



“Is the DMCA's Notice-and-Takedown System Working in the 21st Century?”

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Chairman Tillis, Ranking Member Coons, members of the Subcommittee: thank you for inviting me to testify on the value of Section 512 of the Digital Millennium Copyright Act (“DMCA”) to startups, smaller technology companies, and the users and creators who rely on them.

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues.

Rhetoric over § 512 sets up a false dichotomy of “tech stakeholders” and “copyright stakeholders.” There is a large and growing creative class that has come into existence thanks to a diversity of Internet platforms and online technology.¹ Technology has democratized creativity, and created entirely new ways for independent creators to reach fans and customers. The result has been robust economic sectors that were not possible before the DMCA. And the current statutory framework has enabled small platforms to grow and serve that new creative class.

Overall, § 512 is working well for startups and the users and creators who rely on them. In 1998, Congress set out to provide emerging Internet businesses with certainty that accusations their users were infringing copyright—infringement they had no knowledge of or direct involvement in—would not automatically strap them with unaffordable legal exposure and put them on a fast track to insolvency. And Congress succeeded. Today’s emerging Internet businesses rely on and need that same certainty.

First, regarding the notice-and-takedown framework: it is largely working well, but there is significant abuse of the system and no meaningful opportunities to curtail that. Most online service providers (“OSPs”) see very little actual infringement. Many platforms, even those hosting several million pieces of

¹ See, e.g., Colin Sullivan, *Creators and Tech Companies Can Be Friends*, Medium (Jan. 19, 2017), <https://patreonhq.com/creators-and-tech-companies-can-be-friends-c18a8508c60d> (“It is the best time to be a creator in human history, and that is largely due to the internet.”).

content, receive very few takedown notices, reflecting a fraction of a percent of the hosted content. It is difficult to justify forcing those OSPs to police all of that content: doing so would not catch much (if any) infringement, but it would come with substantial drawbacks and expense. Moreover, OSPs lack the information to identify infringement on their own. Rightsholders are in the best position to identify potential infringement in the first instance, since they know what their copyrighted works are, can identify potential infringement they want resolved, and have the facts most pertinent to fair use and licensing.

While the current framework does work well, improper takedown notices are a very real problem. A noteworthy fraction of takedown notices are, for example, directed to material that is not infringing or material that the notice-sender has no rights to enforce. Instead, some notice-senders use § 512 to hurt competitors, remove content they do not like, or attack speech. When OSPs receive these notices, they may be able to identify the flaws and may decide to leave the improperly-accused material up. But they do that at the risk of sacrificing safe harbors. As companies scale, it becomes nearly impossible to assess each notice for validity. While there are statutory mechanisms to try and combat abuse of the system, the remedies against abuse are weak and users looking to fight back can only do so at great personal risk.

Second, the definitions for safe harbor eligibility are appropriately broad and flexible. The quality and variety of Internet offerings has rapidly expanded because these definitions are flexible enough to accommodate new ideas. Especially in this technology-oriented area, the definitions should be broad and allow innovators and entrepreneurs to explore without being bound by outdated and rigid legal definitions.

Third, changes to the “red flag” knowledge standard or imposing an affirmative duty to monitor would be seriously detrimental. It would create new costs and risks that startups operating on thin margins will be unable to bear. Larger, established incumbents already automate many aspects of their infringement monitoring—after having spent substantial money to develop those processes—and have the resources to absorb increased legal risk. Startups do not.

Technology and filters have many inherent limitations which make them incapable of fully addressing online infringement. Filtering technology is imperfect, with often high false positive rates. It is categorically incapable of answering fact-specific questions of infringement, like fair use, licensing, and the exclusion of unprotectable ideas. But these filters are also out of reach for most startups. The most sophisticated tools are so expensive that the development costs are orders of magnitude above what a startup could afford. Off-the-shelf tools, which cannot screen much content on a multimedia platform, are also too expensive for early-stage companies to license and maintain. All filters are limited in the type of content they screen. And for many types of content, there are no filters. Finally, technology is easily circumvented. Users intent on uploading infringing content can easily modify files to avoid the filters.

In sum, the current § 512 safe harbors and notice-and-takedown system set a baseline for treating small and large companies and small and large creators equally. Each have the same responsibilities and can earn the same benefits under the law. But importantly, any shift in the current policy might not have a significant impact on large companies that are already doing a lot to monitor for infringement and can absorb additional legal risk, but it could cause significant collateral damage to smaller OSPs and their creative communities.

I. Section 512 is working for startups, smaller tech companies, and the users and creators who rely on them.

Despite its age, 17 U.S.C. § 512 has successfully balanced the interests of multiple stakeholders for two decades, and that valuable balance is still relevant today. Changes which shift the existing balance would have an outsized, negative impact on high-tech, high growth startups, smaller tech companies, and the users and creators who rely on them.

A. The explosion of creativity and innovation online confirms § 512’s success.

Section 512 has enabled new innovative and creative industries to flourish. In the last 20 years, there has been an explosion of economic growth and U.S. leadership in online technologies. These successes would not have been possible without the DMCA.² If the U.S. wants to continue that trajectory, Congress must recognize there are still nascent companies who need the same protections afforded to their predecessors.

Economic growth. The Internet is critical for economic growth and a catalyst for job creation. The U.S. has demonstrated its leadership in the global Internet ecosystem over decades.³ In 2018, the Internet sector contributed \$2.1 trillion to the U.S. economy, approximately 10% of GDP.⁴ And the technology and business of running an Internet company are increasingly accessible, as advances have democratized the industry. The cost of running a basic Internet application fell from \$150,000 per month in 2000—two years after the DMCA passed—to \$1,500 per month in 2011.⁵ It is no coincidence that, along with this expansion of economic opportunity, the U.S. was also a pioneer in adopting § 512 safe harbors and the notice-and-takedown system, with many countries following-suit and adopting similar frameworks.⁶

A new creative class. The success of the Internet also brought an “entirely new economic model for the media and entertainment industries.”⁷ Just two decades ago, creators and consumers were effectively bound by limitations of the physical world and traditional content industries. But the Internet opened up

² See, e.g., David Kravets, *10 Years Later, Misunderstood DMCA is the Law That Saved the Web*, Wired (Oct. 27, 2000), <https://www.wired.com/2008/10/ten-years-later/> (“Today’s internet is largely an outgrowth of the much-reviled [DMCA] that lawmakers passed in 1998 . . .”); Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbors, Secondary Liability and Fair Use*, 12 J. Marshall Rev. Intell. Prop. L. 70, 106 (2012) (“The extraordinary and unprecedented growth in innovative Internet services is only possible because of the DMCA”) (citation omitted).

³ See, e.g., McKinsey Global Institute, *Internet Matters: The Net’s Sweeping Impact on Growth, Jobs, and Prosperity*, McKinsey & Company (May 2011), https://www.mckinsey.com/~media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_exec_summary.ashx (study showing Internet consumption and expenditure contributing significantly to the economy, including that the U.S. captured more than 30% of global Internet revenues and more than 40% of net income).

⁴ Christopher Hooton, *Measuring the U.S. Internet Sector: 2019*, Internet Association (Sept. 26, 2019), <https://internetassociation.org/publications/measuring-us-internet-sector-2019/>.

⁵ Marc Andreessen, *Why Software Is Eating The World*, Wall St. J. (Aug. 20, 2011), <http://on.wsj.com/1gt4wRH>.

⁶ See Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 Va. L.J. & Tech. 369, 373 (2014) (listing countries where the DMCA has served as a basis or template for similar protections).

