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## Reinterpreting Repeat Infringement in the Digital Millennium Copyright Act

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# Reinterpreting Repeat Infringement in the Digital Millennium Copyright Act

*Hunter McGhee\**

## ABSTRACT

*In 1998, Congress passed the Digital Millennium Copyright Act, which aimed to balance the growth of the internet with the enforcement interests of copyright holders. In exchange for immunity from third-party infringement, the DMCA imposes certain conditions on internet and online service providers. Unfortunately, the law continues to contain many ambiguities in its statutory scheme, not least of which is the requirement that service providers maintain a “repeat infringer policy” to remove individuals that repeatedly infringe intellectual property rights. In response to a review of the Copyright Act conducted by the House Judiciary Committee, the US Copyright Office authored a report in May of 2020 evaluating the DMCA. The report makes clear that there are persistent issues around the repeat infringer policy requirement. As social media companies become more powerful, resolving the ambiguities in the DMCA becomes increasingly important. This Article accomplishes two things. First, it is the only comprehensive review of the law around repeat infringer policies and lays forth a practical framework for what adequate policies must contain under Section 512(i)(1)(A) of the DMCA. Second, the Article contributes to the scholarly literature by proposing an effects-oriented policy solution in light of the vagueness of Section 512(i) of the DMCA: a tiered system for evaluating termination of users online. This system will consider the type of infringing user, providing lenience to the service providers, clarity to the copyright holders, and security to internet users by reinterpreting*

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*the circumstances in which termination is appropriate to better reflect Congress' legislative intent.*

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## I. INTRODUCTION

Much like death and taxes, the fear of infringement is a certainty for most copyright holders. Infringement exposes an intrinsic tension in the Constitution—one between the dissemination of art and its protection. Article 1, Section 8, Clause 8 gives Congress the enumerated power “to promote the progress of science and useful arts.”<sup>1</sup> Implicit in the word “progress,” however, is both the need for creation and circulation.<sup>2</sup> The US copyright regime uses monopolization as a tool to encourage this creation.<sup>3</sup> In doing so, copyright law seeks to strike a balance between a creator’s right to exclude and the Constitution’s mandate to disseminate expression in society.<sup>4</sup> This tension has consistently created difficulties in holding copyright infringers accountable while also encouraging circulation of the copyrighted material.

The internet has dramatically changed how this tension manifests in practice. Gone are the days of a single infringer toiling away at a hand-copied, print version of a book. That infringer has been replaced by today’s Facebook user who posts a copyrighted image on their profile and shares it with their network within a matter of minutes. Technology has turned single infringers into networks of infringement through innovations like peer-to-peer file sharing. The internet shifted the balance in favor of access, and copyright holders have been trying to play catch-up ever since.

In the late 1990s, Congress sought to strike a compromise between copyright holders and the growing cash cow that was the

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1. U.S. CONST. art. I, § 8, cl. 8.

2. See generally Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001) (describing how “progress” in the Constitution refers to the spread of knowledge and technology).

3. *ArtI.S8.C8.1 Overview of Congress’s Power Over Intellectual Property*, CONSTITUTION ANNOTATED, [https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE\\_00013060/](https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060/) [<https://perma.cc/B2R3-DCEW>] (last visited Mar. 20, 2023).

4. *Id.*

nascent internet.<sup>5</sup> In attempting to do so, Congress passed the Digital Millennium Copyright Act (DMCA),<sup>6</sup> which created safe-harbor provisions that protect Online Service Providers (OSPs) and Internet Service Providers (ISPs) from liability for infringing content created or posted to or through their services.<sup>7</sup> For service providers to qualify for safe harbors, the DMCA requires that they have a repeat infringer policy—a policy to terminate users who repeatedly infringe copyright laws on a particular platform.<sup>8</sup> These policies must be “reasonabl[y] implement[ed]” and must terminate users “in appropriate circumstances.”<sup>9</sup> The DMCA itself never defines these parameters, and there has been little case law on this requirement. The case law that has developed, nevertheless, has led to inconsistent outcomes, resulting in service providers taking vastly different approaches to police their own platforms.<sup>10</sup> In May 2020, the Copyright Office issued a report criticizing the laxity of OSP policies yet offered little guidance on ways to remedy the errors of those policies—the ambiguities in the DMCA’s repeat infringer policy requirement.<sup>11</sup>

In order to address the many problems with Section 512(i)’s repeat infringer policy requirement, this Article proposes a tiered system for evaluating repeat infringer policies based on the type of infringer, the type of infringement at issue, and the size of the OSP through which the infringement occurs. The Article begins with a brief discussion of service provider liability prior to the DMCA and the

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5. See Timothy Wu, *Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 290 (2004).

6. 17 U.S.C. § 512; see also U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 1 (2020) [hereinafter SECTION 512 REPORT].

7. See BRIAN T. YEH, CONG. RSCH. SERV., R43436, SAFE HARBOR FOR ONLINE SERVICE PROVIDERS UNDER SECTION 512(C) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 1 (2014). ISPs are the telecommunications companies such as AT&T that connect users to the internet. OSPs on the other hand are public-facing providers that offer some service to users. See Surbhi Kumari, *What Is the Difference Between ISP and OSP?*, GEEKS FOR GEEKS, <https://www.geeksforgeeks.org/what-is-the-difference-between-isp-and-osp/> [https://perma.cc/Y5MN-SNU6] (May 18, 2022). This Article focuses primarily on OSPs. ISPs face unique constraints, primarily because they store no content for their users and are instead simple conduits connecting their users to the internet. As a result, many ISPs originally were under the impression that the repeat infringer policy requirement did not apply to them. That assumption changed as a result of *BMG v. Cox Communications*, discussed *infra* Part III.A. Further analysis of the repeat infringer policy for ISPs and their protection under 17 U.S.C. § 512(a) is a valuable and important endeavor that warrants its own scholarly work. As such, it is beyond the scope of this Article.

8. 17 U.S.C. § 512(i).

9. 17 U.S.C. § 512(i)(1)(a).

10. See generally Amanda Reid, *Readability, Accessibility, and Clarity: An Analysis of DMCA Repeat Infringer Policies*, 61 JURIMETRICS 405 (2021) (analyzing how different ISPs structure their repeat infringer policies).

11. See generally SECTION 512 REPORT, *supra* note 6.

resulting creation of the repeat infringer policy requirement. Part II analyzes modern case law to provide a comprehensive discussion of the law around Section 512(i) to resolve uncertainties in the DMCA's repeat infringer policy requirement. Part III compares examples of differing repeat infringer policies, noting a stark contrast in how platforms implement their policies based on their size. Part IV analyzes the Copyright Office's 2020 report, while Part V proposes a policy solution to address the tension between expression and dissemination.

## II. INCUBATION OF INNOVATION: THE DMCA AND CONGRESS' VOTE FOR GROWTH

The infant internet was steadily gaining usage among the general population in the late 1980s to early 1990s.<sup>12</sup> But the more the internet grew, the more problems it created for legislators. Soon, Congress would have to legislate on a spate of issues all connected by their digital footprints: harmful content like hate speech or terrorism, taxation of ecommerce industries, protection of children online, and national security risks posed by a growing digital infrastructure. Intellectual property laws were also navigating a profound change in their application in response to evolving technology.<sup>13</sup> It therefore was not long before Congress set its sight on copyright law as the digital era forced Congress to adapt.

Copyright law was “ill-equipped to handle online piracy.”<sup>14</sup> The exponential growth of the internet corresponded with a gradual trend in copyright jurisprudence that lowered the bar for copyrightability.<sup>15</sup> Despite this trend, which afforded copyright protections for a broader

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12. See Evan Andrews, *Who Invented the Internet*, HISTORY, <https://www.history.com/news/who-invented-the-internet> [<https://perma.cc/DJ6W-N65W>] (Oct. 28, 2019).

13. See *Gottschalk v. Benson*, 409 U.S. 63, 67–68 (1972) (applying existing patent laws to the internet and holding that a method for converting binary-coded decimal numbers into pure binary numbers was unpatentable because it was a “basic tool . . . of scientific and technological work”).

14. Joel D. Matteson, *Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It*, 35 SANTA CLARA HIGH TECH. L. J. 1, 5 (2018).

15. For instance, copyrights no longer required formalities to enjoy protection thanks to the Copyright Act of 1976. 17 U.S.C. § 102. The Copyright Act also made registration optional in § 402. See 17 U.S.C. § 402. Thirteen years later in 1989 the notice requirement was dropped in § 401 of the Copyright Act through amendment by the Berne Convention Implementation Act, and in 1992 there was no longer a need to renew registration of a copyrighted work. See 17 U.S.C. §§ 304(a), 408. This all occurred at the same time as the Supreme Court articulated that the only thing needed to create a copyright was a “modicum of creativity” fixed in a tangible medium of expression. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

set of works, infringement on the internet grew at a far more rapid pace than the natural development of the law could withstand. There existed an “underground movement of cyberspace outlaws” who took advantage of the internet to exchange infringing material among “[an] astronomical number of users.”<sup>16</sup> By 1998, this combination of increasing protections and more frequent infringements had created a perfect storm, forcing Congress to act on a familiar problem: resolving the tension between abetting the proliferation of content and securing the enforcement interests of copyright holders. What was Congress to do in the face of exponentially growing technology that threatened outdated copyright regimes? This problem pitted two influential industries against one another: media and entertainment rights organizations against telecommunications and a thriving internet ecosystem.

Congress had a very different understanding of what the internet was in the 1990s than people do in the year 2023. Given the state of the technology in the early 1990s, the internet was seen as a “Celestial Jukebox”—a space where content was not generated by consumers but broadcast through traditional forms of media such as television shows, movies, or music.<sup>17</sup> Congress was cognizant of the fact that copyright owners had concerns about uploading their protected works to the burgeoning internet without legal protections.<sup>18</sup> On the other hand, the telecommunications industry was concerned for the exact opposite reason—it feared being held liable for the conduct of its users, particularly in the case of intellectual property infringement, but also for content such as child pornography or threats of violence.<sup>19</sup> At the time, few cases had addressed service provider liability for user-generated content, yet those cases became important in the development of the DMCA.

#### A. Intermediary Liability on the Internet Before the DMCA

For OSPs, the most important pre-DMCA decision is *Playboy Enterprises, Inc. v. Frena*.<sup>20</sup> There, Playboy Magazine sued George Frena, the operator of a subscription computer billboard, alleging that the billboard was liable for displaying copyrighted photos on its

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16. David Allweiss, *Copyright Infringement on the Internet: Can the Wild, Wild West Be Tamed?*, 15 *TOURO L. REV.* 1005, 1012 (1999).

17. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX*, 187–88 (Stanford Law and Politics 2003).

18. See S. REP. NO. 105-190, at 8 (1998).

19. See GOLDSTEIN, *supra* note 17, at 105–90.

20. 839 F. Supp. 1552 (M.D. Fla. 1993).

service.<sup>21</sup> Subscribers could upload material onto the bulletin board, which was then viewable by other subscribers.<sup>22</sup> Frena alleged that he had not uploaded any of the copyrighted photographs identified by Playboy Magazine; rather, it was the subscribers to the bulletin board that had uploaded the infringing graphics to the service.<sup>23</sup> The US District Court for the Middle District of Florida concluded that the bulletin board's "unauthorized display and distribution of [Playboy]'s copyrighted material [was] copyright infringement under 17 U.S.C. § 501."<sup>24</sup> Therefore, the court held Frena and his platform liable for the infringing conduct of its users.<sup>25</sup>

For ISPs, the story is similar but with a different conclusion. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, the Northern District of California held that an access provider is not directly liable for infringing copies made and stored on its computer.<sup>26</sup> In a made-for-TV fact pattern, the case involved the actions of a former minister of the Church of Scientology who, after turning away from the Church, sought to expose its abuses by posting portions of its works on an online bulletin board.<sup>27</sup> The Religious Technology Center (RTC) owned the underlying copyright in many of these works.<sup>28</sup> Different from the *Playboy* case above, where the plaintiff sued the bulletin board as an OSP, RTC here sued the ISP through which the former minister accessed the internet.<sup>29</sup> In finding for the ISP on the claim of copyright infringement, the court found that mere "storage on a[n] [ISP's] system of infringing copies and retransmission to other servers is not direct infringement" by the ISP operator.<sup>30</sup> While this is a case about ISPs, the court's primary holding—that ISPs are not strictly liable for their users' infringement—served as the basis for Section 512(a) of the DMCA.<sup>31</sup>

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21. *Id.* at 1554.

22. *Id.*

23. *Id.*

24. *Id.* at 1559.

25. *Id.* at 1562–63.

26. 907 F. Supp 1361, 1362–63 (N.D. Cal. 1995).

27. *Id.* at 1365.

28. *Id.*

29. *Id.* at 1365–66.

30. *Id.* at 1370–71.

31. See H.R. REP. NO. 105-551, pt. 1, at 11 (1998) (referring to the Online Copyright Infringement Liability Limitation Act that is part of the DMCA and noting "the bill essentially codifies the result in the leading and most thoughtful judicial decision to date: Religious



The court's additional holding, that Netcom must take down infringing content once notified of its existence, became the foundation of Sections 512(b)-(d) of the DMCA.<sup>32</sup>

In addition to this judicially driven development, the executive branch also sought to address service provider liability. In 1996, the World Intellectual Property Organization (WIPO) hosted a global discussion to consider alterations to international intellectual property laws, intending to make them more modern; President Bill Clinton desired to capitalize on this international interest.<sup>33</sup> Coinciding with the WIPO conference, the Clinton Administration authored a White Paper noting its intended goals for updating intellectual property rights in a growing digital age.<sup>34</sup> The White Paper had the stated goal of making intermediate institutions, like OSPs, strictly liable for user infringements.<sup>35</sup> This grand, so-called "digital agenda" that the Clinton administration had created was wholly rejected by both the international community and Congress.<sup>36</sup> In fact, the bills introduced to implement the Clinton administration's agenda were never reported out of committee.<sup>37</sup>

Opening OSPs up to strict liability for any infringing material they host would have significantly impeded any internet growth because most would-be creators would balk at the risk of monetary damages as a result of already costly litigation.<sup>38</sup> Noticing how unfavorable current doctrine was for OSPs under *Playboy*, and having rejected the underpinnings of the Clinton administration's proposal, Congress sought to circumvent both entirely. The Senate made clear that the goal of any reform would be to "leave current law in its evolving

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Technology Center v. Netcom On-line Communications Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995). In doing so, it overrules those aspects of *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), insofar as that case suggests that such acts by service providers could constitute direct infringement, and provides certainty that Netcom and its progeny, so far only a few district court cases, will be the law of the land").

32. See *Religious Tech. Ctr.*, 907 F. Supp. at 1375; 17 U.S.C. § 512.

33. For extensive commentary on the subject, see Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369 (1997).

34. See Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996, 12:00 PM), <https://www.wired.com/1996/01/white-paper/> [<https://perma.cc/4V49-KNT2>].

35. See BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS: INTELLECTUAL PROPERTY RIGHTS AND THE NATIONAL INFRASTRUCTURE 114-24 (1995).

36. See Samuelson, *supra* note 33, at 372-75.

37. *H.R.2441 - NII Copyright Protection Act of 1995: Bill History in the Congressional Record*, U.S. CONG., <https://www.congress.gov/bill/104th-congress/house-bill/2441/history> [<https://perma.cc/6BVL-9VNL>] (last visited March 19, 2023).

38. S. REP. NO. 105-190, at 8 (1998).

state and, instead, to create a series of ‘safe harbors.’”<sup>39</sup> Those safe harbors eventually became the heart of the DMCA.<sup>40</sup>

*B. DMCA Safe Harbors and the Repeat Infringer Policy Requirement*

Holding service providers liable for third-party content generated and then posted to their services in violation of copyright law would have severely decelerated the progress of the internet. Congress found that “without clarification of their liability, service providers [would] hesitate to make the necessary investment in the expansion of the speed and capacity of the [i]nternet.”<sup>41</sup> In many respects, however, Congress was already late to the party and took a more reactive posture. As discussed, by 1997 service providers had already faced litigation over conduct of their users that had allegedly contravened existing copyright laws.<sup>42</sup>

Leading up to the spring of 1998, service providers and the telecommunications industry at large lobbied Congress for express protections in exchange for stronger anticircumvention rules that the entertainment industry had demanded.<sup>43</sup> Recognizing the muddled state of the law in the early 1990s, Congress set out with a clear, if aspirational, goal to enact a law that “provided greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”<sup>44</sup> This certainty came primarily as a result of incredibly broad protection from liability under the safe harbors in Section 512 of the DMCA.

