



Digital Millennium Copyright Act Reform: Response to Stakeholder Questions

Electronic Frontier Foundation

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Introduction

The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With more than 30,000 dues-paying members, and well over one million followers on social networks, we work to ensure that rights and freedoms are enhanced and protected as our use of technology grows.

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

We have answered these questions with the particular needs and concerns of Internet users, small creators, and small tech companies in mind. Tech giants and large media interests are more than capable of speaking for themselves, and they will, loudly—but those few interests must not determine the future of copyright law. As the Supreme Court has noted, “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other Arts.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

1. The record established in my DMCA reform hearings indicated that an overarching principle of any reform should be making digital copyright less one-size-fits-all. The law needs to account for the fact that small copyright owners and small online services providers (OSPs) may have more in common with each other than they do with big copyright owners and big OSPs, respectively. Accordingly, I think we should consider whether copyright law should be revised to account for such differences among stakeholders. In particular, could copyright law borrow from employment law, or other relevant fields, to establish different thresholds for copyright owners and OSPs of different size, market share, or other relevant metric? If so, what is the best way to accomplish this? Is there a particular area of law, or existing section of the U.S. Code, that provides crucial guidance? As with all questions where it is relevant, please include in your response specific recommended legislative text.

This proposal is a well-intentioned effort to address some concerns about burden that have been raised by OSPs and rightsholders alike. However, it will not address many other concerns and indeed may exacerbate them.

For example, requiring only large OSPs to be proactive in removing potentially infringing content may help ensure that smaller OSPs do not face that burden and can therefore afford to offer competing platforms. However, it does not alleviate the concerns that large OSP takedowns have a correspondingly large effect on speech and that large OSPs may also be less able to make fine-tuned decisions given the volume of notices and uploads they will encounter. For example, YouTube has, as of September 2019, 163 million monthly average users.¹ Almost 20 percent of Americans watch YouTube for more than three hours a day.² Any regime that makes it easier to remove content from YouTube also means that, if the takedown is invalid, more regular Internet users will be prevented from accessing and sharing lawful material.

Similarly, in a study of the online creative economy of 2017, over two million U.S. creators posted on YouTube, earning about four billion dollars per year.³ Any regime that makes it easier to remove content from YouTube is likewise going to pose a threat to the lawful expression of millions of American creators.

More generally, this proposal will further complicate an already highly complex area of law, to the detriment of innovation and expression. Rightsholders, investors, service providers, and users already struggle to navigate that complexity; new complexity means new uncertainties that will discourage investment and competition. Users and smaller rightsholders, meanwhile, will be hard-pressed to figure out what rules apply to which services and then adjust their assumptions over time as their preferred services grow. The DMCA safe harbors fueled extraordinary growth precisely because they offered legal certainty; new legislation should reinforce that certainty, not undermine it.

It is not merely what larger OSPs can do and pay to rightsholders that should determine whether and how to divide up OSPs, but the effect such divisions would have on access to information, freedom of expression, and the copyrights of Internet creators that should form the bedrock of any new legislation.

¹Amy Watson, *Most Popular Video Streaming Services in the United States as of September 2019, by Monthly Average Users*, Statista (Aug 24, 2020), <https://www.statista.com/statistics/910875/us-most-popular-video-streaming-services-by-monthly-average-users/> (last visited Sep 29, 2020).

² US Media Consumption Report 2019, Attest (2019), available at <https://www.askattest.com/original-research/us-media-consumption-report-2019> (last visited Sep 29, 2020).

³ Robert Shapiro and Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy*, Re:Create (2019), 1, available at <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf>.

2. *OSPs eligible for the safe harbor under section 512 are divided into four categories (conduits, caching services, hosting services, and web location tools) that can be both under-inclusive and over-inclusive. First, what types of OSPs should be covered to account for technological advances and business practice changes that have occurred during the past twenty-two years? Second, how should the categories be revised to better cover the types of OSPs that need—rather than just appreciate—the safe harbor’s benefit? Among the possibilities would be to either increase the number of statutory categories to more explicitly cover specific types of service providers or to reduce the number of statutory categories, possibly to only one, and delegate authority to the Copyright Office to identify, by regulation, the covered types of service providers. If Congress were to take the latter approach, would this raise concerns about such authority being delegated to a non-presidentially-appointed Register?*

EFF would oppose any such delegation of authority to the Copyright Office. To begin with, the Copyright Office is not well-placed to understand the economy and landscape of technology and expression. For example, in the Section 1201 rulemaking process, the Copyright Office has consistently rejected proposals for flexible exemptions that would account for a rapidly changing technological landscape, such as proposals to consolidate creator groups into logical, broad groups. The Office insisted instead on dividing creators into narrow categories, excluding new forms of expressions that do not fit.⁴ Similar problems can be found in the Copyright Office’s recent 512 report, which suggests, for example, that Internet Service Providers (ISPs) should have more aggressive repeat infringer policies,⁵ even as Internet usage has grown at an astronomical rate and Internet access has gone from a luxury to a necessity.