⁷ Chris Anderson, *The Long Tail*, Wired (Jan. 10, 2004), <https://www.wired.com/2004/10/tail/>.

avenues for vastly more creators to reach a global audience, and online distribution and retail created a “world of abundance.”⁸

In 2017, nearly 17 million Americans earned a collective \$6.8 billion in income by posting their personal creations on nine Internet platforms. That reflects a growth rate of 16.6% over the previous year. These Internet-enabled creators distribute their work on platforms owned by newer, smaller companies like Etsy, Shapeways, and Twitch, in addition to platforms run by industry giants like Amazon-publishing and YouTube.⁹ Moreover, “social media continues to amplify the reach of U.S. creators,” with traffic from a handful of social media sites generating over half a million dollars in earnings for these Internet-enabled creators.¹⁰

Even the success of individual platforms that serve Internet-enabled creators is remarkable, for example:

- Patreon is a membership platform that makes it easy for artists and creators to get paid. “With a subscription-style payment model, fans pay their favorite creators a monthly amount of their choice, in exchange for exclusive access, extra content, or a closer look into their creative journey.” Since its founding in 2013, Patreon has engaged with over 150,000 creators who have earned over \$1 billion.¹¹ Podcasters, video creators, musicians, visual artists, writers, gaming creators, and other creators use the platform.
- Etsy is a global marketplace of unique and creative goods. As of December 31, 2019, Etsy’s marketplace consisted of 2.5 million active sellers with approximately 65 million items for sale, and 45.7 million active buyers.¹²
- Redbubble owns and operates leading global marketplaces powered by independent artists. Independent artists share and sell their creative works to a worldwide audience, printed on everyday products like apparel, housewares, and wall art. As of June 2019, there were approximately 1 million active artists on Redbubble marketplaces, where 5.4 million customers purchased products.¹³
- Tumblr, a multimedia blogging site with nearly half a million blogs, was the birthplace of a rap collective whose members are now major names, and many consider them “unreachable geniuses.” These artists used the Internet “to achieve virtual exposure and generate loyalty via transparency” and then “scale[d] barriers to mainstream fame.”¹⁴ “Central to their ascent was the

⁸ *Id.*

⁹ Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America’s New Creative Economy*, Re:Create 2 (Feb. 2019), <https://www.recreatecoalition.org/wp-content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf> (reporting earnings for U.S. creators from these platforms: Amazon Publishing, eBay, Etsy, Instagram, Shapeways, Tumblr, Twitch, WordPress, and YouTube).

¹⁰ *Id.* at 1-2 (identifying the contribution of Facebook, Pinterest, Reddit, Twitter, Instagram, Tumblr, and YouTube).

¹¹ *The Story of Patreon*, Patreon, <https://www.patreon.com/about> (last visited May 28, 2020).

¹² *2019 Transparency Report*, Etsy (2020), https://extfiles.etsy.com/advocacy/Etsy_2019_Transparency_Report.pdf.

¹³ Emma Clark, *Redbubble Group*, Redbubble Investor Presentations (Nov. 2019), https://shareholders.redbubble.com/site/PDF/1994_1/investorpresentationnovember2019.

¹⁴ Briana Younger, *Found Family: How Odd Future Changed Everything*, Pitchfork (July 31, 2018), <https://pitchfork.com/levels/found-family-how-odd-future-changed-everything/>.

group's popular Tumblr page."¹⁵ In 2011, one author reflecting on their success noted that "revolutions are still televised, but they get Tumblr'd, tweeted and YouTubed first."¹⁶

For these and numerous other platforms, their users and customers are independent creators who would have no other way to find an audience. These creators do not (or at least did not) have support from record labels, Hollywood distributors, or traditional publishers. While the DMCA is already a carefully crafted balance, these platforms sit at an exciting, essential, but also challenging intersection: they both seek to protect their users from wrongful claims of infringement and to protect their users against infringement of independent work hosted on the platforms. "Many startups are working on ways to get creators paid, and they risk being shut down by laws meant to protect creators."¹⁷

Now is not the time to reverse course. The societal changes stemming from the COVID-19 pandemic have put into sharp focus the importance of the Internet ecosystem § 512 enabled. Many Americans are working, learning, shopping, and communicating from home, more reliant than ever on Internet connectivity and ecommerce to get anything done. Likewise, as brick-and-mortar and other in-person gatherings have come to a screeching halt, for many creators and small businesses their only option for income is through Internet platforms.¹⁸ The platforms that we use, to engage with content or with one another, would not exist but-for the DMCA.¹⁹

Relatedly, startups are major drivers of economic growth, and new, young firms make outsized contributions to net job creation.²⁰ Facing the stark realities of the current economic upheaval, today's startups will be essential to driving long-term economic recovery. But startups need to be well-positioned to survive the current economic downturn and expand and rapidly hire after the pandemic. If they face increased costs or litigation risks over allegations their users are infringing copyright, it would stunt their potential at a time that we need them most.

¹⁵ Thomas Hobbs, *How Odd Future's Tumblr Tore Up the Rules of Music Marketing*, The Face (Sept. 12, 2019), <https://theface.com/music/odd-future-tumblr-2009-2011>.

¹⁶ Jeff Weiss, *Odd Future Wolf Gang Kill Them All is Performing Rap on Its Terms*, L.A. Times (Apr. 10, 2011), <https://www.latimes.com/entertainment/music/la-ca-odd-future-20110410-story.html>.

¹⁷ Sullivan, *supra* note 1.

¹⁸ See, e.g., Maura Church, *COVID-10 and the Creative Economy: Takeaways from Patreon's Data Science Team*, Patreon HQ (Mar. 25, 2020), <https://blog.patreon.com/covid-19-creative-economy-patreon-data-science> (describing growth of new creators and patrons); Tyler Clifford, "It Was Suddenly Cyber Monday" - Etsy CEO Says Sales Spiked 79% in April, CNBC (May 7, 2020), <https://www.cnbc.com/2020/05/07/etsy-ceo-says-sales-jumped-79percent-in-april-likens-it-to-cyber-monday.html>; Kai Ryssdal & Maria Hollenhorst, *Musician-writer Dessa on What Happens When Artists' Gigs Go Away*, Marketplace (Mar. 30, 2020), https://www.marketplace.org/2020/03/30/musician-writer-dessa-on-what-happens-when-artists-gigs-go-away/?_thumbnail_id=241089 (describing use of social media to broadcast performances).

¹⁹ *Supra* note 2.

²⁰ *The Economic Impact Of High-Growth Startups*, Kauffman Foundation (June 7, 2016), https://www.kauffman.org/wp-content/uploads/2019/12/PD_HighGrowth060716.pdf; Arnobio Morelix, *The Impact of COVID-19 on the Global Startup Ecosystem*, Startup Genome (April 1, 2020), <https://startupgenome.com/blog/impact-of-covid19-on-global-startup-ecosystems>.

B. Section 512 provides essential certainty that startups hosting user-generated content will not face crippling litigation or liability.

Certainty in the law is essential to high-tech, high-growth startups. In passing § 512, Congress sought to “provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”²¹ This motivation is in line with the Constitutional authorization for copyright law, to promote progress in science and the useful arts.²² If OSPs cannot proceed with some confidence about whether and when they can be sued for infringement—especially acts of infringement they have no knowledge of or involvement in—the risks and costs of litigation would be so high few companies could succeed.

As several IP scholars have noted:

Without the limitations on liability provided by the DMCA’s safe harbors, the legal exposure for a service provider relying upon vast numbers of users freely exchanging content with one another would be entirely unmanageable; a business built on such a foundation could hardly have attracted financing in any rational marketplace, given the astronomical scope of the potential liability.²³

This is especially true for startups. “The genius of the DMCA is that it lets technology startups comply with the law without hiring a platoon of copyright lawyers.”²⁴ The cost of defending even a frivolous copyright case can exceed a startup’s valuation. In related intermediary liability contexts, the cost of proceeding just through discovery can exceed \$500,000.²⁵ The availability of massive statutory damages awards in copyright litigation compounds this legal exposure by orders of magnitude. In virtually no other area of law can plaintiffs obtain damages so much greater than the actual harm incurred: up to \$150,000 in damages per work infringed, regardless of the economic value of the underlying work or the harm (if any) caused by the infringement.²⁶ In one suit against an OSP, the plaintiff sought a damages award for “more money than the entire music recording industry has made since Edison’s invention of the phonograph in 1877.”²⁷ Put simply, these are not costs and risks that startups can bear.

Engine recently profiled a Greenville, SC based startup that is working to engage readers across the Southeast, and the co-founder’s perspectives cast this in sharp relief. 6AM City provides daily newsletters with hyper-localized coverage to subscribers, and then works to encourage ongoing discussions, conversations, and engagement across social media. Its co-founder has explained that changes in how

²¹ S. REP. 105-190, The Digital Millennium Copyright Act of 1998 (May 11, 1998).

²² U.S. Const. art. I, § 8.

²³ Brief of Amici Curiae 31 Intellectual Prop. & Internet Law Professors in Support Of Defendants-Appellees at 6, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2011), available at https://www.eff.org/files/2013/11/01/amicus_brief_31_intellectual_property_and_internet_law_professors.pdf.

²⁴ Chris Sprigman & Mark Lemley, Opinion, *Why Notice-and-Takedown is a Bit of Copyright Law Worth Saving*, L.A. Times (June 21, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html>.

²⁵ Evan Engstrom, *Primer: Value of Section 230*, Engine (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs>.

²⁶ 17 U.S.C. § 504.

