ANNOTATED BIBLIOGRAPHY FOR PANEL 2

DMCA Smackdown — Take it Down Because I Said So!

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The works cited in this annotated bibliography are about provisions of the Digital Millennium Copyright Act (DMCA) that set forth a process for taking down infringing works from a Web site. Issues addressed include the procedural requirements for notifying an Internet Service Provider that infringing work has been posted and needs to be removed from a site. Another issue addressed is how a poster may challenge a takedown notice. Cited works also deal with the nature of fair use, which one who posts content on a Web site may claim when contesting a takedown notice. The bibliography also addresses such matters as the effects takedowns may have on freedom of speech, how technological innovation relates to the takedown process and the potential for reform of that process.

The annotations that follow are intended to convey themes, key points or issues that appear in the works cited.

Note: Congress' View of the Purpose of the DMCA

The digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works – at virtually no cost at all to the pirate. As technology advances, so must our laws. – The House Commerce Committee.

I. Introductory Information

Ken Lui, *The DMCA Takedown Notice Demystified*, Science Fiction & Fantasy Writers of America (Mar. 6, 2013), http://www.sfwa.org/2013/03/the-dmca-takedown-notice-demystified/

The DMCA process for a takedown of infringing material from a Web site can be complicated to those unfamiliar with it. Without injecting any opinion, this author summarizes the law of the DMCA takedown including: what a DMCA take down notice is, why notices are issued, the parties involved, what the take down notice looks like, how a notice is sent, what a notice must contain, and any recourse for one whose posted content is the target of a takedown notice. A takedown notice can be summarized as "a cost-effective, quick, and powerful tool to remove material that infringes your copyright." is a great starting point for those getting acquainted with takedown process or wanting to find the relevant part of 17 USC §512 relating to the takedown process.

II. An Overview of the DMCA "Safe Harbors", 17 U.S.C. 512 (March 2017)

The "safe harbors" are not copyright exceptions. The "safe harbors" are limitations on liability. More specifically they are limitations on liability for service providers. There are two definitions of the term "service provider." One is a narrow definition that includes any entity

offering transmission, routing, or providing connections for online communication. The other is a broad definition—so broad that it is hard to imagine an online service that does not fall under it. Four main "functions" of service providers are covered by the safe harbor: conduit, caching, hosting, and information location tools (search engines). Section 512 also includes prerequisites and disqualifiers as well as an allotted section for "DMCA Material Misrepresentation" (17 USC 512(f)).

David Oxenford, *Copyright Office Reviews Section 512 Safe Harbor for Online User-Generated Content – The Differing Perceptions of Musicians and Other Copyright Holders and Online Service Providers on the Notice and Take-Down Process*, Broadcast Law Blog (Apr. 12, 2016), http://www.broadcastlawblog.com/2016/04/articles/copyright-office-reviews-section-512-safe-harbor-for-online-user-generated-content-the-differing-perceptions-of-musicians-and-other-copyright-holders-and-online-service-providers-on-the-noti/.

The purpose of Section 512 of the Copyright Act was to provide a safe harbor "to protect differing types of internet service providers (ISPs) from copyright liability for material that uses their services." Many issues surround user-generated content and interplay of the safe harbor with the takedown process. Section 512(c) specifically protects ISPs from liability for "user-generated content." User-generated content is "information residing on systems or networks at the direction of users." Issues under study by the Copyright office include "whether it is possible for [ISPs] to adopt systems that can identify infringing content, and whether the services should be forced to adopt a **"take down, stay down"** system where once infringing content is identified, the service should somehow be forced to go through all of its content to determine whether the material that it has just taken down has popped up someplace else."

