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Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It

*By Joel D. Matteson**

Hoping to spur the growth of the early Internet, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The goal was to balance online service providers' interests in avoiding secondary copyright liability based on their users' online posts with Internet users' interests in maintaining their right to fair use of copyrighted material online. Twenty years later, the evidence demonstrates that the DMCA has skewed too far towards protecting providers of online services at the expense of fair use. This has resulted in unnecessary chilling of otherwise protected speech. Specifically, under the DMCA, putative copyright holders may immediately force down any content they deem to be infringing, regardless of fair use considerations. To address this imbalance, Congress should amend § 512 to eliminate the automatic takedown period so that no material comes down until the poster has had a reasonable opportunity to present his or her fair use defense.

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INTRODUCTION

Consider an upcoming election. The public engages in vigorous debate, online and off. Two weeks before the election, someone posts snippets of a politician's manifesto on YouTube to illustrate the poster's commentary. Upset, the politician issues a takedown notice to YouTube under § 512 of the Digital Millennium Copyright Act (hereinafter, "DMCA"), claiming the video violates his copyright. The politician demands that YouTube immediately take the post down. The candidate does not provide detailed justification, only self-serving and conclusory allegations. Even if both the candidate and the poster suspect that a judge would likely find the video to be protected under copyright's well-established fair use doctrine,¹ the candidate does not actually need to worry about whether the posting constitutes fair use – at least not for the next ten-to-fourteen days. This is because under § 512(g) of the DMCA, the candidate enjoys unprecedented power to require Online Service Providers (hereinafter "OSPs") like YouTube to take down the posted material automatically and upon demand.² Under the DMCA, the candidate may force the takedown of posted material for at least ten-to-fourteen days, regardless of the merits.³ Afraid of losing its safe harbor and of being sued for indirect copyright infringement, YouTube takes the video down. In exchange, YouTube gains immunity from secondary copyright infringement liability.⁴ This is the DMCA bargain; putative copyright holders suddenly become empowered to take down material they disapprove based only on an assertion that it violates their copyright. For their complicity, OSPs get legal immunity.

If the poster believes the material he or she posted constitutes fair use, the poster may issue a counter notice under § 512(g)(3) contesting the takedown. Unfortunately, by operation of DMCA law, the video must nevertheless stay offline for ten-to-fourteen days notwithstanding the counter notice.⁵ Ten-to-fourteen days later when the mandatory takedown period expires, the material is finally eligible

¹ Copyright Act of 1976, 17 U.S.C. § 107 (2012). *See also* 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, 176 (2010).

² Copyright Act of 1976, 17 U.S.C. § 512(g)(2)(c) (2012). *See also* Letter from Lateef Mtima & Steven D. Jamar, Institute for Intellectual Property & Social Justice, to Karyn Temple Clagg, Register of Copyrights, United States Copyright Office 2 (Feb. 21, 2017) (Under the DMCA, "rights holders continue to enjoy the unprecedented capability to have content summarily removed from the Internet without judicial intervention or assessment of any kind.") (available at <https://www.regulations.gov/document?D=COLC-2015-0013-92475>).

³ 17 U.S.C. § 512(g)(2)(c).

⁴ § 512(c).

⁵ § 512(g)(2)(c).

for reposting. But now the election is over. Reposting is moot. Society's right to engage in this valuable public discussion is forever lost. The mandatory ten-to-fourteen day waiting has effectively given the politician two weeks of free censorship.⁶

In 1998, Congress established the "safe harbor" of § 512 of the DMCA.⁷ The safe harbor shields OSPs from secondary liability for copyright infringement for posts made "at the direction of a user" of an online service like YouTube, provided the OSP complies with certain statutory requirements.⁸ If the OSP fails to qualify for safe harbor protection, copyright infringement and liability are evaluated under traditional copyright law. The DMCA makes it clear that failing to qualify for a safe harbor does not limit any defenses a service provider may have.⁹

The safe harbor benefits OSPs by shielding them from secondary liability for copyright infringement. It also benefits copyright holders by conferring upon them unprecedented power to force down all content they allege to be infringing, regardless of whether it actually infringes. The DMCA does not, however, adequately protect the legitimate interests of posters of online content against the automatic ten-to-fourteen day takedown power. This is because, under the DMCA, posters of online content are denied basic due process and protection for their non-infringing fair uses during this ten-to-fourteen day period.

This article explains how the DMCA fails to sufficiently protect users' rights by infringing on fair use and, consequently, chilling the academic, technical, commercial, political, and creative speech that makes the Internet so valuable. This article proposes several much-needed reforms to § 512, the core of which would be the removal of the automatic ten-to-fourteen day takedown period. This period results in an unnecessary prior restraint on fair use, without proof of copyright or a hearing on fair use. Adopting the amendments in this article will increase protection for fair use while continuing to protect copyright and maintaining OSP immunity from secondary liability for copyright infringement.

⁶ See Corynne McSherry & Kit Walsh, Electronic Frontier Foundation, Comment Letter on Section 512 Study 16 (Apr. 1, 2016), https://www.eff.org/files/2016/04/01/eff_comments_512_study_4.1.2016.pdf.

⁷ See Online Copyright Infringement Liability Limitation Act, Title II of the Digital Millennium Copyright Act, Pub. L. No. 105-304, § 202, 112 Stat. 2860, 2877-86 (1998) (codified at 17 U.S.C. § 512).

⁸ 17 U.S.C. § 512. See also *Viacom Int'l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *aff'd in part, vacated in part, remanded*, 676 F.3d 19 (2d Cir. 2012).

⁹ § 512(i). See also DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA): SAFE HARBORS FOR ONLINE SERVICE PROVIDERS, PRACTICAL LAW PRACTICE NOTE 1-518-6907, Practical Law (last visited on Aug. 27, 2018), <https://us.practicallaw.thomsonreuters.com/1-518-6907> (hereinafter "Practice Note").

This article starts by describing the DMCA, including its key provisions, legislative history, and policy. From there, the article reviews specific examples of DMCA abuse and related chilling effects, such as when putative copyright holders illegitimately use the DMCA to muffle opposing political viewpoints or takedown well-meaning videos that happen to include incidental use of copyrighted works. This article then proposes much-needed reforms,

First, targets of DMCA takedown notices must have an opportunity to respond *before* an OSP takes material down based upon a DMCA notice.

Second, OSPs must leave the posted material up and available if the user provides an affidavit of noninfringement.

