Feb. 1, 2010), <http://www.techdirt.com/articles/20100201/1014577990.shtml> (reporting that BayTSP, an internet automated system, generated notices that targeted an innocent user of file sharing).

⁶⁵ See Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 345 (2003) (detailing several examples where automated ‘bots’ sent improper takedown notices). See also Mike Masnick, *RIAA DMCA Notices Based On Flimsy, Easily Falsified Evidence*, TECHDIRT (Feb. 8, 2007), <http://www.techdirt.com/articles/20070207/233111.shtml>.

this procedure works expeditiously is important to providing copyright owners with effective redress against online copyright infringement. Nevertheless, fairness to targets is also critical, and, as described above, the burden copyright owners must meet to send a notice that effectively disables others' creative or informational material is very low. Due to this low burden on copyright owners prior to sending notices, the notice and takedown procedure provides almost no incentive to send notices containing reasonably reviewed infringement claims. Changing the standard for claims under § 512(f) is the most straightforward way to ensure that targets of notices have a reasonable path to redress in situations where copyright holders send overreaching notices. At the same time, the standard should remain sufficiently high to avoid becoming a trap for copyright owners who make honest mistakes or who are simply aggressive in policing their copyrights. As such, we propose changing the standard for actionable misrepresentations to "reckless."

By changing the standard in § 512(f) to "reckless," Congress would give notice targets more meaningful protection under § 512(f), and, as a result, would increase the efficiency and fairness of the notice and takedown procedure by discouraging notice senders from sending notices with reckless misrepresentations. For example, this slight lowering of the standard for relief should encourage copyright owners to either review notices generated by automated technologies or to design company protocols to reasonably protect against erroneous or deficient infringement claims.⁶⁶ At the same time, a "reckless" standard is sufficiently high to avoid capturing notice senders who are merely mistaken, reasonably aggressive, or even negligent, in their claims. In practice, this reform⁶⁷ will deter notice senders from sending notices containing reckless misrepresentations, lessen the burden on targets of notices to combat erroneous infringement claims, and restore procedural safeguards against misuse of the notice and takedown procedure, while still leaving copyright holders with a strong takedown remedy.

⁶⁶ It may be helpful, especially in a time where automated identification technologies are a burgeoning industry, to provide some guidance for courts to apply the reckless standard in situations where large amounts of notices or counter-notices are sent in a systematic, procedural way. One available guideline is taken from the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 15 (2006), "following reasonable procedure" standard used to determine responsible company procedures in consumer credit cases. Section 168(b) of the FCRA requires credit reporting agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit . . . and other information in a manner which is fair and equitable to the consumer, with regard to the . . . accuracy . . . of such information . . ." 15 U.S.C. § 168(b). *See also* *Anderson v. Trans. Union*, 405 F. Supp. 2d 977 (W.D. Wis. 2005); *Sarver v. Experian Info. Solutions, Inc.*, 299 F. Supp. 2d 875, 876–77 (N.D. Ill. 2004). Adopting the "reasonable procedure" standard could provide a clear and workable standard for those using automated notice-sending technologies, and would require them to take positive steps to ensure maximum accuracy, thus protecting targets of notices. For example, this standard could be used as a guiding standard for courts to consider in applying the "reckless" standard to automated systems as well as to large companies that may be acting as automated systems through a large workforce following standard, company protocol: "Especially, in situations where large amounts of notices or counter-notices are sent in a systematic, procedural way, 'reckless' may be defined as 'failing to employ or adopt reasonable procedures to assure maximum accuracy of notices sent.'"