Originally passed as the “Online Copyright Infringement Liability Limitation Act,” Section 512 contains four safe harbors that shield service providers from liability if they meet certain conditions.<sup>45</sup>

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39. *Id.* at 19.

40. *See, e.g., DMCA Safe Harbor*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-safe-harbor/> [<https://perma.cc/D9BL-HGHD>] (last visited Mar. 21, 2023).

41. S. REP. NO. 105-190, at 8 (1998).

42. *See, e.g., Joseph V. Meyers III, Speaking Frankly About Copyright Infringement on Computer Bulletin Boards: Lessons to be Learned from Frank Music, Netcom, and The White Paper*, 49 VAND. L. REV. 439, 478–81 (1996) (discussing suits against America Online by music publishers for permitting nearly unrestricted uploads and downloads of music files by its users).

43. *See Timothy Wu, Copyright’s Communications Policy*, 103 MICH. L. REV. 278, 350–56 (2004).

44. Jeffrey R. Kuester & Daniel R. McClure, *SPA v. ISPs: Contributory Copyright Infringement in Cyberspace*, INTELL. PROP. TODAY, Feb. 1997, at 20.

45. Pub. L. 105-304, tit. II, sec. 202, 112 Stat. 2877-86 (1998).

These four safe harbors protect service providers from being liable for transmitting,<sup>46</sup> caching,<sup>47</sup> storing,<sup>48</sup> or linking<sup>49</sup> infringing material created or uploaded by its users.<sup>50</sup> Taken together, these safe harbors ensure that companies providing internet access and companies that host or transmit user-generated or -uploaded content are not liable when their users commit copyright infringement.<sup>51</sup> These safe harbors provide not only the protection that the telecommunications industry sought, but also the certainty that the service providers desperately needed as the internet continued its exponential growth.<sup>52</sup>

Service providers are not automatically afforded these safe harbors; to qualify, they must satisfy the conditions upon which eligibility hinges.<sup>53</sup> The strings attached to the safe harbors are the result of fine and particular negotiations among Congress, the entertainment and content creation industry, and the telecommunications industry.<sup>54</sup> Failure to satisfy any single condition means a service provider loses its safe-harbor protection, which could result in enormous monetary penalties from litigation.<sup>55</sup>

One of the most cryptic and overlooked conditions is the repeat infringer policy requirement, which requires service providers to (1) adopt and reasonably implement a policy to (2) terminate repeat infringers in (3) appropriate circumstances.<sup>56</sup> Congress created this condition, but left it “entirely fuzzy,”<sup>57</sup> meaning “no one seems to know

46. 17 U.S.C. § 512(a).

47. 17 U.S.C. § 512(b).

48. 17 U.S.C. § 512(c).

49. 17 U.S.C. § 512(d).

50. This of course is a large oversimplification of the safe harbors contained in the DMCA. For more information, see Pamela Samuelson, *Pushing Back on Stricter Copyright ISP Liability Rules*, 27 MICH. TECH. L. REV. 299 (2021).

51. *Id.* at 301.

52. Some argue that the DMCA itself is uncertain in its statutory language. Annemarie Bridy, for instance, argues that the DMCA has done little but shift uncertainty from the domain of interspersed court opinions to the statute itself. *See generally* Annemarie Bridy, *Three Notice Failures in Copyright Law*, 96 B.U. L. REV. 777 (2016). In some respects, this is true. For example, the novelty of this Article is its exploration of the ambiguities of the repeat infringer policy requirement found in the DMCA. However, the DMCA represents a significant improvement for most service providers because the safe harbors are exceptionally broad, leading to a clearer picture of what is allowed.

53. *See* Bridy, *supra* note 52, at 780.

54. *See* David Nimmer, *Back from the Future: A Proleptic Review of the DMCA*, 16 BERKELEY TECH. L.J. 855, 864–65 (2001).

55. *See* David Nimmer, *Repeat Infringers*, 52 J. COPYRIGHT SOC'Y U.S.A. 167, 176 (2005).

56. *Id.* at 201.

57. *Id.* at 170.

what makes one a ‘repeat infringer.’”<sup>58</sup> The repeat infringer policy is entirely different than the other safe-harbor conditions found in Section 512, which are platform-focused, such as whether the platform has constructive knowledge of infringement or whether the platform meets the definition of a “service provider.”<sup>59</sup> The repeat infringer policy requirement, on the other hand, serves as “a prophylactic against future acts of infringement” based solely on the actions a user has taken in the past.<sup>60</sup> Many scholars and judges alike, however, disregard this requirement, stating that it “should not be an overly burdensome [requirement] to meet.”<sup>61</sup> As a result, service providers need only have a “bare-bones repeat infringer policy” that would protect the provider from liability “even if it is profiting from the piracy and does absolutely nothing to discourage it.”<sup>62</sup>

Service providers are held to the bare minimum of standards, and copyright holders are left dissatisfied. The DMCA sought to clear some of the confusion, and for the most part, it succeeded; the safe harbors found in Section 512 allow for most service providers to end any litigation through an early motion for summary judgment, which provides clarity by offering finality, improving consistency of judicial opinions, and providing litigants reasonably certain expectations of litigation outcomes prior to engaging in expensive motions practice.<sup>63</sup> However, there remain ambiguities primarily about the conditions upon which the safe harbors hinge, not the safe harbors themselves.<sup>64</sup> As noted, the safe harbors provide immunity from liability for the

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58. See Mark Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1420 (2004) (citing David Nimmer, *Appreciating Legislative History*, 23 CARDOZO L. REV. 909 (2002)).

59. See 17 U.S.C. § 512(c).

60. See Nimmer, *supra* note 55, at 172.

61. See *Capitol Recs., LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 513 (S.D.N.Y. 2013), *aff’d in part, vacated in part, remanded*, 826 F.3d 78 (2d Cir. 2016); Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 514 (2018) (noting that the repeat infringer policy is a “substantive condition on safe harbor eligibility, but has not been interpreted to be a particularly onerous one”).

62. Authors Guild, Comment Letter on Study of Section 512 of Title 17: A Report of the Register of Copyrights, at 2 (Mar. 31, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-90422> [<https://perma.cc/RZ89-EZN7>].

63. Interestingly, the safe harbors in Section 512 overwhelmingly support motions for summary judgment but the same is not true for motions to dismiss. See Eric Goldman, *It’s Really Hard to Win a Motion to Dismiss Based on 512(c)-Myeress v. BuzzFeed*, TECH. & MKTG. L. BLOG (Mar. 5, 2019), <https://blog.ericgoldman.org/archives/2019/03/its-really-hard-to-win-a-motion-to-dismiss-based-on-512c-myeress-v-buzzfeed.htm> [<https://perma.cc/R58U-W4XT>].

64. See Sag, *supra* note 61 at 510.

caching, hosting, and linking of infringing content or for instances in which the service provider is a “mere conduit” that the user utilizes to infringe on protected works.<sup>65</sup> Even though the safe harbors were intended to clear up issues of liability, the conditions underpinning them—like Section 512(i)—are barriers to effectuating the clarity intended by Congress when it passed the DMCA.<sup>66</sup> Some argue that remaining doubts as to liability of service providers are evidence of Congress achieving its goal to provide statutory support for the growth of the internet.<sup>67</sup> While it might seem counterintuitive, this argument considers the lack of clarity to be a sign that the private sector is self-regulating its conduct at an acceptable level, foreclosing the possibility that courts will step in to offer guidance of their own. Given that Congress sought to provide undeniable protections to service providers, it follows that any liabilities have remained unanswered because the safe harbors effectively prevent adjudication of the issues. Put differently, the boundaries of service provider liability have not been tested because platforms are largely acting well within that statutory regime.

While the DMCA provided clearer boundaries on the actions that service providers could and could not take, it did not resolve all outstanding interpretive issues. There remain ambiguities in the statute that have led to confusion and inconsistent case law, particularly on the conditions of safe-harbor eligibility—problems that the DMCA was supposed to resolve.<sup>68</sup> Section 512(i)’s repeat infringer policy requirement is one of the most significant and frequent causes of this uncertainty.<sup>69</sup> The difference now, as compared to when Congress created the DMCA, is that, nearly thirty years later, the internet is no longer a tiny creature in need of incubation.<sup>70</sup> It has now become a beast so large that “we couldn’t kill [it] if we tried;” the policy considerations relevant to support a promising new industry are not as significant now as they once were.<sup>71</sup> To avoid the mistakes of the past, Section 512(i) must be reinterpreted to provide clarity as to which infringers must be

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65. *Id.* at 512.

66. *Id.* at 510.

67. *Id.*

68. See Org. for Transformative Works, Comment Letter on Study of Section 512 of Title 17: A Report of the Register of Copyrights, at 19–20, <https://www.regulations.gov/document/COLC-2015-0013-86027> [<https://perma.cc/3756-XC59>].

69. *Id.*

70. See Paul Ohm, *We Couldn’t Kill the Internet if We Tried*, 130 HARV. L. REV. F. 79, 80 (2016) (noting that the generative force of the internet is “unlike any other technology we have concocted to date”).

71. *Id.* at 85.

terminated from a service. In order to reinterpret Section 512(i), it is important to discuss in detail the ambiguities currently associated with the repeat infringer policy requirement.

### III. DMCA'S "REPEAT INFRINGER" DEFINITION PROBLEM

Despite copyright holders' "litigat[ing] every word of the DMCA across multiple circuits," three issues persist with the broad scope of Section 512(i).<sup>72</sup> First, the meaning of "repeat infringer" is unclear. A repeat infringer could mean either an individual that infringes multiple times or an individual that infringes multiple works. Even if the meaning were clear, Section 512(i) is silent about the level of certainty that providers must have to define someone as a repeat infringer—whether, for example, it is sufficient that the user is *allegedly* a repeat infringer or if something more is needed.<sup>73</sup> A second, similar concern creeps into vague terms like "appropriate circumstances" that mandate termination of users and subscribers and for which the DMCA offers no guidance.<sup>74</sup> "Appropriate" is subjective and could mean different things based on the user, the platform, or the content involved. Third, the same can also be said for the adoption and implementation requirements in Section 512(i).<sup>75</sup> These ambiguities have led to irregular judicial action, which in turn has motivated service providers to adopt wildly different repeat infringer policies.

Put plainly, a service provider must (1) adopt and reasonably implement a policy to (2) terminate repeat infringers in (3) appropriate circumstances.<sup>76</sup> As to the meaning of each of these three requirements, the DMCA offers no clear guidance.<sup>77</sup> Consequentially, service providers have had difficulty creating repeat infringer policies. The impact of this difficulty creates increased costs to service providers both because of the constant need to reevaluate their policies and through

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72. See Org. for Transformative Works, *supra* note 68, at 19.

73. There remain significant ambiguities about infringement online in general. There are clear examples of infringement, such as uploading a complete copy of a movie or song to an online platform. With user-generated content, however, the matter becomes less clear. User-generated content frequently incorporates segments of larger works to create new works. The resulting creation may look like infringement to some, but not to others. *Id.*

74. A2IM Music Community, Comment Letter on Study of Section 512 of Title 17: A Report of the Register of Copyrights, app B at 8 (Apr. 7, 2016), <https://www.regulations.gov/document?D=COLC-2015-0013-89806> [<https://perma.cc/8FQG-EQ7F>].

75. *Id.* app C at 13.

76. *Id.* app B at 11.

77. See *id.*

liability imposed on the providers for having an insufficient policy.<sup>78</sup> Hitting a constantly moving target is difficult, especially when the target varies in character based on which court hears the dispute.

Since some policies are insufficient, there is also likely underenforcement of the rights of copyright holders as well. Insufficiently defined repeat infringer policies create opportunities for individuals who infringe protected works on numerous occasions to remain on platforms and continue infringing.<sup>79</sup> This increases copyright owners' obligation to self-police their expression by scouring the internet to report instances of infringement—an impractical task for all but those wealthy few with the time or financial resources to moderate others' use of their expression.<sup>80</sup> Additionally, there are ancillary costs to consumers on platforms that, out of a fear of vicarious liability, have created policies that are too stringent.<sup>81</sup> A policy too severe in its punishment of users will lead to more users being removed from platforms or losing access to the internet more broadly, solely because the service provider lacks sufficient information as to what the DMCA requires of its repeat infringer policy.

Institutional copyright holders and consumers alike have expressed near-uniform disapproval toward the DMCA's unclear directive. The vagueness in Section 512(i), they argue, has allowed service providers to “stick their heads in the sand rather than do their fair share.”<sup>82</sup> Much like the service providers, courts have “also struggled with when and how an OSP should determine who the repeat infringers are in order to terminate them.”<sup>83</sup> The following Sections summarize the divergent developments in the law.

#### A. What is Meant by “Repeat Infringer?”

Despite the topic's growing importance, academics have written very little on the meaning of “repeat infringer” under Section 512(i).<sup>84</sup> Beginning with an analysis of two foundational cases, *Corbis Corp v. Amazon.com*<sup>85</sup> and *BMG Rights Management v. Cox Communications*,<sup>86</sup> this Section outlines a working definition of “repeat infringer” as one

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78. See *id.* at 3.

79. See *id.*

80. See *id.* at 4.

81. See *id.* at 11.

82. *Id.* at 3.

83. Authors Guild, *supra* note 62, at 26.

84. See *id.* at 40.

85. 351 F. Supp. 2d 1090 (W.D. Wash. 2004).

86. 881 F.3d 293 (4th Cir. 2018).

who allegedly has infringed protected works multiple times. In numerous cases, copyright holders have been able to successfully invoke and apply this definition to hold OSPs liable for failing to implement sufficient repeat infringer policies.<sup>87</sup>

The first important case to address repeat infringers came less than ten years after passage of the DMCA.<sup>88</sup> The case involved Amazon, a company now evaluated at well over \$1 trillion, but which, in 2004, at the time of the suit, had just begun to explore commercial ventures beyond its online bookselling business.<sup>89</sup> Among other things, Amazon began to expand its capacity to host third-party sellers, a feature that third-party platforms sought to exploit.<sup>90</sup> One such platform was zShops, similar to modern-day eBay or Craigslist.<sup>91</sup> zShops retailers could showcase their products and sell them directly to online consumers.<sup>92</sup> While Amazon did not participate in the process of uploading or linking images to listings on zShops, it did require vendors to register with Amazon, pay a flat monthly fee, use Amazon services for any credit card transactions, and pay Amazon a percentage of the price of any product they sold through the zShops platform.<sup>93</sup> The zShops platform presented a potentially lucrative opportunity for Amazon in its early days, paving the path forward to the trillion-dollar conglomerate that the retailer would later become. However, by the end of its time on Amazon, zShops had suffered a host of setbacks, including intellectual property claims that the platform had impermissibly utilized eBay's protected trademark.<sup>94</sup>

However, Amazon's repeat infringer policy also landed zShops in hot water.<sup>95</sup> In registering with Amazon, vendors were required to

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87. For instance, the most recent and comprehensive review of the law around repeat infringement comes from Andres Sawicki's work on the subject over fifteen years ago. See Andres Sawicki, *Repeat Infringement in the Digital Millennium Copyright Act*, 73 U. CHI. L. REV. 1455, 1456 (2006).

88. See *Corbis Corp.*, 351 F. Supp. 2d at 1100.

89. See *id.* at 1094.

90. See Alnoor Peermohamed, *Failures That Moulded Amazon's Online Marketplace into a Successful Model*, BUS. STANDARD (Dec. 5, 2018), [https://www.business-standard.com/article/companies/failures-which-moulded-amazon-s-online-marketplace-into-a-successful-model-118120401253\\_1.html](https://www.business-standard.com/article/companies/failures-which-moulded-amazon-s-online-marketplace-into-a-successful-model-118120401253_1.html) [<https://perma.cc/2BWC-KQFY>].