Third, the definition of “repeat offender” should not include users who provide counter notices unless subsequently adjudicated as infringers.

Fourth, infringement complainants should be permitted to remove the content violating the copyright only after the poster of the content fails to remove the material themselves within a specified time of the takedown notice.

Fifth, unless reviewed by a human, DMCA notices predicated solely upon automatic, computer-generated infringement-detection devices should be forbidden.

Finally, this article discusses the negative effect on free speech that will persist until Congress reforms the DMCA.

I. WHY CONGRESS CREATED THE DMCA

Throughout the 1990s, the Internet was rapidly becoming a revolutionary new platform for the dissemination of ideas, speech, information, and commerce. Along with this vast new information platform came unprecedented challenges to protecting copyright online. This was particularly challenging in view of the distributional potential of the Internet coupled with copyright’s low bar to creation.¹⁰ To enjoy copyright protection, one needs only an original work of authorship fixed in any tangible medium of expression.¹¹ No formalities are required.¹² In 1976, the United States made copyright registration optional.¹³ In 1989 it removed the requirement notice.¹⁴ In

¹⁰ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (requiring only a “modicum of creativity” to form a copyright).

¹¹ Copyright Act of 1976, 17 U.S.C. § 102 (2012).

¹² *Id.*

¹³ § 408.

¹⁴ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2583, 2587 (codified as amended at 17 U.S.C. § 401 (2012)).

1992, it removed the requirement to renew registration.¹⁵ Because a copyright is so easy to create, and because the Internet allows mass proliferation of content, anyone who uses the Internet frequently encounters copyright and related allegations.¹⁶

Developed decades before the Internet, traditional copyright law was ill-equipped to handle online piracy. Because it was difficult to stop infringement at the individual level, the alternative under traditional copyright law was to direct claims against OSPs under a theory of secondary liability for providing the online venue.¹⁷

But holding OSPs responsible for the infringing acts of their users would only slow the development of the Internet. Faced with liability for their users' infringing acts, OSPs would stop providing services.¹⁸ Imposing on OSPs a "filter-everything" approach would chill online services.¹⁹ Thus, the DMCA was organized around the goal of "provid[ing] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities."²⁰ The law's authors stated, "by limiting the liability of [OSPs], the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand."²¹ The legislative intent behind the safe harbor was to facilitate "the robust development and world-wide expansion of electronic commerce, communications, research, development, and education."²² Congress hoped that by limiting OSP copyright infringement liability, the efficiency and utility of the Internet would continue to improve and expand.²³ Therefore, "without clarification of their liability, service providers [would] hesitate to

¹⁵ Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264, 266 (codified as amended at 17 U.S.C. §§ 304(a), 408 (2012)).

¹⁶ See Maria A. Pallante, *The Curious Case of Copyright Formalities*, 28 BERKELEY TECH. L.J. 1415, 1416 (2013).

¹⁷ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

¹⁸ See McSherry & Walsh, *supra* note 6, at 2.

¹⁹ See Elliot Harmon, "Notice-and-Stay-Down" Is Really Filter Everything, ELECTRONIC FRONTIER FOUND. (Jan. 21, 2016), <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything>.

²⁰ S. REP. NO. 105-190 (1998) at 20, 40 (The DMCA was intended to "protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement."); H.R. CONF. REP. NO. 105-796, at 72-73 (1998), 1998 U.S.S.C.A.N. 639, 649-550; H.R. CONF. REP. NO. 105-796 (1998); H.R. REP. NO. 105-551, pt. 2, at 50 (1998).

²¹ S. REP. NO. 105-190, at 8.

²² *Id.* at 1-2.

²³ *Id.* at 8. ("It's hard to overstate the importance of the DMCA's safe harbor provision to the growth of the early Internet. Had providers and platforms faced liability for what users published, far fewer social networks and web hosts would have existed because of the legal risk. Those that did exist would have had to carefully screen what users posted to ensure no copyright violations were taking place."). See also Klint Finley, *The Internet's Safe Harbor Just Got A Little Less Safe*, WIRED (Aug. 17, 2016, 7:00 AM), <https://www.wired.com/2016/08/internets-safe-harbor-just-got-little-less-safe/>.

make the necessary investment in the expansion of the speed and capacity of the Internet.”²⁴

Any remaining OSPs would tend to censor material instead of allowing the free and open discussion that makes the Internet so valuable.²⁵ Congress, therefore, needed a law that not only bolstered copyright protection online, but also provided OSPs with immunity against liability for secondary infringement.

As the DMCA was being debated in Washington, OSPs and copyright holders lobbied intensely for more protection. Copyright was safer, they argued, if the copyright claimant could, with the click of a mouse, remove allegedly infringing content. Such concerns about protecting copyright while not chilling the burgeoning Internet overshadowed users’ legitimate interest in not being subject to prior restraints and in being able to present the defenses of fair use and uncopyrightable subject matter before their speech was silenced.

To serve this purpose, the law has historically recognized two important boundaries around copyright. These boundaries were developed over centuries to protect fair use and speech by limiting the power of copyright.²⁶ The first boundary, codified in § 102(b) of the Copyright Act, limits the scope of copyright to expression, not the underlying idea.²⁷ This idea/expression dichotomy holds: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principal, or discovery....”²⁸ Implicit in the idea-expression dichotomy is the recognition that monopolies on the mind, ideas, and speech, while sometimes good for a few, are often bad for many.

The second boundary is copyright’s fair use doctrine.²⁹ Under the fair use doctrine, copying without permission is not an infringement if it is for a limited, transformative purpose, including

²⁴ S. REP. NO. 105-190, at 8.

²⁵ See Laura Sydell, *Why Taylor Swift Is Asking Congress To Update Copyright Laws*, NAT’L PUB. RADIO (Aug. 8, 2016, 4:33 PM ET), <https://www.npr.org/sections/alltechconsidered/2016/08/08/487291905/why-taylor-swift-is-asking-congress-to-update-copyright-laws> (“[I]f Congress made Internet companies responsible for finding and taking down unauthorized music files, they would begin to err heavily on the side of caution and censor musicians out of fear that their music might violate the copyright laws and the company would be responsible for millions of dollars in fines.”).

²⁶ See generally *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas – . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market....”). See also Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1301 (2003) (“Anointing the author’s relationship with his work as essential and unrestricted stands in diametric opposition to the open marketplace of ideas idealized in the United States.”).