⁶⁷ By including a "reckless" standard in § 512(f), Congress can help correct the currently imbalanced notice and takedown process that is unfairly burdensome on targets of notices and overly permissive of sloppy and irresponsible use of the procedure by notice senders.

ii. *Reforming § 512(f) to clarify and strengthen remedies.*

Clarifying and strengthening the remedies available under § 512(f) is a second structural reform that will go far to encourage accurate notices. Section 512 currently provides some redress for the actual harm parties suffer from notices and counter-notices knowingly sent containing material misrepresentations. Currently, for parties affected by notices or counter-notices containing knowing and material misrepresentations to receive a damages award, they must show actual harm suffered as a result of a § 512(f) misrepresentation. However, actual harm, in the form of economic damages, can be difficult to quantify and prove.⁶⁸ For example, in a case like *Lenz v. Universal Music Corp.*,⁶⁹ the challenged content was a video of a toddler dancing to twenty seconds of a musical clip in the background. Such a video likely has little traditional economic value, but great sentimental value. In such cases, this value may be very difficult, if not impossible, to quantify. Yet without a foreseeable remedy, there is little incentive for senders of inappropriate notices to mitigate harmful behavior. Further, targets that lose material that is not economically valuable may lose material that is culturally, personally, or otherwise valuable. For example, in the case of political speech, cultural commentary, or other expression interests, harm is great but difficult to quantify monetarily. Both equity and public policy interests suggest that these targets deserve protection and compensation, despite the difficulty of quantifying the harm they have suffered. As such, we proposed carefully circumscribed statutory damages for harms under § 512(f).

Traditionally, when damages are difficult to show or quantify, Congress and courts have used statutory damages as a means to compensate harmed individuals.⁷⁰ Adding statutory damages to notices and counter-notices containing § 512(f) misrepresentations would create more certainty with regard to remedies, thereby providing notice senders, OSPs, and targets with clearer information and more accurate risk assessments.⁷¹ For example, if faced with quantifiable damages for sending bad notices, notice senders will be incentivized to improve accuracy and be deterred from sending notices or counter-notices containing misrepresentations. This deterrence will help reduce misuse of the notice and takedown procedure and avoid unnecessary transaction costs involved in correcting erroneous takedowns. Furthermore, if given some certainty of receiving compensation through statutory damages, victims of abusive notices will have more reason to demand recovery under § 512(f), contributing to the efficiency of the notice and takedown process as a whole.⁷² Clear damages would also punish § 512(f) violators

⁶⁸ Jeffery Cobia, *The Digital Millennium Copyright Act Takedown and Notice Procedure: Misuses, Abuses, and Shortcomings of the Process*, 10 Minn. J. L. Sci. & Tech. 387, 406 (2009) (“While there are foreseeable actual damages, they would likely be difficult to calculate. Loss of momentum of word of mouth and other similar damages cannot be quantified. Therefore, a statutory punitive damage should also be established in order to easily quantify damages to deter potential misrepresentations.”).

⁶⁹ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

⁷⁰ See e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446 (2009).

⁷¹ Relevant actors may include the notice sender, accused infringer, or OSP.

⁷² Also, by adding a statutory damages award, Congress can encourage counter-notice senders to more vigilantly engage with the notice and takedown process. By giving them a potential § 512(f) claim, counter-notice senders will be encouraged to send valid counter-notices and maybe seek redress through a § 512(f) claim. Moreover,

and give targets more influence against § 512(f) violators in settlement and litigation negotiations. Overall, revising § 512(f) to add statutory damage awards would increase notice sender accountability and increase accuracy in sent notices by creating meaningful incentives for accuracy and fairness on the part of notice senders.

To create these positive effects without causing unintended consequences, however, Congress should limit the range of available damages and direct courts to award damage awards that are fair, reasonable, and proportionate to the harm.⁷³ For example, Congress should provide guidance to courts in determining statutory damage awards. Some factors courts should consider in awarding § 512(f) statutory damages include: whether the notice sender has engaged in a pattern or practice of making misrepresentations under § 512(f), whether the notice sender under § 512(c)(3) or counter-notice sender under § 512(g)(3) intended to suppress speech and competition in making the misrepresentation, whether the effect of the misrepresentation is to suppress speech or competition, whether the notice sender under § 512(c)(3) or counter-notice sender under § 512(g)(3) made a good faith attempt to comply with the requirements of § 512(f), and whether the statutory damages award is reasonable and proportional to the actual harm incurred by the party injured by the § 512(f) misrepresentation. By evaluating some or all of these factors, courts will be able to develop fair, reasonable, and proportional damage awards.⁷⁴

