

BEFORE THE U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.

Section 512 Study:

Docket No. 2015-7

Request for Additional Comments

COMMENTS ON BEHALF OF
THE ARTS AND ENTERTAINMENT ADVOCACY CLINIC
AT ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY

The Arts and Entertainment Advocacy Clinic at Antonin Scalia Law School, George Mason University (“the Clinic”)¹ submits these comments in response to the U.S. Copyright Office’s November 8, 2016 Request for Additional Comments regarding the impact and effectiveness of the Digital Millennium Copyright Act (“DMCA”) safe harbor provisions. These comments are informed by the Clinic’s efforts in helping artists send DMCA notices to infringers.

THE DMCA TAKEDOWN NOTICE PROJECT

The Clinic empowers student lawyers to assist artists with copyright issues while learning through hands-on work. Under the supervision of an attorney, student lawyers assist artists with licensing questions, contract analysis, determining fair use in their work, and other copyright matters. Student lawyers also educate the creator community on various copyright issues, draft amicus briefs to be submitted in copyright cases of interest, and participate in regulatory proceedings such as these.

¹¹ The Clinic wishes to acknowledge and appreciates the contributions to this project by the following Clinic students: Stephanie Semler, Patricia Udhmani, Rebecca Eubank, Tyler Del Rosario, Mandi Hart, and Alexander Summerton. In addition, the Clinic extends its thanks to Bhamati Viswanathan, Legal Fellow at the Center for the Protection of Intellectual Property, for her help in research and advice to the students.

During the fall semester of 2016, as part of the Clinic's study of the DMCA and its effectiveness, student lawyers assumed responsibility for enforcing copyright claims for a variety of artists and small businesses in the arts using the notice and takedown provisions of the DMCA. Students searched for infringing material online, confirmed or attempted to confirm infringement, navigated various methods of sending DMCA takedown notices, sent the DMCA takedown notices when appropriate, and followed up on takedown notices. In the process, the students kept records of their experiences, successes, and frustrations with the DMCA notice and takedown system.

To prepare for this endeavor, the students first attended a training session with industry experts from the publishing, film and recording industries who demonstrated various tools and approaches for sending takedown notices. The training, lasting around three hours, gave the student lawyers sufficient knowledge to begin sending notices on behalf of artists who sought the Clinic's assistance.

The students also worked with the IT department of the law school to set up a secure network to protect against malware and other threats posed by infringing sites, develop best practices for the project, set up a dedicated on-campus computer with protective software, and download and install protective software for personal computers.

The training, additional IT resources and expertise given the students far exceeded the training and assistance available to a typical creator interested in enforcing his or her copyright online. Artists often piece together an enforcement strategy through trial and error without the benefit of any support system.

Once this preparatory work was done, the Clinic spent the fall semester engaged in DMCA enforcement for several clients: Michelle Schwarzstein, Lisa Hammer, Sam Rosenthal, and Janyce Stefan-Cole.

The project was limited mainly to enforcing claims against unlicensed websites and locker services and with a few exceptions did not attempt to police the distribution of works via social media services which are not as easily searchable using search engines. Student lawyers developed appropriate search terms and set services such as Google Alerts to find potentially infringing material available for download or streaming online. Once they identified a potentially infringing site, they investigated each site individually to confirm that it did, indeed, make available the infringing content. In instances where work was not accessible without providing credit card information student lawyers were instructed to stop attempting to confirm infringement to protect their own safety. The student lawyers then explored the site to find the means by which the site accepted DMCA takedown notices. Some sites provide a webform while others provide an email address to which to send a takedown notice. It is important to note that many sites have no discernable means of sending a DMCA notice at all. In these cases, the student lawyers worked to find the ISP host and send a notice to them – often a difficult and frustrating process. Once student lawyers found the means by which to send a takedown notice, they did so. One infringing site could lead to the sending of a notice simultaneously to several recipients as students sent notices to the site itself, the ISP host, and to the search engine to remove the link. After sending a takedown notice, they then noted if they received a response. Where possible they followed up to ensure receipt of the notice and action in response to it. Student lawyers monitored whether or not the

material was removed from the site. As noted above, in addition to sending notices to sites themselves, students sent requests to search engines, most often Google, asking them to remove the links to the infringing sites.

The project attempted to duplicate the experience of an artist attempting to enforce a copyright. Student lawyers worked on the project in time available in their school, work, and family schedules, much as an artist would attempt to use the DMCA in the time available when not creating more art or meeting other duties.

Although the student lawyers have training in copyright law and in DMCA copyright enforcement, they still found the process of enforcement confusing and frustrating. Search results often returned high numbers of possible infringements. Clicking through dozens of results to find infringement was frustrating, especially when those links led to phishing or malicious sites. Once infringement was found, searching through websites and ISP ownership directories to find the correct agent to notify was difficult and often futile. The lack of response after many hours of work was disheartening. Despite having obtained “white lists” of licensed distributors from each client at the beginning of the representation, it was sometimes hard to tell if sites were legitimate or if a takedown notice should be sent. Language on some sites was intimidating, and would be even more so for those without legal training. Students were constantly dealing with IT problems posed by visits to untrustworthy sites.