²⁷ Copyright Act of 1976, 17 U.S.C. § 102(b) (2012).

²⁸ *Id.*

²⁹ E.g., Ned Snow, *Proving Fair Use: Burden of Proof as Burden of Speech*, 31 CARDOZO L. REV. 1781, 1793 (2010).

commentary, criticism, or parody.³⁰ Fair use is essential to the equitable, balanced, and proper administration of copyright law.³¹ The fair use doctrine provides an important exception to the general rule that only the holder of a copyrighted work may copy, distribute, make derivative works, or publicly perform or display a copyrighted work.³² The fair use doctrine is vital to U.S. copyright law.³³ It provides the necessary “breathing space” for expression and promotes the dissemination of ideas and speech, which furthers copyright’s ultimate purpose.³⁴ It does this by expressly permitting the use of copyrighted works by someone other than the rights holder to disseminate ideas, critique, parody, criticism, education, and scientific discourse.³⁵

Taking away the defense of fair use by allowing for automatic DMCA takedowns, even for ten-to-fourteen days, over-extends copyright, chills speech, and prematurely, sometimes without cause, deprives the public of a valuable exchange of ideas.³⁶ Besides tearing down important boundaries around copyright, the DMCA’s takedown regime empowers censorship by shifting the burden of proof away from the plaintiff and onto the accused.³⁷ This is significant because whoever bears the burden of proof wins the tie-breaker case.³⁸ Not only does it shift the burden of proof, the DMCA dramatically alters the timing of the presentation of valid defenses to copyright infringement until after the speech has been disabled. It transfers the cost of responding or filing suit for declaratory relief onto the poster, which can become an insurmountable burden for many.³⁹

II. WHAT CONGRESS CREATED: THE DMCA UP CLOSE

Concern about online copyright piracy culminated in Congress’ passage of the Online Copyright Infringement Liability Limitation Act in 1998, now known as § 512 of the DMCA.⁴⁰

The DMCA takedown process works like this: a putative copyright holder observes speech online that he or she wants taken

³⁰ § 107.

³¹ See *Eldred v. Ashcroft*, 537 U.S. 186, 219, 221 (2003) (describing fair use as a “free speech safeguard[]” and a “First Amendment accommodation[]”).

³² § 107.

³³ See Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 686 (2015).

³⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³⁵ § 107.

³⁶ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4-5 (2004).

³⁷ See Snow, *supra* note 29 (discussing the chilling effect on speech of placing the burden of proof on the party claiming fair use).

³⁸ See Loren, *supra* note 33, at 704.

³⁹ See Seltzer, *supra* note 1, at 177.

⁴⁰ 17 U.S.C. § 512 (2012).

down. This complainant sends a written takedown notice to the OSP that hosts the material (the OSP is required to list an agent for receipt of such notices under 17 U.S.C. § 512(c)(2)). The accuser meets a few simple statutory requirements, including that the accuser claims a good faith belief that the target is infringing.⁴¹

After receiving the takedown notice, the OSP must either take the material down for at least ten-to-fourteen days – regardless of whether the material actually infringes on any copyright – or lose immunity against secondary copyright liability.⁴² If the OSP values its enterprise’s legal immunity over an individual poster’s free speech or fair use, the material comes down.

However, § 512 was intended to create a system of checks and balances to allow removal of infringing content while preserving legitimate content.⁴³ To that end, the DMCA system established four separate safe harbors to protect eligible OSPs from liability for copyright infringement based on actions by users of their services.⁴⁴ The Transmission Safe Harbor covers services involving transmitted, routed, or provided connections (for example, telephone lines) for digital online connections for infringing material transmitted by users.⁴⁵ Material on a system or network where the material is initially made available by someone else is subject to the Caching Safe Harbor.⁴⁶ The Storage Safe Harbor, which is the principal subject of this article, involves material hosted, stored or made and “at the direction of users.”⁴⁷ Finally, the Search Engine or Information Location Tools Safe Harbor concerns links or referrals of users to online locations containing infringing matter or activity.⁴⁸

The DMCA defines OSPs two ways. First, as “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.”⁴⁹ Second, the DMCA defines an OSP as “a provider of online services or network access, or the operator of facilities therefor.”⁵⁰

To be eligible for protection under the Safe Harbor, OSPs must designate an agent for service of take-down notices.⁵¹ OSPs must

⁴¹ *Id.* § 512(c)(3); *id.* § 512(g).

⁴² *Id.* § 512(g)(2)(c).

⁴³ See *Practice Note*, *supra* note 9.

⁴⁴ § 512(a)-(d); *Practice Note*, *supra* note 9.

⁴⁵ *Id.* § 512(a).

⁴⁶ *Id.* § 512(b).

⁴⁷ *Id.* § 512(c).

⁴⁸ *Id.* § 512(d).

⁴⁹ *Id.* § 512(k)(1)(A).

⁵⁰ *Id.* § 512(k)(1)(B).

⁵¹ *Id.* § 512(c)(2) (“An agent to receive notifications of claimed infringement.”).

provide agent contact information on both its websites and to the Copyright Office.⁵² OSPs must write, adopt, and post online a repeat infringer policy.⁵³ OSPs must manage the take-down-notice process and respond expeditiously to statutorily-compliant takedown requests.⁵⁴ OSPs must reasonably implement a repeat-infringer policy. OSPs are ineligible for safe harbor protection if they benefit financially from infringing posts for which they have direction and control.⁵⁵ Finally, OSPs must lack actual knowledge of infringement or awareness of facts and circumstances (“red flags”) making infringement apparent.⁵⁶ What constitutes “knowledge” has been the subject of much litigation. The general rule that has emerged is that, to hold an OSP secondarily liable for infringing posts of its users, general knowledge of possible infringement is not enough. Instead, the OSP must have specific knowledge of particular instances of infringing activity.⁵⁷ As long as the OSP lacks such specific knowledge, it may avail itself of the DMCA safe harbor.⁵⁸

In drafting the safe harbor, Congress was careful to alleviate OSPs from having to monitor their websites for potentially infringing activity. Under § 512(m)(1), an OSP has no affirmative duty to monitor for or seek out possible infringements to be eligible for safe harbors.⁵⁹ In *Perfect 10 Inc. v. CCBill LLC*, for example, the court observed, “Were we to require service providers to terminate users under circumstances other than those specified in § 512(c), § 512(c)’s grant of immunity would be meaningless,” as service providers would then need to assume the additional burden of removing users, which the DMCA was designed to ameliorate.⁶⁰

Throughout Congress’ deliberations, protecting OSPs and copyright was the overriding agenda. Users’ interests in fair use were overshadowed by comparison. This is reflected in the fact that users’ only recourse under the DMCA is to file a “counter notice.” This right, however, is very limited and ultimately ineffective because it occurs only after posted material is disabled and removed. It does nothing to prevent the core problem of automatic takedown of material for ten-to-fourteen days. Under the DMCA, if a user provides a counter notice, the OSP *may* decide whether to re-post the

⁵² *Id.*

⁵³ *Id.* § 512(i)(1)(A).