David Oxenford, *Learning Copyright Law from TVs The Good Wife – Compulsory Licenses Derivative Works and Parody and Fair Use*, Broadcast Law Blog (Jan. 8, 2014) http://www.broadcastlawblog.com/2014/01/articles/learning-copyright-law-from-tvs-the-good-wife-compulsory-licenses-derivitive-works-and-parody-and-fair-use/

An episode of "The Good Wife" television series dealt interestingly with the difference between a derivative of a copyrighted work and fair use of that same work. Creating a derivative of a copyrighted work requires permission from the copyright holder. Parody is a form of fair use of a work and so does not require permission. The "Good Wife" episode illustrated "a much-litigated area with no clear answers, so users should not lightly expect that an unlicensed use of a song will be considered a fair use."

III. Chilling Effects – The DMCA, Free Speech and Innovation

Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 Harv. J. Law & Tec 171 (Fall 2010)

A rebalance is needed between speech protection and copyright to reduce erroneous takedowns. A greater constitutional scrutiny can provide such protection for free speech. The DMCA has a chilling effect on free speech. A number of takedowns are correct in their purpose. However a number of erroneous takedown notices are sent without any kind of repercussion. The erroneous takedown is bad because it causes the poster to lose his or her chance to reach the audience as well as costing the public its chance to hear the "lawful speech made in the marketplace of ideas." Concerns about takedowns are categorized as follows:

- DCMAs Chills
    - Error Costs of the DMCA
    - Intermediation – the principal-agent concept of ISPs.
    - The DMCA and the Economics of Speech – Pirates can exploit economies which means the Dark Knight will spread faster than commentary on it.
- First Amendment Problems
    - Copyright and First Amendment
    - Prior Restraints on Speech
    - Understanding Chilling Effects
    - Chill, Intermediated
- The Chill Winds of Copyright and DMCA
    - Errors and Pressures
    - The Chill in Practice
    - "Repeat Infringers"
    - Limited Warming?
    - Against Copyright Secondary Liability
- Reforming Copyright Takedown

Amy McCall, *The DMCA and Researchers' First Amendment Rights*, 3 U. Pitt. J. Tech. L. & Pol'y 1 (Spring 2002).

The DMCA allows copyright owners to engage in threatening litigation and demand removal of content and has a chilling effect on fair users. Two civil actions are described: *Universal City Studios, Inc. v. Remierdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000), aff'd by *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001); and *Felten v. RIAA*, No. CV-01-2669 (D.N.J. 2001), available at http://www.eff.org/legal/Cases/Felten_v_RIAA.

Note: These cases were omens of the current, ongoing issues with DMCA takedowns. The same concerns about chilling effects that arose under the DMCA at the time of the *Remierdes* and *Felten* litigation continue today.

IV. Safe Harbors

EFF to Copyright Office: Improper Content Takedowns Hurt Online Free Expression: Safe Harbors Work for Rights Holders and Service Providers, Electronic Frontier Foundation, (Apr. 1, 2016), https://www.eff.org/press/releases/eff-copyright-office-improper-content-takedowns-hurt-online-free-expression.

The Electronic Frontier Foundation (EFF) notes that the purpose of safe harbors, according to the EFF, is ". . . to give rightsholders streamlined tools to police infringement, and give service providers clear rules so they could avoid liability for the potentially infringing acts of their users. Without those safe harbors, the internet as we know it simply wouldn't exist, and our ability to create, innovate, and share ideas would suffer." The EFF does acknowledge the notice-and-takedown process is often abused. Problems include errors, misuse, and overreach, which pushes legal and legitimate content offline. "A significant swath of lawful speech is getting blocked from the Internet, just because it makes use of a copyrighted work. . . The

Internet needs fewer bad copyright claims – not more burdensome copyright laws – to protect speech," said EFF Staff Attorney Kit Walsh.

Joe Karaganis & Jennifer Urban, *The Rise of the Robo Notice*, 58 ACM 28-30 (Sep. 2015) http://cacm.acm.org/magazines/2015/9/191182-the-rise-of-the-robo-notice.