91. See *Corbis Corp.*, 351 F. Supp. 2d at 1094.

92. See *id.*

93. See *id.*

94. See Steve Yegge, *Jeff Bezos, Jack Ma, and the Quest to Kill eBay*, MEDIUM (Nov. 24, 2018), <https://medium.com/s/story/jeff-bezos-jack-ma-and-the-quest-to-kill-ebay-bb4992dc5020> [<https://perma.cc/9AAF-ADUZ>].

95. See *Corbis Corp.*, 351 F. Supp. 2d at 1095.



enter into a “Participation Agreement” that set forth guidelines for their use of zShops.<sup>96</sup> Those guidelines expressly prohibited vendors from listing or linking to any item that “infringes any third-party intellectual property rights.”<sup>97</sup> As part of its review process, the Participation Agreement noted that Amazon had the “right but not the obligation” to monitor the activity of the vendors and to investigate reported violations of its policy.<sup>98</sup>

These terms of service went further, however, to outline the steps Amazon would take when notified of infringement on the zShops site.<sup>99</sup> When a copyright holder reported that a vendor had infringed their copyright, Amazon would cancel the allegedly infringing listing and then send the vendor an email.<sup>100</sup> In that email, the vendor was notified of the cancellation, the complaining party was identified, and, most importantly, the vendor was reminded of Amazon’s repeat infringer policy: “repeated violations of our Community Rules could result in permanent suspension from our Auction, zShops, and Amazon Marketplace sites.”<sup>101</sup> This short statement was the only utterance of Amazon’s repeat infringer policy. The policy never uses the term “repeat infringer;” it is barely a sentence long, it makes clear that violations may or may not result in terminations from the platform, and it never describes the methodology Amazon uses to determine who qualifies as a repeat infringer. Is such a lackluster policy sufficient to afford safe harbor to Amazon under Section 512(i)?

This bare-bones policy was tested in 2003 when Corbis, a business focused on licensing art, images, and photographs, sued Amazon under theories of contributory and vicarious infringement.<sup>102</sup> Corbis alleged 232 separate counts of infringement for images to which it held the underlying copyright.<sup>103</sup> Two of these images appeared on the Amazon-owned and -operated Internet Movie Database (IMDb) site, while the remaining 230 were hosted by various vendors on Amazon’s zShops platform.<sup>104</sup> Corbis sued Amazon, at which point Amazon

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96. *See id.*

97. *See id.*

98. *See id.* Amazon had even established a designated agent who was responsible for receiving claims of copyright infringement to comply with other mechanisms of Section 512 such as the notice and takedown procedures.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 1094–95.

103. *See id.* at 1097.

104. *See id.*

removed the allegedly infringing content.<sup>105</sup> Some terminated vendors, however, reregistered separate accounts on the zShops platform under “slightly different names” in order to continue selling the goods with the allegedly infringing imagery.<sup>106</sup> The terminated vendors’ circumventing removal through ban evasion was the problem that the repeat infringement policy requirement was designed to prevent; according to Corbis, Amazon’s policy failed to address that problem.<sup>107</sup> In order to hold Amazon liable under third-party infringement doctrines, Corbis had to show that Amazon’s repeat infringer policy did not satisfy the conditions located in Section 512 of the DMCA and, therefore, that Amazon should not receive the protections of the safe-harbor provisions.<sup>108</sup>

Unfortunately for Corbis, Chief Judge Lasnik of the Western District of Washington granted Amazon’s motion for summary judgment.<sup>109</sup> The court noted that the “overall structure of the DMCA” indicated that a policy to terminate repeat infringers need not be very specific.<sup>110</sup> Even though Amazon provided no information regarding its process for removing repeat infringers, the vague language in Section 512(i) was representative of “Congress cho[osing] not to adopt such specific provisions” in order to leave the policy requirements “loosely defined.”<sup>111</sup> Courts, service providers, and copyright holders all understood this lack of congressional specificity to mean one thing: service providers could create whatever policy they desire so long as “there is a realistic threat” that repeat infringers would lose access to the provider’s service.<sup>112</sup> In this instance, Amazon’s policy satisfied Section 512(i), even though Amazon only disseminated the policy to a user after the user had reported infringing content.<sup>113</sup> To the court, it was immaterial that Amazon’s policy never used the term “repeat infringer” nor described the criteria Amazon would use to determine who would qualify.<sup>114</sup>

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105. *See id.*

106. *See id.*

107. *See id.* at 1104.

108. *See id.* at 1099.

109. *See id.* at 1118–19.

110. *See id.* at 1100.

111. *See id.* at 1101.

112. *See id.* (quoting *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)).

113. *See id.*

114. *See id.*

Copyright holders found that *Corbis Corp.* shifted the analytical burden significantly; rather than require that the service provider show that its policy was sufficient, the holding seemed to require the copyright owner to establish that the policy was *not* sufficient.<sup>115</sup> *Corbis Corp.* meant that service providers could define “repeat infringers” as they deemed fit with little judicial interference.<sup>116</sup> From the copyright holder’s perspective, the court’s holding seemed to sanction an understanding of the repeat infringer policy requirement that gave little thought to protecting the underlying intellectual property.<sup>117</sup>

Not only has there been a lack of congressional guidance and little analogous case law, but there has also been an overall lack of discussion in the scholarly literature about what “repeat infringer” actually means. Policymakers, lacking interpretive guidance from the statute and the legal academy, must therefore resolve two remaining questions: First, what quantity of infringement makes it “repeated?” Or, as the Copyright Office puts it, must infringement occur “two [times] or twenty or somewhere in between?”<sup>118</sup> Second, is alleged infringement enough to qualify one as a repeated infringer?<sup>119</sup>

The legal academy has been undecided on these issues. Noted copyright scholar David Nimmer had put forth one solution to both questions. He suggested that the repeat infringer policy should only apply to repeatedly *adjudicated* infringers.<sup>120</sup> Where infringers must be adjudicated as such, Nimmer argued, the number of infringements needed to deem one as “repeatedly” infringing would answer itself through judicial orders.<sup>121</sup> This simplistic proposal would require service providers to have clear policies to remove repeat infringers while respecting the copyright holder as the enforcer of its copyright.<sup>122</sup>

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115. See *id.* at 1110.

116. See *id.* at 1101.

117. See *id.* at 1100.

118. See SECTION 512 REPORT, *supra* note 6, at 99.

119. Consider the following scenario: a copyright holder has a strong disdain for a certain Facebook account. The copyright holder files repeated notices to Facebook that the account is infringing the holder’s copyright, and Facebook terminates the account. Should Facebook deem this account a repeat infringer even if those notices filed by the angry copyright holder were frivolous? Part VI discusses this phenomenon in greater detail. The weaponization of copyright infringement against the alleged infringer as well as overprotective automated systems such as YouTube’s ContentID software can lead to innocent users being de-platformed without any meaningful recourse. The ancillary harm to internet users is not at the forefront of much of the discussion around reforming the DMCA. Nevertheless, users are harmed by overly protective copyright enforcement on the internet—especially enforcement that fails to consider defenses such as fair use.

120. See Nimmer, *supra* note 55, at 185.

121. See *id.*

122. See *id.*

To date, no other authors have published to support or challenge Nimmer's interpretation of the repeat infringer policy requirement. This argument, however, has not been adopted elsewhere. In 2018, for example, the US Court of Appeals for the Fourth Circuit rejected Nimmer's suggestion and handed a decisive win to copyright holders.<sup>123</sup> In *BMG Rights Management v. Cox Communications*, the court seemingly settled the issue of whether Section 512(i) envisioned application to alleged or adjudicated infringers.<sup>124</sup> Writing for the court, Judge Motz held that Section 512(i) was not limited to adjudicated infringers and, further, that service providers could lose their safe-harbor protections if they were "willfully blind" to repeated infringement.<sup>125</sup> However, unfriendly litigants will likely be able to cabin the reach of this case due to its highly irregular facts. Cox Communications was an internet service provider that furnished internet access to nearly five million subscribers.<sup>126</sup> As a conduit provider, Cox never stored nor reviewed any user-generated content, nor did it interfere with its users' internet activity; it merely connected individuals to the internet for a monthly fee.<sup>127</sup>

In order to avail itself of the safe-harbor privileges of the DMCA, Cox attempted to feign compliance with Section 512(i).<sup>128</sup> Similar to Amazon's policy in *Corbis Corp.*, Cox's form agreement with its subscribers never mentioned a repeat infringer policy nor said anything explicitly about repeat infringers.<sup>129</sup> The policy reserved in Cox the right to suspend or terminate subscribers who used the service "to post, copy, transmit, or disseminate any content that infringes the patents, copyrights . . . or proprietary rights of any party."<sup>130</sup> Compared to

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123. See *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 298 (4th Cir. 2018). This is a case arising under Section 512(a) and discusses liability for an ISP whose users utilize their services to upload and distribute infringing content. As noted in Part I, this Article focuses on OSP liability under Section 512(c). The analysis of this case is therefore limited to the points most salient to OSPs and Section 512(i). This case serves as an important development in the interpretation of 512(i), because it is one of the few courts to grapple with defining what a repeat infringer is. It also shows how important the definition of that term is for all service providers given the magnitude of potential monetary damages if left unprotected by the DMCA.

124. See *id.* at 301.

125. See *id.* at 312.

126. See *id.* at 298.

127. See *id.* at 299.

128. *Id.* at 303.

129. *Id.* at 299.

130. *Id.*

Amazon, however, Cox took a more laissez-faire approach to enforcing this agreement.<sup>131</sup>

Cox had exceptionally rudimentary automated enforcement tools, which lagged significantly behind those used by service providers of a similar size at the time.<sup>132</sup> As if its superficial automated system were not already toothless, Cox relied on a “thirteen-strike policy that determines the action to be taken based on how many notices Cox received” about a particular subscriber.<sup>133</sup> The policy hardly ever resulted in penalties for repeat infringers. In fact, the first notice coming from Cox’s system, alleging that a subscriber had infringed on one’s copyright, resulted in no action at all.<sup>134</sup> Even subsequent notices filed by copyright holders to Cox resulted in little to no enforcement of Cox’s already lackluster policy.<sup>135</sup> For instance, the second through the seventh notices were accompanied only by emails from Cox to the infringing subscriber and in no way impacted a subscriber’s access to the service.<sup>136</sup> Even when viewed in the most favorable light, Cox’s policy appeared to provide little security for copyright holders, who had to wait for the thirteenth instance of infringement before Cox would take remedial action.<sup>137</sup>

In the fourteen years between *Corbis Corp.* and *Cox Communications*, repeat infringer policies had only become more informal and less uniform between service providers.<sup>138</sup> Cox’s policy was, after all, similar at least in form to Amazon’s policy, which also never used the term “repeat infringer” nor informed users of policy specifics.<sup>139</sup> In the years after *Corbis Corp.*, copyright holders took greater notice of service providers’ apparent inability to hold repeat infringers accountable. By the time of the *Cox Communications* decision, therefore, copyright holders were demanding stricter oversight, just as service providers were moving in the opposite direction.<sup>140</sup> In many ways, Cox’s sparse policy was the culmination of that growing trend. In the age of peer-to-peer file sharing technology like BitTorrent, digital copyright infringement had become “particularly fast and efficient,” making repeat infringer policies all the

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 303.

139. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1100 (W.D. Wash. 2004).

140. *Cox Commc'ns, Inc.*, 881 F.3d at 299.

more important.<sup>141</sup> But, although infringement had become easier—or, at least, as distribution of infringing material became more widespread—service providers like Cox consistently failed to develop strong and explicit repeat infringer policies.<sup>142</sup>

*Cox Communications* provides an archetypical example of a failing policy. Cox imposed no penalty on the repeat infringer after the first seven reports of alleged infringement, and the eighth and ninth notices only temporarily limited the infringer's access to the internet; in the latter cases, the infringer could circumvent this limit by clicking a simple acknowledgement box.<sup>143</sup> Both the policy and its enforcement were unsuccessful. All in all, it was not until the *thirteenth* violation of Cox's policy that terminating the repeat infringer was ever considered, and even then, termination was not a foregone conclusion.<sup>144</sup> Cox never had an automatic termination policy and rarely terminated users even after their thirteenth strike.<sup>145</sup> Copyright holders believed that Cox's policy not only put their intellectual property at risk but failed to fulfill Congress's goal in requiring repeat infringer policies under Section 512(i)—namely, to ensure that repeat infringers lost the ability to circulate infringing works.<sup>146</sup> Having a policy this unenforced and ill-conceived all but invited the lawsuit that soon arrived.

In 2014, BMG Rights Management, an institutional rights organization that owns and manages the copyright in tens of thousands of musical compositions, sued Cox for contributory and vicarious copyright infringement.<sup>147</sup> Picking up on arguments in scholarly literature (or perhaps recognizing how poorly prescribed its repeat infringer policy was), Cox argued that “repeat infringer” must mean adjudicated and not simply alleged repeat infringers.<sup>148</sup> If that were true, Cox's repeat infringer policy satisfied the requirements in Section 512(i) because it had no knowledge of any adjudicated repeat infringers using its service.<sup>149</sup> Even though its policy failed to threaten infringers with a loss of internet access, the policy would be sufficient under the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 300.

147. *Id.*

148. *Id.* at 301.

149. *Id.*

DMCA if Section 512(i) applied only to adjudicated infringers.<sup>150</sup> In that scenario, to prevail on their infringement claims, copyright holders would need to provide proof to Cox that the prospective defendant was a repeat infringer in the form of a court order finding the same.<sup>151</sup>

The Fourth Circuit, however, disagreed.<sup>152</sup> Turning first to a lengthy discussion about the statutory language of the DMCA, the court noted that in other areas of the law, like in Section 512(g), Congress had distinguished between adjudicated and alleged infringement, and thus their failure to do so in Section 512(i) represented a conscious choice that alleged infringement was all that was needed to identify repeat infringers.<sup>153</sup> The court then pointed to an oft-cited passage in the legislative record that explained that Section 512(i) was created to convey a “realistic threat” to repeat infringers that their activity jeopardized their continued access to the provider’s service.<sup>154</sup> Based on this language, the court concluded that “the risk of losing one’s internet access would hardly constitute a ‘realistic threat’ capable of deterring infringement if that punishment applied only to those *already* subject to civil penalties and legal fees as adjudicated infringers.”<sup>155</sup> In that case, therefore, the threat of losing access would exist “only once [the repeat infringer] has been sued in court and found liable for multiple instances of infringement”—a restriction that the court determined to be unworkable.<sup>156</sup>

The holding in *Cox Communications* heralded two significant developments in copyright law.<sup>157</sup> First, the case determined that “repeat infringer” need only refer to “repeat *alleged* infringer.”<sup>158</sup> Additionally, the Fourth Circuit noted that, despite the “need to afford ISPs flexibility in crafting repeat infringer policies,” an ISP that fails to enforce the terms of that policy “in any meaningful fashion” does not satisfy Section 512(i)’s implementation requirement.<sup>159</sup> Second, *Cox*

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150. *Id.*

151. *Id.*

152. *Id.* at 303.

153. *Id.* at 301. 17 U.S.C. § 512(g) limits liability for taking down “activity claimed to be infringing . . . regardless of whether the material or activity is ultimately determined to be infringing.” The argument is that Congress was able to distinguish between alleged and adjudicated infringement since Congress made clear that such a distinction did not matter for Section 512(g). Therefore, had Congress meant to restrict Section 512(i) to adjudicated infringers, it could have easily.

154. *Cox Commc’ns, Inc.*, 881 F.3d at 302.

155. *Id.* (emphasis in original).

156. *Id.*

157. *Id.* at 303, 310.

158. *Id.* at 303.

159. *Id.* This implementation requirement is discussed further in Part III.