⁵⁴ *Id.* § 512(c)(1)(C).

⁵⁵ *Id.* § 512(c).

⁵⁶ *Id.* § 512(c)(1)(A).

⁵⁷ *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir. 2013).

⁵⁸ *Id.* at 1021.

⁵⁹ § 512(m)(1).

⁶⁰ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1111 (9th Cir. 2007); *see also* H.R. REP. NO. 105–551, pt. 2, 61 (1998) (“Section 512(i) is not intended “to undermine the ... knowledge standard of [§ 512](c).”).

material, but nothing in the statute requires reposting. In fact, OSPs often lack incentives to repost. Even if an OSP wants to repost, it cannot do so less than ten days after receiving a counter notice without losing immunity under the safe harbor.

Making matters worse, under the DMCA, users are not entitled to notice of the *ex parte* takedown until *after* it occurs.⁶¹ Thus, users are not entitled to present either a fair use defense or the defense of uncopyrightable subject matter or thin copyright before the material comes down. This is because Congress failed to extend the fair use and uncopyrightable subject matter defenses to the critical ten-to-fourteen-day automatic DMCA takedown regime. Without these protections, too many OSPs have abused the DMCA takedown power and too much legitimate speech has been removed.

III. THE PROBLEM: WIDESPREAD DMCA ABUSES

In 2007, Stephanie Lenz, a stay-at-home mother, uploaded a brief video on YouTube of her dancing toddler. For less than thirty-seconds, Prince's song, "Let's Go Crazy," played audibly in the background. Although there was no hint of commercial use or infringement – Stephanie was simply sharing with friends and followers – Universal Musical Corporation, Prince's publishing administrator responsible for enforcing his copyrights, issued a takedown notice. YouTube summarily removed the video. Stephanie filed a counter notice under § 512(g) before filing for declaratory relief in federal district court. Stephanie sought relief under § 512(f) for knowing misrepresentation of allegations of infringement under the DMCA. Ruling in Stephanie's favor, the United States District Court for the Northern District of California held that Stephanie's video was fair use.⁶² The Ninth Circuit affirmed, declaring that "Fair use is not just excused by the law, it is wholly authorized by the law."⁶³ The Ninth Circuit declared that putative copyright holders have a "duty to consider – in good faith and prior to sending a takedown notification – whether allegedly infringing material constitutes fair use."⁶⁴

While the *Lenz* decision sounds encouraging, the decision is difficult to enforce because the user must somehow prove bad faith or willful blindness on the part of the DMCA complainant.⁶⁵ This is unworkable for people like Stephanie. By the court's own admission, the *Lenz* standard sets a low bar for plaintiffs to overcome with

⁶¹ § 512(g)(2)(A).

⁶² *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

⁶³ *Id.* at 1151.

⁶⁴ *Id.* at 1157.

⁶⁵ § 512(e)(3)(A)(v); *id.* § 512(f).

respect to establishing their subjective good faith:

“Though *Lenz* argues Universal should have known the video qualifies for fair use as a matter of law, we have already decided a copyright holder need only form a subjective good faith belief that a use is not authorized.”⁶⁶ The copyright holder is the party forming the subjective intent; therefore, that party is in a privileged position to declare whether or not that subjective state of mind has been met. The *Lenz* court continued: “If, however, a copyright holder forms a subjective good faith belief the allegedly infringing material does not constitute fair use, we are in no position to dispute the copyright holder’s belief even if we would have reached the opposite conclusion.”⁶⁷ If the court cannot dispute the copyright claimant’s subjective mental state, are targets such as Stephanie any better off?

Moreover, in a recent Federal Case in New York, the court rejected a DMCA target’s § 512(f) misrepresentation claim, holding that the copyright holder did have a good faith subjective belief.⁶⁸ The court ruled that once the putative copyright holder alleges good faith, the onus is on the target to disprove that mental state.⁶⁹ There, the target “failed to proffer any evidence that suggests defendants lacked a subjective ‘good faith belief,’ and therefore . . . failed to create a triable issue.”⁷⁰

It is not clear whether other courts will adopt the *Lenz* approach and require – at least in theory – that the copyright holder consider fair use or, alternately, whether courts will follow the precedent in *Hosseinzadeh* and require the target somehow prove the complainant’s bad faith.

At least one court has refused to apply the *Lenz* rule altogether. In *Tuteur v. Crosley-Corcoran*, the US District Court for the District of Massachusetts declined to follow the earlier district court decision in *Lenz*, which held that a copyright holder must consider fair use, holding, on the contrary, that “the DMCA did not require a notice-giver verify that he or she has explored an alleged infringer’s possible affirmative defenses prior to acting. . . .”⁷¹ The risk of other courts not following *Lenz* is legitimate considering that Congress, in enacting the DMCA, did not require a sender of a takedown notice to verify

⁶⁶ *Lenz*, 815 F.3d at 1153 (citing *Rossi v. Motion Picture Ass’n of Am. Inc.*, 391 F.3d 1000 (9th Cir.2004)); see also § 512(c)(3)(A)(v).

⁶⁷ *Lenz*, 815 F.3d at 1154.

⁶⁸ *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 47 (S.D.N.Y. 2017).

⁶⁹ *Id.* at 47.

⁷⁰ *Id.*

⁷¹ *Tuteur v. Crosley-Corcoran*, 961 F.Supp.2d 333, 343-44 (D. Mass. 2013).

the existence or lack of fair use, only to affirm a good faith belief that the copyrighted material is being used without permission.⁷²

Thus, even though § 512(f) – in theory – renders a copyright claimant liable for damages for bad faith allegations, all that the DMCA requires to avoid such liability is to produce a mere self-serving allegation of good faith under § 512(c)(3)(A)(v). For the target of a DMCA takedown, holding the putative copyright holder to a bad-faith standard is too difficult because it requires proving a subjective mental state.