2. Increasing notice sender accountability under § 512(c)(3)(A)(vi)'s notice requirement

Copyright owners who use the notice and takedown procedure wield significant influence over access to and dissemination of creative and informational material. To encourage proper use of this procedure, § 512(c) requires some elements of takedown notices to be asserted under penalty of perjury.⁷⁵ Currently, however, § 512(c)(3)(A)(vi) does not require the substantive representations—the copyright claims, identification of allegedly infringing material, and the like—to be made under penalty of perjury for representations.⁷⁶ Rather, the statute only requires that the “complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed” be made under penalty of perjury.⁷⁷ Revising § 512(c)(3)(A)(vi) to

counter-notice senders will also be deterred against file invalid and non-compliant counter-notices. This will make overall participation in the notice and takedown procedure more efficient and increase accountability of the relevant parties.

⁷³There should be guidelines for awarding statutory damages in a consistent, reasonable, and just manner. See Pamela Samuelson & Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 27 (2010); Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 268 (2009). See also Samuelson & Wheatland, *supra* note 70, at 510.

⁷⁴ See Samuelson & Wheatland, *supra* note 70 (addressing some of the concerns of arbitrary, inconsistent, or grossly excessive damage awards present in copyright infringement cases).

⁷⁵ According to the Copyright Office's December 1998 summary of the DMCA, “a copyright owner submits a notification under penalty of perjury, including a list of specified elements, to the service provider's designated agent.” See U.S. COPYRIGHT OFFICE, *supra* note 1, at 13. This suggests that the Copyright Office intended the entire notice to be submitted under penalty of perjury.

⁷⁶ See 17 U.S.C. § 512(c)(3)(A)(vi).

⁷⁷ See *id.*

requiring the signer to verify, under penalty of perjury, that the statements in the notice are accurate will encourage notice senders to file notices that are vetted for accuracy and that are free of misrepresentations.

This reform is also consistent with § 512(g)(3)(C)'s counter-notice requirement, which requires that counter-notice senders to submit a “statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.”⁷⁸ By revising § 512(c)(3)(A)(vi) to also make notices representations under penalty of perjury, Congress would increase notice sender accountability, maintain consistency with § 512(g)(3)(C) requirements, and restore balance between notice senders and counter-notice senders.

B. REFORMING AND STRENGTHENING § 512(G)'S COUNTER-NOTICE PROCEDURES

The notice and takedown procedure provides copyright owners with the power to monitor infringing uses of their material on the Internet without bringing copyright infringement suits. While this allows fast and efficient redress against unlawful uses, it also puts targets of notices in the burdensome position of having to actively challenge non-compliant or erroneous notices, usually after material has been taken down. Though § 512(g) enables targets to contest these takedown notices, after their allegedly infringing material was taken down, this counter-notice process is currently unclear and inefficient. As a result, some targets struggle to effectively combat erroneous takedown notices and are unable to quickly reinstate their lawful materials for public access.

Even though some OSPs are required, pursuant to the current § 512(g)(2)(A), to “take[] reasonable steps promptly to notify the . . . [alleged infringer] that it has removed or disabled access to the material,”⁷⁹ those who are technically notified may not, in practice, receive notice of the takedown. These targeted users may not receive notice of the removed work for reasons including not reviewing email or not updating the stored email address.⁸⁰ Furthermore, even when notice targets do receive information regarding the takedown, OSPs are not required to provide targets with information regarding their counter-notice rights. Because of this, many online users, even when they are aware that their material has been deactivated, are unaware of the § 512(g) counter-notice procedure.⁸¹ This, in part, emboldens notice senders to send invalid or erroneous notices which, when unchecked, allow some notice senders to silence or slow the dissemination of lawful uses of online material.⁸² Moreover, service providers providing

⁷⁸ See 17 U.S.C. § 512(g)(3)(C).

⁷⁹ 17 U.S.C. § 512(g)(2)(A).