The Copyright Office already has a large number of responsibilities, and there are a number of jobs—like registration and recordation, digitizing records and making them available online, creating a usable visual registry and so on—that *only* it can do.⁶ Rather than asking the Copyright Office to be a new technological regulator, we should be calling on the Office to fulfill its traditional functions, updated for the 21st century, and giving it the resources to do so.⁷

In addition, the Copyright Office has not established itself as a neutral arbiter. To the contrary, it has repeatedly taken the side of major copyright holders over the public

⁴ Mitch Stoltz, *New Exemptions to DMCA Section 1201 Are Welcome, But Don’t Go Far Enough*, EFF (October 26, 2018), available at <https://www.eff.org/deeplinks/2018/10/new-exemptions-dmca-section-1201-are-welcome-dont-go-far-enough> (Last visited Nov 23, 2020).

⁵ Copyright Office Report at 100-09.

⁶ *See generally* <https://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf>

⁷ Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 BERKELEY TECH. L.J. 733, 734 (2018), https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3051&context=faculty_publications.

interest.⁸ For example, during a heated debate over cable set-top box competition, the Office spent months consulting with the Motion Picture Association of America and its allies, and made no attempt to seek other views, whether from independent manufacturers, technologists, or consumers, until very late.⁹

In general, while large technology companies and major media corporations are often heard by the Copyright Office, it is much harder for smaller technology companies, start-ups, independent creators, and regular users. And in any regime under the Copyright Office, large companies have the money and time to keep abreast of regulations and rulemakings, while the vast majority of Internet users will find themselves at a marked disadvantage.

3. *Section 512 places the burden on copyright owners to identify infringing materials and affirmatively ask the OSP to remove the material or disable access to it. This burden appears to strike the correct balance, but the burden that the notice-and-takedown system itself places on copyright owners is too heavy; the system is also woefully inefficient for both copyright owners and service providers. I believe U.S. copyright law should move towards some type of a notice-and-staydown system—in other words, once a copyright owner notifies a service provider that a use of a copyrighted work is infringing, the service provider must, without further prompting, remove subsequent infringing uses absent a statement from the user (whether the copyright owner or not) that they believe the use is licensed or otherwise authorized by law (e.g., fair use). What are your thoughts on such a system, and how could it best be implemented?*

EFF would strongly oppose any legislation to that effect—as would millions of Internet users, service providers large and small, and the hundreds of thousands of small businesses that rely on those service providers.

The existing safe harbors were carefully crafted to ensure that service providers could play an important role in policing infringement while providing powerful platforms for free expression and innovation. Conditioning liability limitations on a service provider's ability to actively police potential infringement would likely lead to over-blocking and/or aggressive filtering of user-generated content. That would make the Internet a much less hospitable place for free speech and innovation.

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

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

⁸ See https://www.publicknowledge.org/wp-content/uploads/2019/09/Final_Captured_Systemic_Bias_at_the_US_Copyright_Office.pdf.

⁹ See <https://www.eff.org/deeplinks/2016/10/newly-released-documents-show-hollywood-influenced-copyright-offices-comments-set>.

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i)¹⁰

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

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

Finally, any proposal that would amount to an expression blacklist would suffer many of the same problems as the unconstitutional legislative proposals that were soundly defeated in 2012.¹¹ EFF hopes that all stakeholders would prefer to focus the discussion on positive steps, rather than reviving old debates.

4. *Starting from the place of the provisions that support the current notice-and-takedown system, a notice-and-staydown system would need to give more teeth to the knowledge standards and requirements for implementing a repeat infringer policy; to clarify that section 512(m)'s lack of a duty to monitor does not mean lack of a duty to investigate once notified and also that representative list and identifiable location do not require as much detail as courts have required; and to provide better mechanisms for users to contest a takedown as authorized by a license or by law. How would you revise or add to the existing provisions in section 512 to accomplish this or, if this could better be achieved by starting from scratch, what new legislative text do you think would best accomplish this?*

For the reasons explained above, we strongly oppose a notice and staydown system. Moreover, we particularly oppose any legislative revision that would “strengthen” repeat infringer requirements.

With respect to mechanisms for users to contest improper takedowns, please see our responses to questions 6 and 8, below.

5. *The injunctions available under section 512(j) have been narrowly interpreted by courts and thus little-used by copyright owners. Is it worthwhile for Congress to consider revising this provision to make injunctions more readily available for website-blocking in special circumstances (with an eye toward article 8(3) of the Information Society Directive)? Such injunctions could be issued by a special tribunal and appealed to federal*

¹⁰ EFF will not focus in this response on the questions related to standard technical measures, except to observe that we are not aware of any technical measures that meet the definition set forth in Section 512(i).

¹¹ *SOPA/PIPA: Internet Blacklist Legislation*, available at <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill>.

district court, or, out of concern for user protections, the law could require that injunction orders come from the district court alone. If warranted, what would be the best way to enact limited website-blocking via such injunctions? Again, please provide suggested legislative text. If you do not think the law should be amended to expand the availability of injunctions, please be specific about any ways you think section 512(j) could be improved.