In another high-profile instance of DMCA abuse, just weeks before the 2008 election, several political advertisements from the McCain campaign were abruptly taken down due to a DMCA notice. This notice was perpetrated by various news and television companies alleging the ads infringed their copyrighted television programs.⁷³ The McCain campaign responded to YouTube in vain:

We write ... to alert you to a problem that has already chilled this free and uninhibited discourse [O]verreaching copyright claims have resulted in the removal of non-infringing campaign videos from YouTube, thus silencing political speech [O]ur advertisements or web videos have been the subject of [Digital Millennium Copyright Act] takedown notices regarding uses that are clearly privileged under the fair use doctrine. The uses at issue have been the inclusion of fewer than ten seconds of footage from news broadcasts in campaign ads or videos, as a basis for commentary on the issues presented in the news reports, or on the reports themselves.⁷⁴

YouTube responded by pointing out that the DCMA tied its hands. If it wanted to maintain its immunity, YouTube explained, it had to take the material down for at least ten-to-fourteen days, regardless of the merits.⁷⁵

⁷² D. MASS WEIGHS IN ON DMCA GOOD FAITH BELIEF REQUIREMENT FOR TAKEDOWN NOTICES, PRACTICAL LAW LEGAL UPDATE 4-541-8345, Practical Law (Sep. 17, 2013), <https://us.practicallaw.thomsonreuters.com/4-541-8345>.

⁷³ See Seltzer, *supra* note 1, at 172.

⁷⁴ Letter from Trevor Potter, Gen. Counsel, McCain-Palin 2008, to Chad Hurley, CEO, YouTube, et al. (Oct. 13, 2008) (available at <https://perma.cc/C8AR-4XZ5>).

⁷⁵ Letter from Zahava Levine, Chief Counsel, YouTube, to Trevor Potter, Gen. Counsel, McCain-Palin 2008, at 2-3 (Oct. 14, 2008) (available at <https://www.publicknowledge.org/pdf/youtube-letter-20080514.pdf>) (“We try to be careful not to favor one category of content on our site over others, and to treat all of our users fairly”).

The Obama campaign suffered a similar indignity.⁷⁶ In that instance, the rightsholder, NBC, insisted that the Obama campaign cease distributing an advertisement titled, “Bad News,” that dissuaded voting for McCain. NBC reasoned that it had not been consulted and the video briefly showed images of reporter, Tom Brokaw, then in the employ of NBC.⁷⁷

News organizations repeatedly misuse the DMCA takedown process to target political ads containing fair use material, such as brief media clips. For instance, BMG Rights Management issued a takedown notice targeting an official Romney campaign ad that showed President Obama singing a line from Al Green’s song, “Let’s Stay Together.”⁷⁸ The political clip was not about commercializing Al Green’s song. Its purpose was purely political, but it came down anyway because, under the DMCA, the underlying merits are irrelevant during the ten-to-fourteen day automatic takedown period.

In another widely publicized instance of DMCA abuse, radio host Rush Limbaugh sent a DMCA takedown notice to YouTube demanding removal of a montage of Limbaugh’s “most vile smears.”⁷⁹ The footage was arguably embarrassing to Limbaugh and the DMCA provided the means to disable access to the material. Artist Johnathan McIntosh made a transformative remix video, *Buffy v. Edward: Twilight Remixed*.⁸⁰ The clearly transformative video did not, however, stop Lionsgate from issuing a takedown notice. Facing public outcry, Lionsgate relented, but not before much disruption and waste.⁸¹ Public outrage forced Lionsgate to back off, but many takedowns take place in the “shadows of the law” where they are not subject to public censure.⁸²

Film critic, Kevin B. Lee, had his entire YouTube account suspended due to DMCA takedown notices. Why? Because Lee used

⁷⁶ See Steve McClellan, *YouTube Pulls Obama Spot*, ADWEEK (Oct. 1, 2008), <https://www.adweek.com/brand-marketing/youtube-pulls-obama-spot-97103/>.

⁷⁷ *Id.*

⁷⁸ See Timothy Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, ARS TECHNICA (July 16, 2012, 4:59 PM), <https://arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/>.

⁷⁹ See Markos Moulitsas, *Rush Limbaugh Demands YouTube Remove Daily Kos Video ... Watch It Here*, DAILY KOS (Apr. 23, 2012, 2:04 PM), <https://www.dailykos.com/stories/2012/4/23/1085791/-Rush-Limbaugh-demands-YouTube-remove-Daily-Kos-video-watch-it-here>.

⁸⁰ See Jonathan McIntosh, *“Buffy v. Edward” Remix Unfairly Removed by Lionsgate*, ARS TECHNICA (Jan. 9, 2013, 7:40 PM), <https://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/>.

⁸¹ *Id.*

⁸² Cf. Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) (describing the realm of extrajudicial negotiations and dealings as the “shadow of the law”).

brief clips of films in his reviews.⁸³ This was quintessential fair use. Yet, nothing in the DMCA prevents any complainant from having a post automatically taken down before the poster even receives notice of the allegations.

Companies also misuse the DMCA to engage in “rent-seeking” behavior where the DMCA takedown power becomes leverage to a payoff arrangement.⁸⁴

Complementing the anecdotal evidence, empirical studies also confirm widespread DMCA abuse.⁸⁵ One report described how DMCA complainants issued takedown notices to remove legitimate political ads without considering fair use.⁸⁶ This resulted in removal and chilling of Constitutionally-protected political speech. One study concluded that “[s]ervice providers have confirmed that unfounded DMCA notices are common and significantly burdensome.”⁸⁷

An empirical study of DMCA takedowns uncovers a “surprisingly high incidence of flawed takedowns.”⁸⁸ DMCA takedown notices involving uncopyrightable subject matter and fair use represented 30% of the takedown notices studied.⁸⁹ Considering the millions of takedown notices sent each year, the amount of lawful speech implicated is staggering. With respect to the DMCA, the speech at issue tends to be speech lawfully made under the fair use doctrine since § 512 primarily affects copyright.

Yet, flawed DMCA takedowns are not subject to judicial review and no allowance is made for fair use or uncopyrightable subject matter, defenses that are fundamental to copyright law.⁹⁰ Empirical data shows that 57% of the takedown notices to Google are from companies demanding the take down of material posted by competitors.⁹¹ Over a third (37%) of the take down notices are from

⁸³ See Matt Zoller Seitz, *Copy Rites: YouTube v. Kevin B. Lee*, SLANT (Jan. 13, 2009), <https://www.slantmagazine.com/house/article/copy-rites-youtube-vs-kevin-b-lee>.