²⁷ *Arista Group LLC v. LimeWire LLC*, No. 784 F. Supp. 2d 313, 317 (S.D.N.Y. 2011).

copyright is handled for online content would be “one of the biggest liabilities for [his] company.” It is “essential to ensure that new businesses can clearly and easily understand copyright policy, and know what they can and cannot do, so that they are not accidentally put in a difficult legal situation later in their growth A large shift in policy might not have a significant impact on large companies that can accommodate change, but it could unintentionally result in a negative impact on entrepreneurs and the small business community.”²⁸

And he is not alone. As others have noted, “[t]he DMCA provides important certainty that [Automattic’s] hosting of user generated content will not lead to costly and crippling copyright infringement lawsuits.”²⁹ Likewise, “[f]ollowing the DMCA is critical for any company with user generated and uploaded works. Patreon would be sued into oblivion by copyright holders if we ignored the DMCA”³⁰

Indeed, the enormous litigation costs associated with online copyright infringement cases forced an online video sharing startup into bankruptcy, even though the company ultimately won its cases and proved it was entitled to the DMCA’s safe harbor.³¹

Although the tech sector has grown significantly since the DMCA’s enactment, the Internet ecosystem is full of startups. These innovators will drive our economy and the directions that technology and creation can take, and § 512 is critical to their growth. Startups across the country have built their brand new or growing businesses on § 512’s foundation. Even slight changes to the law could fundamentally shift the ground beneath them, which compounded with the current economic state, could doom many startups and destroy the economic potential they currently stand to create. Changes that make it more difficult for platforms to operate without unmanageable legal exposure would instead entrench existing incumbents and make it harder for startups to compete. In sum, a motivating principle of § 512—protecting emerging companies from automatic legal exposure over allegations that their users have infringed copyrights—remains incredibly relevant today.

²⁸ #StartupsEverywhere: Greenville, SC, Engine (May 15, 2020), <https://www.engine.is/news/startupseverywhere-greenville-sc> (Profile of Ryan Heafy, Co-Founder and COO, 6AM City).

²⁹ Paul Sieminski, Automattic, <https://republicans-judiciary.house.gov/wp-content/uploads/2016/02/031314-Testimony-Sieminski.pdf>.

³⁰ Colin Sullivan, *A Fair DMCA Policy for Creators*, Patreon Blog (Feb. 25, 2019), <https://blog.patreon.com/a-fair-dmca-policy-for-creators>.

³¹ Emily Chasan, *Web Video Service Veoh to Liquidate, Founder Says*, Reuters (Feb. 12, 2010), <https://www.reuters.com/article/veoh-bankruptcy-idCNN1216366120100212> (quoting founder saying “[t]he distraction of the legal battles, and the challenges of the broader macro-economic climate have lead to our Chapter 7 bankruptcy.”). Veoh launched in 2005, and was sued by Universal Music Group in 2007. That case was not resolved until 2013. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013). UMG eventually lost the suit, with the Ninth Circuit affirming that Veoh was operating within the protection of DMCA safe harbors. But while the suit was pending, Veoh filed for bankruptcy. *See also, e.g.*, Joseph Parish, *Universal Loses DMCA Lawsuit Against Veoh*, The Verge (Dec. 22, 2011), <https://www.theverge.com/2011/12/22/2652889/universal-dmca-lawsuit-veoh-affirmed> (covering Veoh’s first Ninth Circuit victory and bankruptcy); *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (in another case filed by adult film producer, court held that Veoh met its burden of proving its entitlement to the safe harbor).

II. The notice & takedown system is essentially working, and working well, but there is abuse of the system and no meaningful opportunities to curtail it.

A. Most companies experience very little infringement, and it is difficult to justify increasing the costs, burdens, and risks they face.

Especially for platforms that rarely encounter copyrighted content, the high costs of proactively monitoring user activity or the significant risks of litigation are difficult to justify. For these companies and the creators and users they serve (and they are numerous), the notice and takedown system is working especially well.

Even for those that host enormous amounts of content, most OSPs see little actual infringement. As the Subcommittee has already heard, a vast majority of platforms receive relatively few notices of claimed infringement.³² OSPs which receive a handful of notices (on the order of dozens to hundreds) can subject each notice to human review.³³ Even for companies that receive a higher number of notices, in most cases the claims of infringement are vastly outnumbered by the non-infringing content on the site.

- Automattic is, among other things, the home of WordPress.com. It hosts millions of websites, ranging from non-commercial blogs to websites for major media outlets.³⁴ In recent months, Automattic received approximately 500-1000 takedown notices per month, and its staff are able to “carefully review[] each DMCA takedown notice . . . for accuracy and validity” before removing any content.³⁵ The total number of notices received is an incredibly small fraction of the tens of millions of posts and media files uploaded on Wordpress.com each month.³⁶
- Shapeways is a “platform that enables the full creator experience through design, making, and selling,” born out of 3D printing.³⁷ With over 45,000 shops on its marketplace, in 2018, it only received 291 notices that involved copyright claims.³⁸

³² *The Digital Millennium Copyright Act at 22: What is it, why it was enacted, and where we are now: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 116th Congress at 1:30:44 (2020) (testimony of Professor Rebecca Tushnet, Frank Stanton Professor of the First Amendment, Harvard Law School); available at <https://www.judiciary.senate.gov/imo/media/doc/Tushnet%20Testimony.pdf>.

³³ See, e.g., Jennifer M. Urban et al., *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc’y U.S.A. 371, 381-82 (2017) (results of survey in which approximately one third of OSPs reported receiving fewer than 100 takedown notices per year).

³⁴ Comments of Automattic Inc., *In re* Section 512 Study, Docket No. 2015-7, at 1 (Mar. 22, 2017), available at <https://www.regulations.gov/document?D=COLC-2015-0013-92493>; *Notable WordPress Users*, WordPress.com, <https://wordpress.com/notable-users/> (last visited May 31, 2020).

³⁵ *Intellectual Property*, Automattic, <https://transparency.automattic.com/intellectual-property/> (last visited May 31, 2020).

³⁶ See Comments of Automattic Inc., *In re* Section 512 Study, at 2 (reporting activity for December 2016).

³⁷ *Shapeways Fact Sheet*, Shapeways (2018), <https://static1.sw-cdn.net/files/cms/press/Shapeways-Fact-Sheet-2018-Q3.pdf>.

³⁸ *Id.*; 2018 Transparency Report, Shapeways, <https://www.shapeways.com/legal/transparency/2018> (last visited May 31, 2020).

- Tumblr, in the first half of 2019, received just under 5,000 DMCA notices, and removed 0.000006% of its users' posts in response.³⁹
- In the second half of 2019, Wikimedia received fewer than 20 DMCA notices.⁴⁰

Because so many companies see so little infringement, changing the law (and increasing the burdens and costs on those platforms) would also have little impact in resolving infringement because they just do not see much of it to begin with. As noted by a group of smaller platforms that host original content, requiring them “to deploy expensive content moderation tools will only make it more costly and difficult to run [a] business[] without any meaningful impact on copyright infringement.”⁴¹

B. Rightsholders are best positioned to identify potential infringement in the first instance.

The notice-and-takedown framework appropriately puts rightsholders in the driver's seat to initiate the takedown process by identifying claims of infringement and asking OSPs to respond. Startups cannot know the facts necessary to identify copyright ownership, infringement, fair use, permissible use, etc.⁴² Moreover, not all creators are identical, and many rightsholders affirmatively encourage sharing (which could mistakenly look like unpermitted infringement) because it benefits them. OSPs cannot know the facts necessary to act on any given piece of content, and are ill-suited to make copyright enforcement decisions for the vast amounts of their user-generated works.

Identifying potential infringement. Congress and the courts have rightly avoided putting OSPs in the position of identifying and removing allegedly infringing material. A rightsholder may have to police for infringement of the works it has created, but an OSP bearing the same burden would have to learn, identify, and monitor the alleged infringement of millions and millions of copyrighted works.⁴³ Copyrighted content is ubiquitous, with protection attaching automatically.⁴⁴ It is impossible for OSPs to shoulder even the knowledge of all copyrighted works and owners, let alone the enforcement.

Identifying infringement is also a fact and context specific question where the necessary facts and context are outside of the OSP's grasp.⁴⁵ As the Second Circuit has correctly noted:

³⁹ *Tumblr Copyright and Trademark Transparency Report*, Tumblr (Jan - June 2019), <https://assets.tumblr.com/downloads/transparency/Transparency-Report-2019.pdf>.

⁴⁰ *DMCA Takedown Notices*, Wikimedia Foundation, <https://wikimediafoundation.org/about/transparency/2019-2/dmca-takedown-notice/> (last visited May 30, 2020).

