

BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS, Washington, D.C.

In the Matter of Section 512 Study: Notice and Request for Public Comment	Docket No. 2015-7
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Comments of New Media Rights

By Art Neill and Erika Lee

I. Commenting Party

New Media Rights is a non-profit program that provides preventative, one-to-one legal services to creators, entrepreneurs, and internet users whose projects require specialized internet, intellectual property, privacy, media, and communications law expertise. These legal services include counsel to users, intermediaries, and copyright holders on section 512 of the DMCA. New Media Rights is an independently funded program of California Western School of Law, a 501(c)(3) non-profit. Further information regarding New Media Right’s mission and activities can be obtained at <http://www.newmediarights.org>.

II. Comments

These comments are based on our work with clients who rely on section 512 and lawful content reuse, particularly internet users, smaller intermediaries, and independent creators. These comments will be divided into two broad categories: Part I addresses key problems with section 512 and offers a proposal for legislative solutions to these problems. Part II focuses on the section 512 notice and takedown procedures, and the particular problem of large-scale automated takedowns.

Specifically, Part I (A) discusses the fact that section 512(f) is ineffectual at preventing copyright overreach and bullying. Next, Part I (B) analyzes the vagueness of the law as it pertains to a fair use consideration before sending a takedown notice. Part I (B) also proposes

three legislative solutions that would clarify fair use in section 512(c)(3)(A)(v), impose a gross negligence standard for section 512(f), and clarify section 512(f) damages.

Part II first focuses on the significant power imbalance between large- and small-scale copyright holders, and the settling culture that results from the financial disparity between rightsholders and defendants. Part II then focuses on the problem of the inaccuracies of mass automated takedowns, and rejects “notice and staydown” style changes that would place extraordinary further burdens on internet users and service providers.

These comments are filed in response to the Notice of Inquiry issued by the U.S. Copyright Office on December 31st, 2015 addressing several of the Subjects of Inquiry with regards to section 512 of the Digital Millennium Copyright Act (“DMCA”). In accordance with the Office’s requests, the subjects addressed will include questions 1, 5, 8, 9 12, 15, and 28. Answers to these questions will be addressed within the main sections and subsections of this comment, and for convenience will be referenced in the headings where applicable.

Part I: (NOI Questions 1, 5, 8, 9, 15, 28)

A. DMCA Section 512(f) is ineffectual at preventing copyright overreach and bullying

When Congress enacted 17 U.S.C. § 512(f), it did so with the purpose of providing users protection from having their material removed from a website without justification, and without any means of recourse.¹ However, section 512(f) is not providing Congress’ intended balance, but is rather toothless against preventing copyright overreach and content bullying. At its core, the DMCA safe harbor provisions provide for a notice and takedown system that allows content to be removed from the internet without ever seeing the inside of a courtroom. While this is

¹ See S. REP. 105-190, 21 (512(f) was meant to “balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.”)

efficient in theory, in practice the DMCA is a powerful extrajudicial tool, and just one of many approaches content bullies use to remove otherwise lawful content from the internet.

At New Media Rights, we provide direct legal services to remix artists responding to content bullies.² Content bullying occurs when an individual takes down another user's content for an improper purpose. But what truly differentiates content bullies from reasonable individuals involved in a copyright dispute is their tenacity for sending inaccurate takedowns, ignoring appeals, and insisting on removing and disabling non-infringing content. Large-scale copyright holders often use automated means (e.g. web crawlers) to find infringing content³ and then mass-produce DMCA takedown notices; often not considering legitimate reuses like fair use. Other methods of content bullying include cease and desist letters and removals of urls from search engines. As a result, many types of otherwise legal⁴ content disappear as collateral damage⁵ in large-scale copyright holders' war on piracy. In addition to using DMCA section 512 notice and takedown procedures without considering legitimate reuses, large-scale copyright holders often use their privileged relationships with content sharing websites like YouTube, including the Content ID system, to remove or monetize the legal reuse of their content.⁶ Both large- and small-scale copyright holders are often guilty of overlooking fair use considerations

² See e.g., Jonathan McIntosh, *Buffey vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>; *Teens make parody video, but Sony tells them to beat it... just beat it!* New Media Rights (October 15, 2013) http://www.newmediarights.org/teens_make_parody_video_sony_tells_them_beat_it%E2%80%A6_just_beat_it.