Injunctions to restrain the forums and conduits of speech are treated with extreme skepticism in the U.S. free speech tradition. One who complains that a forthcoming movie contains a scene that libels them generally cannot receive an injunction stopping the distribution of the movie. This is considered a prior restraint and treated with the highest level of First Amendment scrutiny. Section 512(j), which limits the injunctions that can issue against service providers in copyright infringement cases, safeguards this important principle of free speech.

Website blocking as a remedy for copyright infringement has been thoroughly rejected in the U.S. As you are aware, the Stop Online Piracy Act of 2011 (SOPA) would have created a system of court-ordered site blocking injunctions aimed at Internet intermediaries like hosting providers and Domain Name System participants.¹² SOPA and its Senate companion bill (PIPA) raised alarm across the spectrum of U.S. and global Internet users because of its potential to create a censorship regime. Internet users, beginning with grassroots movements in online communities such as Reddit and the volunteer editors of Wikipedia, led an unprecedented action against the bills that culminated in thousands of websites, from the largest to the smallest, going dark in protest. Millions of Americans wrote or called their members of Congress in the space of a single day. With near unanimity, the many sponsors of SOPA and PIPA withdrew their support.

As the critics of SOPA/PIPA recognized, website blocking is a blunt instrument that inevitably risks over-blocking of lawful and non-infringing speech. In addition, a regime of site-blocking injunctions directed to Internet companies at the infrastructure level would require the creation of technological and organizational systems of censorship, similar to those required of Internet companies operating in China. Once created, the use of these systems is unlikely to be confined to copyright enforcement, nor to U.S. court orders. They risk being used to censor all manner of speech that violates foreign laws or offends powerful interests.

Section 512(j) is an important bulwark against such abuse and helps keep copyright law in line with the First Amendment. In particular, the requirement that courts consider “whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations” was prescient. Website-blocking regimes in other countries such as Australia have proven ineffective at driving traffic to commercial entertainment websites and have led to rightsholders demanding ever more draconian legal measures, including

¹² See <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill>.

extrajudicial expansion of website blacklists and bans on common commercial security software that could be used to evade blocking.¹³

In summary, material alterations to Section 512(j) would be broadly unpopular and would undermine any efforts at copyright law reform.

6. *It is clear from the record established across my hearings that one major shortcoming of section 512 is that users who have had their content removed may decide to not file a counter-notice because they fear subjecting themselves to federal litigation if the copyright owner objects to the putback. At the same time, the requirement that a copyright owner pursue federal litigation to keep a user from having content put back up following a counter-notice is a heavy burden. Congress might consider improving dispute resolution by directing disputes between notice and counter-notice filers to a small claims court rather than federal court. What is the best way to accomplish this? Would the copyright small claims court as envisioned by the CASE Act be the proper forum? If not, how should such a tribunal be designed? Related, what should be the time period for putbacks? There is broad agreement that the current 10-14 day window works poorly for both copyright owners and users. How would you amend this?*

Federal court is the only appropriate forum for adjudication of claims of copyright infringement. Funneling infringement disputes into special tribunals would not improve the Section 512 framework and would raise a host of other problems.¹⁴

To the extent that filing a federal lawsuit is a heavy burden for a rightsholder who wants to stop a putback, that is by design. The Section 512 safe harbors give rightsholders (and anyone who claims to be a rightsholder) tremendous leverage to have content taken offline based on no more than an email or a web form submission. That copyright holders have a legal tool to get speech removed from the Internet without ever setting foot in court is an anomaly in our legal system and an extraordinary advantage. No other area of law gives aggrieved parties this type of leverage to obtain extrajudicial resolution of their complaints. Even the option to prevent a putback by filing a federal lawsuit is exceptional, in that it does not require any judicial finding that the claim is likely to succeed, as would be required to obtain an injunction. This exceptional treatment of copyright claims already sends the message that our nation's traditional reverence for free expression does not apply if that expression happens to make use, even lawful use, of a

¹³ See <https://www.eff.org/deeplinks/2018/11/sopaau-australia-testbed-worlds-most-extreme-copyright-blocks>.

¹⁴ EFF's response to this question will address only why such a system is not justified by concerns about burden to rightsholders and would not encourage more use of counternotices, rather than providing an exhaustive critique of the proposal. For further reading on EFF's objections to the CASE Act, see, e.g., Katharine Trendacosta, *Yet Another Year of Fighting a Bad Copyright Bill: 2019 Year in Review*, EFF Deeplinks Blog (Dec. 22, 2019), <https://www.eff.org/deeplinks/2019/12/yet-another-year-fighting-bad-copyright-bill-2019-year-review>; EFF et al. letter to House Judiciary Committee opposing the CASE Act (Apr. 26, 2018), <https://www.eff.org/document/letter-house-judiciary-committee-opposing-case-act>.

copyrighted work. Requiring rightsholders who want to keep content offline to stand behind disputed claims in federal court is not too much to ask—and is in fact a necessary check on abuses of the powerful censorship tool that Section 512 gives them.