⁴¹ Letter to Members of European Parliament (Sept. 10, 2018), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5b96a38ac2241b0779235c8d/1536598923659/Article+13+-+Company+Letter.pdf>.

⁴² See, e.g., Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 Colum. L. Rev. Sidebar 83, 97-98 (2012) (reciting numerous questions that must be answered to identify infringement).

⁴³ *Capitol Records LLC v. Vimeo, LLC*, 826 F.3d 78, 96 (2d Cir. 2016) (“[T]he fact that music is ‘recognizable’ . . . or even *famous* . . . is insufficient to demonstrate that the music was in fact recognized by a hypothetical ordinary individual who has no specialized knowledge of the field of music. Some ordinary people know little or nothing of music. Lovers of one style or category of music may have no familiarity with other categories.”).

⁴⁴ 17 U.S.C. § 102(a).

⁴⁵ E.g., *Strategic Considerations In U.S. Copyright Litigation*, Findlaw (June 13, 2017), <https://corporate.findlaw.com/intellectual-property/strategic-considerations-in-u-s-copyright-litigation.html>.

The service provider’s employee cannot be expected to know how to distinguish, for example, between infringements and parodies that may qualify as fair use. Nor can every employee of a service provider be automatically expected to know how likely or unlikely it may be that the user who posted the material had authorization to use the copyrighted music. Even an employee who was a copyright expert cannot be expected to know when the use of a copyrighted song has been licensed.⁴⁶

Startups simply lack the bandwidth to obtain all of that knowledge, and as discussed in more detail below, there are no technical tools or automated approaches that could solve the problem.

Deciding what to leave up or take down. The existing notice-and-takedown framework gives rightsholders discretion to determine how they want to respond when they identify potential infringement. In some sense, copyright law is also about giving creators a level of control over “when and how to release their works to the public.”

Artists who self-distribute on the Internet may exercise . . . control, for example, by first making their works available to a dedicated fan base on a site such as Bandcamp, before authorizing its broader dissemination via streaming platforms such as YouTube. Whether or not such strategies yield creators more money, the power to decide whether, when, and how to bring one’s work to the public is both one that copyright law has long secured and one of considerable importance to creators, including in the online environment.⁴⁷

Not all rightsholders are anti-infringement, and many encourage widespread sharing of their work online because it allows them to reach a larger audience that would be harder to find through traditional channels. Copyright law’s inherently one-size-fits-all nature is already ill-suited to accommodate all rightsholders’ preferences. For example:

- A user posted a homemade video of a child dancing to a copyrighted song. The rightsholder in this case did not issue a takedown notice. Instead, the rightsholder retweeted the video, obtaining over a quarter of a million views on their own twitter account.⁴⁸
- As Judge Posner described, an up-and-coming band may prefer to waive copyright enforcement, in favor of users playing and sharing their music to build a following that could be converted to fans and customers of subsequent work.⁴⁹

⁴⁶ *Capitol Records LLC v. Vimeo, LLC*, 826 F.3d 78, 96-97 (2d Cir. 2016).

⁴⁷ Jane C. Ginsburg, *The Role of the Author in Copyright*, in *Copyright Law in an Age of Limitations and Exceptions*, in *Copyright Law in an Age of Limitations and Exceptions* 79 (Ruth L. Okediji ed. 2017).

⁴⁸ Kristelia Garcia, *Monetizing Infringement*, 54 UC Davis L. Rev. ____ (forthcoming Nov. 2020).

⁴⁹ *In re Aimster*, 334 F.3d 643, 652 (7th Cir. 2003).

- Some rightsholders may choose not to shut down fan sites or pull fan art,⁵⁰ instead finding ways (explicitly or implicitly) to enable their fans’ creativity.⁵¹

Startups cannot determine, in the first instance, whether a rightsholder might prefer leaving allegedly infringing content online or removing it through the standard takedown process. Changes to § 512 could force OSPs to determine what to do, though, taking the decision of whether to remove, tolerate, or encourage alleged infringement away from the creator. Were Congress to go further, and mandate that OSPs remove any potentially infringing content, it would put those OSPs in the even more uncomfortable position of removing many creators’ sanctioned and preferred sharing. This is a particularly poor fit for smaller companies and their up-and-coming creators, because those are the creators who need to leverage online word-of-mouth to find fans and future customers.⁵²

C. Improper takedown notices are a significant problem, and increasing obligations on OSPs would exacerbate the issue of over-takedown (including of legitimate content).

There is a widely-demonstrated problem of improper takedown notices. In one study, “[n]early every OSP recounted stories of deliberate gaming of the DMCA takedown process, including to harass competitors, to resolve personal disputes, to silence critics, or to threaten the OSP or damage its relationship with its users.”⁵³

Empirical research indicates that approximately 30% of takedown requests are problematic.⁵⁴ This number includes, for example, “fundamentally flawed” notices (targeting, e.g., content that does not match the allegedly infringed works), those that failed to comply with substantive statutory requirements (e.g., failing to identify the allegedly infringed work), and those that were directed to fair uses.⁵⁵ Reported numbers vary, platform-by-platform, but smaller tech companies’ reporting bears the problem out: for example, the majority of notices Automattic receives are incomplete, but beyond that close to 10% of the notices are abusive—“directed at fair use of content, material that isn’t copyrightable, or content that the complaining party misrepresents ownership of a copyright.”⁵⁶

Going beyond the numbers, the types of problems OSPs see are noteworthy. Because upon receipt of even a wrongful or abusive takedown notice, OSPs must either abandon their safe harbor protections or takedown content they know is not-infringing. And for their users, the costs of having legitimate content

⁵⁰ See, e.g., Rani Mehta, *Online Platforms Want IP Owners to Talk and Beware of Bots*, ManagingIP (May 15, 2020) (describing Redbubble partnership program through which rightsholders can support and allow fan art), Urban *supra* note 33, at 386.

⁵¹ E.g., *Redbubble Partner Program*, Redbubble, <https://www.redbubble.com/partner-program> (last visited May 31, 2020) (enables Redbubble artists to create and sell officially licensed fan art); Garcia, *supra* note 48 (describing how rightsholders may consider fan art beneficial).

⁵² Garcia, *supra* note 48.

⁵³ Urban, *supra* note 33, at 389.

⁵⁴ Jennifer M. Urban, Joe Karaganis, & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 11 (Mar. 2017), <https://americanassembly.org/publications-blog/notice-and-takedown-in-everyday-practice>.

⁵⁵ *Id.* at 12.

⁵⁶ *Intellectual Property 2019: Jul 1 – Dec 31*, Automattic, <https://transparency.automattic.com/intellectual-property/intellectual-property-2019-jul-1-dec-31/> (last visited May 31, 2020).



taken down can be high. The following scenarios should give policymakers pause when considering making it even easier to force OSPs to remove accused content.

- **Improper notices that are devised solely to hurt competitors.** A recent report “identified hundreds of instances in which individuals or companies, often using apparently fake identities, caused the Alphabet Inc. unit to remove links to unfavorable articles and blog posts” by sending copyright takedown notices.⁵⁷

In another example, along with the rise of self-publishing, authors are now frequently using copyright notices to squash their competition and “improperly to attack others’ works maliciously.” Literary tropes and standard plot points are not copyrightable. But some authors are still trying to leverage DMCA-takedowns to remove other authors’ works by claiming infringement when those authors use (again, copyright-ineligible) tropes in their own work.⁵⁸

“[I]naccurate, abusive, fraudulent, or misinformed section 512 notices can seriously disrupt or even destroy a small business. [Etsy] [s]ellers have raised concerns that some notices are strategically sent in bad faith by competitors with no legitimate basis or solely with the intent to disrupt their business.”⁵⁹

- **Improper notices that seek to remove fair uses.** An OSP received a takedown notice from a local authority, alleging infringement of their city logo. The city accused a homeless blogger of infringing that copyright in a post that criticized the city’s actions toward the homeless community. The blogger had modified the logo to illustrate his frustration. The OSP rejected the complaint, as a parody and protected speech.⁶⁰

City Logo	Claimed Infringement // Parody
	

- **Improper notices to takedown things the sender has no rights to.** Many OSPs receive notices where the sender has no claim to enforce the copyright at issue. Some takedown notices even seek to remove content that is in the public domain. For example, a musician posted a video of