³ These automated takedown processes often result in the takedown of non-infringing content. See Mike Masnick, *Microsoft Sends Google DMCA Takedowns For Microsoft's Own Website*, TechDirt (July 30, 2013) <http://www.techdirt.com/articles/20130729/16181423993/microsoft-sends-google-dmca-takedowns-microsofts-own-website.shtml>; Emil Protalinski, *Why automated DMCA takedown requests are asinine: HBO asked Google to censor links to HBO.com*, The Next Web (February 3, 2013) <http://thenextweb.com/media/2013/02/03/why-automated-dmca-takedown-requests-are-asinine-hbo-asked-google-to-censor-links-to-hbo-com>.

⁴ See e.g. Ron, *Microsoft's automated DMCA bot strikes again, sends takedown notice for Open Office*, WinBeta (August 18, 2013) <http://www.winbeta.org/news/microsofts-automated-dmca-bot-strikes-again-sends-takedown-notice-openoffice>.

⁵ See Jonathan McIntosh, *Buffey vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

⁶ *Id.*

when filing take down requests, intentionally misusing the DMCA to remove objectionable yet entirely legal content.

B. The extent of a fair use consideration before taking down content is not clear.

While fair use is a legitimate use of copyrighted content, statute and case law does not make it clear enough to rightsholders that they should consider fair use before taking down content from the internet. The only case to address the matter, the *Lenz* case, provides some guidance in the right direction, but the ruling is not a flawless demarcation of the law. In 2015, the 9th Circuit established that rightsholders must consider fair use before sending a takedown notice.⁷ The 9th Circuit also dispelled the traditional approach to fair use as an affirmative defense to copyright infringement, stating that fair use is actually a legitimate, authorized use under the law.⁸ Furthermore, even if fair use is classified as an affirmative defense, it is “uniquely situated” in copyright law, and is treated differently than the typical affirmative defense.⁹ Thus, as it pertains to DMCA section 512(c)(3)(A)(v), fair use is an “authorized use.”¹⁰ Taken together, the 9th Circuit made progress and created precedent by clarifying that fair use is a legitimate, authorized use under the law, and that a copyright holder must consider the existence of fair use before sending a takedown notification under DMCA section 512(c).¹¹ But, this ruling requiring a consideration of fair use is only minimally helpful, because even if a work has a strong fair use argument, there is still a chance that the content will be taken down. This is because the 9th Circuit established only a subjective, rather than objective, standard for copyright owners to meet before sending takedown notices.¹²

⁷ *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1133 (9th Cir. 2015), *amended*, No. 13-16106, 2016 WL 1056082 at *6, *10 (9th Cir. Mar. 17, 2016).

⁸ *Id.* at *4, *6 (“Fair use is not just excused by the law, it is wholly authorized by the law”).

⁹ *Id.* at *6.

¹⁰ *Id.* at *4, *6.

¹¹ *Id.* at *6, *10.

¹² *Id.* at *6-7 (citing *Rossi v. Motion Picture Assn. of America, Inc.*, 391 F.3d 1000, 1004 (9th Cir. 2004)).

This subjective standard¹³ is problematic because it ensures that even textbook cases of fair use remain at risk. As the law currently stands, the lax subjective standard leaves the door wide open for rightsholders to only minimally consider fair use before sending a takedown notice.¹⁴ Such a cursory consideration of fair use under the subjective standard undermines 512(f) as a remedy for frivolous takedowns because it allows content bullies a back door escape from a *meaningful* consideration of fair use. Because fair use can seem complex and is not often respected by content bullies, creators are less likely to develop certain kinds of content – especially once they’ve already experienced content bullying for their other work. If a reuse can be taken down without a meaningful consideration of fair use, one consequence is that the very concept of fair use is compromised. This construction of section 512(f), whereby rightsholders can bypass a meaningful consideration of fair use without consequences, weakens the creativity and innovation that fair use was designed to promote. This effect is in discord with Congress’ intent in enacting 512(f) because it allows the balance to be tipped in favor of rapid content removal, while at the same time stripping recourse from users who make legitimate uses of content.