Creating special tribunals to resolve DMCA disputes also would do nothing to make the counter-notice process less intimidating to users. For one thing, there is no reason to assume that the prospect of being summoned to appear before a special “copyright court” would be any less daunting to most people than being sued in federal court—especially if that forum would provide lesser procedural and substantive protections to defendants. Nor would the creation of such a tribunal actually remove the threat of federal litigation from the equation. The tribunal proposed by the CASE Act would serve only as an alternative to, not a replacement for, federal litigation¹⁵—a feature almost certainly required by the Constitution. Thus at the point when a user would have to decide whether to send a counter-notice, the threat of federal litigation would remain.

As to the 10–14-day waiting period for putbacks, EFF does not recommend a change so long as the basic mechanics of the notice-and-takedown process remain in place. Focusing in particular on the counter-notice process, lengthening the timeline would worsen the detrimental effect on speech when, as is common, the DMCA process is abused to take down lawful speech, particularly speech of a time-sensitive nature. Shortening the timeline, however, might make it difficult for senders to draft papers that can withstand legal scrutiny. This is a tension inherent in Section 512’s notice-and-takedown framework. Within that system, the best way to protect online speech is to ensure that the cause of action created by Section 512(f) for false takedowns is meaningful, making counter-notices less necessary in the first place. Congress could also mitigate the waiting period’s impact on lawful expression by making clear that a service provider does not forfeit its safe harbor eligibility by restoring content sooner than 10 days after receiving a counter-notice when the facts clearly warrant it—e.g., in obvious fair use cases or when a claim is shown to be fraudulent.

7. *More generally, the notice- and counter-notice sending process have many shortcomings. These could be improved by clarifying when automation is appropriate and that OSPs cannot erect requirements beyond those in section 512(c)(3); by authorizing the Copyright Office to develop standardized web forms for notices and counter-notices and to set regulations for the communications that OSPs must deliver to a user when their content is taken down or had access disabled (including offering information about the fair use doctrine as codified in section 107 and as illustrated in the Copyright Office’s Fair Use Index); and by increasing privacy protections for notice and counter-notice senders by masking certain personally identifiable information, including address and phone number. How could this best be done? Please provide specific provisions for accomplishing these goals.*

¹⁵ S. 1273, §§ 1502(a), 1504(a).

Multiple proposals are embedded in this query; we address them in sequence, below.

Automation

If Congress addresses the use of automation, it should be to make clear that meaningful human review is *always* required before sending a DMCA notice. Automated processes can play a role in identifying *potentially* infringing content. However, such processes cannot substitute for human review. Indeed, a 2017 study of takedown notices using automated processes identified serious problems. For example:

- 4.2% (approximately 4.5 million) were fundamentally flawed because they targeted content that clearly did not match the identified infringed work.
- Nearly a third (28.4%) had other characteristics that raised questions about their validity.
- Greater than 15% of takedown requests appeared not to comply with the most substantive statutory requirements: sufficiently identifying the allegedly infringed work or the material alleged to infringe.
- 6.6% involved potential fair uses.
- 2.3% were based on legal complaints other than copyright, such as trademark or defamation.¹⁶

This empirical work is consistent with EFF's practical experience. To take just a few examples: in 2013, Fox Broadcasting sent a takedown notice targeting author Cory Doctorow's book, *Homeland*, because the book shares a title with a popular television show. In 2014, court documents in the case of *Disney v. Hotfile* revealed that Warner Bros used "robots" (the company's own term) to send thousands of infringement accusations without human review, based primarily on filenames and metadata rather than inspection of the files' contents. The documents also showed that Warner knew its automated searches were too broad and that its system was taking down content to which Warner had no rights.¹⁷

EFF has itself been a target. In 2018, a "content protection service" called Topple Track sent a slew of abusive takedown notices to have sites wrongly removed from Google search results. Topple Track had boasted that it was "one of the leading Google Trusted Copyright Program members." In practice, Topple Track algorithms were so out of control that it sent improper notices targeting an EFF case page, the authorized music stores of both Beyonce and Bruno Mars, and a New Yorker article about patriotic songs,

¹⁶ See Jennifer Urban, Joe Karaganis, and Brianna L. Schofield, *Notice and Takedown in Everyday Practice* (Mar. 22, 2017) ("Urban Study"), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628, at 88.

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

among many others.¹⁸ Topple Track even sent an improper notice targeting an article by a member of the European Parliament that was about improper automated copyright notices.¹⁹ The company that ran Topple Track eventually contacted EFF to apologize for the improper takedown notices, blaming “bugs within the system that resulted in many whitelisted domains receiving these notices unintentionally.”

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

Privacy Protections

EFF supports improving privacy protections for notice and counter-notice senders. In particular, the addition of language explicitly permitting users to send counter-notices anonymously, by designating a proxy or agent who could accept service of legal process on their behalf, could ameliorate a major obstacle preventing effective use of the counter-notice system. Allowing service providers to withhold the identifying information of counter-notice senders, including name, address, and phone number, absent a valid subpoena or court order would further protect users for whom counter-noticing through an agent may not be an adequate option.