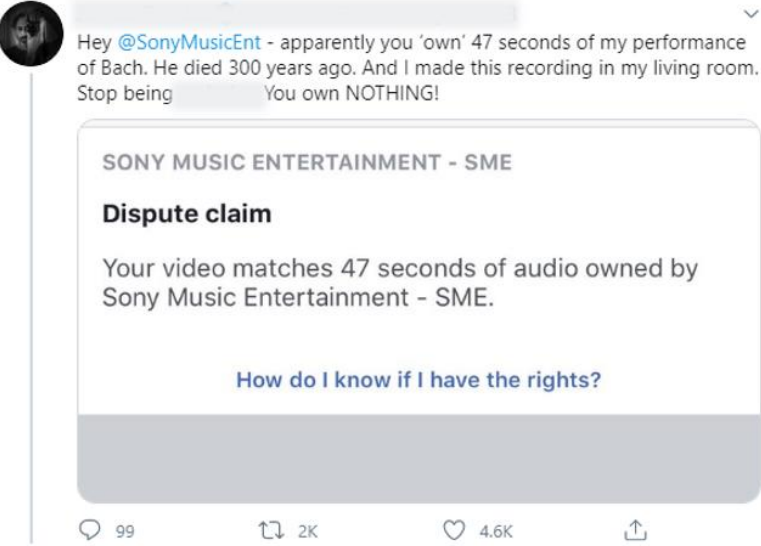
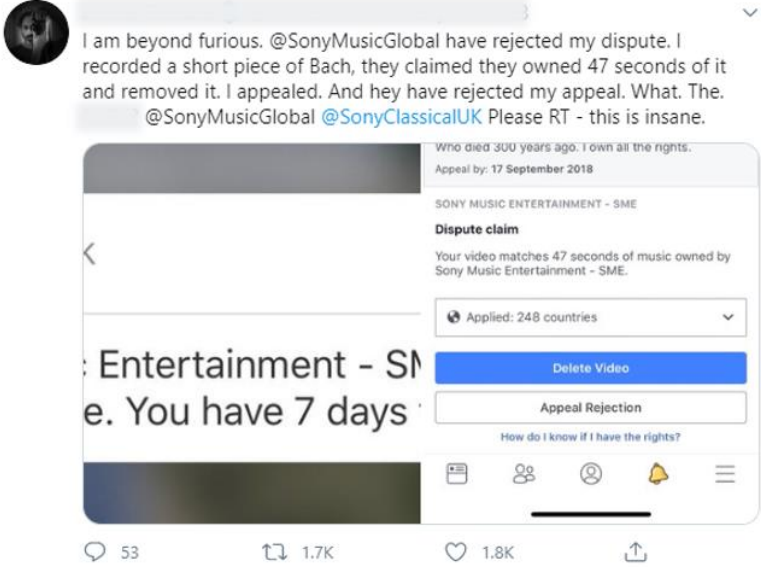
⁵⁷ Andrea Fuller, Kirsten Grind, & Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), <https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001>.

⁵⁸ Alexandra Alter, *A Feud in Wolf-Kink Erotica Raises a Deep Legal Question*, New York Times (May 29, 2020), <https://www.nytimes.com/2020/05/23/business/omegaverse-erotica-copyright.html>.

⁵⁹ Letter from Etsy to United States Copyright Office 4 (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92464>.

⁶⁰ Clicky Steve, *Hall of Shame: Something Stinks in Abbotsford*, Automattic (May 2, 2017), <https://transparency.automattic.com/2017/05/02/hall-of-shame-something-stinks-in-abbotsford/>.

himself playing a song written by Bach, the composer who died in 1750.⁶¹ In 2018, Sony Music sent a takedown notice targeting the musician’s performance, asserting ownership of a portion of Bach’s composition.⁶² The musician disputed Sony’s claim, but instead of acknowledging what must have been a mistake, Sony dug in and refused to allow the OSP to restore the video. It was only, eventually restored after enough public pressure built and the musician contacted Sony Classical and Sony’s public relations teams directly.

<p>Takedown of Public Domain Composition</p>	 <p>Hey @SonyMusicEnt - apparently you 'own' 47 seconds of my performance of Bach. He died 300 years ago. And I made this recording in my living room. Stop being [redacted] You own NOTHING!</p> <p>SONY MUSIC ENTERTAINMENT - SME</p> <p>Dispute claim</p> <p>Your video matches 47 seconds of audio owned by Sony Music Entertainment - SME.</p> <p>How do I know if I have the rights?</p> <p>99 2K 4.6K</p>
<p>Refusal to Restore It</p>	 <p>I am beyond furious. @SonyMusicGlobal have rejected my dispute. I recorded a short piece of Bach, they claimed they owned 47 seconds of it and removed it. I appealed. And hey have rejected my appeal. What. The. @SonyMusicGlobal @SonyClassicalUK Please RT - this is insane.</p> <p>Who died 300 years ago. I own all the rights. Appeal by: 17 September 2018</p> <p>SONY MUSIC ENTERTAINMENT - SME</p> <p>Dispute claim</p> <p>Your video matches 47 seconds of music owned by Sony Music Entertainment - SME.</p> <p>Applied: 248 countries</p> <p>Delete Video</p> <p>Appeal Rejection</p> <p>How do I know if I have the rights?</p> <p>53 1.7K 1.8K</p>

⁶¹ *Johann Sebastian Bach*, Wikipedia https://en.wikipedia.org/wiki/Johann_Sebastian_Bach (last visited May 28, 2020).

⁶² *Sony Finally Admits It Doesn't Own Bach and It Only Took a Bunch of Public Pressure*, EFF, <https://www.eff.org/takedowns/sony-finally-admits-it-doesnt-own-bach-and-it-only-took-public-pressure> (last visited May 31, 2020).

Finally, notices that fail to comply with the statutory requirements in ways that may seem formalistic are also significant. For example, if a notice-sender fails to provide enough information about the location of the alleged infringement, it can become impossible for the OSP to take it down. However, because of the significant risks of leaving claimed infringement up, OSPs try to identify flagged material whenever possible. One OSP reported that—in light of the risk of statutory damages—it had staff make six attempts to identify the allegedly infringing material.⁶³

Especially for startups who operate on thin margins, refusing to take down content in response to an improper notice exposes them to enormous risk and liability. OSPs also know that “[u]sers who post content to a company’s services are a constituency whose expression deserves to be protected.”⁶⁴ Even one improper notice forces a startup to either “bet the company” or preserve its user’s rightful content.⁶⁵

D. Prevalence of improper notices also reveals problems with judicial interpretation of “repeat infringers.”

The scope of improper notices also sheds light on problems with the judicial conception of a repeat infringer. In order for an OSP to qualify for safe harbor protections, it must adopt and reasonably implement a policy to terminate repeat infringers.⁶⁶ The case law suggests that mere accusations of infringement are sufficient to label someone a “repeat infringer.”⁶⁷

It can be problematic, on its face, that mere allegations should be enough to have someone removed from a platform, or worse, lose their access to the Internet. For example:

- A user sent numerous falsified takedown notices to dozens of artists on SoundCloud. Some artists’ inboxes were flooded with notices, and those resulted in their removal from the platform. Upon review, SoundCloud identified that the copyright claims were invalid, and reinstated the affected content. But had SoundCloud not had the ability (and flexibility) to manually review, and restore the users, those artists would have lost their work and their followers.⁶⁸
- A Shapeways “user had been targeted by a series of [a burst of takedown notices from a large rightsholder] without responding. When the user was notified that they were in danger of having their account deactivated under the Shapeways repeat infringer policy, the user elected to counternotice against a significant number of the original claims. These counternotices were successful and the models were reactivated.”⁶⁹

⁶³ Urban, *supra* note 33, at 388.

⁶⁴ Paul Sieminski, Opinion, *Corporations Abusing Copyright Laws Are Ruining the Web for Everyone*, Wired (Jan. 17, 2014), <https://www.wired.com/2014/01/internet-companies-fair-use/>.

⁶⁵ Urban, *supra* note 33, at 390.

⁶⁶ 17 U.S.C. § 512(i)(1)(A).

⁶⁷ See *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns Inc.*, 881 F.3d 293 (2018) (holding that a “repeat infringer” is something less than an individual who has been adjudicated as an infringer).

⁶⁸ Lauren Kenner, *SoundCloud Copyright Fraudster Attacks Dozens of Bass Music Artists*, EDM.com (Nov. 15, 2018), <https://edm.com/news/soundcloud-takedowns-fraud>.

⁶⁹ *2018 Transparency Report*, Shapeways <https://www.shapeways.com/legal/transparency/2018> (last visited May 31, 2020).

Just as OSPs do not want to have to take down rightful content, they also do not want to have to choose between losing their safe harbor or removing their users and creators who are repeatedly, wrongfully accused of infringement. But—in light of the substantial penalties for a company that fails to prove its “repeat infringer” policy satisfies the statute and case law coupled with the resource demands of verifying every accusation of infringement—it is a tough choice, and many OSPs have understandably gravitated to policies that use DMCA takedown notices as a proxy for infringement. If the judicial interpretations were more balanced or there were meaningful opportunities to combat improper notices, it would free OSPs up to focus on terminating the actual blatant infringers while allowing others to stay online.