The vast majority of cases involving content bullying that we see involve content holders taking down remixes, even when those remixes have a strong fair use argument. One textbook example of content bullying, and why section 512(f) needs to be amended to include an objective consideration of fair use, is a takedown we dealt with in 2013. The takedown involved a remix by remix artist Jonathan McIntosh called “Buffy vs Edward: Twilight Remixed.” This particular remix is used in law school classrooms across the country to teach the concepts of

¹³ “A copyright holder need only form a subjective good faith belief that a use is not authorized” *Lenz*, 2016 WL 1056082, at *6-7.

¹⁴ See *Lenz*, 2016 WL 1056082 at *12 (*dissent by* M. Smith, “The majority’s unfortunate interpretation of §512(f) would permit a party to avoid liability with only the most perfunctory attention to fair use”).

transformativeness and fair use. The Copyright Office even mentioned this remix by name when discussing transformative noncommercial video after Mr. McIntosh displayed it during testimony at a Copyright Office hearing in Los Angeles regarding DMCA anti-circumvention exemptions in May, 2012.¹⁵ Although fair use can be hard to predict, Jonathan's remix is about as close as one can get to declaring a work fair use without a final court decision. Despite this, Jonathan's video was wrongly monetized twice through YouTube's ContentID system and then taken down under the DMCA takedown process.¹⁶ It took three months, multiple appeals, outreach to the copyright holder, a DMCA counternotice, and quite a bit of press¹⁷ to overcome Lionsgate's misuse of both the Content ID system and the DMCA takedown system to get the video back up. This type of bullying behavior was exactly the kind of behavior section 512(f) was supposed to protect against. But without explicitly requiring a consideration of fair use, section 512(f) cannot adequately protect against content bullying.

The effect of a subjective fair use consideration standard on content creators is stifling. We speak and work with creators who, at the start of projects, simply abandon their plans out of fear of this type of content bullying; from app and game developers that cease creating because

¹⁵Jonathan McIntosh, *Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

¹⁶ "The audio/visual content of this video has been reviewed by our team as well as the YouTube content ID system and it has been determined that the video utilizes copyrighted works belonging to Lionsgate. Had our requestes [sic] to monetize this video not been disputed, we would have placed an ad on the cotent [sic] and allowed it to remain online. Unfortunately after appeal, we are left with no other option than to remove the content." representative, Matty Van Schoor, stated in a response email to New Media Rights on December 20, 2012. *Id.*

¹⁷ See Daniel Nye Griffiths, *Copyright In The Twilight Zone: The Strange Case Of 'Buffy Versus Edward,'* Forbes (January 15, 2013) <http://www.forbes.com/sites/danielnyegriffiths/2013/01/15/copyright-in-the-twilight-zone-the-strange-case-of-buffy-versus-edward/>; Jonathan McIntosh, "Buffy vs Edward" remix unfairly removed by Lionsgate: the model "fair use video" used by the US Copyright Office is a casualty of YouTube's Content ID system, Ars Technica (January 9, 2013) <http://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate/>; Jonathan McIntosh, *Lionsgate Censors Remix Video That The Copyright Office Itself Used As An Example Of Fair Use*, TechDirt (January 10, 2013) <http://www.techdirt.com/articles/20130110/01515121624/lionsgate-censors-remix-video-that-copyright-office-itself-used-as-example-fair-use.shtml>; Cory Doctorow, *Lionsgate commits copyfraud, has classic "Buffy vs Edward" video censored*, BoingBoing (January 11, 2013) <http://boingboing.net/2013/01/11/lionsgate-commits-copyfraud-h.html>.

they worry about intimidation from larger copyright holders, to video creators who abandon their parody and criticism projects because of the very real risk of their YouTube accounts being crippled by too many takedowns. Today, there are few consequences, other than bad press¹⁸ for this type of behavior. At this point in time, few courts have awarded damages in a section 512(f) case. One is the *Lenz* case, which awarded nominal damages to the plaintiff for “unquantifiable harm” suffered.¹⁹ There have been injunctions²⁰ and two out of court settlements,²¹ but courts still have an apparent reluctance to award actual damages.²² In *Automattic Inc. v. Steiner*, the court awarded damages for the “time and resources incurred in dealing with Defendant’s takedown notices” in a manner consistent with the *Lenz* court’s interpretation of section 512(f), as well as attorneys’ fees.²³ However, while the court found that the defendant violated section 512(f) by knowingly misrepresenting that plaintiffs had violated his copyright,²⁴ the defendant never filed an answer to the complaint.²⁵ So the court awarded these damages as part of a default judgment.²⁶ While it is notable that the court awarded damages, the result is still limited to the unique situation where a defendant makes no attempt to show up and contest a 512(f) claim. The award of damages was a win for combating knowing misrepresentations under 512(f), but