⁸⁰ For example, users may not vigilantly check email accounts for notice of takedown; other users, especially unsophisticated users, may not understand the meaning of the notice even they see it in their inbox.

⁸¹ Cf. *What To Do When You've Received a DMCA § 512 Takedown Notice*, NEW MEDIA RIGHTS http://www.newmediarights.org/guide/legal/copyright/dmca/What_to_do_when_youve_received_a_DMCA_section_512_takedown_notice_from_your_ISP_webhost_or_a_website (last visited Mar. 28, 2011) (stating that “receiving a takedown notice . . . can be a frustrating experience” and providing information about counter-notice rights).

⁸² In some cases, online users, especially unsophisticated users, may even be deterred from posting materials because the opaque notice and takedown procedure creates a fear of takedowns and copyright infringement suits. See *Internet Service Provider Copyright Code of Practice—TCF Consultation Draft*, Google submission on TCF Draft ISP Copyright Code of Practice (Mar. 6, 2009), available at <http://www.tcf.org.nz/content/ebc0a1f5-6c04->

information location services, defined in § 512(d), instead of general hosting and access to users, defined in § 512(c), are not required to notify targets that their material is being taken down in order to maintain safe harbor protection.⁸³ In these cases, the information location service providers do not have a service relationship with the targets and have little to no way of contacting them about takedowns. As targets may not even know when material has been taken down, they are deprived of fair participation in the notice and takedown procedure.

1. Giving users notice of the notice and takedown process and increasing transparency of the notice and takedown procedure

Robust and active participation by targets of notices in the notice and takedown procedure is important to provide balance and increase efficiency in the procedure. However, before being able to send a counter-notice, targets must know their material has been taken down pursuant to a takedown notice. Since some targets are currently uninformed about the § 512(g) counter-notice process,⁸⁴ these targets are unable to or do not respond to notices targeting lawful uses of material. As a result, targets are deprived of appropriate process and participation in the notice and takedown procedure. To address this problem, Congress should make two reforms. First, Congress should revise § 512(c)(3)(A)(vii) to require that notice senders send a copy of the notice to targets and a copy of the notice to the suggested Repository later proposed in Part III(d)(i) of this Report. Second, Congress should revise paragraph (2) of § 512(g) to require OSPs as defined by § 512(c) to notify targets and inform them of their right to issue a counter-notice.⁸⁵ As a result, Congress will increase transparency in the notice and takedown procedure, increase notice sender accountability, and strengthen user protections.

C. ENCOURAGING PROMPT REPLACEMENT OF LAWFUL USES OF CREATIVE AND INFORMATIVE CONTENT

Currently, the notice and takedown procedure requires OSPs to disable content for at least ten—and up to fourteen—business days. Even if OSPs receive a valid counter-notice, §

48e5-9215-ef96d06898c0.cmr. Though uses of notice and takedown procedure have been inadequately documented, there is ancillary evidence to suggest that this insufficient knowledge of the counter-notice process, results in radically skewed procedural protections in favor of copyright owners. According to a recent WIPO report, “[t]he vast majority of cases . . . totaling thousands every quarter at Yahoo!, involve no counter-notice; the materials are taken down and they stay down.” Batur Oktay & Greg Wrenn, *Workshop on Service Provider Liability: A Look Back at the Notice-Takedown Provisions of the U.S. Digital Millennium Copyright Act One Year After Enactment*, WIPO, Dec. 9–10, 1999, available at www.wipo.int/edocs/mdocs/mdocs/en/osp_lia/osp_lia_2.doc.

⁸³ See 17 U.S.C. § 512(d).

⁸⁴ Under the current § 512(c) framework, even though most OSPs are required to notify targets of notices their material is being disabled or deactivated, neither notice senders nor OSPs are required to inform accused infringers of § 512(g)’s counter-notice procedure.