Under the current system, many users may feel intimidated or fear harassment or reprisal if they reveal their personal information to the sender of the takedown notice, particularly where the user’s content is critical, a parody, or addresses controversial subject matter. It appears that these fears are not unfounded. One OSP surveyed in the study by U.C. Berkeley School of Law researchers described “cases where allegedly abusive ex-husbands have filed DMCA complaints against images their ex-wife had posted as a means of attempting to get her current address.”²⁰ According to an amicus brief filed on her behalf in *Lenz v. Universal Music*, when YouTube creator Rebecca Prince considered filing a counter-notice in response to an abusive notice, she “feared that gaining her sensitive information was in fact what this person wanted so he or she could use it to ‘dox’ her—that is, to release her identifying information online to further harass and intimidate her—which in fact happened.”²¹

¹⁸ Daniel Nazer, *Topple Track Attacks EFF and Others with Outrageous DMCA Notices*, EFF Deeplinks Blog (Aug. 9, 2018), <https://www.eff.org/deeplinks/2018/08/topple-track-attacks-eff-and-others-outrageous-dmca-notices>.

¹⁹ Julia Reda, *Out-of-Control Censorship Machines Removed My Article Warning of Out-of-Control Censorship Machines* (Aug. 17, 2018), <https://juliareda.eu/2018/08/censorship-machines-gonna-censor/>.

²⁰ Urban Study at 45 n.131.

²¹ Brief of Amici Curiae Yes Men, Rebecca Prince, and May First in Support of Petitioners, at 18, *Lenz v. Universal Music Corp.*, U.S. Supreme Court No. 16-217 (“Yes

We recognize that notice senders are also required to disclose identifying information and may have similar concerns. EFF would not object to extending protections for address and contact information to notice senders. It is not viable, however, to allow notice senders to remain entirely anonymous at any stage. A basic element of any copyright infringement claim is the claimant's ownership of the rights at issue. A user who is the target of a takedown notice thus would be unduly impeded in evaluating and responding to the claim without knowing its source. Further, we do not see how the remedial measures designed to address takedown abuse can be effective without revealing the source of the notice.

Other Counter-Notice Process Improvements

In addition to the counter-notice process improvements discussed in response to Questions 6 and 7, above, we also urge increased transparency and procedural protections for users. OSPs vary widely in the information and opportunities they provide to users who are the targets of takedown notices. Congress could better protect the rights of online speakers by making clear that OSPs that wish to claim immunity under the Section 512 safe harbors must provide their users with the details of any infringement claims lodged against them, as well as provide an opportunity to respond to those claims and clear information about how to do so.

8. *At the same time that Congress should revise section 512 to ensure that infringing material stays down once identified, it should also discourage the over-sending of notices as a counter-balance to the more significant action that an OSP must take after receiving a notice. This could be done, for example, by heightening the requirements for accuracy in notice sending, possibly with stricter requirements and heavier penalties. As noted above, the standard may be more lenient for small entities and individuals. How might the requirements be heightened in a meaningful way while not unduly burdening copyright owners trying to protect their work against infringement?*

Congress could make the DMCA more effective in deterring improper takedown notices by making explicit that the sender of a takedown notice must have an *objectively reasonable* belief that the material at issue is not authorized by the copyright owner or the law, including fair use doctrine. Rather than creating new requirements or penalties, the purpose of this change would be to clarify the existing statutory requirements and prevent incorrect interpretations of the statute from gutting the Section 512(f) safeguard.

When it passed the DMCA, Congress knew that Section 512's powerful incentives could result in lawful material being censored from the Internet without prior judicial scrutiny, much less advance notice to the person who posted the material or an opportunity to contest the removal. To inhibit abuse, Congress made sure that the DMCA included a series of checks and balances. First, it included Section 512(g), which creates a counter-notice process that allows for restoration after a two-week waiting period. Second, it included Section 512(c)(3), which sets out clear rules for asserting infringement under the

Men Brief?), <http://www.scotusblog.com/wp-content/uploads/2016/09/16-217-amicus-cert-yes-men-et-al.pdf>.

DMCA. Third, it included Section 512(f), which gives users the ability to hold rightsholders accountable if they send a DMCA notice in bad faith.

As the Senate Report on Section 512(f) explained,

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

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

Specifically, Section 512(f) creates a cause of action against “[a]ny person who knowingly materially misrepresents under this section [i.e., under Section 512] – (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification.” By its clear language, Section 512(f) refers back to Section 512(c)(3), which outlines the specific affirmations required to allege infringement under the DMCA. *See id.* § 512(c)(3)(A); *see also id.* § 512(b)(2)(E) & (d)(3). A mere statement that material is “infringing” does not suffice; to allege infringement under the DMCA the complaining party must state that it “has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.” *Id.* § 512(c)(3)(A)(v) (emphasis added). Taken together, Sections 512(c) and (f) deter improper notices: 512(c) by requiring a notice sender to properly consider whether her notice targets actual infringement, 512(f) by imposing a penalty if she fails to do so.