¹⁸ Jonathan McIntosh, *Buffy vs Edward Remix Unfairly Removed by Lionsgate* (January 9, 2013) <http://www.rebelliouspixels.com/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>; See also Patti Mengers, *Chalk up another win for Lansdowne kids; audio restored to ‘Read It’ video*, Daily Times News (October 10, 2013) <http://www.delcotimes.com/general-news/20131010/chalk-up-another-win-for-lansdowne-kids-audio-restored-to-read-it-video>.

¹⁹ *Lenz*, 2016 WL 1056082 at *9.

²⁰ *Biosafe-One, Inc. v. Hawks*, 524 F. Supp. 2d 452 (S.D.N.Y. 2007); *Design Furnishings, Inc. v. Zen Path LLC*, 2010 U.S. Dist. LEXIS 112314 (E.D. Cal. 2010).

²¹ *Diebold Coughs Up Cash in Copyright Case*, Electronic Frontier Foundation (October 15, 2004) <https://www.eff.org/press/archives/2004/10/15>. *Lawrence Lessig Settles Fair Use Lawsuit Over Phoenix Music Snippets*, Electronic Frontier Foundation (February 27, 2014) <https://www.eff.org/press/releases/lawrence-lessig-settles-fair-use-lawsuit-over-phoenix-music-snippets>.

²² See *Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1030, 1032 (N.D. Cal. 2015).

²³ *Id.* at 1030.

²⁴ *Id.* at 1026-27.

²⁵ *Id.* at 1019.

²⁶ *Id.* at 1033.

because the damages were awarded on a default judgment, it may still be difficult to receive actual damages when a defendant actually does answer the complaint. These penalties have done nothing, if very little, to stem the tide of rampant abuse of the DMCA takedown process because from the large content holder's perspective, there are no real economic penalties for this type of behavior. Indeed, it makes far more sense to take things down without considering fair use and quietly settle matters out of court if and when a remix artist fights back than it does to take the additional time and resources to find a better way of distributing content and policing actual piracy.

In short, section 512(f) is broken. It does not serve as a meaningful incentive for copyright owners to avoid causing collateral damage in their efforts to enforce their rights under copyright law. Rather than trying to reinvent fair use, we think there is a much simpler legislative solution to the section 512(f) problem. New Media Rights would like to propose three legislative solutions to help fix section 512(f) and make it an actual working tool to fight content bullying.

Solution 1: Clarify the Role of Fair Use in the Text of 17 U.S.C. § 512(c)(3)(A)(v)

The first solution we propose addresses the lack of clarity regarding if and to what extent fair use must be taken into account before filing a takedown notice under the DMCA. We propose that Copyright Office encourage Congress to make the following legislative change to 17 USC §512(c)(3)(A)(v), new texts is in brackets:

A statement that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law[, including fair use under 17 USC §107.]

The addition of this half sentence to the statement that the copyright holder must make before they file a DMCA takedown notice makes it clear that fair use must be considered before sending

a takedown notice, in accordance with the *Lenz* ruling. The removal of “complaining party has a good faith belief that” helps establish a higher objective standard, rather than allowing copyright owners a bare minimum subjective standard. As a result, content owners would have to meaningfully consider fair use before taking down a work, and abuse of the takedown system could not be sidestepped with a minimal showing of subjective belief that the use was not fair use. This change would also make it clear that section 512(f) sanctions could be awarded where a content owner failed to take into account fair use before taking down a piece of content. This would help prevent many of the content takedowns that are nothing more than content bullying or collateral damage in the efforts to fight piracy. Yet it would still shield copyright owners that take objectively reasonable safeguards to account for fair use.