⁸⁵ This reform is limited because some OSPs, those defined in § 512(d), do not have service relationships with their subscribers. In the case of search engines or information location tool service providers, these § 512(d) OSPs have little to no way of contacting subscribers about notices. However, even though § 512(d) search location providers will not be affected by this particular reform, other reforms in this Report, like the § 512(f) reform and the Repository, seek to increase notice sender accountability and notice and takedown procedure transparency in general. As a result, these reforms will help minimize some of harms from erroneous notices and takedowns sent to § 512(d) OSPs.

512(g)(2)(C) requires OSPs to wait at least ten business days before reinstating the material, even in light of a substantively valid counter-notice.⁸⁶ This requirement incentivizes OSPs to quickly remove allegedly infringing material⁸⁷ to gain safe harbor, and pressures them—as they have a strong interest in maintaining safe harbor protection—to keep the material down for the full ten-to-fourteen-day period. This skews the procedure in favor of takedown, creates serious risks for expression, especially for materials that are time-sensitive,⁸⁸ and may lead to economic losses from having lawful material removed from online access for up to two weeks. Given the ubiquity of OSPs as platforms for hosting time-sensitive political speech, in addition to other kinds of valuable material, such as health information, the potential harms from delayed replacement of lawful materials can be severe. Therefore, merely improving the transparency, notification, and user-friendliness of the counter-notice procedure may not be enough to protect against the chilling effects that result from the current § 512 counter-notice procedure. In addition, to minimize the losses from erroneous takedowns, OSPs must be allowed to promptly replace material pursuant to a valid counter-notice. Congress should reform § 512(g)(2)(C) to allow OSPs to “promptly replace” erroneously removed material upon receipt of a valid counter-notice. By minimizing the time in which mistakenly removed material is disabled or removed, Congress can encourage healthy dissemination and innovation of creative and informative content.

D. BRINGING TRANSPARENCY TO THE NOTICE AND TAKEDOWN PROCEDURE

The notice and takedown procedure currently operates entirely through private communications between private parties. This system has the benefits of simplicity and cost-effectiveness. However, a system based on private communications also produces no public record of communications, decisions, or final actions. As such, there is no centralized way to track, review, or learn about how the notice and takedown process is used. Although the Chilling Effects project collects notices from Google and other § 512 participants and provides some useful insight into these questions, it is in no way comprehensive.⁸⁹ In addition, the press and others have publicized select notices, usually in cases involving bad actors, but this has occurred only when the targeted online user has the means and awareness to contact the press regarding the incident.⁹⁰

⁸⁶ 17 U.S.C. § 512(g)(2)(C). While § 512(c)(1)(C) only requires OSPs to “respond[] expeditiously to remove” the material claimed to be infringing, in practice, many OSPs automatically takedown the claimed infringing material. See J. Royce Fichtner & Troy J. Strader, *Automated Takedown Notices and Their Potential to Generate Liability Under Section 512(f) of the Digital Millennium Copyright Act*, 5 J. INTEL. PROP. L. & PRACTICE 12, 1 (2010), available at <http://jiplp.oxfordjournals.org/content/early/2010/11/19/jiplp.jpq154.full.pdf+html>. Furthermore, once this material is taken down, § 512(g)(2)(C) requires OSPs to disable or deactivate the material “not less than ten” and not “more than 14, business days following receipt of the counter notice.” See § 512(g)(2)(C).

⁸⁷ See Oktay & Wrenn, *supra* note 82, at 16 (“At Yahoo!, most take downs occur within 24 to 48 hours of receiving notice, but at times it can take longer.”).

⁸⁸ See McDiarmid, *supra* note 18.

⁸⁹ CHILLING EFFECTS CLEARINGHOUSE, *supra* note 41.