E. The DMCA fails to meaningfully combat improper notices.

Sections 512(f) and (g) should be mechanisms for users to push back against improper notices, but those provisions have proven ineffective at combating the problem.⁷⁰ As one company’s attorney explained, “an increasing number of copyright holders misuse this [DMCA takedown] system to target even lawful fair uses of their work. And the current DMCA system enables these aggressive copyright owners by providing virtually no penalties for failing to consider common exceptions to infringement—like fair use.”⁷¹ Without effective mechanisms to oppose wrongful notices, the DMCA also effectively becomes a go-to tool for individuals whose primary goal is to have speech removed from a platform.

First, regarding § 512(f), this provision states that the notice sender should have a “good faith belief” that the accused infringement is not authorized.⁷² However, that “good faith” is measured subjectively, meaning that a wrongly accused infringer would have to prove that the sender knew what it was doing was wrong.⁷³ Even if it were objectively improper for the (purported) rightsholder to send the notice, a wrongly accused infringer would not be able to push back. Because it is incredibly difficult (near impossible) to prove subjective bad faith in court, abusers of the DMCA’s notice system can send faulty notices virtually risk free.⁷⁴

In addition, the remedy for victims of improper notices is wholly out of balance to be an effective deterrent in the context of copyright law. Wrongfully accused infringers may only recover for actual damages and attorneys fees, even though their permissible speech was targeted for takedown, whereas rightsholders can use the threat of \$150,000 statutory damages to stifle even legitimate speech.⁷⁵ Experience with § 512(f) litigation confirms its flaws:

⁷⁰ See, e.g., Urban, *supra* note 33 (recommending that notice-and-takedown “needs better mechanisms for ensuring that infringement is actually likely before material comes down and stays down, and better due process mechanisms for targets).

⁷¹ Sieminski, *supra* note 64.

⁷² 17 U.S.C. § 512(f).

⁷³ *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1004-05 (9th Cir. 2004).

⁷⁴ See, e.g., Eric Goldman, *DMCA’s Unhelpful 512(f) Preempts Helpful State Law Claims—Stevens v. Vodka and Milk*, Technology & Marketing Law Blog (Mar. 28, 2018), <https://blog.ericgoldman.org/archives/2018/03/dmcas-unhelpful-512f-preempts-helpful-state-law-claims-stevens-v-vodka-and-milk.htm> (summarizing cases); Steve Vondran, *DMCA “Bad Faith” Takedowns and Counternotifications May Require a Plaintiff to Prove Subjective Bad Faith*, Attorney Steve Blog (Jan. 28, 2019) <https://www.vondranlegal.com/ninth-circuit-512f-dmca-bad-faith-claims-require-evidence-of-subjective-state-of-mind> (similar).

⁷⁵ Compare § 512(f) with § 504.

[I]n two previous cases, Automattic was unable to seek redress for blatant violations of Section 512:

- In *Automattic Inc. et al. v. Chatwal*, Automattic spent about \$25,000 in legal fees to bring a lawsuit against a blatant abuser of Section 512, but was unable to recover these costs because the contact information provided on the notice of claimed infringement was false and the defendant could not be found, to even be served with notice of our lawsuit.
- In *Automattic et al. v. Steiner*, Automattic obtained a default judgment against the defendant in the amount of \$25,084 (including out of pocket legal fees of approximately \$22,000 and time spent working on the case), but by the time the judgement was entered, the defendant was unable to be found and the judgment could not be collected.⁷⁶

Second, § 512(g), sets out the counter-notice procedure through which wrongfully accused infringers can have content restored. But this provision is very rarely used:⁷⁷

- Reddit is home to hundreds of thousands of communities, with over 400 million diverse people sharing and commenting on the things they care about most.⁷⁸ In 2019, Reddit “received 34,989 copyright notices, which resulted in 170,684 pieces of content being reviewed, and 124,257 content removals.” But Reddit only received 7 counter-notices.⁷⁹
- Etsy members only submitted counter-notices opposing copyright claims for 4.7% of listings with a takedown notice.⁸⁰
- Automattic only received 11 counter notices in the second half of 2019, compared to the 4,851 copyright notices it received.⁸¹

Unfortunately, because of the way § 512(g) is structured, it is not so surprising that it is underutilized. To submit a counter-notice, a user must: publicly identify him or herself, provide his or her address and phone number, and consent to being sued.⁸² Under the circumstances, many users will understandably be reluctant to give the improper-notice sender their name and contact information. Indeed, the DMCA can

⁷⁶ Comments of Automattic Inc., *In re* Section 512 Study, at 3-4.

⁷⁷ See also, e.g., Monseau, *supra* note 2, at 89.

⁷⁸ About, Reddit, <https://www.redditinc.com/> (last visited May 31, 2020).

⁷⁹ *Transparency Report 2019*, Reddit, <https://www.redditinc.com/policies/transparency-report-2019> (last visited May 31, 2020).

⁸⁰ *2019 Transparency Report*, Etsy (2020), https://extfiles.etsy.com/advocacy/Etsy_2019_Transparency_Report.pdf..

⁸¹ *Intellectual Property 2019: Jul 1 – Dec 31*, Automattic, <https://transparency.automattic.com/intellectual-property/intellectual-property-2019-jul-1-dec-31/> (last visited May 31, 2020).

⁸² § 512(g)(3).

become an easy tool for removing speech from a platform, and—especially in light of the identification requirements—an effective bludgeon against anonymous speech.⁸³

Likewise, the “risk of being liable for large statutory damages (even if the infringement is minor) clearly daunts and sidelines an average individual user.”⁸⁴ Some OSPs have reported feeling uncomfortable even encouraging users to send a counter-notice, because of the exposure to liability if they are ultimately incorrect.⁸⁵ There is a further imbalance of power in those situations when the notice-sender is a major entertainment company with expensive lawyers and the recipient is an independent creator or general user.⁸⁶

And the statute provides that OSPs can only restore content 10-14 days after it receives the counter-notice.⁸⁷ In many cases, this time frame is too long for the accused infringer, and their material will no longer be relevant or valuable by the time it is restored.

As a popular online marketplace for unique, vintage, and handmade items, Etsy receives a significant volume of takedown notices around the winter holiday shopping season. While the DMCA counter-notice process allows an Etsy seller to formally dispute an infringement claim made against their shop, the seller is still subjected to waiting 10-14 business days before access to a listing is restored in the absence of a court order. . . . When [] bad faith notices are sent near the busiest shopping season of the year, it can be especially devastating to a seller that relies in large part on holiday sales for their livelihood.⁸⁸

III. The current safe harbors and definitions of service providers are appropriate, and Congress must preserve flexibility and breadth in those definitions.

In defining which service providers would be eligible for safe harbors, Congress successfully wrote a law that is broad and flexible. Indeed, Congress wanted to create safe harbors that “ensure[] that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”⁸⁹ And it did.

Especially in a technology-oriented law with an eye toward innovation, rigid or narrow legal definitions would create a law that could not stand the test of time.⁹⁰ Congress should not now constrict the existing

⁸³ In one recent example a religious organization sought to use copyright infringement complaints in an attempt to unmask a critic who voiced concerns about the organization to an online community. *Redditior Wins Fight to Stay Anonymous*, EFF (Mar. 3, 2020), <https://www.eff.org/press/releases/redditor-wins-fight-stay-anonymous>.

⁸⁴ Sieminski, *supra* note 64.

⁸⁵ Urban, *supra* note 33, at 393.

⁸⁶ *Id.* at 394.

⁸⁷ 17 U.S.C. § 512(g)(2)(c).

⁸⁸ Letter from Etsy to United States Copyright Office 4-5 (Feb. 21, 2017).

⁸⁹ S. REP. 105-190, 8.

⁹⁰ *See, e.g.,* Monseau, *supra* note 2, at 114 (arguing “courts should avoid as much as possible decisions which limit or prohibit technologies that make new uses of copyrighted works”); *cf.* Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575, 1638-40 (2003) (patent law has avoided technology- and industry-

definitions, as that would curtail entrepreneurs with exciting new technical or business ideas.