Some content owners have complained that because fair use is so complex and difficult to predict, considering fair use before sending a takedown notice is just too time consuming.²⁷ However, the current standard only requires a “good faith belief” that a video is not fair use. This only requires that whoever is performing the takedown consider whether the reuse is excused by fair use, not perform a more exhaustive analysis that one might expect in a law school exam or a motion filed before a court.²⁸ This is a modest requirement considering that this process removes content from the internet without any formal decision by a judge. By applying the objective

²⁷ Brief of Amicus Curiae, Motion Picture Association of America in support of neither party at 11-13, *Tuteur v. Crosley-Corcoran*, No. 13-10159-RGS, 2013 WL 1450930, (D. Mass. Apr. 10, 2013). <https://www.documentcloud.org/documents/699602-mpaa-on-dmca-512f.html#document/p1>; see *Lenz v. Universal Music Corp.*, No. 13-16106, 2015 WL 9259957 (9th Cir. 2015) (oral argument of Kelly M. Klaus on behalf of the Respondent); see also Brief for Motion Picture Association of America as Amicus Curiae Supporting Appellants and Reversal at 18, *Lenz v. Universal Music Corp.*, 2013 WL 5798884 (9th Cir. 2013) (No. 13-16106, 13-16107); Appellants’ First Brief on Cross-Appeal at 35-36, *Lenz v. Universal Music Corp.*, 2013 WL 5698384 (9th Cir. 2013) (Nos. 13-16106, 13-16107).

²⁸ This point has been debated quite vigorously in the *Lenz* case however the court has ruled on multiple occasions that fair use must be considered before sending a takedown notice. Our legislative proposal merely codifies that point, and establishes a more objective standard. See, *Lenz v. Universal Music Corp.*, 5:07-CV-03783-JF, 2013 WL 271673 (N.D. Cal. Jan. 24, 2013)(quoting *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150, 1153-54 (N.D. Cal. 2008)), *Lenz v. Universal Music Corp.*, 2015 WL 5315388 at 1.

standard in conjunction with a clarified stance on fair use to 17 USC §512(c)(3)(A)(v), this change will better fulfill the original intention of Congress that the DMCA safe harbors, "... balance the need for rapid response to potential infringement with the end-users [sic] legitimate interests in not having material removed without recourse."²⁹

Solution 2: Impose a Gross Negligence Standard for Section 512(f)

The second solution we propose addresses the problem that it is almost impossible to win a section 512(f) case because of its impossibly high mens rea standard. New Media Rights proposes the introduction of a new, attainable standard.

Currently, the section 512(f) "knowingly materially misrepresents" standard is absurdly high. Since the passage of the DMCA eighteen years ago, there have only been a few cases that have been able to meet such a high bar.³⁰ In the face of millions of content takedowns every year,³¹ the fact that there have only been a few cases to meet the "knowingly misrepresents" standard exemplifies the failure of section 512(f) to curb abuse of the DMCA notice and takedown system. We propose a lower, "gross negligence" standard. This standard will transform section 512(f) into a tool that actually protects remix creators from wrongful takedowns because it will not deter remix creators from seeking recourse from frivolous and wrongful takedowns. As more cases are brought forth under 512(f), there will be fewer wrongful takedowns because content holders will know there are real consequences for sending wrongful takedown notices. To ensure the affordability of bringing these actions, in addition to the

²⁹ S. REP. No. 105-190 at 21 (1998).

³⁰ See e.g. *Biosafe-One, Inc. v. Hawks*, 524 F.Supp.2d 452 (S.D.N.Y. 2007); *Design Furnishings, Inc. v. Zen Path LLC*, 2010 U.S. Dist. LEXIS 112314 (E.D. Cal. 2010); *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

³¹ Including DMCA, url and Content ID like takedowns.

changes to damages we outline below, we believe the Copyright Small Claims Court recently proposed by the Copyright Office should have jurisdiction over section 512(f) cases.

Solution 3: Clarifying Section 512(f) Damages

Although the 9th Circuit allowed recovery for nominal damages in the *Lenz* case, actual damages have never been awarded for a violation of section 512(f). We would like to propose a damages model that we believe would lead to a modest increase in the amount of section 512(f) cases being brought against egregious content takedowns, and in the long run would reduce the amount of content bullying. We propose that section 512(f) be rewritten to clarify for what period damages, especially attorney's fees, can be awarded.