⁹⁰ For example, in 2008, the American Rights Counsel, on behalf of the Church of Scientology, sent more than 4,000 takedown notices relating to videos containing material criticizing the Church of Scientology within twelve hours. YouTube, pursuant to § 512(g), rapidly removed the allegedly infringing material. However, the allegedly infringing material was most likely lawful under the fair use exemption and anti-Scientology critics were able to

Overall, this lack of transparency encourages a climate prone to misuse of the notice and takedown procedure by allowing notice senders to avoid public accountability. In addition, without greater transparency regarding how the notice and takedown procedure works and how it is used, and without public access to the communications involved in the procedure, notice and counter-notice senders lack information about what makes a compliant notice and what materials are appropriate targets for notices or counter-notices. This further weakens the ability for targets of notices to fully participate in the notice and takedown process because there is little transparent⁹¹ or concrete evidence of notice and takedown procedure misuse. Moreover, without a comprehensive public record of notices and counter-notices, it is very difficult for scholars and policy makers to assess when inefficiencies or abuses in the notice and takedown procedure occur, what causes these inefficiencies or abuses, and what potential solutions are available. Therefore, in order to increase transparency of the notice and takedown procedure and increase notice sender accountability, Congress should create a free-of-charge, current, public, and searchable repository of notices and counter-notices.

1. Improving transparency and accountability through a centralized repository of notices

The notice and takedown procedure works, in part, because it is expeditious, low-cost, and easy to use. However, it is also opaque, biased toward takedown, and lacking in public accountability. Making the procedure more transparent and creating a public record of its use by requiring notice and counter-notice senders to publicly file their notices and counter-notices would encourage accountability, efficiency, and fairness. Furthermore, increased transparency and a public record would help policymakers assess § 512's successes and failures, and evaluate potential reforms. As such, Congress should introduce transparency and accountability into the notice and takedown process by creating a centralized repository or a network of interconnected repositories for notices and counter-notices that is current, accessible, public, and easily searchable. This reform would provide several significant benefits.

First, the repository would increase notice quality and accuracy. Notice and counter-notice senders would be able to search the centralized database to determine whether similar notices and counter-notices have been sent, by whom, what claims they have made, and with what success.⁹² This kind of information should help all participants better evaluate the quality and accuracy of notices, in turn helping participants craft and send better notices.

garner enough publicity and outrage at the misuse of the § 512 notice and takedown procedure to force YouTube to respond to their counter-notices. See Eva Galperin, *Massive Takedown of Anti-Scientology Videos on YouTube*, ELECTRONIC FRONTIER FOUNDATION (Sept. 5, 2008), <http://www.eff.org/deeplinks/2008/09/massive-takedown-anti-scientology-videos-youtube>; Nate Anderson, *Scientology fights critics with 4,000 DMCA takedown notices*, ARS TECHNICA (Sept. 8, 2008), <http://arstechnica.com/old/content/2008/09/scientology-fights-critics-with-4000-dmca-takedown-notices.ars>.

⁹¹ As such, without a transparent and accurate means of assessing questionable uses of the notice and takedown process, courts and accused infringers can neither accurately assess if notice and counter-notices senders have misused the notice and takedown procedure nor punish bad actors.

⁹² This would give notice and counter-notice senders tools to assess the appropriateness of sending the notice or counter-notice and the likelihood of success based on past uses of the process.

Second, the repository would help targets of notices more fully participate in the notice and takedown process and would increase notice sender accountability. The repository would give targets the means to investigate invalid or inaccurate notices, discover information about bad actors, and find evidence of reckless practices. Such a repository would also enable targets who choose to send counter-notices to evaluate notices, see how they were used, and determine when and how to send counter-notices. This paper trail would help empower targets, help increase notice sender accountability, deter notice senders from sending notices with knowing or reckless misrepresentations, and increase overall notice and takedown efficiency.

Finally, a repository can provide for better transparency of use and potential misuse of the notice and takedown procedure. Currently, academics, policy advocates, and lawmakers have little to no complete data regarding the use, compliance, and success of notices and counter-notices sent.⁹³ However, a free-of-charge, current, public, and searchable repository of notices and counter-notices would allow academics, policy advocates, and lawmakers to evaluate § 512 efficiency, find ways to optimize the notice and takedown procedure, and provide accurate information regarding misuses of the procedure. Data from the repository could also be used to help quantify § 512 structural harms, thereby increasing fairness in awarding damages and helping guide Congress to make more informed policy decisions regarding the notice and takedown procedure.