In addition, the immense statutory damages available under copyright law compel OSPs to build their businesses around compliance with § 512's safe harbors, even though such compliance can be rather burdensome for OSPs without vast resources (e.g., expeditiously processing notices and removal of content, establishing and implementing a reasonable repeat infringer policy, designating an agent, etc.) Failing to expeditiously remove a single infringing work can lead to statutory damages of up to \$150,000, regardless of whether the infringement caused any actual harm. Likewise, allowing one apparent fair use to stay up after a takedown notice was sent can expose a company to significant liability. As such, a single judgment could bankrupt many startups.⁹¹ For OSPs that facilitate the distribution of large amounts of content, damages awards can quickly reach absurd levels. These inflated damages risks emphasize the importance of broad definitions in safe harbor eligibility, to make room for future services and business models.

IV. The DMCA's current knowledge standards are well tailored, and changes in this area of the law would put startups and their users at a significant disadvantage.

Reducing the “red flag” knowledge standard or imposing an affirmative duty to monitor would be seriously detrimental. And because startups and their users and creators have fewer resources than wealthy rightsholder organizations and larger platforms, they stand to lose the most if the law shifts more monitoring responsibility on OSPs.

First, a takedown notice is a *claim of infringement*,⁹² not “actual knowledge” of infringement, and the two should not be confused.⁹³ As above, many notices are improper.⁹⁴ Even for notices sent in good-faith, it is wrong to assume that a takedown notice creates “actual knowledge that [] material . . . is infringing.”⁹⁵ Claimed infringement is a (often significantly) lower standard.

In addition, there is already an incentive for OSPs to “over-takedown.”⁹⁶ Reducing the knowledge standard would only amplify that problem. By removing or reducing the role of the rightsholder, OSPs would have to identify what is copyrighted, decide what creators want to happen to that material, and decide which user posts are infringing versus permissible. Not being able to answer any of those

specific legislation, with Congress instead erring in favor of a standards-based statute that allows flexibility to accommodate different technologies).

⁹¹ See, e.g., Monseau, *supra* note 2, at 108 (noting that expansion of the safe harbors may reflect the general knowledge that infringement damages are so high, “any [] platform and its investors would be in danger of incurring massive potential liability for infringement by allowing sharing on their site”).

⁹² 17 U.S.C. § 512(c)(3) (describing “a notification of claimed infringement”).

⁹³ Compare 17 U.S.C. § 512(c)(3) with 17 U.S.C. § 512(c)(1)(a).

⁹⁴ *Supra* part II.C.

⁹⁵ 17 U.S.C. § 512(c)(1)(a).

⁹⁶ Urban, *supra* note 33, at 384 (describing OSPs acting conservatively and “erring on the side of takedown in order to avoid liability risk”).

questions with certainty, necessary self-preservation will encourage companies to remove even more rightful content.⁹⁷

A. Startups would have the most to lose.

Proposals to reduce the “red flag” knowledge standard or impose an affirmative duty to monitor are designed to increase costs and risks for OSPs. Importantly, these proposals also lay the foundation for more litigation.

As noted above, startups are ill-suited to absorb the increased costs of monitoring.⁹⁸ Larger OSPs have resources to develop filtering technologies uniquely suited to their platforms and the user-generated content they host. Indeed, as startups scale, many will develop automated approaches to flag potential infringement. Larger OSPs can also afford to hire lawyers and human content moderators,⁹⁹ and they can negotiate with (especially wealthy) rightsholder organizations so that their users have permission to share copyrighted material. Startups are not able to afford that tech or those employees, and would have a distinct disadvantage in any negotiation with lawyers hired by traditional rightsholder communities.¹⁰⁰

Moreover, because the costs and risks of a copyright suit are unusually high,¹⁰¹ the increased threat of litigation would be a very powerful tool to harm emerging companies.¹⁰² Rightsholders sue OSPs for infringement, and have been successful at using lengthy legal battles to slow companies down or stop them altogether. Recently proposed changes to § 512 would open the courtroom doors even wider. Here again, more established OSPs can afford the costs of a legal defense (even if covering the cost of a statutory damage award would be out of reach for even the most successful companies). By contrast, for startups, the mere existence of litigation (or threat of litigation) can be enough to scare off investors and customers, reduce valuation, and put the entire company at risk.¹⁰³

⁹⁷ See, e.g., Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, 42 Colum. J.L. & the Arts, 53, 59, 70 (2018) (describing over-blocking harm, and addition over-blocking errors caused by automation).

⁹⁸ *Supra* part I.B.

⁹⁹ E.g., Urban, *supra* note 33, at 384 (some OSPs have reported employing thirty full-time employees to handle DMCA takedown notices).

¹⁰⁰ See generally *id.* at 397-402 (shifts toward DMCA “plus” are already viewed as competitive advantage that affect market entry and success).

¹⁰¹ See, e.g., *supra* parts I.B, III.

¹⁰² Cf. Robin Feldman, *Patent Demands & Startup Companies: The View from the Ventura Capital Community*, 16 Yale J. L. & Tech. 236, 280 (2014) (all VC’s surveyed indicated that they would be deterred from investing in any company which had received a patent infringement demand letter).

¹⁰³ See, e.g., *id.*, Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C.L. Rev. 1571, 1587-88 (2009) (describing strategic use of patent litigation to threaten a competitor business’s survival); Ted Sichelman, *The Vonage Trilogy: A Case Study in “Patent Bullying,”* 90 Notre Dame L. Rev. 543, 575 (2014) (describing IP litigation that put startup “at the brink of insolvency,” and hurt its value).

B. Imposing a duty to monitor or modifying the “red flag” standard even slightly would undermine the certainty of safe harbors.

Conditioning safe harbor protection on increased affirmative monitoring would be unworkable for businesses. Any affirmative duty to monitor user-generated content would either have to endorse a particular technology (the limitations of which are discussed below, and which would quickly become outdated), or it would have to be based around a “reasonableness” standard that would be defined by the courts, further increasing the cost of litigation.¹⁰⁴

If Congress were to re-write any portion of the DMCA, it would take decades of litigation for courts to interpret what the statute means. That would require courts to apply new law to enough factual scenarios “before OSPs could have any confidence in their protection under the [new] safe harbor.”¹⁰⁵

A “reasonableness” standard is particularly fraught from a startup perspective. Determining what level of monitoring (or what filtering technology) is reasonable would be a fact-specific inquiry. In many cases, those are questions that have to go to a jury.¹⁰⁶ Therefore, for an OSP to definitively know whether its current copyright moderation practices are reasonable, it would have to defend itself in a full jury trial. As noted, the cost of defending even a frivolous copyright case can exceed a startup’s valuation. The cost of proceeding through discovery can exceed \$500,000,¹⁰⁷ and taking IP cases to trial is easily in the seven-figure range.¹⁰⁸ If it costs more money than a startup has to prove its practices are reasonable, that safe harbor would have little practical value.¹⁰⁹

In addition, the reasonableness standard is intentionally flexible, meaning that what is reasonable one month might not be reasonable the next—as technology changes, as a company grows, or as the type of infringement it encounters shifts. All of those are unpredictable occurrences, but considering the fast pace at which new technology emerges and how quickly startups can (and do) grow, the problem of a shifting reasonableness standard makes it a very poor fit to this context, since a startup could never know in advance whether or not a court would find its practices to be reasonable.¹¹⁰ The baseline of what is “enough” will constantly be changing, and static copyright moderation practices will quickly become outdated and likely be deemed “unreasonable” for purposes of obtaining safe harbor protection.

¹⁰⁴ See, e.g., Appendix A (Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* 24 (Mar. 2017), <https://www.engine.is/the-limits-of-filtering>).

¹⁰⁵ Appx. A at 24.

¹⁰⁶ See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007) (reasonableness of repeat infringer policy a question of fact); see also *Tran v. State Farm Mut. Auto. Ins. Co.*, 999 F. Supp. 1369, 1372 (D. Haw. 1998) (“An analysis of what is reasonable is almost always de facto a question for the jury.”).

¹⁰⁷ Evan Engstrom, *Primer: Value of Section 230*, Engine (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs>.

¹⁰⁸ Malathi Nayak, *Costs Soar for Trade Secrets, Pharma Patent Suits, Survey Finds*, Bloomberg Law (Sept. 10, 2019), <https://news.bloomberglaw.com/ip-law/costs-soar-for-trade-secrets-pharma-patent-suits-survey-finds> (median cost of patent suit with \$1-10M at stake is \$1.5M, and cost of patent case with over \$15M at risk is \$4M).

¹⁰⁹ See, e.g., Appx. A at 25.

¹¹⁰ See Appx. A at 24.