The notice and takedown process serves three purposes. The process created a cheap and fast way to resolve copyright disputes for online services as opposed to the lengthy process of filing a lawsuit. The process also established a set of steps service providers can take to avoid liability (both vicarious and contributory). The process enabled protections for free speech and fair use, albeit in the arguably weak form of a "counter notice." The procedural aspects of issuing takedown notices and counternotices are included in the DMCA.

V. Fair Use

Jacqui Cheng, *NFL fumbles DMCA takedown battle, could face sanctions The NFL wasn't happy when law professor Wendy Seltzer posted a Super Bowl clip …*, Ars Technica (March 20, 2007), https://arstechnica.com/business/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions/

The story of a dispute over the DMCA takedown provisions and fair use is told, beginning as follows:

> Brooklyn Law School professor Wendy Seltzer…posted a YouTube clip on her personal blog in early February [2007]. The clip showed the NFL's copyright message that aired during the Super Bowl:
>
> > This telecast is copyrighted by the NFL for the private use of our audience, and any other use of this telecast or of any pictures, descriptions or accounts of the game without the NFL's consent is prohibited
>
> Seltzer took exception to this claim—as it clearly makes no concession for fair use—and wanted to show her students how content owners are beginning to exaggerate their rights.

Lenz v. Universal Music Corp. (Lenz III), 815 F.3d 1145, 1148 (9th Cir. 2016)

The court summarized this case as follows:

> Stephanie Lenz filed suit under 17 U.S.C. § 512(f)—part of the Digital Millennium Copyright Act ("DMCA")—against Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively "Universal"). She alleges Universal misrepresented in a takedown notification that her 29–second home video (the "video") constituted an infringing use of a portion of a composition by the Artist known as Prince, which Universal insists was unauthorized by the law. Her claim boils down to a question of whether copyright holders have been abusing the extrajudicial takedown procedures provided for in the DMCA by declining to first evaluate whether the content qualifies as fair use. We hold that the statute requires copyright holders to consider fair use before sending a takedown notification, and that in this case, there is a triable issue as to whether the copyright holder formed a subjective good faith belief that the use was not authorized by law.

Note: The video at issue in the case may be viewed on the Electronic Frontier Foundation's Web site, https://www.eff.org/cases/lenz-v-universal, along with documents related to an appeal from the 9th Circuit decision, including the petition for a writ of certiorari.

Lawrence Lessig, *Copyright and Politics Don't Mix*, The New York Times (Oct. 20, 2008) http://www.nytimes.com/2008/10/21/opinion/21lessig.html

The author expresses concern about disregard for fair use, citing a 2007 in 2007 in which "Fox News ordered John McCain to stop using a clip of himself at a Fox News-moderated debate." As the author also notes, "Last month, Warner Music Group demanded YouTube remove an amateur video attacking Barack Obama that included its music, while NBC asked the Obama campaign to pull an ad that included some NBC News video with Tom Brokaw and Keith Olbermann." The author concludes, "No doubt, these corporations are simply trying to avoid controversy or embarrassment, but by claiming infringement, they are effectively censoring political speech."

David Oxenford, *Digital and Social Media Legal Issues for Broadcasters – Exercise Care in Using Internet Content on Your Digital Properties, And Why Fair Use is Not Always a Defense*, Broadcast Law Blog (Feb. 14, 2014) http://www.broadcastlawblog.com/2014/02/articles/digital-and-social-media-legal-issues-for-broadcasters-exercise-care-in-using-internet-content-on-your-digital-properties-and-why-fair-use-is-not-always-a-defense/.

The Internet is about sharing of information generally. However, taking and using copyrighted content from the Internet is illegal if permission is not gained by the creator or owner of that copyright. In fact, even if attribution to the creator of the content used is included, it is not enough – neither is sharing a link to the original content. Even free sites are often only sharing material to be used for personal use and not commercial exploitation. A myth exists around fair use that portions can be used in the form of 5 second, 10 second, or 30 second windows. This myth behind these windows is a user believes he or she is not violating copyright by using only a portion of the content. For example, users may think that if they only use a 30 second clip from a 4-minute song, then they are not infringing. In fact, however, any use of any portion of a copyrighted song can be infringement. Similarly, it is a false belief that reusing a picture/image so long as it is a limited size or resolution does not constitute infringement is a myth. Fair use is a possible defense to infringement. Fair use is judged on several factors (see §107 of US Copyright Act). Some examples of what might be considered fair use are using material for commentary or criticism. A few seconds from a song or movie clip could potentially be used, especially if for commentary, criticism, or as an educational tool in the classroom.