*Communications*' broader ruling held that contributory infringement required more than a showing that the infringement was caused by a service provider's negligence.<sup>160</sup> Rather, for a court to find the service provider liable for contributory infringement, the provider must (1) either lack a policy entirely or have a policy that is not enforced in a "meaningful fashion" and (2) be willfully blind to "direct infringement" occurring on its platform or through its services.<sup>161</sup>

Both of these developments broadened the scope of service provider liability for contributory infringement. By making clear that alleged infringers must be removed, the Fourth Circuit put the onus on the service providers to create not only a reliable system to identify repeat infringers, but also a reliable policy to ensure their removal from the provider's service.<sup>162</sup> The court, moreover, in articulating a "willful blindness" test for policing direct infringement, lowered the bar for holding service providers contributorily liable.<sup>163</sup> Almost immediately, the *Cox Communications* decision was lauded by institutional copyright holders.<sup>164</sup> The National Music Publishers Association, for instance, noted that "the *BMG v. Cox* case highlights an important development from our perspective, namely the opportunity for the successful enforcement of the plain language of the DMCA, where a service has enabled repeat infringers in massive scale on its own network."<sup>165</sup>

Seemingly still dissatisfied, however, the National Music Publishers Association continued to note that "enforcement in the [*Cox Communications*] litigation involved the most extreme of circumstances" and that the ruling had "not changed the music community's perspective on the DMCA."<sup>166</sup> At first glance, it appears true that Cox's lackluster policy and its indifference toward repeat infringement were exceptional. At the same time, however, any initial concern that the *Cox Communications* case would have a limited impact has proven false in the years since the ruling was handed down. After *Cox Communications*, in cases where copyright holders have contested the repeat infringer policies of service providers, courts have been more

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160. *Id.* at 310.

161. *Id.* at 303, 308.

162. *Id.* at 305.

163. *Id.* at 310.

164. *See, e.g.*, SECTION 512 REPORT, *supra* note 6, at 97 n.510.

165. *Id.*

166. *Id.*



willing than ever to find that these policies did not entitle the providers to the protections of the statutory safe harbors.<sup>167</sup>

### 1. The State of the Repeat Infringer Policy Definition Today

Given the historical backdrop, this Section captures the current state of the repeat infringer policy requirement. Beginning with *Corbis Corp.*, historically, service providers have been given broad latitude to create their own repeat infringer policies and define repeat infringers in the context of the DMCA.<sup>168</sup> Since the *Corbis Corp.* era, courts have developed a more copyright holder-friendly definition of “repeat infringer.”<sup>169</sup> Taking “repeat” in isolation, the infringement must happen “repeatedly and flagrantly” or in a “blatant” manner.<sup>170</sup> As one court has put it, “all it t[akes] to be a ‘repeat infringer’ [is] to repeatedly sideload copyrighted material for personal use.”<sup>171</sup> The user allegedly infringing a valid copyright need not be aware that its activities constitute infringement to be considered an infringer.<sup>172</sup> This state of the law still makes it difficult for copyright owners to determine who will qualify as a repeat infringer because the standards are still left to the discretion of each individual service provider, and their repeat infringer policies vary significantly.<sup>173</sup> While it is not incumbent on copyright owners to identify repeat infringers on a given platform, their inability to do so correspondingly inhibits their ability to hold OSPs accountable for failing to enforce the OSPs’ infringement policies.<sup>174</sup> At the same time, however, leaving this discretion to service providers

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167. See, e.g., *UMG Recordings, Inc. v. Grande Commc’ns Networks, LLC*, 384 F. Supp. 3d 743, 755–56 (W.D. Tex. 2019) (holding that “comparing the facts in this case to the facts in [Cox]” shows the ISP was willfully blind and failed to have a reasonably implemented repeat infringer policy); *Warner Records Inc. v. Charter Commc’ns, Inc.*, 454 F. Supp. 3d 1069, 1086 (D. Colo. 2020) (holding that “*BMG Rights Management* [is] instructive as applied to this case” and concludes that the ISP is not immune to liability); *BWP Media USA Inc. v. Polyvore, Inc.*, 922 F.3d 42, 44 (2d Cir. 2019) (overturning grant of summary judgment because there were serious questions of material fact as to whether the service provider “satisfied the requirements for the Digital Millennium Copyright Act (DMCA) § 512(c) safe harbor”); *Atl. Recording Corp. v. Spinrilla, LLC*, 506 F. Supp. 3d 1294, 1318 (N.D. Ga. 2020) (using *Cox Communication’s* definition of repeat infringer to deny the service provider’s motion for summary judgment under the DMCA safe-harbor provisions).

168. See *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1118 (C.D. Cal. 2009) (citing *Corbis Corp.*, 351 F.Supp. 2d at 1100–01).

169. See *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 302 (4th Cir. 2018).

170. *Id.*

171. See *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79, 89 (2d Cir. 2016).

172. See *id.* at 90.

173. *Id.* at 87.

174. SECTION 512 REPORT, *supra* note 6, at 21.

tracks the expressed legislative intent in passing Section 512(i).<sup>175</sup> Therefore, the malleability of the term “repeat infringer” necessarily permits variations in its definition from one service provider to the next.

*B. The Nonexistent Standard for Adoption and “Appropriate Circumstances”*

There are two general requirements in Section 512(i)(1)(A) for safe-harbor protections.<sup>176</sup> The first is the requirement that service providers adopt a *sufficient* policy.<sup>177</sup> The ambiguity with that requirement stems from the indeterminate nature of the term “repeat infringer,” which makes it difficult for providers to craft a satisfactory policy, as illuminated in the previous section.<sup>178</sup> The second requirement demands that service providers reasonably administer the sufficient policy.<sup>179</sup> These two requirements naturally share some overlap; however, the former asks, first, whether the service provider actually adopted a policy, and, second, whether that policy “require[s] termination of users’ accounts under reasonable circumstances.”<sup>180</sup> The remaining sections of this Article discuss and analyze the ambiguities that remain in the terms embedded in those two general requirements: “reasonably implemented,” “adoption,” and “termination in appropriate circumstances.”<sup>181</sup>

Service providers must satisfy the requirement that their policy be “reasonably implemented;”<sup>182</sup> if the service provider “could have used another, more effective and reasonable, method for preventing disingenuous users from re-accessing” their services, then this requirement has not been satisfied.<sup>183</sup> For this and the other requirements in Section 512(i)(1)(a), like “adoption” and “termination in appropriate circumstances,” courts have struggled to determine

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175. *See id.* at 99.

176. 17 U.S.C. § 512(i)(1)(A).

177. *Id.*

178. *See id.*

179. *Id.*

180. SECTION 512 REPORT, *supra* note 6, at 103.

181. The full text of 17 U.S.C. § 512(i)(1)(A) states a service provider is only eligible for limitations on liability if the service provider: “has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.”

182. 17 U.S.C. § 512(i)(1)(A).

183. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1103–04 (W.D. Wash. 2004).

when a service provider has or has not “reasonably implemented” its repeat infringer policy, and the resulting ambiguity has created judicial inefficiencies.<sup>184</sup> In the case of the “adoption” requirement, for example, a service provider’s compliance will almost always be a question of fact, the determination of which does not permit application of a bright-line rule.<sup>185</sup> This hindrance extends to the rest of Section 512(i), which hampers efforts to discern its intended meaning.

The most confusing and consequential of the three ambiguities is the “termination under appropriate circumstances” requirement, primarily because of its inherent subjectivity and context-specific evaluation.<sup>186</sup> Section 512(i) requires service providers to adopt a policy that “provides for the termination *in appropriate circumstances*” of repeat infringers.<sup>187</sup> Just as the DMCA failed to define “repeat infringer,” though, it also failed to define or describe “appropriate circumstances.”<sup>188</sup> Early case law attempted to provide guidance on more basic questions like the definition of “repeat infringer” under the DMCA; it did not focus on the deceptively simple phrase “appropriate circumstances.”<sup>189</sup> The focus on these more fundamental questions foreclosed any robust analysis on the circumstances that would require a user to be terminated. Yet again, therefore, the DMCA’s definition problem led to erratic judicial standards and vastly different policies from one service provider to another.

Because of this confusion, courts have frequently decided to analyze “appropriate circumstances” as a part of the “adoption” or “implementation” requirement.<sup>190</sup> The failure to recognize “appropriate circumstances” as its own distinct requirement has caused the law to develop in a way contrary to Congress’ legislative intent.<sup>191</sup> In the current environment, courts have condensed “appropriate circumstances” into an afterthought; the “implementation [of a repeat infringer policy] is reasonable if, under ‘appropriate circumstances,’ the service provider terminates users who repeatedly or blatantly infringe

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184. SECTION 512 REPORT, *supra* note 6, at 109.

185. EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79, 88 (2d Cir. 2016). For example, in some cases the policy exists only in the head of the service provider operator and it is not written anywhere. It then becomes a difficult question as to whether a policy exists and whether it terminates users in appropriate circumstances. SECTION 512 REPORT, *supra* note 6, at 104 n.547.

186. SECTION 512 REPORT, *supra* note 6, at 103.

187. 17 U.S.C. § 512(i)(1)(A) (emphasis added).

188. SECTION 512 REPORT, *supra* note 6, at 103.

189. *Id.*

190. See BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc., 881 F.3d 293, 303 (4th Cir. 2018).

191. SECTION 512 REPORT, *supra* note 6, at 106.

copyright[s].”<sup>192</sup> This is nothing more than judicial misconstruction of the appropriate circumstances requirement. Under this view, the court determines that this requirement is simply an element of reasonable implementation, not its own condition—in other words, a policy is only reasonably implemented if termination occurs in appropriate circumstances.<sup>193</sup> Yet, policies undoubtedly may be “reasonably implemented” and still fail the “termination in appropriate circumstances” requirement.<sup>194</sup> By sweeping the issue under a larger heading, judicial actors avoid defining “appropriate circumstances.” The lack of any legislatively or judicially created standard has led to different case law on the meaning of “appropriate circumstances.” Largely, the select few cases discussing this requirement fall within two categories—what this Article calls “egregious failure” and “factor formulation,” with the first being more common.<sup>195</sup>

### 1. “Appropriate Circumstances” as Egregious Failure

Most courts that discuss “appropriate circumstances” find that the requirement is not met only when there is particularly egregious behavior by either the alleged infringer or the service provider.<sup>196</sup> These cases tend to look solely at how service providers conduct themselves in addressing repeat infringement.<sup>197</sup> For example, the court in *Capitol Records, LLC v. Escape Media Group* found that a service provider was ineligible for the DMCA’s safe harbors because “hundreds or thousands” of infringers that had received infringement notices had avoided consequential termination.<sup>198</sup> In that case, Escape Media Group owned and operated Grooveshark, a free music-streaming website that allowed users to swap music stored on their personal computers, similar to other peer-to-peer programs like Napster.<sup>199</sup> The platform’s setup and structure meant that most users committed copyright infringement each time they copied a song and uploaded it to the Grooveshark

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192. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

193. See *id.*

194. See *infra* Section III.D.

195. SECTION 512 REPORT, *supra* note 6, at 104–05.

196. *Id.* at 104.

197. *Id.* at 105.

198. *Capitol Recs., LLC v. Escape Media Grp.*, No. 12-CV-6646 (AJN), 2015 WL 1402049, at \*12–13 (S.D.N.Y. Mar. 25, 2015).

199. *Id.*

interface.<sup>200</sup> The number of infringing users on the platform was enormous.<sup>201</sup>

Grooveshark's problems, however, started long before any user infringed a copyright through the Grooveshark service. When users signed up for the platform, Grooveshark informed them of its repeat infringer policy.<sup>202</sup> However, once the user signed up for the service, Grooveshark enforced an entirely different policy.<sup>203</sup> Grooveshark enumerated a one-strike policy which "purport[ed] to 'disable account holders' upload privileges in response to DMCA notifications, but [which] does not delete all data or audio files associated with their account or bar them from signing in to simply and passively use the Grooveshark website."<sup>204</sup> Under the terms that Grooveshark actually enforced, Grooveshark would never remove a repeat infringer.<sup>205</sup> Instead, Grooveshark would only restrict the infringer's uploading privileges while still hosting the infringing content on its platform.<sup>206</sup> On top of this, Grooveshark's definition of "appropriate circumstances" effectively created a "DMCA Lite" procedure.<sup>207</sup> For instance, in order for Grooveshark to consider termination appropriate, the takedown notice provided by the copyright holder must not be deemed defective by Grooveshark's parent company, Escape Media.<sup>208</sup> Evaluating defective takedown notices is not uncommon because the DMCA itself lays out conditions that takedown notices must meet to be deemed satisfactory in Section 512(c)(3)(A).<sup>209</sup> However, Grooveshark additionally required that takedown notices be "signed under oath"—a condition that the DMCA did not require.<sup>210</sup> This additional burden on copyright holders had significant practical ramifications. Over a period

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200. *Id.* at \*32.

201. *Id.*

202. *Id.* at \*23–24.

203. *Id.* at \*22–23.

204. *Id.* at \*13.

205. *Id.* at \*13–14.

206. *Id.* at \*24.

207. *Id.* at \*30.

208. *Id.* Notices must be signed by an authorized actor; identify the copyrighted work; identify the infringing work; give reasonably sufficient information to permit the service provider to contact the complaining party, such as an address and telephone number; submit a statement of good faith belief that this is infringement; and submit a statement that the notification is accurate. *See* 17 U.S.C. § 512(c)(3).

209. 17 U.S.C. § 512(c)(3)(A); *see also, e.g.*, Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 339, 347–51 (2018) (discussing Section 512(c)(3)'s effective notification requirements).

210. Capitol Recs., LLC, 2015 WL 1402049, at \*31–32.

of just two years, Grooveshark deemed 90 percent of notices it received defective.<sup>211</sup>

The court found for the copyright holders in this case, holding that, considering Grooveshark's pattern of behavior, Grooveshark had "not implemented in appropriate circumstances" its repeat infringer policy.<sup>212</sup> However, in so holding, the court carefully made an important distinction: instead of evaluating "termination in appropriate circumstances," as the text of Section 512(i) appears to require, the court evaluated *implementation* "in appropriate circumstances."<sup>213</sup> Instead of defining the boundaries of appropriate circumstances, the court merely looked at the actions taken by the service provider, weighed those against the degree of infringement on the platform, and then determined whether the provider's enforcement of its policy was adequate or egregious.<sup>214</sup> Notably, of course, the Fourth Circuit in *Cox Communications* did the same thing, finding that Cox's thirteen-strike policy did not lead to termination of users in appropriate circumstances.<sup>215</sup>

Consider the repercussions of this approach. What if Grooveshark's policy of rejecting insufficient notices from copyright holders followed the exact text of the DMCA? What if this compliant policy still led to the dismissal of 90 percent of all notices? Or, what if all other facts remained the same, but instead of restricting uploading privileges, Grooveshark deleted the user's account? The longer the list of rhetorical questions, the clearer the problem with this judicial approach becomes—namely, that even on the terms of the court's solution, the answer to each of those questions remains unclear. Amid that lack of clarity, service providers are left to contemplate solutions of their own. The confusion in the law combined with this approach that evaluates how a service provider implements its policy rather than whether the service provider terminates users in appropriate circumstances forces service providers to comply with a statutory condition that has no definition and no delineated boundaries. Service providers could take a risk-adverse posture and *overenforce* a stringent policy, or they could take a more lax enforcement approach and *underutilize* their less harsh repeat infringer policies. The resulting

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211. *Id.* at \*31.

212. *Id.* at \*29–30.

213. *Id.* at \*30.

214. *See id.* at \*14.

215. *See* BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc., 881 F.3d 293, 300 (4th Cir. 2018).

ambiguity, as in the rest of Section 512(i), has led to both over- and underenforcement of copyright protections, frustrated copyright holders, and imposed higher institutional costs on service providers.

## 2. “Appropriate Circumstances” as Factor Formulations

In deciding whether the repeat infringer policy of a given platform terminates users in “appropriate circumstances,” some courts have gone beyond simply weighing enforcement of the policy against infringement on the platform,<sup>216</sup> either because this factual determination is especially close or because it fails to reckon with the idiosyncrasies of each case. This strand of cases features courts’ attempts to offer clarity and consistency in the absence of legislative guidance.<sup>217</sup> These cases are also generally more accommodating of service providers.<sup>218</sup> By taking the so-called “factor formulation” approach, courts often conduct a holistic review of the given facts against an enumerated list of factors to judge the service provider’s method of terminating users.<sup>219</sup> “Factor formulation” and the “egregious error” approach seek to resolve the same question: whether a service provider’s repeat infringer policy leads to the termination of users in appropriate circumstances.<sup>220</sup> Broadly, the two approaches do this in a similar fashion; yet, the mere enumeration of factors in one case may lead to entirely different results than in a similar case viewed through the egregiousness lens.