C. Increased monitoring obligations on startups would make investors more hesitant.

Fundamental changes to the DMCA could shift the financial landscape for technology startups, because investors will be reluctant to cover the costs of platform liability for user infringement. In a survey of investors, a majority of respondents said they would be deterred from investing in online platforms that hosted user-generated music or video posts if new laws increased the risks that their investments would be exposed to secondary liability in IP infringement cases.¹¹¹ Indeed, even just the uncertainty over whether (and when) an OSP would qualify for the safe harbor could curtail investment.¹¹²

D. Filtering tools are inadequate, expensive, and/or non-existent.

When contemplating any changes in the law which would effectively require platforms to filter all user-generated content, Congress should closely study how filtering tools actually work and the impact they are likely to have on infringement, startup activity, and creative production. As the attached paper details, filtering technologies and automated programs to flag potential infringement have “many inherent limitations [that] make them incapable of fully addressing copyright infringement.”¹¹³

Even complex, existing technologies are limited in their capacity to accurately identify the content they are designed to identify.¹¹⁴ The inaccuracies often result in an unacceptably high number of “false positives.”¹¹⁵ “[A]utomated systems, even if responsibly deployed, have limited capacity to avoid mistakes. Errors can be hard to catch, as resource constraints prevent any substantial human review of the vast majority of automated notices.”¹¹⁶

These technologies are easy to circumvent. For a user intent on uploading infringing content, he or she would only need to make slight alterations to a file (changing the name or trimming 2 seconds from an audio file) to evade metadata or hash-based filters.¹¹⁷

Filters are limited in the type of content they can operate on. For example, audio and video fingerprinting tools cannot identify potential infringement in any other file types. And there are no programs to filter, e.g., software programs or architectural designs. Likewise, as Engine and other smaller companies have noted, for “sites that allow users to sell physical goods, distribute remixed content, or publish blogs, no filtering tool will accurately identify alleged infringement.”¹¹⁸ Moreover, as technology and creativity

¹¹¹ Appendix B (Matthew C. LeMerle et al., *The Impact of Internet Regulation on Early Stage Investment* 5 (Nov. 2014), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/%20EngineFifthEraCopyrightReport.pdf>.)

¹¹² Appx. A at 24.

¹¹³ Appx. A at 1.

¹¹⁴ See, e.g., Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 Colum. L. Rev. Sidebar 83, 102-03 (2012) (describing how “[f]iltering is notoriously prone to mistakes and shortcomings and constantly risks being both over- and under-inclusive”).

¹¹⁵ *Id.* at 12, 15, 17 (reporting the false positive rate for one off-the-shelf audio fingerprinting tool as 1-2%).

¹¹⁶ Urban, *supra* note 33, at 386.

¹¹⁷ See Appx. A at 12-13.

¹¹⁸ Letter to John Kerry, United States Secretary of State, Penny Pritzker, United States Secretary of Commerce, and Michael Froman, United States Trade Representative (Dec. 16, 2016) (on file).

continue to evolve, there will be new types and formats of content we cannot even contemplate right now. It would be impossible to build technology to filter for that future content.

In addition, even the most sophisticated tools (which are still imperfect) are so expensive they would not be obtainable for startups. YouTube famously spent over \$100 million to develop its ContentID technology, a sum orders of magnitude greater than what the typical startup could afford.¹¹⁹ Off-the-shelf tools like Audible Magic are equally impractical for startups, as licenses can easily cost well upwards of \$10,000 per month and require companies to spend even more to implement and maintain the software.¹²⁰ By contrast, early-stage companies raise an average of \$78,500 during their first year.¹²¹ And of course, if OSPs were forced to pay high costs for imperfect filters, that would hamper innovation, as companies would be forced to divert money from R&D to implementing and maintaining filters.¹²²

Finally, as above, startups cannot know what is (and is not) infringement. In most cases that will require facts that are not (and cannot be) in a startup's possession.¹²³ So even with the technologies that exist, without the rightsholders' participation, there is no way for startups to even know what copyrighted content is out there. This creates a particularly difficult problem for small creators, who have less access to the automated filtering tools. Just as imposing a duty to monitor would entrench incumbent companies, these same obligations would entrench large, traditional rightsholders and disadvantage smaller creators whose works are not identified by filters.

E. A notice-and-staydown requirement would, in fact, be a filtering mandate.

Imposing “notice-and-staydown” would amount to mandating OSPs implement filtering/automated technologies. It would be “impossible to enforce any ‘staydown’ without technologies that mark and identify copyrighted material.”¹²⁴ As such, adopting notice and staydown would not alleviate the problems addressed in this section, and would exacerbate other flaws that emerge under notice-and-takedown.

First, notice-and-staydown would impose mandatory filtering costs on all companies, and significantly increase the costs of market entry.¹²⁵ “If a law like takedown and staydown existed three years ago, [Patreon] never would have received the funding to start as a company because of the massive liabilities associated with user generated content”¹²⁶ And, as above, the filtering tools (and their quality) will

¹¹⁹ Paul Sawers, *YouTube: We've Invested \$100 Million in Content ID and Paid Over \$3 Billion to Rightsholders*, VentureBeat (Nov. 7, 2018), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/>.

¹²⁰ *Supra* note 33, at 400.

¹²¹ *Startup Funding Infographic*, Fundable, <https://www.fundable.com/learn/resources/infographics/startup-funding-infographic> (last visited May 29, 2020).

¹²² Sonia K. Katyal & Jason M. Schultz, *The Unending Search for the Optimal Infringement Filter*, 112 Colum. L. Rev. Sidebar 83, 88 (2012).

¹²³ *Supra* part II.B.

¹²⁴ Sprigman & Lemley, *supra* note 24; *see also, e.g.*, Husovec, *supra* note 97, at 72 (describing “notice and staydown [] where unilateral filtering by intermediaries becomes compulsory”).

¹²⁵ *E.g.*, Husovec, *supra* note 97, at 75.

¹²⁶ Sullivan, *supra* note 1.

become a means of competition, where startups will be at a disadvantage.¹²⁷ But notice-and-staydown also creates a “multiplication of the compliance costs.” Under a staydown system, OSPs would have “to implement costly automated enforcement even if one right holder issues his or her first-notice.”¹²⁸ That is, for an OSP that currently receives a single notice, they can assess it and remove the accused content. Under notice-and-staydown, that same OSP which has so little infringement it only received one notice, would now be responsible for purchasing and implementing a filter for all content uploaded on the platform. For a startup, that would mean having the money to buy a sufficient filter the day it gets its first notice (which would be impossible to predict).

Second, a notice-and-staydown approach is inflexible and fails to acknowledge that copyright infringement is highly context specific. “[J]ust because one user is infringing on a copyright doesn’t mean that a second user who posts the same content is also infringing. The second person may be licensed or making a sort of use—for example, a non-profit educational use—that the law often treats as permissible. Notice and staydown would guarantee that such perfectly legitimate uses would get blocked.”¹²⁹

F. Mandating further automation of efforts to detect infringement would exacerbate the chilling effects of the DMCA.

This is already a time of algorithmic copyright enforcement. Many OSPs and rightsholders deploy technology to automate detecting potential copyright infringement. And the negative effects of that experience should caution against mandating companies take that automation even further.

Automating decisions about potential copyright infringement has far reaching consequences. Much has been said about the First Amendment problems of removing content without a full assessment of whether it is, in fact, infringing.¹³⁰ But the chilling consequences of takedown go further, as recipients of takedown notices are deterred from other forms of online communication and engagement generally. In one study, the majority of people who received a takedown notice were unlikely to re-post or re-share the removed content. But 72% of respondents indicated they would also *be less willing to share content they created personally in the future*.¹³¹ 81% reported concerns about their privacy after receiving such notice, and 75% said they would be less likely to contribute to online communities in the future.¹³² Those chilling effects are even more pronounced in women than in men.¹³³ Before imposing more automation and rigidity on OSPs, Congress should account for the fact that individual users and creators (and even more so, women) who have a post taken offline will be less likely to share creations or participate online going forward.

¹²⁷ Husovec, *supra* note 97, at 72; *supra* part IV.D.

¹²⁸ Husovec, *supra* note 97, at 77.

¹²⁹ Sprigman & Lemley, *supra* note 24.

¹³⁰ E.g., Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J.L. & Tech. 171 (2010).

¹³¹ Jonathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 Stan. Tech. L. Rev. 412, 447 (2019).

¹³² *Id.*

¹³³ *Id.* at 450, 470-71.

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Thank you again for inviting me to testify on the value of § 512 of the Digital Millennium Copyright Act to startups and the users and creators who rely on them. As in all policy areas, Engine strives to seek solutions and work with lawmakers towards the goal of balanced legal frameworks that support and ensure clarity for startups. We know that the Subcommittee's review of the DMCA will be an ongoing process, and hope that the Subcommittee will continue to give startups and smaller technology companies a seat at the table throughout the year.