Wendy Seltzer, *The Imperfect Is the Enemy of the Good: Anticircumvention versus Open User Innovation*, 25 Berkeley Tech. L.J. 909 (Spring 2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496058.

Abstract: "Digital Rights Management, law-backed technological control of usage of copyrighted works, is clearly imperfect: It often fails to stop piracy and frequently blocks non-infringing uses. Yet the drive to correct these imperfections masks a deeper conflict, between the DRM system of anticircumvention and open development in the entire surrounding media

environment. This conflict, at the heart of the DRM schema, will only deepen, even if other aspects of DRM can be improved. This paper takes a systemic look at the legal, technical, and business environment of DRM to highlight this openness conflict and its effects."

Wendy Seltzer, *Exposing the Flaws of Censorship by Domain Name*, 9-1 IEEE Security and Privacy 83, 83-87 (Jan/Feb. 2011) https://wendy.seltzer.org/pubs/COICA-IEEE.pdf.

Proposed federal law, called the Combating Online Infringement and Counterfeits Act threatens free expression online. The proposed federal law also threatens the integrity of the Internet's Domain Name System. It also undermines US foreign policy, all while stifling free speech. The freedom of speech, as guaranteed by the First Amendment, would be shut down before the accused registrants have any chance to defend their position. Free speech, due process, and technological advancement are all shown to be hindered by the COICA.

Note: The analysis of this Act, which was proposed in 2010, addresses many of the issues surrounding current takedown problems.

VI. Stay Down Take Down – Whack a Mole

Corynne McSherry et al., In the Matter of Section 512 Study: Docket No. 2015-7, Electronic Frontier Foundation (Apr. 1, 2016) https://www.eff.org/files/2016/04/01/eff_comments_512_study_4.1.2016.pdf.

The EFF is a nonprofit organization dedicated to ensuring copyright law enhances advancement of creativity and freedom of expression. The EFF replied to the Copyright Office's request for comment on Section 512. The EFF responded to the following questions:

- Are the Section 512 Safe Harbors working as Congress intended?
    - Without Section 512, the internet would be much less friendly to innovation and creation. Currently the internet serves as a fostering place for these purposes. However, the Safe Harbors lead to over-blocking. The safe harbors provide a means to limit liability and thus lead to blocking of lawful content to limit potential liability. Further, service providers may refuse certain types of services because of severe liability. An example of this is a smaller business trying to start the next YouTube. Small businesses couldn't provide this kind of service which has large liability implications. Despite these set-backs, no revocation on the safe harbors should be adopted as an additional burden intermediary providers.
- How efficient or burdensome is Section 512's notice and takedown process for addressing online infringement?
    - The EFF is strongly opposed to any legislation with the effects of "take down, stay down." Forcing service providers to actively police content would lead to over-block and/or aggressive limitations on user generated content. Additionally, most service providers are not equipped to handle such policing. This type of policy would drive many service providers out of the market.
- Address the role of both human and automated notice and takedown processes under Section 512, including the respective feasibility, benefits, and limitations.

    - Automated processes cannot substitute for human review of content. Automated identifiers have not shown an efficiency, yet, which makes them useful.
- How effective is the counter-notice process for addressing false and mistaken assertions of infringement?
    - Not very. Abusive takedown notices are too common and a persistent problem.
- Are the remedies for Misrepresentation set forth in Section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?
    - The number of abusive takedown notices and misuse of takedowns shows that 512(f) needs to be strengthened. However, recent court cases have shown respect for Section 512(f). See *Batzel v. Smith*, 333 F.3d 1018, 1031 n. 19 (9th Cir. 2003) which "carefully balance[es] the First Amendment rights of users with the rights of a potentially injured copyright holder."