In *Ventura Content, Ltd. v. Motherless, Inc.*, the Ninth Circuit provided a clear example of the factor formulations approach, following a similar analysis as the courts in *Capitol Records* and *Cox Communications*, while reaching an opposite conclusion.<sup>221</sup> *Motherless* was an OSP that hosted millions of pornographic images and videos on its site, most of which were created and uploaded by users.<sup>222</sup> *Ventura Content*, a professional creator of pornographic content, located thirty-three clips on *Motherless*’s platform that allegedly infringed on copyrights that *Ventura* owned.<sup>223</sup> In finding in favor of *Motherless*, the

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216. See *Rosen v. eBay, Inc.*, No. CV 16-9183-MWF (EX), 2018 WL 4808513, at \*5 (C.D. Cal. Apr. 4, 2018).

217. See *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

218. *Id.*

219. See *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 603 (9th Cir. 2018).

220. *Id.* at 618–19.

221. *Id.* at 604.

222. *Id.* at 600.

223. *Id.* at 602.

Ninth Circuit provided a list of factors<sup>224</sup> that “may bear on whether a service provider has ‘adopted and reasonably implemented’ its policy for terminating ‘in appropriate circumstances’ repeat infringers.”<sup>225</sup>

The *Ventura* court drew heavily from *Capitol Records*’s “egregious error” analysis to identify factors that may weigh against service providers and, correspondingly, the efficacy of their repeat infringer policies.<sup>226</sup> For instance, if a service provider changed “the email address to which takedown notices are sent” without notifying people of the change, or if the service provider itself participated in the infringement, then the service provider’s policy most likely did not lead to the termination of repeat infringers in appropriate circumstances.<sup>227</sup> Notably, neither of those two factors have any relation to how service providers *remove* users from their platform, which is ostensibly the focus of the statutory termination requirement.<sup>228</sup> The Ninth Circuit continued its analysis, however, by determining whether the service provider “allow[ed] terminated users to rejoin the site” or “refus[ed] to terminate known repeat infringers,” pointing to *Cox Communications* as an example of both factors at work.<sup>229</sup> In so doing, the Ninth Circuit identified factors that could only apply in the most egregious of circumstances, supporting the inclusion of those factors by citing the most egregious examples of service providers’ repeat infringer policies.<sup>230</sup> This approach, however, offered little practical advice to

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224. The entire set of factors the court identified is:

a DMCA log . . . ; blocking a subscriber’s name and email address from uploads; putting email addresses from terminated accounts on a banned list; and prohibiting a banned user from reopening a terminated account. Other factors cut against the service provider, including: changing the email address to which takedown notices are sent without providing notice of the change; participating in copyright infringement; allowing terminated users to rejoin the site; and refusing to terminate known repeat infringers.

*Id.* at 617–18.

225. *Id.* at 617. This is a prime example of a court merging adoption, reasonable implementation, and appropriate circumstances together into one mangled inquiry.

226. *See id.* at 606.

227. *Id.* at 617–18.

228. The notice-and-takedown regime in the DMCA serves as the vehicle for most infringement claims. It is not clear, however, how changing an email impacts the appropriate circumstances in which users are removed on the platform. This is more an issue of implementing the repeat infringer policy. *See* Sawicki, *supra* note 87, at 1468 (noting that Congress’s goal for the termination policy was to reduce “the instances of flagrant violation of copyright law by threatening people with termination” from online access).

229. *See Ventura Content, Ltd.*, 885 F.3d at 617–18.

230. *Id.*



service providers about the gray area between policies that definitively do and do not satisfy the commands of the DMCA.

On the other side of the scale, the *Ventura* court noted four factors that tip the balance in favor of the service provider and, consequently, in support of a finding that its repeat infringer policy terminated users in appropriate circumstances.<sup>231</sup> Under *Ventura*, signs of a compliant policy include maintaining a logbook dedicated to DMCA takedown notices, even if the logbook is missing a significant number of entries; keeping a “banned” list updated with the email address of terminated users; blocking subscriber names and emails from posting content; and permanently prohibiting a banned user from returning to the platform.<sup>232</sup>

As of the writing of this Article, this factor formulation, designed to evaluate “appropriate circumstances” under the DMCA, is the only judicially created alternative to the subjective approach used in the egregious failure cases.<sup>233</sup> Considered from a different perspective, the two approaches may not be in conflict; rather, they identify similar outputs resulting from different inputs. The “egregious error” cases, on the one hand, deal almost exclusively with significant and intentional noncompliance. On the other hand, the “factor formulation” cases have dealt with much closer calls and have sketched a uniform analysis that can nevertheless accommodate unique facts. Perhaps then, too, the resulting ambiguities of when appropriate circumstances exist are a consequence of that difference in inputs. While this perspective on the development of the law has its own challenges and leaves a significant gap in the law by failing to recognize the important difference in instructing service providers between what *not to do* and what *to do*, it highlights the confusion that the absence of a uniform, standard meaning of “appropriate circumstances” has caused.

### 3. The State of the “Appropriate Circumstances” Definition Today

The “appropriate circumstances” prong remains the most important yet least informative condition for DMCA safe-harbor protections.<sup>234</sup> Case law and legislative ambiguity have left OSPs in

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231. *Id.* at 617.

232. *Id.* Note, however, that the Ninth Circuit states that revoking posting privileges for infringing users is evident of a proper policy. This is the exact opposite of the conclusion reached in *Capitol Records*, where Grooveshark restricted uploading privileges for accounts that received takedown notices, yet the court viewed this in an unfavorable light.

233. *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting that he could not define “hard-core pornography,” but “I know it when I see it”).

234. *See Sawicki*, *supra* note 87.

uncharted waters. They have no positive prescriptions, only the negative command of *Cox Communications*, to regulate their own conduct.<sup>235</sup> Section 512(i) describes the final goal: an ideal repeat infringer policy that perfectly complies with the DMCA safe-harbor conditions.<sup>236</sup> The problem, however, is that no standards exist to assist service providers in crafting that ideal policy, especially if a provider begins from a place of “egregious failure.” Leaving some discretion to the providers, while faithful to the legislative intent behind the DMCA, leaves too much of an inconsistency gap whereby service providers have a collection of things they should not do, but no uniform instruction as to what they all should do with regards to repeat infringers. Service providers can try to improve their policies by following the factor formulation cases, but the absence of a standard understanding of “appropriate circumstances” continues to harm copyright holders, service providers, and internet users in the meantime.

### C. The Reasonable Implementation Condition

The requirement that repeat infringer policies be “reasonably implemented” is the most judicially discussed of the three ambiguities that plague the safe-harbor provision of Section 512(i)(1)(A).<sup>237</sup> The historical tendency was to assume most policies were reasonably implemented. In *Corbis Corp.*, for example, the district court found that a repeat infringer who rejoined zShops after termination under a different identity failed to “create a legitimate question of fact” regarding whether Amazon had “reasonably implemented” its policy.<sup>238</sup> Even though Amazon’s policy failed to prevent repeat infringers from returning to its zShops platform to continue infringing, the court found that the policy had been reasonably implemented under Section 512(i) and granted Amazon’s motion for summary judgment.<sup>239</sup>

To prove that a repeat infringer policy has not been reasonably implemented, copyright holders must show that the service provider “could have used another, more effective and reasonable, method for

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235. See *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 305 (4th Cir. 2018).

236. See 17 U.S.C. § 512 (i).

237. See *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1102–03 (W.D. Wash. 2004).

238. *Id.* at 1107.

239. *Id.* at 1104–05.

preventing disingenuous users from re-accessing” their services.<sup>240</sup> In other words, reasonable implementation does not require perfect implementation.<sup>241</sup> Even though a service provider might not catch and suspend all infringing users, a court may still find reasonable implementation if it finds, for example, that the service provider had no alternative means of policing its platform.<sup>242</sup> Notably, even the Copyright Office “agrees that ‘reasonable’ implementation does not (and should not) mean perfect.”<sup>243</sup>

There are generally three things copyright holders can allege that, if true, will show an unreasonably implemented repeat infringer policy. First, they can show that the service provider encouraged infringement or that the executives of the service provider infringed copyrights to which the service provider turned a blind eye.<sup>244</sup> Copyright holders could also show that the service provider’s system for handling takedown notices has been so poorly maintained that it has resulted in notices “fall[ing] into a vacuum” and being ignored completely.<sup>245</sup> Lastly, copyright holders may show the service provider failed to implement a repeat infringer policy at all, as was the case in *Capitol Records*.<sup>246</sup> With the burden on the copyright holders, these three possible allegations are the only judicially enumerated paths towards showing a service provider’s policy has been unreasonably implemented.<sup>247</sup>

#### *D. Satisfactory Repeat Infringer Policies Under Current Law*

This Article has compiled and analyzed recent case law around three crucial ambiguities in Section 512(i) of the DMCA.<sup>248</sup> How the DMCA defines terms like “repeat infringer,” “termination in appropriate circumstances,” and “reasonable implementation” is fundamentally important for copyright lawyers to properly advise their

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240. *Id.*

241. *See* *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 618 (9th Cir. 2018).

242. *Id.* at 618–19.

243. SECTION 512 REPORT, *supra* note 6, at 109.

244. *See In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (finding a service provider did not “reasonably implement” its repeat infringer policy because it “invited” infringement).

245. *See* *Ellison v. Robertson*, 357 F.3d 1072, 1080 (9th Cir. 2004).

246. *See* *Capitol Recs., LLC v. Escape Media Grp., Inc.*, No. 12-CV-6646 (AJN), 2015 WL 1402049, at \*6 (S.D.N.Y. Mar. 25, 2015).

247. *Id.* at \*12; *In re Aimster Copyright Litig.*, 334 F.3d at 655; *Ellison*, 357 F.3d at 1080. There of course may be and should be more iteration of sufficient arguments to show unreasonable implementation, however they have yet to be enumerated.

248. *See* *Sawicki*, *supra* note 87.

clients about the safe-harbor provisions. Yet its definitions have been unclear since the very day the DMCA became law.<sup>249</sup> This Section summarizes the ways in which modern practitioners have interpreted these vague terms to show more plainly what adequate policies are.

Under current law, a repeat infringer is a user that, either knowingly or unknowingly, “repeatedly and flagrantly” or “blatantly” infringes a copyright.<sup>250</sup> All policies must lead to the termination of repeat infringers in appropriate circumstances.<sup>251</sup> This means that service providers cannot be egregiously lax in enforcing their policies, no matter how stern their policies seem in theory.<sup>252</sup> The more formal the process for removing infringers, the more likely the policy leads to termination in appropriate circumstances.<sup>253</sup> Formality can take the form of a continually updated “banned” list of terminated users, an actively maintained repository for accepting and acting upon DMCA takedown notices, and a more aggressive approach to removing infringers than just restricting their access to uploading content.<sup>254</sup> This policy must also be reasonably implemented. If a litigant can show that the implementation of the repeat infringer policy “fails to enforce the terms of its policy in any meaningful fashion,” then that implementation is categorically unreasonable.<sup>255</sup> The policy need not be written and the particulars of the policy need not be communicated to users; they need only be informed of the policy’s existence.<sup>256</sup> If a service provider fails to meet any singular condition, it must lose its safe-harbor protection.<sup>257</sup>

#### IV. TOO BIG TO FAIL? THE ASYMMETRICAL EFFECT OF THE DMCA’S CONFUSION

The more confusing the repeat infringer policy requirement, the higher the likelihood that an OSP will not be protected by the DMCA’s

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249. See *id.* at 1456. Since the adoption requirement is overwhelmingly merged into the implementation prong by courts, under current law it is sufficient to focus only on implementation and not both adoption and implementation.

250. See *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 302 (4th Cir. 2018).

251. *Id.* at 300.

252. *Id.* at 302.

253. *Id.* at 303.

254. See *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 617 (9th Cir. 2018).

255. See *Cox Commc’ns*, 881 F.3d at 303.

256. See *Ventura Content, Ltd.*, 885 F.3d at 620 (Rawlinson, J., dissenting).

257. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

safe-harbor provisions. At least in theory, that is the expected result, because statutory confusion generally makes compliance more difficult.<sup>258</sup> In actuality, however, the understanding of what policies are adequate has been so volatile that there are few, if any, identical repeat infringer policies,<sup>259</sup> and despite their differences, many of them are still sufficient. Curiously, further analysis of these policies has revealed a direct connection between the size of an OSP and the success of its repeat infringer policy—the bigger the provider, the less likely that a court will strike down its infringement policies.<sup>260</sup> One implication of the repeat infringer policy requirement, therefore, is that it serves to stymie the growth of smaller, more vulnerable OSPs, while serving as a nearly nonexistent hurdle for larger OSPs. This has created a regime where OSPs are essentially penalized for their size and not for how closely their policies align with the statutory directive in Section 512(i).<sup>261</sup>

*A. The Larger the OSP, the More Formal its Policy*

With more institutional resources, larger OSPs are more likely to have not only more comprehensive repeat infringer policies but also a larger crew of dedicated employees to augment and implement those policies.<sup>262</sup> These larger OSPs have highly sophisticated automated systems that streamline implementation of their policies, thereby lowering many of the hurdles that smaller OSPs and startup companies face.<sup>263</sup> For instance, Facebook has plastered its policy all over its materials in a way that costs a great deal of financial and human resources to create and maintain; nevertheless, this approach goes a long way towards satisfying the implementation requirement in Section

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258. See generally, e.g., Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010) (discussing what ambiguity in the law is and the impact it has on compliance).

259. See, e.g., *Cox Commc'ns*, 881 F.3d at 299; *Ventura Content, Ltd.*, 885 F.3d at 601–602; *Atlantic Recording Co. v. Spinrilla, LLC*, 506 F. Supp. 3d 1294, 1320 (N.D. Ga. 2020).

260. SECTION 512 REPORT, *supra* note 5, at 9–10, 89.

261. *Id.* at 9–10.

262. *Id.*

263. *Id.*

512(i).<sup>264</sup> Facebook’s policy is also similar in length, terms, and broader implementation to most other large OSPs.<sup>265</sup>

In relevant part, the Facebook policy notes that if a user “repeatedly post[s] content that infringes someone else’s intellectual property rights, such as copyrights or trademarks, [the user’s] account may be disabled or [the user’s] Page or Group removed under Facebook’s repeat infringer policy.”<sup>266</sup> Users are made aware that their ability to “post photos or videos may be limited” and that they could “also lose access to certain features or functionality on Facebook” if they repeatedly infringe copyrighted material.<sup>267</sup> Beyond that, Facebook notes that punishment might “depend on the nature of the reported content and where it was posted.”<sup>268</sup>

Facebook devotes significant resources to educating users on its repeat infringer policy. When it removes infringing content, Facebook sends a notification “to the reported users informing them that their content was removed and providing information about the report and reporting party.”<sup>269</sup> Users are informed how to contact the reporting party, how to contest removal, and are again reminded of the repeat

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264. See *Repeated Intellectual Property Infringer Policy for Meta*, FACEBOOK, <https://www.facebook.com/help/350712395302528> [<https://perma.cc/38NJ-PFRW>] (last visited Mar. 24, 2023); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms> [<https://perma.cc/XA5H-FEZJ>] (last visited Mar. 24, 2023).

265. For example, Airbnb, TikTok, Twitch, and Twitter all have repeat infringer policies that mirror Facebook’s. *Copyright Policy*, AIRBNB, <https://www.airbnb.com/help/article/2878> [<https://perma.cc/VGN5-8Z52>] (last visited Mar. 24, 2023); *Intellectual Property Policy*, TIKTOK, <https://www.tiktok.com/legal/page/global/copyright-policy/en> [<https://perma.cc/NSH4-TDEG>] (June 7, 2021); *Copyrights and Your Channel*, TWITCH, <https://www.twitch.tv/creator-camp/en/paths/getting-started-on-twitch/copyrights-and-your-channel/> [<https://perma.cc/S47F-BX5W>] (last visited Mar. 24, 2023); *Copyright Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/copyright-policy> [<https://perma.cc/C8RX-3XAE>] (last visited Mar. 24, 2023). The policies are exhaustive, with multiple pages of information, hypothetical examples of copyright infringement, helpful tips to avoid infringement, and information about the process of removing content because of alleged infringement. These policies are in addition to robust automated systems that browse the OSPs for infringing material. The extent alone of these policies and how formalized they have become highlights the institutional capabilities of large and small OSPs, with smaller OSPs failing to have formalized policies. The lack of a formalized, clearly conveyed policy bodes poorly for an OSP’s chance of proving its policy is reasonably implemented under Section 512(i)(1)(A).