⁸⁴ See Josh Tabish, *The Copyright Barons Are Coming. Now's the Time to Stop Them*, WIRED (Jan. 31, 2017, 9:00 AM), <https://www.wired.com/2017/01/copyright-barons-coming-nows-time-stop/> (“Increased fortification of copyright amounts to nothing more than ‘rent-seeking’ by powerful companies that are less interested in supporting creative communities than in maximizing their profit margins.”).

⁸⁵ See generally Mtima & Jamar, *supra* note 2, at 1-2.

⁸⁶ See CTR. FOR DEMOCRACY & TECHNOLOGY, CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH 4-9 (Oct. 2010), https://cdt.org/files/pdfs/copyright_takedowns.pdf.

⁸⁷ McSherry & Walsh, *supra* 6, at 12.

⁸⁸ JENNIFER M. URBAN & LAURA QUILTER, EFFICIENT PROCESS OR “CHILLING EFFECTS”? TAKEDOWN NOTICES UNDER SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 2 (2005) (summary report) (available at https://www.law.berkeley.edu/files/Chilling_Effects_Report.pdf).

⁸⁹ *Id.* at 2.

⁹⁰ See *e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-46 (1991) (describing the “fundamental axiom” that copyright law does not protect underlying facts).

⁹¹ Urban & Quilter, *supra* note 88, at 2.

foreign companies.⁹² An Electronic Frontier Foundation study of the DMCA concluded: “If even a small percentage of the millions of takedown notices sent each year are improper, that percentage still represents a significant swath of lawful speech.”⁹³

IV. THE SOLUTION—REFORMING THE DMCA

Experience demonstrates that the DMCA’s notice-and-takedown regime actually creates two standards of intellectual property protection: one for offline speech, where stronger due process considerations require that copyright complainants support their contentions with evidence before disabling speech, and another for online speech, where prior restraints apply, and evidence is inapposite.

The DMCA needs recalibration. As it stands, it wields a hatchet where a scalpel is needed. It creates a bright-line rule that is inappropriate for fair use, where, instead, a careful, nuanced, and case-by-case approach is required.⁹⁴ Recognizing this, the Supreme Court observed, “The task [of fair use analysis] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”⁹⁵

To address these concerns, this article proposes five reforms. First, users should be entitled to advanced notice of takedown demands so they may respond *before* their speech is removed.⁹⁶ Studies conclude that the counter-notification process is simply not effective at addressing false and mistaken assertions of infringement.⁹⁷ For one, any counter notice is not effective for at least ten-to-fourteen days, meaning an OSP could suppress content absent justification or substantive inquiry for the term imposed by statute.⁹⁸ This contradicts the longstanding disfavor of prior restraints. The DMCA operates like a prior restraint because it imposes a limit on speech, such as fair use, before any hearing on the merits. This allows for private, extra-judicial disposition of speech in the “shadows of the law.”⁹⁹

Defenders of the DMCA status quo argue that users are afforded due process via the limited counter notice provision, but users have

⁹² *Id.* at 2.

⁹³ McSherry & Walsh, *supra* note 6, at 12.

⁹⁴ *See e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

⁹⁵ *Id.* at 577 (citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985)).

⁹⁶ *See generally*, McSherry & Walsh, *supra* note 6, at 16.

⁹⁷ *See* Urban & Quilter, *supra* note 88, at 14-15.

⁹⁸ Copyright Act of 1976, 17 U.S.C. § 512(c)(1)(C) (2012); *Id.* § 512(g)(2)(C).

⁹⁹ *Cf.* Mnookin & Kornhausert, *supra* note 82, at 673 (describing the need for a better system of norms to reach reasonable results in bargaining and negotiations outside the courtroom).

no right to submit a counter notice before the material is taken down. In fact, they don't even have the right to *know* about the process until after the material is removed. And even if the user has a legally-recognizable defense, such as fair use, and timely submits a counter notice, the posts are still automatically taken down for at least ten-to-fourteen days.

Therefore, as the second method of reform, this article proposes amending the DMCA to remove the automatic right to take down disputed material on demand if the user provides a sworn affidavit of non-infringement. Under the third reform posited in this article, if the target does not respond, the material ultimately comes down. But the burden of proof belongs back on the claimant instead of the accused. Under a properly-reformed DMCA, an aggrieved copyright complainant may still use the OSP to transmit a takedown demand, but that complainant may not force the material down absent either an agreement or a judicial order.

Contrast this with the current version of DMCA, where the copyright complainant can force the material down simply by providing a takedown notice wherein the alleged copyright holder states that she has a good faith belief that there is no legal basis for the use of the allegedly infringing materials.¹⁰⁰ Giving the complainant such broad power of prior restraint based on mere allegation means protected speech is vulnerable to shutdown despite a total lack of evidence of infringement and without regard to whether the complainant even has a valid copyright.¹⁰¹ Instead, the material should stay up if the poster makes a sworn statement that he or she has a legal basis for posting the material. From there, the complainant may still have her day in court, but she may not abuse the DMCA to circumvent otherwise applicable law, such as the doctrine of fair use.

Abuse of posters' rights, such as fair use, does not go away after the automatic takedown period expires. The material remains down because OSPs often lack incentive to repost the material: "If put-back is not occurring in the appropriate circumstances, the process becomes more akin to an extra-judicial injunction than a [temporary restraining order (TRO)] – a dramatic realignment of traditional legal procedures that protect defendants."¹⁰² Without a pro-fair use default rule, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected activity (such as posting fair use material online) – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace

¹⁰⁰ § 512(c)(3)(A)(v).

¹⁰¹ See Urban & Quilter, *supra* note 88, at 5.

¹⁰² *Id.* at 5.

of ideas.”¹⁰³ Consequently, “the censor’s determination may in practice be final.”¹⁰⁴

Moreover, a law such as the DMCA, making lawful activity such as fair use posts subject to automatic takedown, tips toward self-censorship. When too much burden is placed on the poster, self-censorship results.¹⁰⁵

This article also maintains that concerns about the removal of the on-demand, ten-to-fourteen-day period are overstated. For example, if a complainant issues a takedown notice to a blatant infringer, such as one who reposts an entire copyrighted movie, that infringer, caught red-handed, has little incentive to contest a costly and losing case. Further, if that user does not respond with a good faith affidavit of non-infringement, under the proposed reform, that material may still be disabled. In other words, under the revisions this article espouses, infringing material may come down, just not immediately or automatically. In clear-cut infringement cases, the material still comes down because obvious infringers are less likely to file bad faith affidavits of non-infringement. If they do, and lose any subsequent litigation, penalties may apply. Therefore, Congress should adopt enhanced penalties to discourage frivolous affidavits of non-infringement.