Takedown Hall of Shame, Electronic Frontier Foundation (last visited: Apr. 10, 2017). https://www.eff.org/takedowns.

This source provides a list of "bogus" copyright and trademark complaints. The page provides links to numerous instances of takedown notices which can be considered case studies. The site storyline reads, "Bogus copyright and trademark complaints have threatened all kinds of creative expression on the internet. EFF's Hall of Shame collects the worst of the worst."

Robert Atkinson et al., *RE: Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7*, Information Technology & Innovation Foundation (Mar. 21, 2016), http://www2.itif.org/2016-section-512-comments.pdf.

In this response to the U.S. Copyright Office's request for public comment concerning the impact and effectiveness of the Section 512 Safe Harbor provisions, the Information Technology & Innovation Foundation claims the DMCA provides balance and should go unchanged. Success of the takedown process is credited to the lack of counter-notices which are filed as well as data indicating very few takedown notices are issued inappropriately. Further supporting this claim, the ITIF states that very few cases have inappropriately hindered free speech. The ITIF also points to a provision in the DMCA which provides for monetary damages when a party knowingly misrepresents information in a takedown notice. In addition, the ITIF addresses what it believes are the two chief errors which could occur in the notice and takedown process: "false positives" and "false negatives." False positives occur when a takedown notice is inappropriately used to request a takedown for materials that qualify for an exemption. False negatives occur when infringing content is not identified, and therefore not taken down. (For a criticism of this comment, see Mike Masnick, *DMCA's Notice and Takedown Procedure Is a Total Mess, And It's Mainly Because of Bogus Automated Takedowns*, cited immediately below.)

Mike Masnick, *DMCA's Notice and Takedown Procedure is a Total Mess, And It's Mainly Because of Bogus Automated Takedowns*, Techdirt (Mar. 30, 2016) https://www.techdirt.com/articles/20160330/01583234053/dmcas-notice-takedown-procedure-is-total-mess-mainly-because-bogus-automated-takedowns.shtml.

Takedown notices can be generated by robots and automatically sent out to Internet Service Providers or Online Service Providers. A problem is that automating issuance of notices

can produce numerous erroneous or "bogus" takedowns of content that was posted as a fair use or is otherwise legal.

Major copyright owners are calling for a "notice and staydown" process. In their view, when they issue a notice to take down allegedly infringing content from a Web site, the "platform needs to proactively block any copies of that content from ever being uploaded again." This approach would overwhelm the ability of smaller platforms especially if issuance of takedown notices is automated. Moreover, a notice and staydown process "would completely wipe out the fair use possibilities, and potentially violate the First Amendment."

The Information Technology & Innovation Foundation ("ITIF"), a think tank, has suggested automated take downs are not a problem because of the limited number of counternotices, which arguably indicates relatively few content posters feel they legitimately can object to takedowns. ITIF's position is denounced as "ridiculous" because of a low number of objections. People are afraid to file counter notices. Descriptions of the counternotice process make it appear "complicated and dangerous." Issuing a counternotice "can lead to you being sued in federal court, where you may face statutory damages awards up to $150,000 per work infringed." Further, one study, documenting the "abusive and faulty nature of automated takedowns" shows that 1 in 25 takedown requests (4.2%) was "fundamentally flawed" and almost one third (28.4%) "had characteristics that raised clear questions about their validity." These questionable takedown requests included issues "about compliance with the statutory requirements (15.4%), potential fair use defenses (7.3%), and subject matter inappropriate for DMCA takedown (2.3%)."