266. *Repeated Intellectual Property Infringer Policy for Meta*, *supra* note 264.

267. *Id.*

268. *Id.* This is similar, yet crucially different, to the tiered system proposed in Part VI of this Article; however, currently only the largest institutional actors may afford to implement such a policy.

269. See *Intellectual Property Transparency Report*, FACEBOOK (2022), <https://transparency.facebook.com/intellectual-property> [<https://perma.cc/LF2K-6TME>].

infringer policy and directed to content to educate themselves on avoiding infringement in the first place.<sup>270</sup> According to the most recent data published by Facebook, in January of 2020 alone, Facebook removed 327,464 posts, yet it only received 57,249 reports from copyright owners.<sup>271</sup> As a result of its repeat infringer policy and automatic removal process, Facebook has removed significantly more users and content than copyright holders have reported.<sup>272</sup> Courts will likely view this difference in magnitude favorably if Facebook's repeat infringer policy is ever called into question.<sup>273</sup>

Formal implementation of a repeat infringer policy is an expectation and, typically, a reality for larger OSPs given their resources and sophistication. These large OSPs benefit from this expectation; in many cases, courts take as a given that a large OSP has a reasonably implemented policy just because the OSP removes content from its platform on its own, even though it is not required to do so, and because the actual amount of infringing content is proportionally insignificant compared with the raw amount of content on the service. The popular auction website eBay, for example, has terms of service that nowhere use the phrase "repeat infringer" or make mention of a policy that would combat patterns of infringement.<sup>274</sup> The only area that addresses infringement notes that eBay users "will not . . . infringe any Intellectual Property Rights that belong to third parties affected by [the user's] use of our Services [n]or post content that does not belong to you."<sup>275</sup> eBay's vague description is likely inadequate to inform "subscribers and account holders of the service provider's system" of identifying repeat infringers at the level required by Section 512(i)(1)(A).<sup>276</sup> Nevertheless, courts have found this exact policy to be reasonably implemented under the DMCA.<sup>277</sup> Barry Rosen, a photographer, sued eBay in 2013, alleging that eBay had failed to address infringing photographs located on various postings throughout the site.<sup>278</sup> Rosen argued, in part, that eBay's policy was inadequately

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270. *Id.*

271. *See id.*

272. *Id.*

273. *See* *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 303–04 (4th Cir. 2018).

274. *See User Agreement*, EBAY (2022), <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259> [<https://perma.cc/HDA4-4NYL>].

275. *Id.*

276. *Id.*; *see also* 17 U.S.C. § 512(i)(1)(A).

277. *See* *Rosen v. eBay, Inc.*, No. CV 13-6801 MWF (Ex), 2015 WL 1600081, at \*8 (C.D. Cal. 2015).

278. *Id.*

implemented and adopted because it failed to “put users on notice that they face exclusion from the service if they repeatedly violate copyright laws.”<sup>279</sup> Naturally, it is difficult to put users on notice of a policy that punishes individuals for repeated infringement when the term “repeated” is absent from that policy. In ruling for eBay, however, the court noted that “eBay has on its webpage a number of policies that inform users of its intellectual [property] policies.”<sup>280</sup>

This ruling, however, blurs two important distinctions. First, merely noting that users shall not infringe intellectual property rights is not the same as providing a separate notice that repeat infringers are subject to account termination—the type of notice that Section 512(i) requires.<sup>281</sup> Second, even a cursory glance at the listing of policies on eBay’s website shows that they fail to contain any substantial discussion about a repeat infringer policy.<sup>282</sup> The court cites to a “Why did eBay remove my listing” page—a page that continues to remain on the website<sup>283</sup>—where eBay enlightens users that it might remove a listing for one of the following reasons: “it violates one of our policies, it violates a law, the rights owner of the item requested its removal, or it’s been active on the site for a year or more without any sales.”<sup>284</sup> This general statement, which exhausts the explanation that eBay provides to its users, does not suffice to inform users of the existence of eBay’s repeat infringer policy. eBay, however, is a large OSP with upwards of 180 million monthly users and a similarly large amount of corporate resources to ensure compliance with the DMCA.<sup>285</sup> The court found that, because eBay had “suspended repeat offenders” after its alleged repeat infringer policy was implemented in October 2000, its policy was reasonably implemented.<sup>286</sup> In making this determination, the court appeared to equate reasonable implementation with *any*

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279. *Id.* at \*8–9.

280. *See Rosen*, 2015 WL 1600081, at \*9.

281. 17 U.S.C. § 512(i)(1)(A).

282. *User Agreement*, EBAY, *supra* note 274.

283. *Rosen*, 2015 WL 1600081, at \*9; *see also Removed Listings*, EBAY, <https://www.ebay.com/help/selling/listings/creating-managing-listings/removed-listings?id=4656#:~:text=We%20may%20have%20to%20remove,one%20of%20the%20following%20reasons%3A&text=It's%20been%20active%20on%20the,or%20more%20without%20any%20sales> [<https://perma.cc/NHP7-LAZQ>] (last visited Mar. 24, 2023).

284. *Id.*

285. *See Number of eBay’s Total Active Buyers from 1st Quarter 2010 to 2nd Quarter 2022*, STATISTA, <https://www.statista.com/statistics/242235/number-of-ebays-total-active-users/> [<https://perma.cc/H2JH-F76P>] (last visited Mar. 24, 2023).

286. *Rosen*, 2015 WL 1600081, at \*8.



implementation.<sup>287</sup> Of course, in the fifteen years since eBay allegedly implemented its policy, that eBay happened to remove some infringers should hardly be surprising—the DMCA, after all, requires it to do so.<sup>288</sup> Yet, reasonable implementation demands more from a service provider than a showing of infrequent removal, and the *Rosen* court erred in conflating these two separate concepts.

*B. The Smaller the OSP, the Less Formal its Policy*

Smaller OSPs, in contrast to eBay and others just discussed, overwhelmingly lack the resources to create and continually update their repeat infringer policies.<sup>289</sup> These providers are usually focused on a niche service or might be newcomers to the industry.<sup>290</sup> Their policies—if they even have one listed—may not include educational resources designed to notify users of methods to avoid copyright infringement, are likely only one or two sentences long, and most likely fail to describe the process of termination in adequate detail. Of course, Section 512(i) does not require that an OSP provide educational resources, nor that it develop an exhaustive written policy;<sup>291</sup> however, these features may provide some evidence that the policy has been reasonably implemented.<sup>292</sup> Since small OSPs likely have rudimentary or nonexistent automated programs, they do not benefit from the assumption afforded to larger OSPs—that, because of their size and sophistication, their policies are likely sufficient<sup>293</sup>—and are more likely to have unreasonably implemented policies, even though the actual terms of these policies are similar to those of their larger counterparts.

Take, for instance, KiwiCo, a subscription company that creates crafting and engineering projects for children and adults.<sup>294</sup> By purchasing a subscription, consumers agree to KiwiCo's terms of

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287. *Id.*

288. *Id.*; 17 U.S.C. § 512.

289. Engine, GitHub, Kickstarter, Medium & Redbubble, Comment Letter on Study of Section 512 of Title 17: A Report of the Register of Copyrights, at 6 (Apr. 1, 2016) <https://www.regulations.gov/comment/COLC-2015-0013-90694> [<https://perma.cc/GG8Y-3RLA>].

290. See, e.g., *About Rev*, REV.AI, <https://www.rev.com/about-rev> [<https://perma.cc/4HMR-DTDY>] (last visited Mar. 24, 2023); *Our Story*, LEGALGPS, <https://www.legalgps.com/about-legal-gps> [<https://perma.cc/7VG2-N6UU>] (last visited Mar. 24, 2023).

291. 17 U.S.C. § 512(i).

292. See *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 658–59 (N.D. Ill. 2002).

293. Engine et al., *supra* note 289, at 7.

294. *What Is KiwiCo?*, KIWICO, [https://support.kiwico.com/en\\_us/what-is-kiwico-B1J9jDlfv](https://support.kiwico.com/en_us/what-is-kiwico-B1J9jDlfv) [<https://perma.cc/3PHG-UZFP>] (last visited Mar. 24, 2023).

service.<sup>295</sup> Then, they are informed of KiwiCo's repeat infringer policy through a pop-up notification, which simply copies the text of Section 512(i) verbatim: "[W]e have adopted and implemented a policy . . . that provides for the removal of any infringing materials and for the termination, in appropriate circumstances, of users of our online Site and Services who are repeat infringers."<sup>296</sup> The vast majority of KiwiCo's repeat infringer policy is copied language from Section 512(i) with no additional explanation or information.<sup>297</sup> Many smaller OSPs have followed KiwiCo's lead, simply copying the language of Section 512(i) in a cost-effective attempt to satisfy the DMCA's requirements.<sup>298</sup> Carowinds,<sup>299</sup> a rollercoaster and amusement park company; Legal GPS,<sup>300</sup> a business that provides startups with legal information resources; and the Boston Museum of Science,<sup>301</sup> for example, all use the exact same language as KiwiCo.

If smaller OSPs do not explicitly copy Section 512(i), they may, alternatively, include in their policies an ambiguous sentence about reserving the right to terminate the accounts of repeat infringers.<sup>302</sup> These sections are very small, offer no specifics, and contain little information about the company's process for evaluating and terminating infringers. For example, Kit, a collaborative community for content creators;<sup>303</sup> Rev.ai, a company that manages speech-to-text APIs;<sup>304</sup> and MegaMile, a website for retreading vehicle tires,<sup>305</sup> all have bare-bones policies that largely restate statutory language without including anything specific to the individual platform. These smaller

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295. *Terms and Conditions*, KIWICO, <https://www.kiwico.com/terms> [https://perma.cc/DDD8-L29R] (last visited Mar. 24, 2023).

296. *Id.*

297. *Id.*; see also 17 U.S.C. § 512(i).

298. See *Legal Terms of Use*, CAROWINDS, <https://www.carowinds.com/legal/terms-of-use> [https://perma.cc/L54X-X88N] (July 13, 2013); *Terms of Use*, LEGALGPS, <https://www.legalgps.com/terms-of-use> [https://perma.cc/Z6VB-7767] (last visited Mar. 24, 2023); *Terms of Use*, BOS. MUSEUM SCI., <https://www.mos.org/terms-of-use> [https://perma.cc/D42C-FXLZ] (last visited Mar. 24, 2023).

299. See *Legal Terms of Use*, CAROWINDS, *supra* note 298.

300. See *Terms of Use*, LEGALGPS, *supra* note 298.

301. See *Terms of Use*, BOS. MUSEUM SCI., *supra* note 298.

302. See *Terms of Service*, KRAFTS, INTERESTS & TOYS, LLC, <https://kit.co/terms> [https://perma.cc/F3BK-SWTU] (last visited Mar. 26, 2023).

303. See *id.*

304. See *Terms of Service*, REV.AI, <https://www.rev.ai/about/terms> [https://perma.cc/ZTD7-Y7XP] (last visited Mar. 26, 2023).

305. See *Terms of Use*, MEGAMILE, <https://www.megamileretreads.com/terms-of-use> [https://perma.cc/69QP-WNAQ] (Oct. 5, 2021).

OSPs offer niche services and have largely vacuous policies that leave users without any more guidance than, simply, that infringement might lead to suspension. Further, these bare-bones policies run the risk of both over- and underenforcement, depending on the risk aversion of the OSP.

Some smaller OSPs do even less than that, even when there is a tremendous threat that serial infringement is occurring on its platform. Displate is a smaller OSP that creates metal posters—typical posters that are punched out of galvanized metal instead of printed on canvas or paper.<sup>306</sup> Its business model is similar to, though more centralized than, the popular e-commerce site Etsy.<sup>307</sup> Artists from around the world submit designs for “displates,” which are then purchasable on Displate’s website.<sup>308</sup> When a customer purchases a particular design, Displate prints out the artwork on sheet metal, punches it through a sizing template, and ships it to the customer.<sup>309</sup>

Even under a very broad definition of fair use, many of the designs on Displate’s website are likely infringing.<sup>310</sup> Some designs copy popular artwork, logos, and pictures exactly with little to no deviation from the original copyrighted work, and with little to no creative contributions from the Displate designer.<sup>311</sup> Despite this, Displate’s repeat infringer policy is even more barren than KiwiCo’s and those of other small OSPs.<sup>312</sup> In relevant parts, under Displate’s “Respect for Intellectual Property” webpage, its policy states: “Displate has a zero-tolerance policy for intellectual property rights infringement. . . . Artists thus are required to upload works which in no way infringe upon the copyrights . . . of any person.”<sup>313</sup> This is the exact language found in Displate’s terms of service as well.<sup>314</sup> There is no reference to repeat infringers, no reference to termination of user

306. *Frequently Asked Questions*, DISPLATE, <https://displate.com/about-faq> [<https://perma.cc/V9WE-N5V6>] (last visited Mar. 26, 2023).

307. *Id.*

308. *Id.*

309. *Id.*

310. *See* 17 U.S.C. § 107 (codifying the fair use factors); *Posters & Art Prints*, DISPLATE, <https://displate.com/posters/all/3> [<https://perma.cc/WP3C-Z4VS>] (last visited Mar. 26, 2023).

311. *See, e.g., Pulp Fiction Poster*, DISPLATE, <https://displate.com/displate/1598560?ref=1617> [<https://perma.cc/86NU-JK8W>] (last visited Mar. 26, 2023); *Dark Side of the Moon*, DISPLATE <https://displate.com/displate/4573669?ref=1617> [<https://perma.cc/G8ZX-A4GX>] (last visited Mar. 26, 2023).

312. *See About Copyright*, DISPLATE, <https://displate.com/about-copyright> [<https://perma.cc/8A8N-CKWA>] (last visited Mar. 26, 2023).

313. *See id.*

314. *See Terms of Use*, DISPLATE, <https://displate.com/about-regulations> [<https://perma.cc/7DMZ-B3NQ>] (last visited Mar. 27, 2023).

accounts, and no information about the process Displate uses to evaluate alleged infringement on its platform.<sup>315</sup> While Section 512(i) does not require any of this information, Displate's failure to go beyond its meager admonition means its repeat infringer policy, if it does exist, is likely informal and, potentially, unreasonably implemented.

Policies for smaller OSPs are frequently less uniform than those of their larger counterparts.<sup>316</sup> As the examples above demonstrate, one group of small OSPs copies the text of Section 512(i) for lack of any alternatives, likely due to constraints imposed by their size and their limited resources.<sup>317</sup> Another group includes only vague references to a free-floating right to terminate repeat infringers, while it fails to explain that right in terms of an explicit repeat infringer policy.<sup>318</sup> In still another group, small OSPs may attempt to comply with Section 512(i) without referring to a policy or to repeat infringers at all.<sup>319</sup> OSPs in this category, like Displate, choose instead to make conclusory promises to value intellectual property rights and not to tolerate infringement thereof.<sup>320</sup> These idealistic statements fail to substantially convey to users of the particular service that their access to the platform may be terminated if they repeatedly infringe copyrights.

Because of the lack of clarity afforded to all service providers and the institutional resources gap between larger and smaller OSPs, the differences in this Section are hardly surprising, yet their effects have been felt across the internet. Section 512(i) is no exercise in clarity, but as repeat infringement progresses unchecked, copyright holders are increasingly demanding that policy makers and courts resolve the remaining ambiguities in the policy requirement. So far, however, approaches to resolution have been inconsistent. Differently situated OSPs have, logically, resolved differently the ambiguities of Section 512(i). The aberrant policies that this Section has noted stem from unclear statutory language that fails to standardize approaches to the DMCA's safe-harbor requirements. So far, however, the Copyright Office has failed to offer any policy recommendations that would improve the current situation.