To limit abuse of the poster’s use of the affidavit of non-infringement, the DMCA should be amended to provide for punitive damages to the copyright complainant who prevails in court despite receiving an affidavit of non-infringement made in bad faith.

For the fourth proposed reform, the DMCA term “repeat offender” should be redrafted to include only those who have been adjudicated as copyright infringers more than once.¹⁰⁶ This is important because if an OSP deems someone to be a repeat infringer, the OSP may ban that individual from using the online service to engage in lawful expression, such as under the fair use doctrine. Thus, such a ban should only take effect after a proceeding on the merits.

Studying the impact that repeat infringer provisions of § 512(a)(A) has on speech and fair use, the Electronic Frontier Foundation finds serious Constitutional issues.¹⁰⁷ Accusations of alleged infringement carry drastic consequences: “A user could have

¹⁰³ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

¹⁰⁴ *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

¹⁰⁵ *See, e.g., Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the [accuser] must bear these burdens.”).

¹⁰⁶ *See* David Nimmer, *Repeat Infringers*, 52 J. COPYRIGHT SOC’Y U.S.A. 167, 196-97 (2005).

¹⁰⁷ *See* McSherry & Walsh, *supra* note 6, at 17-18.

content removed, or may have her access terminated entirely,” without basis in fact or law.¹⁰⁸

This paper further proposes that after receiving an affidavit of non-infringement from a user, OSPs must continue to be allowed to maintain their safe harbor immunity, even if they do not take the accused material down.

Fifth, no takedown should issue if based solely upon an automatic, computer-generated infringement detection device unless subsequently reviewed by a human. Under this reform, copyright holders may still use automated infringement takedown devices, they would just need someone to review the flag before issuing a DMCA takedown notice. This is because when unverified automated process generates DMCA notices, overbroad takedowns occur. A web crawler constitutes such an automatic infringement detection device. Copyright holders routinely use these devices to scour the Internet for potential infringement. These devices’ primary benefit comes from their ability to cover ground quickly. They are, however, rather poor at evaluating images in context or weighing fair use or policy arguments. For example, in one infamous case from 2003, the Recording Industry Association of America (RIAA) sent a DMCA notice to Penn State’s Department of Astronomy and Astrophysics.¹⁰⁹ The RIAA accused the university of violating its copyright to songs by the musician Usher. The RIAA’s automated detection device mistakenly identified the musician Usher with Penn State’s faculty member, Peter Usher, and his a cappella astronomy-themed song about gamma rays.¹¹⁰ While web crawlers should continue to be permissible, humans should review the results before basing any DMCA takedown notice on them.

V. DMCA AND FREE SPEECH

The DMCA raises concerns not only about copyright law and fair use, but also about free speech. Under longstanding First Amendment law, generally speech may not be silenced without a hearing where evidence is presented and where the speaker enjoys due process in terms of advance notice of an adversarial proceeding and an opportunity to be heard during that hearing¹¹¹.

¹⁰⁸ Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1112 (2007).

¹⁰⁹ See Declan McCullagh, *RIAA Apologizes for Threatening Letter*, CNET News (May 13, 2003, 6:12pm PST), <https://www.cnet.com/news/riaa-apologizes-for-threatening-letter/>.

¹¹⁰ See Seltzer, *supra* note 1, at 210.

¹¹¹ Edward Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 339 (1987) (“By 1868, due process had come to connote a certain core procedural fairness when government moved against a citizen’s life, liberty, or property.”).

This is true offline, where the presumption favors speech, and where prior restraints are, as a general matter, presumptively unconstitutional.¹¹² But online, under the DMCA, these rules no longer apply. Online, a copyright complainant may remove posted material (or “speech”) on demand, without proof or a hearing. The speaker has no right to advance notice of any adversarial takedown notice regarding online posts under the DMCA. Those who speak online through an OSP cannot stop the takedown during the first ten-to-fourteen days based on any valid defense, such as fair use, uncopyrightable subject matter, or thin copyright (where the copyright is very narrow). Only after an OSP takes a post down due to a DMCA takedown notice must it notify the user via an email stating, “Your video has been removed due to a copyright complaint.”¹¹³

DMCA abuse is particularly concerning in light of the centrality of the Internet to modern-day discourse. Every important debate, every major event, every new insight is expressed through the Internet. Indeed, in drafting the DMCA, Congress observed that “[t]he rapidly developing array of Internet and other interactive computer services available to Americans represent an extraordinary advance in availability of educational and informational resources to our citizens.”¹¹⁴ Laws regulating online posts, therefore, function as laws permitting whether knowledge, information, and speech will receive the same level of protection in cyberspace as offline. In *Board of Education v. Pico*, for instance, the Supreme Court acknowledged this, concluding that access to information “follows ineluctably from the sender’s First Amendment right” and “is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”¹¹⁵

The United Nations Report of the Special Rapporteur noted, “[B]y acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights.”¹¹⁶ The issue of Internet access and speech is, therefore, more broadly, an issue about human rights – specifically, the right to information.

The Internet has become even more integral now than when Congress created the DMCA in 1998. According to recent Pew Research, two-thirds of Americans believe “that lacking a home

¹¹² See *Romero v. Erik G. Abrahamson, P.A.*, 113 So. 3d 870, 872 (Fla. Dist. Ct. App. 2012).

¹¹³ See Seltzer, *supra* note 1, at 172.

¹¹⁴ 47 U.S.C. § 230(a)(1) (2012).

¹¹⁵ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

¹¹⁶ Human Rights Council, Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/17/27 ¶22 (May 16, 2011).