Original Text

. . . shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

Proposed Text

. . . shall be liable for damages, costs, and attorneys' fees that are incurred by any of the following parties who are injured by such misrepresentation:

- i. the alleged infringer or,
- ii. any copyright owner or copyright owner's authorized licensee or,
- iii. the service provider.

Damages, costs, and attorneys' fees shall be inclusive of all activities related to the misrepresentation including but not limited to any damages, costs, and attorneys' fees that arise out of any of the following:

- i. the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or
- ii. replacing the removed material or ceasing to disable access to it, or
- iii. pre-litigation work and any resulting litigation.

Nothing in this provision shall restrict the award of other damages under 17 U.S.C. 505.

This proposed text clarifies what damages can be awarded. In addition, by separating out who can recover damages and the types of activities for which damages can be recovered into their own sub-lists, the statute becomes more readable, which will hopefully leave less room for confusion about section 512(f) damages.

The most important clarification we propose is to explicitly allow for the recovery of attorneys fees for both pre-litigation and litigation work. Bringing a copyright lawsuit is expensive³² and often requires extensive pre-litigation work. Without allowing for the possibility of the recovery of attorney's fees for pre-litigation and litigation work, only the independently wealthy or those lucky enough to find the impossibly rare species of pro-bono public interest copyright litigators with significant financial resources can bring a section 512(f) case. By offering damages for both pre-litigation and litigation work, attorneys will be able to afford to take on worthy section 512(f) cases on contingency instead of outright refusing to take even the most worthy section 512(f) case.

As a final point of clarification, because section 512(f) is a part of Title 17, costs and attorneys fees may only be awarded at the court's discretion.³³ Thus, these changes are not imposing a new fee shifting statute within copyright law but rather clarifying when fees and costs already awarded by Title 17 may be awarded in 512(f) cases.

Part II: (NOI Questions 8, 9, 12, 15, 28)

³² Intellectual Property Insurance Services Corporation, AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 2015 (2016) (citing to the AM. INTELLECTUAL PROP. LAW ASS'N REPORT OF THE ECONOMIC SURVEY 2015, which shows that the median cost for litigating a copyright infringement lawsuit with less than \$1 million in damages at issue was \$325,000).

³³ "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. §505 (2008). *See also*, "Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

A. There is a significant power imbalance between large-scale copyright holders and small-scale defendants.

In the current copyright litigation system, there is a significant power imbalance between wealthy, large-scale copyright holders and small-scale defendants. This has created a climate in which large-scale plaintiffs frequently exploit small-scale defendants' lack of sophistication and resources to extract outrageous settlements from them. The disparity between the amounts of funds available to these two parties has resulted in the "settling culture" that exists today. Small infringement claims, at best, are straightforward affairs involving cooperative parties. At their worst, small copyright claims are exploitative of individuals without the resources or sophistication to properly defend themselves. When a small-scale defendant runs afoul of a large-scale copyright holder, often the only rational economic choice is to settle out of court. Because large-scale copyright holders often have a significant amount of funds to put towards litigating a claim, they are often able to intimidate defendants with fewer resources to settle out of court, even when a valid defense may exist.³⁴

In addition to financial obstacles, small-scale defendants face the misuse and abuse of copyright laws by large copyright holders. Glaring examples of this abuse are seen in sweeping takedown notices issued by large copyright holders.³⁵ These sweeps often fail to distinguish

³⁴ These issues are discussed extensively in New Media Rights' January 17th, 2012 Comment on Small Claims response to the Copyright Office's Notice of Inquiry Comments of New Media Rights, in the matter of remedies for small copyright claims, Docket No. 2011-10, at 1, http://www.newmediarights.org/sites/newmediarights.org/files/New_Media_Rights_Small_Claims_Copyright_Comment_final_d.pdf, January 17, 2012.