Mike Masnick, *The Rebranding of SOPA: Now Called 'Notice and Staydown'*, Techdirt (Mar. 14, 2014), https://www.techdirt.com/articles/20140313/17470826574/rebranding-sopa-now-called-notice-staydown.shtml

Topics covered by the author include the "idea is, more or less, that if a site receives a takedown notice concerning a particular copy of a work, it should then automatically delete all copies of that work and, more importantly, block that work from ever being uploaded again. Criticisms of "takedown and staydown" include "the fact that such a law would more or less lock in a few big players, like YouTube, and effectively kill the chance of any startup or entrepreneur to innovate." Such a law "would basically just guarantee that the few big players who could afford both the technology and the legal liability/insurance over the inevitable lawsuits, would be able to continue hosting user generated content."

Glyn Moody, *The EUs Proposed Copyright Directive Is Likely to be a Wonderful Gift – For US Internet Giants*, TechDirt (Sep. 27, 2016), https://www.techdirt.com/articles/20160923/09161035602/eus-proposed-copyright-directive-is-likely-to-be-wonderful-gift-us-internet-giants.shtml.

A European Union copyright proposal, which would obligate YouTube and other such sites to automatically detect and remove infringing user-generated content, would help large Internet companies obtain monopolies. Smaller companies and startups would have much difficulty complying. Effectively, larger companies, which can manage a greater burden, will survive the administrative hurdles while the smaller companies will either shut down or not start at all. The challenges for the smaller companies is to have the means to deploy preventative filtering to keep infringing content from being uploaded.

Mike Masnick, *EU Announces Absolutely Ridiculous Copyright Proposal That Will Chill Innovation, Harm Creativity*, TechDirt (Sep. 14, 2016), https://www.techdirt.com/articles/20160914/11513635518/eu-announces-absolutely-ridiculous-copyright-proposal-that-will-chill-innovation-harm-creativity.shtml.

The author augments Glyn Moody's argument in "The EUs Proposed Copyright Directive Is Likely to be a Wonderful Gift – For US Internet Giants." The EU proposal would do away with the limitations on liability for service providers, which means they would have to fall back on content identification systems to detect infringing content and remove the content to protect themselves against claims. Google has the best Content ID and may keep that software exclusively. Others cannot effectively prevent infringement without a strong Content ID system, giving a competitive advantage to Google. Startups probably could not afford this type of system development.

David Oxenford, *Axl Rose DMCA Takedown Notices Illustrate the Difficulty With Safe Harbor Reforms – User-Generated Content and Fair Use Issues*, Lexology (June 9, 2016), http://www.lexology.com/library/detail.aspx?g=2cf30cd0-b6af-47c5-95d6-e74dd91044c9.

One problem with automated takedown notices is they cannot evaluate the criteria which must be considered in a takedown. Four factors are listed in the Copyright Act in Section 107, none of which necessarily carries more weight than another: 1) The purpose and character of the use, including whether such a use is of a commercial nature or is for nonprofit educational purposes; 2) The nature of the copyrighted work; 3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) The effect of the use upon the potential market for or value of the copyrighted work. These evaluations are not easy to make and are even more problematic by an automated means. (For example. consider whether an automated means could evaluate how a work is being used – is it for purposes of commentary or criticism, which generally favors finding of fair use?). The take down, stay down approach is criticized as well as the "whack a mole" concern about content subject to previous take downs popping up again on the same site, sometimes moments later.

Andy, *RIAA CEO: Piracy Notices Are Costly & Increasingly Pointless*, Torrent Freak (Sep. 24, 2015), https://torrentfreak.com/riaa-ceo-piracy-notices-are-costly-increasingly-pointless-150924/.