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315. *Id.*

316. *See Terms of Service*, KRAFTS, INTERESTS & TOYS, LLC, *supra* note 302; *About Copyright*, DISPLATE, *supra* note 312; *Legal Terms of Use*, CAROWINDS, *supra* note 298.

317. *See, e.g., supra* note 298.

318. *See Terms of Service*, KRAFTS, INTERESTS & TOYS, LLC, *supra* note 302; *Terms of Service*, REV.AI, *supra* note 304; *Terms of Use*, MEGAMILE, *supra* note 305.

319. *See About Copyright*, DISPLATE, *supra* note 312.

320. *See Terms of Use*, DISPLATE, *supra* note 314.

## V. THE COPYRIGHT OFFICE'S SECTION 512 REPORT

In April 2015, the US Copyright Office suggested a series of policy studies to the House Judiciary Committee, intending to assist in congressional review of the Copyright Act in the twenty-first century.<sup>321</sup> From those policy studies came the Report on Section 512 (Section 512 Report).<sup>322</sup> Long awaited, the Section 512 Report became the “first comprehensive study issued by a [US] government agency on the operation of section 512,” better known as the DMCA.<sup>323</sup> Contained in the 250-page report was a thorough review of not only the DMCA itself, but the public’s perception of it.<sup>324</sup> As part of the process, the Copyright Office sought extensive public involvement.<sup>325</sup>

As the Copyright Office noted in the Section 512 Report, the DMCA had come under fire for being too lenient towards service providers.<sup>326</sup> So too had other statutes, like Section 230 of the Communications Act, which provides immunity to online platforms from civil liability based on third-party content.<sup>327</sup> Just as Section 230 has afforded online service providers significant leeway in moderating the content found on their platforms, so too has the DMCA afforded service providers protection from liability for copyright infringement perpetuated by users of their services.<sup>328</sup> As social media companies receive more public ire, Congress and institutional stakeholders may call for reviews of statutes granting service providers immunity from otherwise punishable acts.<sup>329</sup>

Though a detailed analysis of the Copyright Office’s Section 512 Report is beyond the scope of this Article, the Section 512 Report

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321. See *Section 512 Study*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/policy/section512/> [<https://perma.cc/5MXU-AZ8R>] (last visited Mar. 26., 2023).

322. See generally SECTION 512 REPORT, *supra* note 6.

323. *Id.* at 1.

324. *Id.* at 8, 12–13.

325. *Id.* at 12–13.

326. See *id.* at 96.

327. 47 U.S.C. § 230; see also, e.g., Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279 (2019) (discussing Congress’s broader attempt to peel back Section 230’s protections afforded to OSPs).

328. 17 U.S.C. § 512(a).

329. Institutional stakeholders are large rights management organizations that enforce thousands of copyrights. For example, The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) both own hundreds of thousands of copyrights in musical compositions created by individual artists. *About Us*, ASCAP, <https://www.ascap.com/about-us> [<https://perma.cc/NY25-BEUC>] (last visited Mar. 26, 2023); *About*, BMI, <https://www.bmi.com/about> [<https://perma.cc/8C3T-LBCQ>] (last visited Mar. 26, 2023).

underscores the recurring volatility of the term “repeat infringer.”<sup>330</sup> According to the Section 512 Report, “the Copyright Office saw some shift in stakeholder views across the span” of its study on Section 512.<sup>331</sup> Based on its findings, the Copyright Office put forth many policy suggestions to “improve” the Copyright Act in the digital age.<sup>332</sup>

While the Copyright Office billed its Section 512 Report as a neutral evaluation of the effectiveness of Section 512, it reads more like a white paper written on behalf of institutional copyright holders. Its proposals increase the administrative burdens and costs for service providers with no equal concessions or compromises on the part of copyright holders.<sup>333</sup> For example, the first recommendation mandates that, to maintain the DMCA’s safe-harbor protections, service providers create written policies to share with each individual user.<sup>334</sup> These policies should be “publicly available” because this recommendation is “the appropriate minimum requirement” to which service providers must comply.<sup>335</sup> Additionally, the Copyright Office hints at requiring service providers to remove repeat infringers even “in the absence of a formal takedown notice from a rights holder.”<sup>336</sup> Bordering on outlandish, the Copyright Office goes on to explain that notices, either from copyright holders or a service provider’s automated content moderation system, should be considered a “strike” for purposes of termination consideration.<sup>337</sup> Such a change would require service providers to conduct near-constant review of the content that its users generate and upload. For instance, if Congress were to agree with the Copyright Office’s suggestion, Facebook and other media platforms would have to spend enormous amounts of resources and capital to review up to four *petabytes* of data each day.<sup>338</sup>

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330. See SECTION 512 REPORT, *supra* note 6, at 96. The Copyright Office maintains a significant level of respect in Congress and in the courthouse. Therefore, the recommendations proffered by the Copyright Office should be analyzed in greater detail than space allows for in this Article.

331. *See id.*

332. *Id.* at 64.

333. *Id.* at 3, 64, 106, 109.

334. *See id.* at 3. This policy is a sound recommendation and is discussed further in Part VI.

335. *Id.*

336. *Id.* at 112 n.591.

337. *Id.* at 103.

338. The most recent data is from 2014, so the number is likely much larger than that now. For reference, four petabytes of data are equal to one million gigabytes. The Copyright Office

Moreover, equating a complaint and a substantiated strike is an erroneous proposition. Filing a complaint in court, for example, obviously has far more limited consequences than receiving a favorable judgment. Similarly, when one files a takedown notice, the Copyright Office is incorrect to suggest that this is the same as a substantiated strike. As noted, the Section 512 Report contains no policy suggestions that impose costs or burdens on copyright holders vis-à-vis the repeat infringer policy requirement.<sup>339</sup> The imbalances in the DMCA are clear enough, but they are due primarily to the lack of judicial or legislative standards and the ambiguous text of the statute itself.<sup>340</sup> These imbalances will not be resolved by implementing the Copyright Office's suggestions.

For all its shortcomings, the Section 512 Report does note an important development within its 250 pages: institutional copyright holders actually *changed their stances* over the course of the study.<sup>341</sup> They began with a deep disdain towards the repeat infringer policy requirement but later began to embrace its protections as courts became much more generous towards the copyright holders than the service providers.<sup>342</sup> Shifts in stakeholder perspectives throughout the course of the study shine an even brighter light on the problems with the repeat infringer policy requirement. It is an overly volatile area of the law, which provides nothing but instability to service providers and copyright holders alike. The Copyright Office is correct to note how muddled this area of law has become and how the persistent confusion largely benefits large OSPs. The solution, however, is not to strap all OSPs down with overly burdensome and equally unmanageable requirements, but rather to create a flexible framework that increases consistency and accountability. Creating a tiered approach by evaluating appropriate circumstances for terminating infringers is a step towards that goal.

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suggests that Congress look at either incentivizing, or, more likely, punishing service providers in a way that forces them to sift through the content posted to or through their services. Such a burden is unthinkable and unworkable. See Janet Wiener & Nathan Bronson, *Facebook's Top Open Data Problems*, FACEBOOK RSCH. (Oct. 21, 2014), <https://research.fb.com/blog/2014/10/facebook-s-top-open-data-problems/> [<https://perma.cc/FM8V-ASKP>].

339. See SECTION 512 REPORT, *supra* note 6, at 2–3.

340. See *supra* Part III.

341. See Section 512 Report, *supra* note 6, at 96.

342. See *id.*

## VI. RECALIBRATING THE BURDEN BY DEFINING “APPROPRIATE CIRCUMSTANCES”

Part III of this Article attempted to clarify the parameters of Section 512(i),<sup>343</sup> but more work remains to be done to define its terms with particularity. The confusion brought by the ambiguities in the DMCA has led to numerous imbalances. After the Fourth Circuit’s decision in *Cox Communications*, which determined that repeat infringers need not have been adjudicated as such,<sup>344</sup> institutional copyright holders have enjoyed greater bargaining leverage against service providers and their inadequate infringement policies.<sup>345</sup> Service providers, for their part, have enjoyed significant leeway in showing their policies have been reasonably implemented, even where such implementation occurred without following strict formalities.<sup>346</sup> This final Part explores an array of suggested changes to the repeat infringer policy requirement in the digital age.

One simple suggestion is to petition Congress to consider requiring service providers to enumerate specific types of conduct that would merit restrictions on users’ access to its service. This suggestion would still afford different service providers the opportunity to tailor their policies to their specific services. For example, infringement on a social media platform likely takes a different scope and form than infringement on an online retail website like Amazon. Articulating the boundaries of unacceptable conduct by example will give clarity and consistency to copyright holders and put users on more informed notice.

Along similar lines, Congress should require service providers to enumerate and publish their repeat infringer policies. Currently, under case law like *Motherless*, service providers satisfy the adoption prong of Section 512(i) even if their repeat infringer policy is unwritten and only the fact of its existence is communicated to users.<sup>347</sup> As the Copyright Office rhetorically asked, “what benefit is it to users if they know only that a policy exists, but are not informed of the code of conduct by which they are expected to govern themselves?”<sup>348</sup> These policy changes would impose only trivial administrative costs for the service providers yet

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343. 17 U.S.C. § 512(i).

344. *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 302–03 (4th Cir. 2018).

345. See SECTION 512 REPORT, *supra* note 6, at 97.

346. See *id.* at 101.

347. See *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 615 (9th Cir. 2018).

348. SECTION 512 REPORT, *supra* note 6, at 106.



provide greater clarity and certainty to users and copyright holders alike.

*A. Appropriate Circumstances Must Depend on the Nature of Infringement*

More complex policy solutions aim at reforming not the text of the DMCA itself, but rather the effects it produces—namely, which users are terminated and for how long.<sup>349</sup> As one scholar noted, “copyright holders are indifferent to infringement when no potential purchaser of the expressive work is involved.”<sup>350</sup> As such, reforming Section 512(i) should attempt to balance the interests of copyright holders in protecting their work and facilitating the dissemination thereof. Such reforms would, therefore, hold the most prolific and harmful infringers accountable without impairing select uses of copyrighted material by service providers and commercial users.<sup>351</sup> At the end of the day, the primary focus of both service providers and copyright holders is in determining which users must be removed from a platform; yet, the mechanics behind that determination are inscrutable given the mysteries of “appropriate circumstances.” Instead, to gain clarity, practitioners and service providers must determine the type of infringer the DMCA seeks to terminate and how best to define “appropriate circumstances.”

Courts and policymakers have a significant amount of latitude to define the circumstances that must lead to the termination of repeat infringers. As noted in Part III, courts have so far failed to define “appropriate circumstances;” either they take a loose, fact-intensive approach to condemn egregious behavior, or they list factors to consider without discussing the circumstances around the infringement itself.<sup>352</sup> In a digital world, those circumstances must consider what *type* of infringer the user is, which should then also determine whether termination is appropriate. With the advent of the internet, strict

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349. See Sawicki, *supra* note 87.

350. See *id.* at 1474 (citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 37 (Belknap 2003)).

351. There is a large swath of interests for copyright holders, and it would be impossible to capture all of their interests as one monolithic class. For example, an increasing number of creators are electing to open their work to free use through the Creative Commons or other non-commercial licensing structures. See generally LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004). This discussion is focused on the commercially interested actors, as the interaction between commercially motivated creators and appropriators is the crux of the tension in the DMCA.

352. See *Ventura Content, Ltd.*, 885 F.3d at 617–18; *Capitol Recs., LLC v. Escape Media Grp., Inc.*, No. 12-CV-6646 (AJN), 2015 WL 1402049, at \*12–13 (S.D.N.Y. Mar. 25, 2015).

culpability became less and less applicable as new forms of infringement occurred and recurred.<sup>353</sup> In light of this change, and to protect creative expression online, “termination in appropriate circumstances” should target only the most culpable repeat infringers. This interpretation is best implemented through an “infringement gradient” that defines the types of infringers and the penalties they should face for repeat infringement.

This suggestion is not without foundation in the DMCA. Reports from both the House of Representatives and the Senate on the DMCA illuminate the sponsors’ intentions that “those who *repeatedly or flagrantly* abuse their access to the [i]nternet” by infringing upon intellectual property rights “should know that there is a realistic threat of losing that access.”<sup>354</sup> The intent behind the statute was to target infringement that occurred frequently *or* infringement that was egregious in nature.<sup>355</sup> The uniform sentiment expressed in both the House and the Senate report was that two forms of abuse warranted punishment under Section 512(i).<sup>356</sup> The first form is repeat infringement, carried out by one that infringed on an existing copyright and then did so again.<sup>357</sup> The second is flagrant infringement, conducted by a user who maliciously and intentionally stole another’s copyrighted work for personal use.<sup>358</sup> The circumstances in which these users must face termination are not necessarily, and should not be, the same.

Not only did Congress draw the distinction between the two types of infringement, the legislative history also notes that “there are different degrees of online copyright infringement, from the inadvertent

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353. See Allweiss, *supra* note 16.

354. H.R. REP. NO. 105-551, pt. 2, at 61 (1998); S. REP. NO. 105-190, at 52 (1998) (emphasis added). Compare a seventy-year-old grandmother who has infringed copyrighted works fifteen times by posting them to her personal Facebook page with a user who takes digital artwork, prints them on t-shirts, and then sells the t-shirts through Facebook. It is the second time this user has used his Facebook account to sell infringing material. In the first example, the grandmother is undoubtedly a repeat infringer textually speaking. But should this result in a permanent ban from Facebook? Arguably no, because the infringement is relatively harmless and the cost of permanently restricting access for a grandmother is a drastic measure in light of the minor impact her infringement has had. On the other hand, under current doctrine, the user selling copyrighted works might not be terminated, although his behavior is exactly the type of infringement most concerning to copyright holders. In other words, it is inappropriate to terminate the grandmother’s account in this circumstance.

355. See S. REP. NO. 105-190, at 52 (1998).

356. See H.R. REP. NO. 105-551, pt. 2, at 61 (1998); S. REP. NO. 105-190, at 52 (1998).

357. S. REP. NO. 105-190, at 52 (1998).

358. *Id.*

and noncommercial, to the willful and commercial.”<sup>359</sup> This Article puts forth a policy proposal that builds off this legislative history: a tiered system of infringement that allows for a dynamic meaning of “appropriate circumstances” to account for the motivation of the alleged infringer.<sup>360</sup> This tiered system affords service providers the opportunity to construct policies that impose more severe penalties when the infringement is deliberate and done for unlawful commercial gain. For instance, in a tiered system, an entrepreneur uploading a t-shirt featuring Mickey Mouse to their Etsy shop would face stiffer penalties than would an individual posting a cell phone video taken at a live concert to their personal Twitter feeds.<sup>361</sup> This scheme would also leave intact the notice-and-takedown provisions of the DMCA, so copyright holders would retain the opportunity to enforce their own copyrights.

### *B. Creating an Infringement Gradient in a Tiered System*

In years past, policy makers have put forward proposals like the Copyright Alert System that attempt to take a tiered approach to prosecuting cases of copyright infringement.<sup>362</sup> That system featured a six-strike policy to discourage would-be infringers, gradually increasing the punishments for each successive strike until the sixth strike mandated termination.<sup>363</sup> This Article takes a different approach. Instead, it enumerates tiers of infringement that correspond to and dictate requisite punishments. This approach provides much-needed clarity to copyright holders to determine under what circumstances they can ensure the termination of repeat infringers. This clarity will also help OSPs for similar reasons and potentially provide more leniency to smaller OSPs, which will help to combat harmful judicial assumptions. The tiered system may also serve to force OSPs to better communicate their policies to users.

To ensure that this reinterpretation of “appropriate circumstances” constitutes an improvement over the confusion of the current system, it will categorize instances of infringement into a workable Infringement Gradient, modeled by a chart that delineates distinctions between willful and inadvertent infringement and between

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359. H.R. REP. NO. 105-551, pt. 2, at 61 (1998); S. REP. NO. 105-190, at 52 (1998).