Some have suggested that Congress intended for speech concerns to be addressed almost exclusively via the counter-notice process spelled out in Section 512(g). That cannot be correct. First, it effectively reads Section 512(f) out of the statute, rendering it superfluous. Second, it’s clear from the statute itself that Congress viewed Section 512(f) and Section 512(g) as distinct, independent remedies. Users who have been improperly targeted can choose to counter-notice under Section 512(g), to take legal action under Section 512(f), or both. If Congress had intended Section 512(g) to be the primary remedy for misuse of the DMCA, it could have required users to take advantage of the counter-notice process before, during, or after filing a lawsuit under Section 512(f). It did not.

Unfortunately, the Ninth Circuit Court of Appeals undermined Congress’ purpose in *Lenz v. Universal*. The Ninth Circuit correctly held that the DMCA requires a rightsholder to consider whether the uses she targets in a DMCA notice are actually lawful under the fair use doctrine. 815 F.3d 1145, 1153 (9th Cir. 2016). However, the appeals court also held that a rightsholder’s determination on that question passes muster as long as she subjectively believes it to be true. *Id.* at 1154. This leads to a virtually incoherent result: a rightsholder must consider fair use, but has no incentive to actually learn what such a consideration should entail. After all, if she doesn’t know what the fair use factors are, she can’t be held liable for not applying them thoughtfully. As Judge Milan Smith noted in his dissent, “in an era when a significant proportion of media distribution and

consumption takes place on third-party safe harbors such as YouTube, if a creative work can be taken down without meaningfully considering fair use, then the viability of the concept of fair use itself is in jeopardy.” *Id.* at 1160. If the sender of an improper takedown cannot suffer liability under Section 512(f) no matter how unreasonable its belief, the *Lenz* decision sharply limits Section 512(f) protections for even classic fair uses upon which creators rely. *Id.* (concluding that the Ninth Circuit’s “construction eviscerates § 512(f) and leaves it toothless against frivolous takedown notices”). For example, some rightsholders unreasonably believe that virtually all uses of copyrighted works must be licensed. Fair use exists, in significant part, to make sure such beliefs don’t thwart new creativity. Allowing a copyright owner to hide behind unreasonable beliefs undermines this crucial protection for online expression. By contrast, requiring a rightsholder to form a reasonable good faith belief as to whether the use she is targeting is unlawful or not comports perfectly with Congress’ intent.

Congress could remedy this erroneous reading of the statute by clarifying, once and for all, that Section 512(f) encompasses an objective standard, i.e., that the sender of a takedown notice must have a reasonable belief that the material at issue is not authorized by the copyright owner or the law. To be clear, in many instances a reviewer will be confronted with facts that make the legal conclusion of infringement simple. In other instances, a reviewer will be confronted with facts that make the legal conclusion of non-infringement equally simple. As for the edge cases, where it is not immediately clear whether the uses is lawful for not, the reviewer is obligated only to form a reasonable belief—one that is *defensible*, even if it turns out to be incorrect. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986) (a good faith belief “need not be correct,” but it must “be defensible”).

In addition, a reasonable belief requirement helps reconcile the DMCA and the First Amendment. The Supreme Court has repeatedly affirmed that while Congress has broad latitude to exercise its power under Article I, section 8, it goes too far when it alters the traditional contours of copyright. *Golan v. Holder*, 132 S. Ct. 873, 890 (2012); *see also Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

9. *Though section 512 says that OSPs must accommodate standard technical measures (STMs), no such measures exist after more than twenty-two years, and some stakeholders have complained that service providers have no incentive to establish STMs. The Copyright Office could help here, if Congress provided regulatory authority to adopt STMs and promulgate related regulations. How broadly or narrowly should the scope of this authority be defined?*

The reason why no STMs exist is not lack of incentives but rather that Congress set out a necessarily high bar for adoption. Congress correctly defined STMs as measures that “have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process.” 17 U.S.C. 512(i)(2)(A). Given the dangerous consequences STMs pose for online expression and practical due process, EFF agrees that service providers should only be required to accommodate measures that meet that standard. But it is a very challenging one given the

many industries involved and, more importantly, the many types of copyright owners that would be affected by any such measures, from large movie studios to vidders to YouTube creators to musicians to teachers to political organizers to ordinary people just posting the proverbial cat videos. Many of these creators may, for example, be much more concerned about protecting fair use than protecting a movie studio's ability to monetize snippets.

This is not a problem the Copyright Office can solve, both because it is a tremendous challenge and because the Copyright Office has not shown much interest in defending the copyright balance. As discussed above, EFF's own investigations have revealed attempts by the Office to lobby other government agencies against long overdue reforms that would have benefited consumers, technology users, and the public as a whole.²² Moreover, the DMCA has already saddled the Copyright Office with many additional obligations, such as the 1201 exemption process. Congress should not add more.

10. One concern with the voluntary agreements that copyright owners and OSPs adopt to supplement section 512 is that third-party interests are not often represented in the agreements. That can lead to concerns that certain copyright owners may be shutout from utilizing an OSP or including their works in an OSP's monetization program, or that the speech of specific users and consumers may be censored. I am interested in protecting these interests possibly by allowing for regulatory review to ensure that voluntary agreements do not prohibit uses authorized by law (e.g., fair use) or otherwise unduly burden third parties, including copyright owners not party to an agreement. What would be the best format for such regulatory review? And since these agreements may implicate areas of law outside copyright, such as antitrust, who is best suited to handle such review: Federal Trade Commission, Department of Justice, or Copyright Office?