³⁵ See Andy, *Anti-Piracy Group Hits Indie Creators For Using the Word 'Pixels,'* TorrentFreak (August 8, 2015) <https://torrentfreak.com/anti-piracy-group-hits-indie-creators-for-using-the-word-pixels-150808/>; see also *Once Again, DMCA Abused to Target Political Ads*, Electronic Frontier Foundation (November 17, 2015) <https://www.eff.org/deeplinks/2015/11/once-again-dmca-abused-target-political-ads>; *Takedown Hall of Shame: AIDS Denialists Target Debunking Documentary*, Electronic Frontier Foundation (February 9, 2014) <https://www.eff.org/takedowns/aids-denialists-target-debunking-documentary>. See *Takedown Hall of Shame: Homeland Insecurity Through Bogus Takedowns*, Electronic Frontier Foundation (April 18, 2013), <https://www.eff.org/takedowns/homeland-insecurity-through-bogus-takedowns>; See also Mike Masnick, *HBO's Latest DMCA Abuse: Issues Takedown to Google Over Popular VLC Media Player*, TechDirt (July 15, 2013, 4:18

between fair use of a work and infringing activity.³⁶ Before these takedown notices are issued, there is little if any review of the work, which often leads to improper takedown notices. These broad, automated sweeps adversely affect all users, but particularly remix artists who rely in part on existing content to create their commentaries, criticisms, or parodies. When large copyright holders abuse the DMCA takedown notice process the artist's work loses value; as the old adage goes: timing is everything. As we have seen, disputes with a copyright holder can take months to resolve,³⁷ and when the allegedly infringing work is placed back on the site, it is often too late and the damage has already been done: the work has lost popularity and monetary value. Even if small-scale defendants want to hold the large copyright holder responsible for their wrongful takedown, the law is not friendly to their claims, and it is difficult for them to muster the resources to pursue these wrongs in court. Instead, the best the small-scale defendant can do is to publicly shame the plaintiff for abusive takedowns.

Moreover, as mentioned above, relying on an automated takedown process without a substantive consideration of fair use can be stifling on creative expression, and can also adversely affect small-scale internet service providers (ISPs).³⁸ It is the worst kept secret that mass, automated takedown notices sent by large-scale copyright holders are rife with inaccuracies and target non-infringing content because there is a lack of human review.³⁹

PM), <http://www.techdirt.com/articles/20130715/11202123803/hbos-latest-dmca-abuse-issues-takedown-to-google-over-popular-vlc-media-player.shtml>

³⁶ In a recently published report, researchers observed whether automated notice and takedown systems would generate a significant number of notices for which a more contextualized human review is needed to determine a legitimate use, such as fair use. The study posited that about 8 million notices out of 108.3 million surveyed could be expected to present such a need for a fair use determination. See Jennifer M. Urban, Brianna L. Schofield & Joe Karaganis, *Notice and Takedown in Everyday Practice*, 95-96 (2016).

³⁷ See *supra* discussion of “Buffy v. Edward” at 5-6.

³⁸ See discussion of content bullying, *supra* at 6; see also Urban et al., *supra*, at 111 (“Human review of requests [for takedown] is crucial to preserving the integrity of open, online platforms that host individual expression. . .”).

³⁹ Urban, *supra*, at 92, 116 (“. . . nearly a third of the notices [surveyed] raised questions about their validity, and one in twenty-five apparently targeted the wrong material entirely.”)

Without a meaningful review of the accuracy of automated takedown notices, the blanket-inclusion of legitimate content undermines those legitimate uses of content, like fair use, available to content creators. It becomes an even more serious issue in the context of “notice and staydown” procedures.

Notice and staydown procedures are heavily favored by large-scale rightsholders, as well as trade associations like the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA). In essence, staydowns require that once a rightsholder identifies infringing content through a takedown notice, the ISP must make sure that the infringing content never reappears on its site.⁴⁰ The 9th Circuit has already rejected a staydown procedure whereby an ISP would be required to program its filtering technology to ensure that allegedly infringing content could not be re-posted to the site.⁴¹ This staydown procedure was rejected primarily because such a procedure would contradict section 512(c), which does not require ISPs to monitor user activity for infringement.⁴² Staydown procedures would burden ISPs with an increased obligation to monitor their sites for infringement, which is not as feasible for smaller ISPs that lack the resources and finances to be able to devote to infringement monitoring.

Since mass takedown notices often do not account for legitimate uses, staydown procedures run the high risk of silencing those legitimate uses. While this primarily affects small-scale defendants, large copyright holders have recently been the victim of their own prolific abuse of the takedown notice procedure.⁴³ These “mistaken” takedown notices illustrate

⁴⁰ *Id.* at 60.

⁴¹ *UMG Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1029-30 (9th Cir. 2013).