While the Copyright Office should have discretion to realize this reform in the most efficient, feasible, and productive way, this Report suggests the following options for its realization. On the one hand, the Register of Copyright can directly create and oversee a centralized repository of notices and counter-notices.⁹⁴ Alternately, the Register of Copyright can certify and supervise alternative repositories comprising a network of repositories, with adequate technical and substantive standards.⁹⁵ Regardless of which option is pursued, this Report suggests developing the repository or repositories to include the following standards: access via an application programming interface, system compatibility such that users can use one query to search the entire network of repositories, system accessibility through application programming interfaces⁹⁶ for user contributions and innovation, free public access on the Internet for all users, and substantively complete and up-to-date collections of notices and counter-notices. Furthermore, to ensure that these alternative repositories consistently comply with the required technical and substantive standards, notice senders should be required to file a copy of the notice with the repository. Finally, the Register of Copyright would certify, regularly audit, and review these repositories for compliance with § 512(c)(4).

⁹³ See Urban & Quilter, *supra* note 13.

⁹⁴ The Repository may consist of a network of certified repositories.

⁹⁵ See also Samuelson & Members of The CPP, *supra* note 73 (suggesting the Copyright Office certify alternative registries of copyright works).

⁹⁶ See *Legislation.gov.uk Launched Providing Full Access to the Statute Book as Open Data*, OPEN.UP (July 29, 2010), <http://blog.openup.tso.co.uk/2010/07/29/legislation-gov-uk-launched-providing-full-access-to-the-statute-book-as-open-data/> (reporting that legislation.gov.uk provides free access to an API that enables innovators to access and use the data). See also David Orenstein, *QuickStudy: Application Programming Interface (API)*, COMPUTERWORLD (Jan. 10, 2000), http://www.computerworld.com/s/article/43487/Application_Programming_Interface.

IV. CONCLUSION

Section 512 of the DMCA provides necessary protections in the digital age. Section 512 provides safe harbor protections for OSPs that enable access to creative and informative materials in a way that is foundational to the Internet. Section 512 also protects copyright owners by establishing a means to enforce their exclusive rights of dissemination, reproduction, and public display. However, because of the several key structural and procedural shortcomings in § 512 outlined above, the current balance of the notice and takedown procedure is tilted too much towards takedown. In some cases, these takedowns can be used to chill lawful uses of material, hamper innovation, and in the worst cases, censor speech. Faced with these harms, it is important that Congress remedy these issues by adopting the proposed reforms to § 512 outlined in this Report. Not only would these reforms be consistent with the original purpose of the DMCA, these reforms are important in this digital age to preserve free speech, encourage innovation, and promote the production of new creative and informative works. As such, it is important that Congress take active steps to restore balance among copyright owners, OSPs, and new creators in today's fast-paced Internet landscape.

APPENDIX A

SEC. 6. PROTECTION AGAINST COPYRIGHT ABUSE.

(a) MISREPRESENTATIONS. —Section 512(f) of title 17, United States Code, shall be amended to read as follows:

“(f) MISREPRESENTATIONS.— Any person who—

- (1) knowingly or recklessly misrepresents under this section that material or activity is infringing, or knowingly makes misrepresentations under subsections (c)(3) or (h)(2), or
- (2) knowingly misrepresents under subsection (g)(3) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for:

(A) any damages incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(B) Statutory Damages. —

(i) Except as provided by clause (ii), a party injured by a misrepresentation under paragraph (1) may elect, at any time before final judgment is rendered, to recover, instead of actual damages, an award of statutory damages for each misrepresentation, in a sum of not less than \$200 and not more than \$2,500 as the court considers just.

(ii) In a case where the court finds that the misrepresentation was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$25,000.

(iii) In determining the appropriate statutory damages award under paragraph (B) of this section, courts shall consider, as relevant and appropriate:

- (A) whether the notice sender or counter-notice sender has engaged in a pattern or practice of making misrepresentations under § 512(f),
- (B) whether the notice sender under § 512(c)(3) or § 512(d)(3), or counter-notice sender under § 512(g)(3) intended to suppress speech and competition in making the misrepresentation,
- (C) whether the effect of the misrepresentation is to suppress speech or competition,
- (D) whether the notice sender under § 512(c)(3) or counter-notice sender under § 512(g)(3) made a good faith attempt to comply with the requirements of § 512(f), and
- (E) whether the statutory damages award is reasonable and proportional to the actual harm incurred by the party injured by the § 512(f) misrepresentation.