RIAA CEO Cary Sherman criticizes the DMCA takedown system, saying, "The result is a never-ending game that is both costly and increasingly pointless." The main problem is the "whack a mole" issue. When service providers receive a takedown notice, they are in compliance if they remove the content from the site. Users can add the content again; then another takedown notice needs to be sent and the provider would remove the content again to be in compliance. This is what is considered the "whack a mole" process. Google is considered to be quick to comply with these notices; a good example is YouTube. It is easy to imagine a song being posted by a registered user, a takedown notice being sent to YouTube by the copyright owner of the song, and then YouTube complying by removing the content. Soon after the song is reposted by the user. Sherman wants "take down, stay down," which would make YouTube responsible for keeping the content off the Internet. Not all Internet providers, especially the smaller ones, are able to keep this type of monitoring up because they don't have the necessary

resources or technology. Online music pirates are taking advantage of the current takedown system. These types of illegal music providers can repost any material in a matter of hours.

Stephen Carlisle, *DMCA "Takedown" Notices: Why "Takedown" Should Become "Take* Down and Stay Down" and Why It's Good for Everyone (July 23, 2014), http://copyright.nova.edu/dmca-takedown-notices/

The "take down and stay down" approach should be the new "Takedown." The problem is the weakness of the current takedown notice process rather than the chilling effects of takedowns on free speech. A "take down, stay down" policy would eliminate the "whack-a-mole" problem. Second, this policy would reduce the massive amount of notices being filed. As of 2014, Google had received over 100 million, with 6.5 million coming in a single week prior to July 23, 2014. Both large and small entities would benefit from a "Take down, Stay down" policy. Google would benefit by having to expend less resources, and smaller, independent folks could save time and resources. Another problem addressed is that internet pirates are silencing the creative voices of musicians and film makers. In particular, smaller film makers are threatened because they can't sustain themselves after pirating. Smaller producers don't have the resources to issue takedowns. "Artists need to devote their time to making art. They should not have to devote their time to sending out repetitive takedown notices. The time for take down and stay down has come."

Judy Chu & Tom Marino, V*ictims of IP Theft Need Better Protection*, The Hill (March 12, 2014) http://thehill.com/opinion/op-ed/200630-victims-of-ip-theft-need-better-protection

"[A] recent study by the Digital Citizens Alliance estimates that the top 596 pirate sites raked in $227 million in advertising revenues last year. These sites had a profit margin of between 80 and 94 percent. Content thieves rely on stealing the rights-protected work of others and distributing on low-cost sites. It's a low-risk, high-reward business."

Chris Castle, *Safe Harbor Not Loophole: Five Things We Could Do Right Now to Make the DMCA Notice and Takedown Work Better*, The Trichordist (Sep. 10, 2012). https://thetrichordist.com/2012/09/10/safe-harbor-not-loophole-five-things-we-could-do-right-now-to-make-the-dmca-notice-and-takedown-work-better/

The DMCA is not broken but the law is not being applied correctly. The DMCA has all the provisions needed to work properly and, as always, some people will abuse a law. To decrease abuse of the law, the following five proposals offer ways to make the DMCA takedown process work better: 1) Stop playing games with red flag knowledge. If a site can receive over a million takedown notices in a week, then they know they are infringing. (However, the author is stating references to the million takedown notices as if they are for the same piece of infringing material, not different items.) 2) Block the file, not the link to the file. By removing a link, the service provider is not effective and the service provider should be forced to remove the link and the infringing material. However, the infringing material itself is not always hosted on the same service provider at the provider which hosts the link (YouTube is listed as an example). 3) Don't treat sites that haven't registered a DMCA agent as if they are entitled to the safe harbor. The DMCA requires a site to have a registered agent, otherwise they have no safe harbor. 4) Don't support automatic reposting. 5) Issue Google-style public transparency reports. Additionally,

further transparency is proposed from companies such as Google. One example is for transparency reports from all entities which Google holds.

Artists For An Ethical and Sustainable Internet, *The DMCA is Broken*, The Trichordist (July 18, 2012), https://thetrichordist.com/2012/07/18/the-dmca-is-broken/.

An indie label album licensor speaks about its troubles with the DMCA over a two-year experiment. The writers sent more than 50,000 takedown notices over two years and found that most were repeat notices to the same top 20 offenders. The takedown notices took 24-48 hours to be effective, but then the infringing work would be available again on the same site, under the same name, within a few hours.