EFF shares Senator Tillis's concerns about voluntary agreements between major media and entertainment companies and OSPs. Such agreements have often ignored the rights and needs of Internet users generally, and of small creators particularly. Perhaps the most significant such agreement in effect today is YouTube's "DMCA-Plus" agreements with major rightsholders, which institute automated takedowns of creative work based on Google's proprietary algorithms (known as ContentID), or divert advertising revenues from video creators to major rightsholders.

One major force behind these agreements has been pressure from the federal government, particularly the Intellectual Property Enforcement Coordinator, the U.S. Trade Representative, and other officials. These officials have often sought to achieve policy outcomes through private, ostensibly voluntary agreements that could not have been enacted by Congress. This form of policymaking is undemocratic and avoids accountability, even for policies that may violate the First Amendment.²³ The Committee

²² See <https://www.eff.org/deeplinks/2016/10/newly-released-documents-show-hollywood-influenced-copyright-offices-comments-set>; <https://www.eff.org/deeplinks/2016/08/copyright-office-jumps-set-top-box-debate-says-hollywood-should-control-your-tv>

²³ See generally <https://www.eff.org/deeplinks/2016/09/shadow-regulation-back-room-threat-digital-rights>.

can address this “shadow regulation” problem by requiring that when government actors encourage or participate in the creation of voluntary agreements concerning copyright enforcement, they must promote agreements that would comport with the First Amendment and the Due Process Clause as if such agreements had been created by state actors, and they must represent the interests of small creators and users of copyrighted works.

We also support stringent antitrust review of inter-industry agreements on copyright enforcement, by both the Department of Justice and the Federal Trade Commission. Court precedent and agency oversight of music publishers, movie theaters, and other media and entertainment markets can serve as a model.

11. Section 1201 currently allows for temporary exemptions to be granted from the circumvention prohibition, but those exemptions do not extend to third-party assistance. This means that when the Librarian of Congress grants an exemption for circumvention of technological protection measures (TPMs) over software for a tractor to allow for repair, the tractor owner must perform the software repair themselves. The Copyright Office has recommended amending the statute to grant the Librarian authority to adopt temporary exemptions permitting third-party assistance “at the direction of” an intended user, and this may be the right way to address this problem. Do you agree with the Copyright Office?

If so, how should this provision be drafted to avoid unintended consequences, and to what extent is the Unlocking Consumer Choice and Wireless Competition Act a helpful model? If not, please explain why you do not agree and provide specific recommendations as to how you think this problem should be addressed?

Please see consolidated response to Questions 11-14 below.

12. The Copyright Office has recommended revising some of the permanent exemptions so that they are better tailored to the types of uses sought today. In particular, the exemptions for security testing and encryption research should be revised to expand the types of activities permitted, ease the requirements to seek authorization from the owner of the relevant system or technology, and eliminate or clarify the multifactor tests for eligibility. What thoughts do you have about revising these existing permanent exemptions, and how would you recommend that be done?

Please see consolidated response to Questions 11-14 below.

13. Congress should adopt new permanent exemptions for noninfringing activities that have repeatedly received exemptions in recent triennial rulemakings, or where there is a particularly broad-based need, including to enable blind or visually impaired persons to utilize assistive technologies and to allow diagnosis, repair, or maintenance of a computer program, including to circumvent obsolete access controls. What other temporary exemptions should be made permanent?

Please see consolidated response to Questions 11-14 below.

14. *There are various ways that the triennial rulemaking process could be streamlined to be more efficient and so that section 1201 better accounts for user concerns. These include establishing presumptive renewal of exemptions adopted in the previous rulemaking cycle, shifting the burden to those who want to oppose an exemption from the previous rulemaking, and authorizing the Librarian, upon recommendation of the Register, to make permanent a temporary exemption that has been renewed twice without opposition and without modification. How ought section 1201 be revised to reflect the stakeholder desire for a less burdensome triennial rulemaking process and consumer interests, and what other means should be adopted to make the rulemaking process more efficient?*

EFF appreciates this effort to grapple with Section 1201's many flaws. However, we do not believe a piecemeal response is adequate to remedy them. Congress must be bolder, and either excise the provision altogether or require that any violation have an actual nexus with copyright infringement.

Section 1201 of the DMCA causes broad and well-documented harms to speech; to competition, innovation, product safety and security; and to consumer choice and autonomy.²⁴ It has no demonstrated effect advancing the purposes of copyright law; to the contrary, it inhibits them.

The fix is simple: repeal Section 1201.

Failing that, Congress can significantly mitigate the law's constitutional defects and practical harms by making clear that only acts of circumvention with a close nexus to copyright infringement are actionable under Section 1201. This approach, expressed in the Unlocking Technology Act,²⁵ would cleanly address the majority of harms inflicted by the law and would better conform Section 1201 to both its intended scope and the Supreme Court's guidance that the traditional limits on copyright law, such as fair use, are needed to avoid conflict with the First Amendment.