(iv) To prevent injustice, the court in its discretion, may reduce the award of statutory damages below \$200 consistent with principles of equity.

(C) Fees and Costs. —Alleged infringers or service providers so injured shall also be allowed to recover their full costs and a reasonable attorney's fee.

(b) REQUIRING ACCURACY OF NOTICE. — Section 512(c)(3)(A)(vi) is amended to read as follows:

“(vi) under penalty of perjury, a statement:

(A) that the information in the notification is accurate, and

(B) that the complaining party is authorized to act on behalf of the owner of the exclusive right that is allegedly infringed.”

(c) REQUIRING FURTHER NOTICE —Section 512(c)(3)(A) of title 17, United States Code is amended by adding after clause (vi) the following:

“(vii) A statement that a copy of the notice of claimed infringement has been provided to the claimed infringer, or an explanation of why such notice could not be given;

(viii) A statement that a copy of the notice of claimed infringement has been provided to the Copyright Office or a repository designated by the Copyright Office as provided in paragraph (4)”;

(d) NOTICE REPOSITORY—Section 512(c) of title 17, United States Code is amended by adding after the end of paragraph (3) the following:

“(4) ESTABLISHMENT OF A DATABASE OF NOTICES—

(a) IN GENERAL—The Register of Copyrights shall establish, itself or through the designation of alternative repositories, an electronic database of notices of claimed infringement and counter-notices.

(b) STANDARDS—The entire database or collection of repositories under paragraph (a) shall be—

(i) kept current,

(ii) entirely searchable from a single website,

(iii) made available to the public, through the Internet, and

(iv) searchable free of charge.

(e) ALTERNATIVE MEANS OF DESIGNATING AGENT—Section 512(c)(2) of title 17, United States Code is amended to read as:

“Designated agent—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph

(3), by making conspicuously available through its service, including on its website in a location accessible to the public, or by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.”

(f) **REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY.** —Paragraph (2) of Section 512(g) of title 17, United States Code, shall be amended to read as follows:

“(2) EXCEPTION.— Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a proper notice provided under subsection (c)(1)(C) according to the provisions of (c)(3), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber of its receipt of such notice and informs the subscriber of his or her right to issue a counter-notice described in paragraph (3) before it removes or disables access to the material;

(B) upon receipt of a counter-notice described in paragraph (3), promptly replaces the removed material and provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter-notice, and informs that person that it *has replaced* the removed material; and

(C) removes or disables access to the material if its designated agent receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.”

(g) **CONDITIONS FOR ELIGIBILITY FOR LIMITATION ON LIABILITY.** —Paragraph (1) of Section 512(i) of title 17, United States Code, is amended—

(1) by striking “and” at the end of subparagraph (A);

(2) by redesignating subparagraph (B) as subparagraph (C), and by inserting after subparagraph (A) the following:

“(B) implements the procedures set forth in Section 512(g)(2)(A)–(C); and”

SEC. 9. HARMONIZING SAFE HARBORS

(a) Section 512(a) of title 17, United States Code, is amended by inserting “, or violation of sections 1101, 1201, or 1202 of this title,” after “for infringement of copyright”.

- (b) Section 512(b)(1) of title 17, United States Code, is amended by inserting “, or violation of sections 1101, 1201, or 1202 of this title,” after “for infringement of copyright”.
- (c) Section 512(c)(1) of title 17, United States Code, is amended by inserting “, or violation of sections 1101, 1201, or 1202 of this title,” after “for infringement of copyright”.
- (d) Section 512(d) of title 17, United States Code, is amended by inserting “, or violation of sections 1101, 1201, or 1202 of this title,” after “for infringement of copyright”.