⁴² *Id.*

⁴³ A key part of the MPAA’s anti-piracy strategy is its “Where to Watch” search engine, which provides legitimate and legal sources to stream films. The search engine has become the target of mass takedown notices from Hollywood studios directed at the links on the site. See Mike Masnick, *Hollywood Helps Show Why DMCA*

how easy it is to make an error using the automatic takedown process, even for those who advocate for stricter takedown procedures. Without a form of meaningful review of these mass, automated takedowns, a staydown procedure could have a drastic impact on non-infringing content. But more importantly, staydown procedures would prevent ISPs from relying on the Section 512 safe harbors.⁴⁴

In spite of high numbers of inaccurate takedowns, the MPAA and RIAA support drastic changes to the DMCA that place onerous requirements on service providers large and small. These groups argue for policies they have previously labeled as “notice and staydown,” by errantly citing studies that purport to show how only a handful of counternotices are filed in response to mass takedown notices.⁴⁵ They claim that because there are only a few counternotices filed per year, abuse of the takedown system and removal of non-infringing content are rare.⁴⁶ The problem with this flawed assertion is that it conflates notice quality with the number of counternotices filed in response to takedown notices. It assumes that counternotices are an effective solution to mistaken or wrongful takedowns, and few counternotices relative to takedown notices must mean the system is functioning well. But counternotices are infrequently used for a variety of reasons that have nothing to do with notice quality: impracticality, timing issues, resources, intimidation by large copyright holders, lack of knowledge of how to properly handle a counternotice, and lack of knowledge that

Takedowns Are Dangerous, By Taking Down Links To MPAA's Search Engine, TechDirt (Jan 19, 2016, 8:34am), <https://www.techdirt.com/articles/20160118/07513633369/hollywood-helps-show-why-dmca-takedowns-are-dangerous-taking-down-links-to-mpaas-search-engine.shtml>.

⁴⁴ Urban, *supra*, at 121.

⁴⁵ Robert D. Atkinson, Daniel Castro & Alan McQuinn, Comments, *In the Matter of Section 512 Study Notice and Request for Public Comment Comments of Information Technology & Innovation Foundation*, Docket No. 2015-7 at 4 (March 21, 2016) (citing Bruce Boyden, *The Failure of the DMCA Notice and Takedown System*, Center for the Protection of Intellectual Property (December 2013) <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf>)

⁴⁶ *Id.*

counternoticing is possible, among others.⁴⁷ This is not to mention that foreign defendants who counternotice are agreeing to United States court jurisdiction of a claim, which makes every decision to counternotice a challenging one for defendants outside the United States. The fact that there are only a handful of counternotices does not mean that mistaken or wrongful takedowns are rare. In fact, the frequency of inaccurate notices is quite high,⁴⁸ and the low number of counternotices only proves that the counternotice procedure is not working as it was intended, allowing removal of legitimate content from the internet en masse.⁴⁹ Implementing a staydown procedure would only perpetuate the wrongful takedown of non-infringing content. The result of would be a system where ISPs would have to constantly monitor the use of copyrights, which defeats the purpose of the section 512 safe harbors.

III. Conclusion

We respectfully offer these comments and proposed reforms based on our firsthand experience with clients who interact with section 512, particularly internet users, small online service providers, and independent creators. Section 512 creates an extraordinary, out of court process that allows copyright holders to remove content from the internet without any court decision. The Office should then avoid large copyright holder calls to go beyond this already extraordinary process, and dramatically expand the burden on online service providers without concern for the collateral damage it causes to artistic progress, freedom of speech, and the intellectual enrichment of the public. Any reform should instead be targeted at meeting the

⁴⁷ Urban, *supra*, at 44-46.

⁴⁸ In the Urban report, 30% of the notices in one study and 37% of notices in another study were questionable. Urban, *supra*, at 2, 135.

⁴⁹ A low number of counternotices does not necessarily mean that there is a corresponding low number of mistaken or wrongful takedowns, but rather reflects the concern that sending a counternotice is likely to result in litigation. *See Comments of Automattic, Inc. In the Matter of Section 512 Study*, Docket No. 2015-7, at 3 (2016).

important interests of users and smaller online service providers, rather than the interests of large copyright holders.

Respectfully Submitted,

A handwritten signature in black ink that reads "Art H. Neill". The signature is written in a cursive style and is positioned above a horizontal line.

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