VII. User Generated Content

Benjamin Wilson, Notice, *Takedown, and the Good-Faith Standard: How to Protect Internet Users from Bad-Faith Removal of Web Content*, 29 St. Louis U. Pub. L. Rev. 613 (2010)

Proving copyright owner's subjective bad faith is extremely challenging for Internet users who have posted allegedly infringing content. One study found that over a third of takedown notices had major flaws, however only two cases since the adoption of the DMCA in 1998 have favored Internet users, including *Lenz*. The same study found that 41% of takedown notifications targeted business competitors. These numbers raise the question of whether senders are acting in good faith. A good faith basis needs to be adopted for takedowns to be successful. The burden of proof should not be on the Internet user but the copyright holder. Section 512(f) is weak and needs to be reformed.

Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement., UGC Principles (last visited: 10, 2017) http://www.ugcprinciples.com/index.html

A group of copyright owners and user generated content advocators came up with principles they agree will make UGC more successful. In coming up with these principles, the group agreed on four goals: 1) the elimination of infringing content on UGC Services, 2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, 3) the accommodation of fair use of copyrighted content on UGC Services, and 4) the protection of legitimate interests in user privacy.

The group came up with 15 different principles. The address, for example, how users generating content should behave during the uploading process, and also take into account systems that notify service providers upon upload if the content is infringing.

Electronic Frontier Foundation, *Fair Use Principles for User Generated Video Content*, (last visited: Apr. 10, 2017), https://www.eff.org/pages/fair-use-principles-user-generated-video-content.

Online video posting sites such as YouTube and others have generated a massive birth of creativity, unlike anything before in history. By allowing users to create and publish their creations, User Generated Content, the Internet has sparked free expression and provided a means for users to reach a global audience. This reach is without the assistance of a major movie studio or the like. Six principles to protect this user expression from false takedown notices are: 1) Give wide berth to transformative, creative uses. Allow copyright owners to pursue, widely,

anyone infringing of their work. However, keep a strong backing for fair use, especially when that fair use is comment, criticism, satire, parody, scholarship, etc. 2) Filters must incorporate protections for fair use. The proposal is that there be three "strikes" against the work before blocking. These three strikes relate to the video or track that matches the owner's content, and it must be nearly in its entirety. (The EFF proposes a 90% cutoff). 3) Require that the owner of the content be notified when his or her content is removed. 4) In addition, the user must be notified of his or her options. The minimum would be of the two options: counter-notice, or right to sue. 5) Maintain a hotline for those users who make mistakes. Establish a route for them to fix mistakes with a 3-day quarantine period. 6) Provide for reinstatement of content upon counter-notice.

Selected statutes and cases

17 U.S.C.S. § 512, Limitations on liability relating to material online, https://www.law.cornell.edu/uscode/text/17/512

17 U.S.C.S. § 107. *Limitations on exclusive rights: Fair Use*, https://www.law.cornell.edu/uscode/text/17/107.

Lenz v. Universal Music Corp., 572 F.Supp.2d 1150 (N.D. Cal., 2008), *aff'd by* Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016); *Writ of cert. denied*, 137 S. Ct. 416 (Oct. 31, 2016).

Viacom International, Inc. v. YouTube and Google, Inc., 676 F.3d 19 (2nd Cir., 2012). See Jonathan Stempel, *Google, Viacom settle landmark YouTube lawsuit*, Technology News (Mar 18, 2014), http://www.reuters.com/article/us-google-viacom-lawsuit-idUSBREA2H11220140318

EMI Christian Music Group, Inc. v. MP3tunes, LLC, 844 F.3d 79 (Dec. 13, 2016).

Mavrix Photographs, LLC v. Livejournal, Inc., No. 14-56596 (Apr. 7, 2017).

Universal City Studios, Inc. v. Reimerdes, 111 F.Supp.2d 294 (S.D.N.Y. 2000), aff'd by *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001).

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