Both of these approaches have a virtue that the current Section 1201 lacks: *simplicity*.

One of the reasons the existing permanent exemptions are inadequate to protect lawful and important activities is that they are difficult to rely on in everyday practice, particularly for those who cannot afford regular review by a specialist attorney. The permanent exemptions are replete with conditions that are difficult to satisfy *ex ante* or

²⁴ The harms have been extensively documented over years of Congressional inquiry and triennial rulemakings. *See generally* 2016 Study of Section 1201 Comments of the Electronic Frontier Foundation; Comments of the Cyberlaw Clinic at Harvard Law School; Comments of the Institute of Scrap Recycling Industries, Inc.; Comments of the American Automobile Association; Comments of the Auto Care Association; Comments of Mozilla, Inc.; Comments of New America's Open Technology Institute; Comments of the Owners' Rights Initiative; etc., at <http://copyright.gov/policy/1201/>.

²⁵ H.R. 1587 (114th Cong.), <https://www.govtrack.us/congress/bills/114/hr1587>.

whose satisfaction cannot be guaranteed. These conditions act as traps for the unwary, discouraging lawful and important activities.

Amateur and independent creators, small businesses, researchers, hobbyists, repair professionals, and other individuals should be able make lawful uses of copyrighted works with confidence. In addition, Congress should avoid statutory language that attempts to address policy or regulatory issues that are far afield from the purposes of copyright law, such as product safety, automotive design, disclosure of security vulnerabilities, or anything that effectively expands copyright's reach beyond its traditional contours. These policy concerns are the subject of other laws and regulations enforced by expert agencies, or in the courts through tort and commercial law. The DMCA need not address these concerns, and it should not duplicate or be contingent upon the application of other laws.

Finally, the triennial rulemaking process cannot save Section 1201. EFF has participated in virtually every rulemaking process, and it is clear that it has produced, and can only produce, limited exemptions that do not go nearly far enough to protect innovation, speech, and other legitimate activities.

Despite clear guidance from Congress that the Librarian “*shall* publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected,”²⁶ the Copyright Office has taken the position that the Librarian has total discretion to deny exemptions – even those that meet this statutory standard. The rulemaking authorities also argue that this process is immune to judicial oversight. This unaccountable process has been onerous for all parties and heavily skewed against the public interest.

As noted above, the Copyright Office also lacks the expertise and mandate to act as a general regulator of technology and culture. The overbreadth of Section 1201 causes it to impede important and legitimate conduct everywhere that digital software and other copyrighted works appear. It might be possible for an agency to apply a clear standard that provides clear breathing room for lawful activity, perhaps as a backstop to a defendant's raising fair use in court, a way to get clarity before risking suit. But that would be a far cry from the current system of freewheeling policy decisions that implicate multiple economic centers and the fundamental rights of technology users without binding legal standards or judicial oversight.

15. *Though it did not receive as much attention during my hearings as sections 512 and 1201, section 1202 is another important part of copyright law added to title 17 by the DMCA, and it too is in need of modernizing. For example, Congress could amend section 1202 to drop the double-intent standard and only require a copyright owner to prove that a defendant removed or altered rights management information (knowingly or not) with the knowledge that it would encourage infringement. And Congress could adopt the Copyright Office's recommendation to enact a new section 1202A to provide the author of*

²⁶ 17 USC 1201(a)(1)(D) (emphasis added).

a copyrighted work—rather than just the copyright owner—with a right of action when someone removes or alters rights management information with the intent to conceal an author’s attribution information. Do you think that the proposed legislative text that appears on page 98 of Authors, Attribution, and Integrity: Examining Moral Rights in the United States is the best way to add a right for the copyright owner, or would you recommend different text? And what are your thoughts on revising section 1202’s double-intent standard?

An additional right of attribution is likely to be redundant to existing rights under copyright law, which already provide copyright owners with broad powers to control dissemination of their works.

A fixed, statutory attribution right is also inconsistent with the rapid and diverse participatory cultural practices that prevail online. Cultural symbols are often rapidly reworked and shared, and norms around attribution vary dramatically across contexts. Many creative communities have established norms regarding when and to what extent attribution is needed.²⁷ A rigid attribution requirement could disrupt these practices and impede valuable downstream creativity, while creating further opportunities for copyright trolling.

A statutory right of attribution could also interfere with privacy protective measures employed by online platforms. Many platforms large and small strip identifying metadata from works on their platforms to protect their users’ privacy and the ability of the public to safely use the platforms for journalism and activism. If automatically removing this data were to trigger liability for violating an author’s right of attribution, platforms would likely be chilled from protecting their users’ privacy in this way—especially small platforms without expert legal counsel. Of course, platforms could offer the option to enable metadata preservation on their uploads so that sophisticated users who understand the risks and wish to attach attribution metadata can do so. A rigid statutory right is likely to impede, rather than enhance, the choices available to the wide range of creators and innovators who must interact with it.

Respectfully,

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²⁷ Rebecca Tushnet, *Copyright Law, Fan Fiction, and the Rights of the Author* at 3, available at <https://tushnet.files.wordpress.com/2013/06/fandombook.pdf>.