360. See H.R. REP. NO. 105-551, pt. 2, at 61 (1998); S. REP. NO. 105-190, at 52 (1998).

361. This assumes the absence of any fair use defenses.

362. Alan Pate, *Controversial “Six Strikes” Copyright Alert System Debut Delayed*, JD SUPRA (Nov. 29, 2012), <https://www.jdsupra.com/legalnews/controversial-six-strikes-copyright-al-96808/> [<https://perma.cc/7PND-RZWB>].

363. See *id.*

commercial and noncommercial infringement. The tables below also account for the size of OSP to attempt to hold larger OSPs to stricter rules, given the increased deference they now enjoy.<sup>364</sup> The Infringement Gradient consists of four distinct types of infringers, the key characteristics of which are explained below.

### 1. Willful Commercial Infringers

The willful commercial infringer represents the worst and most culpable infringer.<sup>365</sup> This user understands the material they are using is subject to a copyright and that using it in a particular manner is infringement; nevertheless, they appropriate the artistic material for their own commercial gain. This could be, for example, an individual or an organization that takes digital artwork, removes any watermark or identifying feature present, and then sells prints of the artwork over the internet. Service provider policies must be strictest against these infringers. If the provider favors a “strike policy” system, these users should be terminated after two or three strikes, and the termination should be permanent.<sup>366</sup>

### 2. Willful Noncommercial Infringers

These users are less morally culpable than the willful commercial infringers because, while they know or should know the underlying expression is subject to another’s copyright, they are not profiting from the infringement. To be sure, noncommercial infringement is still infringement, and it deserves punishment, but it does not merit punishment as harsh as that for the willful commercial infringer. This is a user who, for example, records the latest episode of

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364. See SECTION 512 REPORT, *supra* note 6, at 106. As such, the number of monthly active users (MAUs) is an important metric for defining the distinction between large and small OSPs. The numbers below are somewhat arbitrary, yet still likely in an appropriate range for drawing that distinction.

365. Consider these categories as a game of Chutes and Ladders minus the Chutes. One can go from an inadvertent, noncommercial infringer to a willful commercial infringer, however one that is already a willful commercial infringer cannot slide down the infringement gradient and become a non-culpable infringer.

366. Strike policies are extremely easy to implement and exceedingly common, so this Article uses them as an example. Strike policies are essentially the same as the rules of baseball—an instance of infringement counts as a “strike” on a user’s account, and once the user reaches a predetermined number of strikes, their account is terminated. Service providers could consider permanently banning an account after just the second or third instance of infringement, however, internet access is the ticket to interacting with the modern world.

a hit Netflix show and then sends it to their friends on Twitter. They gain no monetary value by infringing the copyright of the show, but nevertheless they disseminate copyrighted material. Thus, while not out of personal monetary benefit, this infringement imposes economic harms on the copyright holder. For reducing the market for the underlying work and therefore decreasing the copyright holder's economic benefit, these individuals should still receive extensive bans between forty-five and sixty days with the possibility of a permanent ban; however, the strike threshold should be increased to up to five strikes.

### 3. Inadvertent Commercial Infringers

The distinction between willful and inadvertent commercial infringers is difficult to determine because copyright infringement does not require a mental state. A particular instance of infringement, for example, either does or does not qualify as such regardless of whether the individual intentionally infringed another's copyright.<sup>367</sup> However, service providers may distinguish between the willful and the inadvertent commercial infringer through a system that puts the inadvertent infringer on notice that the content they are using is copyrighted, and similar infringement after that notice places these infringers into the most punishable category. For instance, consider a new shop on Etsy that has three drawings for sale. One of these drawings is an infringing replica of artwork created by a different artist and the other two are original. It is not clear whether the user had knowledge of the underlying copyright because there is no watermark or proprietary signal on the art. The service provider must then treat the user as an inadvertent infringer, notify her of her mistake, and then treat her as a willful infringer from that point on.

### 4. Inadvertent Noncommercial Infringers

Because most copyright holders—and nearly all rights management organizations—want monetary return for their artistic expression, inadvertent noncommercial infringers are the least concerning from a public policy standpoint. This brand of infringer unknowingly infringes, and the resulting infringement does not act as a market substitute for the underlying work. A user of this type goes to

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367. While a particular mental state is not necessary to show infringement under the Copyright Act, willful infringement is still shown in some cases as it relates to calculating statutory damages. See 17 U.S.C. § 504(c)(2). Therefore, showing a mental state for digital infringement would not be impossibly difficult and could be shown through a variety of ways.

a concert, records an entire song performed, and later posts it on their private Facebook feed. This type of infringer is the least morally culpable and the least offensive to copyright holders because this infringement is dissemination in nearly its purest form. Beyond the symbolic harm of infringement *qua* infringement, there is little if any economic harm in such a noncommercial use, which certainly does not dissuade artists from creating their art. These individuals should be given the most leniency under any policy and should only be terminated in the most extreme circumstances—for example, if they continue to infringe despite numerous repeated warnings. Service providers should also consider requiring these users to complete a short, noncumbersome training to highlight best practices to avoid infringing another's copyright.

<b>Large OSPs</b> (MAU > 15–20 million)	<u>Commercial</u>	<u>Noncommercial</u>
<u>Willful</u>	2+ strikes = termination	3+ strikes = 45–60-day ban 5+ strikes = termination
<u>Inadvertent</u>	2 strikes = 15-day ban 3 strikes = termination	3+ strikes = 15-day ban 5+ strikes = 30-day ban 7+ strikes = termination

<b>Small OSPs</b> (MAU < 15–20 million)	<u>Commercial</u>	<u>Noncommercial</u>
<u>Willful</u>	3+ strikes = termination	4+ strikes = 45–60-day ban 6+ strikes = termination
<u>Inadvertent</u>	3 strikes = 15-day ban 4 strikes = termination	4+ strikes = 15-day ban 6+ strikes = 30-day ban 8+ strikes = termination

### *C. Whose Burden is This to Bear?*

Of all the factors involved in designing the Infringement Gradient, the most significant lies in determining who or what entity

bears the burden to enforce it. This is because the enforcement question is directly tied to the difficulty involved in the current system: some copyright holders want stronger enforcement of a program that they do not control—the OSPs’ repeat infringer policy.<sup>368</sup> In the twenty-three years since the DMCA was passed, service providers have, either knowingly or unknowingly, benefitted from copyright infringement on their platforms.<sup>369</sup> The fewer users removed from a platform for infringement, the more content remains on the platform, and thus the more money the service provider receives from a larger user base. It is not unreasonable to place the burden of enforcement, therefore, on service providers, while still recognizing that copyright holders may and should enforce their own copyrights. This change would not require service providers to monitor their platforms any more than the law already requires. It would simply mandate that service providers be harsher in enforcing their policies against the most harmful infringers.

The commercial nature of alleged infringement should be relatively easy to determine. Identifying commercial infringement may be an easier task for some providers than others. For instance, nearly all the content on Amazon has been posted for a commercial purpose, so almost all infringing users will be either willful or inadvertent commercial infringers.<sup>370</sup> Even on platforms with more diverse purposes, such as Facebook, there may be certain areas where the commercial nature of the alleged infringement will be easy to determine, such as on Facebook Marketplace.<sup>371</sup>

Evaluating the willfulness of the infringement, however, is a more difficult determination. In this respect, service providers should be given the leniency to assume, when a user appropriates the content of another, that the user has unintentionally infringed the underlying copyright. After the first instance of commercial infringement, service providers should be required to inform the user of three things: (1) that copyright infringement has occurred, (2) that any future infringement will be considered willful, and (3) that willful infringers are subject to account termination. Through this process, willful commercial infringers would essentially be held to a two-strike policy and inadvertent commercial infringers to a three-strike policy. The first strike occurs when the service provider is made aware of the user’s first

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368. See SECTION 512 REPORT, *supra* note 6, at 109.

369. See *id.* at 26.

370. See *What We Do*, AMAZON, <https://www.aboutamazon.com/what-we-do/amazon-store> [<https://perma.cc/7483-4XK4>] (last visited Mar. 27, 2023).

371. See Chaim Gartenberg, *What Is Facebook? Just Ask Mark Zuckerberg*, VERGE (Mar. 8, 2019, 8:00 AM), <https://www.theverge.com/2019/3/8/18255269/facebook-mark-zuckerberg-definition-social-media-network-sharing-privacy> [<https://perma.cc/A49H-6XWY>].

infringement, either through its online system or through a takedown request filed by a copyright holder. After that, the service provider, through an automated system, would notify the user of the infringement as normal but would include enough additional information to effectively describe to the user the alleged infringement. The impact of this notice is that any infringement occurring after notice would place the user in the most punishable category of infringers, thereby leading to more termination of bad-faith infringers than under current, prevailing applications of Section 512(i).

Notably, this system does not require service providers to actively monitor their own websites for copyright infringement. Doing so would be contrary to the purported goals of the DMCA.<sup>372</sup> The system does, however, provide a clearer application of “appropriate circumstances,” encouraging increased accountability for all actors. It also presents few administrative burdens on service providers. Most service providers can easily incorporate the Infringement Gradient into their systems of content moderation and processing takedown requests. Service providers could, for example, allow copyright holders to hand-select the type of infringer when filling out a takedown request. While copyright holders would not be required to do so, this ministerial act would help service providers hold the most egregious infringers accountable. Service providers would also face the same good-faith reporting requirements currently imposed by the DMCA and supported by relevant case law.<sup>373</sup> By making the process easier on service providers, copyright holders would in return reap the benefits of more targeted termination. The change would require service providers to be far less lenient on policing the most damaging forms of infringement—those that seek to unjustly capitalize on appropriated artistic expression to the detriment of the artists themselves.

#### *D. The Benefit of a Tiered Approach to Appropriate Circumstances*

This system affords service providers room to create policies that work for their own platforms. Willful and commercial infringement will look vastly different on Twitter than it will on Etsy, a site created for commercial purposes. Given the interests of service providers in disseminating creative works, the interests of copyright holders in

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372. See SECTION 512 REPORT, *supra* note 6, at 1.

373. See 17 U.S.C. § 512(c)(3)(v); *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148 (9th Cir. 2016) (holding that copyright holders must consider the availability of fair use claims when filing a takedown notice).



receiving compensation for those works, and the Constitution's attempt to balance the two, a tiered system targets nefarious infringers—those that seek to profit off the creative work of others—while being more lenient on infringers that disseminate protected works with no commercial motive. This move, which specifically targets primary infringers, helps to combat the difficulty in holding such actors accountable in the digital age—an age in which encryption and anonymity services have obfuscated digital identities.

By distinguishing between small and large OSPs, the gradient is able to target the most notorious infringers on the largest platforms to limit the most pervasive and detrimental forms of infringement. One might be concerned with this approach because it would require fewer strikes, on the whole, against users of larger services than against users of smaller OSPs. While this is true, larger OSPs have the resources to develop and circulate material to their users on practices to avoid infringement. With more resources to dedicate to educating users and improving automatic reporting systems, larger platforms can protect the content they host without a more lenient strike policy.

A system that targets and imposes harsher penalties on flagrant infringers will promote uniformity in the internal governance of service provider platforms because such a system will provide clarity for the platform and for affected users. Focusing on the most culpable infringers will encourage service providers to create “two-strike” repeat infringer policies, where an infringer is permanently removed from the platform after only two instances of commercial infringement. On the other hand, the system will allow service providers to be more lenient in cases of inadvertent infringement or where the infringement occurs by those without the commercial motivation to appropriate. This moves both service providers and copyright holders away from the current, unworkable reliance on divergent case law and recalibrates their interests in a world where the internet is no longer a vulnerable creature in need of protection.

The Infringement Gradient is a tiered system for evaluating not which user will be punished, but rather how that user will be punished. Losing internet access (in the case of ISPs) or access to a specific website (in the case of OSPs) can be a serious burden for individuals. For many, maintaining employment becomes nearly impossible without internet access; such a loss also restricts an individual's access to healthcare, understanding of current events, and ability to participate in the modern, digital society. Additionally, the expression rights of permanently banned users are harshly disregarded if “termination” in Section 512(i) is meant to impose a permanent ban for cases of unintentional and seemingly harmless infringement. Without an

adequate definition of “appropriate circumstances,” or an understanding flexible enough to recognize repeated and flagrant infringement as two distinct categories, the current system of policing repeat infringement threatens to overinclude passive, nonculpable users beyond what the DMCA envisions.

This threat of overinclusion is especially salient in today’s digital landscape. Consider the following example from Joel Matteson: two weeks prior to the casting of ballots in an upcoming election, a prominent political commentator posts a video on YouTube containing speeches of one of the candidates in order to speak out against the candidate’s policies.<sup>374</sup> Not wanting the negative influence of the commentator’s video to impact the election, the candidate files a takedown notice to YouTube, claiming the video violates the candidate’s copyright.<sup>375</sup> Under Section 512(g) of the DMCA, the candidate need not worry about whether the video actually infringes on his copyright because he may force the takedown of posted material for at least ten to fourteen days regardless of the merits of his complaint.<sup>376</sup> Of course, the commentator could file a counter notice under Section 512(g)(3), but the video nevertheless would be removed from YouTube for ten to fourteen days, long enough for the election to take place unaffected.<sup>377</sup> Despite applicable fair use arguments, the notice-and-takedown regime can be weaponized to silence the substance of someone’s expression regardless of the applicability or lack thereof of copyright protections.

Automatic systems are not immune from abuse, either. The pace and responsiveness of the online environment incentivizes a regime of excessive takedown notices, both from automated systems and copyright holders. A comprehensive study from 2017 found that there was a “high number of questionable notices” filed against users and that the users “almost never use the counter notice process.”<sup>378</sup> Evaluating over twenty-nine OSPs through detailed surveys, interviews, and publicly available data, the study concluded that “secret, algorithmic decision making is difficult for Internet users to penetrate and challenge, rendering their expression rights vulnerable.”<sup>379</sup> Even YouTube’s state-of-the-art “Content ID” program flags an extraordinary

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374. Matteson, *supra* note 14, at 2.

375. *Id.*

376. 17 U.S.C. § 512(g)(2)(C).

377. See Matteson, *supra* note 14, at 2; 17 U.S.C. § 512(g)(3).

378. See JENNIFER M. URBAN, JOE KARAGANIS & BRIANNA L. SCHOFIELD, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 127 (2017).

379. *Id.* at 4.

quantity of noninfringing videos as infringing.<sup>380</sup> Sophisticated artificial intelligence has similarly led to the frequent issuance of takedown notices and the inaccurate application of strikes against user accounts where no infringement has actually occurred.<sup>381</sup> The tiered design of the Infringement Gradient serves to protect those individuals most vulnerable to abusive algorithmic processes by taking steps against the broad generalization of users on any given platform while also targeting the most pervasive and harmful forms of infringement.

## VII. CONCLUSION

Life has become increasingly digital, from tracking personal finances through online banking, to connecting with loved ones in the middle of a pandemic through video platforms, to watching complete concerts in the metaverse. The ways in which people interact and share content with one another constitute fundamental exchanges across the internet. Yet these exchanges have been threatened by overly protective copyright holders, poorly configured algorithmic content moderation systems, and overactive service providers wary of losing the DMCA's liability shields. Despite what the Copyright Office believes, Section 512(i) does not need strengthening. Service providers have not been turning a blind eye to infringement and intentionally creating wildly different repeat infringer policies to augment their own profit margins. Rather, their inconsistent activity naturally reflects the ambiguities in Section 512(i) itself.

This Article defines in Part VI the contours of a satisfactory repeat infringer policy under current interpretations of Section 512(i).<sup>382</sup> Additionally, against policy proposals put forth by the Copyright Office, which needlessly burden service providers with increased administrative costs, this Article puts forth policy solutions to recalibrate enforcement of copyrights in the digital world.<sup>383</sup> The definition and redefinition of the vagueness in the DMCA's repeat infringer policy requirement explored by this Article would prevent copyright holders from being left with the binary choice between dissemination and creativity any longer.

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380. See Leron Solomon, Note, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 255 (2015).

381. See generally Jonathon W. Penney, *Privacy and Legal Automation: The DMCA as a Case Study*, 22 STAN. TECH. L. REV. 412 (2019).

382. 17 U.S.C. § 512(i).

383. See *supra* Part VI.