[broadband Internet] subscription is a *major disadvantage* when it comes to accessing government services, searching for employment, following the news, learning new things, or getting health information.”¹¹⁷ Therefore, deprivation of the right to fair use is tantamount to deprivation of the Internet itself. Thus, “[d]epriving a person of Internet access,” even if for only ten-to-fourteen days, is “an extreme measure impacting fundamental freedoms of speech and association.”¹¹⁸ With the benefit of twenty-years of hindsight, the DMCA’s enablement of the private disregard of fair use, and the removal of the plaintiff’s duty to prove the existence of a valid copyright in the first place undermine the very policy behind copyright itself – to promote the free and open exchange of ideas.¹¹⁹

Recognizing the vital public interest in free speech, the court in *Authors Guild v. Google, Inc.*, for instance, held that, “while authors are undoubtedly important intended beneficiaries of copyright, the ultimate primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance”¹²⁰ Because copyright exists for the public benefit, we must evaluate the DMCA based on how well it furthers this ultimate purpose.¹²¹ The overbroad takedown of lawful speech implicates the Constitution and the right to make, seek, and receive ideas, information, and expression. This is why, in *Stanley v. Georgia*, the Supreme Court held that the right to seek and obtain information and speech is “fundamental to our free society.”¹²²

Similarly, *Reno v. American Civil Liberties Union* held that expression on the Internet is entitled to the same First Amendment protection as offline speech.¹²³ Not only is Internet speech constitutionally protected, but the Internet is central to disseminating speech. Therefore, rules restricting Internet speech and fair use merit closer scrutiny. The *Reno* court observed that the Internet is “the most participatory form of mass speech yet developed.”¹²⁴

At other times, the Supreme Court has declared similar values. The right to receive information, whether on the Internet or not, relies on the fundamental need to develop a person’s ability to exercise their right to make meaningful and contributory expression in various facets of society.¹²⁵ Because there is no legally recognized right to force private OSPs to post any particular content, a victim of an

¹¹⁷ John B. Horrigan & Maeve Duggan, *Home Broadband 2015*, Pew Research Center (Dec. 21, 2015), <http://www.pewinternet.org/2015/12/21/home-broadband-2015/> (emphasis in original).

¹¹⁸ McSherry & Walsh, *supra* note 6, at 20.

¹¹⁹ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1134 (1990).

¹²⁰ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015).

¹²¹ See, e.g., U.S. CONST., art. I, § 8, cl. 8.

¹²² *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

¹²³ *Reno v. A.C.L.U.*, 521 U.S. 844, 870 (1997).

¹²⁴ *Id.* at 863.

¹²⁵ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

improper DMCA takedown cannot obtain a court order, such as a temporary restraining order that compels the OSP to keep online content subject to an abusive takedown demand.

Derogating these principles, the DMCA allows speech to be forced down on demand for ten-to-fourteen days based on mere allegation and without the claimant having to carry any burden of proof or even having to establish the existence of a valid copyright in the first place. The DMCA's imbalance in favor of the putative copyright holder "harm[s] the government's interest in promoting the generation and dissemination of knowledge and culture."¹²⁶

Ironically, the DMCA bias against users is self-defeating. By depriving users of key protections against automatic takedowns, the DMCA undermines the purpose for which it was created – ultimately, to promote the dissemination of speech, ideas, and commerce by encouraging the growth of a vital medium of communication, the Internet. Instead, "[t]he law's shield for service providers becomes, paradoxically, a sword against the public, which depends upon these providers as platforms for speech."¹²⁷ A "heckler's veto" phenomena emerges, where any putative copyright claimant who merely dislikes a post can disable it arbitrarily via a DMCA takedown notice.¹²⁸

In view of this widespread abuse, the DMCA should be amended to give speech the benefit of the doubt. This would bring the DMCA into compliance with centuries of American jurisprudence. "First Amendment standards," the Supreme Court reasons, "must give the benefit of any doubt to protecting rather than stifling speech."¹²⁹ On a similar note, the Supreme Court, in *Virginia v. Hicks*, recognized that failure to extend offline protections to online copyright infringement allegations would inevitably harm society: "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."¹³⁰ This is consistent with the High Court's previous observation that "the censor's determination" amounts to a one-sided and often self-serving appraisal of infringement. This unilateral determination regarding whether material stays up or goes down, the Court recognized, "may in practice be final."¹³¹

¹²⁶ McSherry & Walsh, *supra* note 6, at 20.

¹²⁷ Seltzer, *supra* note 1, at 175.

¹²⁸ *See id.* at 186, n. 74.

¹²⁹ *F.E.C. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 451 (2007).

¹³⁰ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

¹³¹ *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

Our legal system has long recognized the fundamental procedural right to notice and an opportunity to be heard before speech is muzzled, whether by a DMCA takedown or any other means.¹³² Nowhere else in the law of the United States are such basic procedural safeguards *systematically* eliminated. Offline, prior restraints are heavily disfavored and have been for well over a hundred years.¹³³ Prior restraints are seldom appropriate absent a clear showing of irreparable harm, which is rare in the copyright context, where, for instance, money damages may be sufficient, such as from an implied license or judicially-imposed reasonable royalty.¹³⁴

Because takedowns occur when the issue of infringement is far from clear-cut, the benefit of the doubt should go to speech. A pro-speech default rule accords with long-standing policy in favor of speech and against prior restraints.¹³⁵ Such reform would give the benefit of the doubt to fair use and squares with the legal policy of erring on the side of protecting speech.¹³⁶

CONCLUSION

To protect users' interests in the indispensable defense of fair use, Congress should amend § 512 of the DMCA to eliminate the automatic and mandatory ten-to-fourteen-day takedown period if the target responds with a good faith affidavit of non-infringement. If the user does not respond, then the material should come down after a specified amount of time. The simple adjustments posited in this article will not harm copyright but will protect fair use while leaving intact OSPs' Safe Harbor immunity. In so doing, underlying policies common to both the DMCA and copyright's fair use doctrine – to provide for the dissemination of ideas and speech – will be strengthened for the public's benefit.

¹³² See, e.g., *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (holding that prior restraints are presumptively unconstitutional).

¹³³ Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 651-52 (1955).

¹³⁴ See Seltzer, *supra* note 1, at 226 ("It is already difficult to square the presumption of 'irreparable harm' and frequent issuance of preliminary injunctions in copyright cases with this doctrine."). But see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 182 n.164 (1998) (noting that those copyright remedies may not compensate for damage to reputation, which may be more valued by the holder and more difficult to calculate, depending on whether the jurisdiction treats reputation as a property interest).

¹³⁵ See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 686-87 (1978).

¹³⁶ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964); see also Henry P. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 519 (1969) ("Like the substantive rules themselves, insensitive procedures can 'chill' the right of free expression.").