THE ARTISTS AND WORKS REPRESENTED²

The works represented included two movies, one album, one single song, and one book. Works were chosen in order to compare whether projects at different stages of release face different levels of infringement and/or if enforcement is easier in particular scenarios. None of the works were works for which the authors expected especially high levels of infringement (i.e. comparable to the levels of highly promoted albums, movies or books by celebrities), but any measurable infringement would be meaningful in terms of the ability to recoup costs invested in the project, and in some cases could influence whether the creator could continue to produce work professionally on a full time basis.

Of the two movies, one had been previously released internationally and the Clinic was tasked with enforcing infringements of the later English language release when that was made available. The other film was not yet released, but had been entered and shown in film festivals. Similarly, the Clinic enforced against infringements for two bands: in the first case for Black Tape For a Blue Girl, of a newly released album, and in the second, for Radiana, for a new single while monitoring whether the infringement of the single also affected infringement of the band's earlier self-titled album. The Clinic found that in most cases the works that were in official release and readily available from

² Clinic students additionally monitored for infringements of two additional and uniquely distributed works – a dramatic musical work which had only been released to fans via a special website in physical format (CD) in limited quantities; and a collection of previously unreleased vintage movie stills uploaded for licensing to the protected website of a small photo archive. With regard to the photographs, the website of the photoarchive was hacked and the images were downloaded without authorization immediately upon uploading, but the Clinic was not able to trace their distribution to any websites searchable with the tools available to it. The dramatic musical work with limited release in CD form was released late in the semester and was not found to be infringed during the time period that the Clinic was conducting its enforcement activities.

legitimate sources were more infringed than those not yet released. However, the Clinic also encountered significant pre-release infringement.

The clients the Clinic represented did not have formal legal training. They prefer to spend their time at their vocations rather than figuring out the various DMCA processes sites employ. Although one client was a sophisticated user of the DMCA and regularly uses it to enforce against infringement of his works, several clients were either not aware of the DMCA process before meeting with the Clinic, or had not previously used it because they perceived it as too troublesome for too little return on time invested.

A brief description of each work and highlights of the Clinic's findings follows.

Michelle Schwarzstein

Ms. Schwarzstein helps run a production and distribution company, Brainstorm Media, which her father started twenty-one years ago. Brainstorm creates films through its production branch. It also helps distribute its own and others' films to television, video on demand, and movie theaters. They say the following about their distribution business:

Having been involved in distribution since 1995, Brainstorm has been a trend-setter in VOD, TV and other media. Now that the indie film industry has evolved, the company treats distribution more like a craft. The distribution plan for each individual film is tailored for that movie to maximize the outcome. In the movie business, it's been generally accepted that the development and production are the only areas which require creativity. No longer. As the business continues to change, distribution will further evolve as a craft designed to facilitate a connection between filmmakers and their audience.

Ms. Schwarzstein relayed the disappointment that infringement brings, especially to a distribution company, because it erodes appreciation and audiences for film. While the company used to be excited to produce and distribute films they genuinely believed in, because of infringement, the allure of good film is slowly fading. For a distribution

company whose livelihood depends on placing films into venues where people will pay to watch them, the advent of pirated content online for free cuts into their business deeply.

The Clinic engaged in DMCA enforcement for Sundance winning director Mads Matthiesen's second feature film "The Model." Brainstorm Media acquired the rights to the film to distribute it in the United States and Canada.³ On August 12, 2016, "The Model" was released in New York and Los Angeles. It also played at the Vancouver International Film Festival on September 29, 2016, and had its digital release on iTunes on September 6th. The film is available on iTunes, Amazon, Google Play, and YouTube. Additionally, it was licensed to Netflix beginning December 6, 2016.

Clinic students began enforcing against infringements of "The Model" on September 15. During the enforcement period, they identified nineteen unique potentially infringing sites and sent forty three takedown notices. The film was removed from three sites.

Lisa Hammer

Ms. Hammer is an independent filmmaker and recording artist who has been making films since the late 1980s. Ms. Hammer's story was the most striking because the infringement affected her not only financially but also emotionally. Ms. Hammer first learned her work was being infringed when a friend told her to Google her work. After one search, she was so disheartened by what she found that she decided that she could not take on sending the DMCA takedown notices herself. Ms. Hammer reports she used to "make a decent living off of her works in the 1980s and 90s", but now, she barely makes

³ The film was released in Denmark on February 11, 2016.

enough money to cover the costs of creating her films. Ms. Hammer has had to reach out to her fans through GoFundMe pages just to be able to create new works.

While Ms. Hammer has made several films, in this case the student lawyers were tasked with enforcement of just one - “The Sisters Plotz,” a madcap comedy about three middle aged sisters living with their long-suffering butler. At the time the Clinic began enforcement, the film was only in festival release. It had a cast and crew screening sometime in the fall of 2015, and had been revealed at the American Cinema Tech festival in May 2016. In general, “The Sisters Plotz” was infringed less than “The Model,” but it is significant to note that it was infringed despite only being in festival release. Students found five unique potentially infringing sites and sent ten takedown notices. The film was not removed from any of the sites.

In addition to film, Ms. Hammer is also in a band called Radiana. Their music is regularly infringed, causing even more emotional and financial turmoil for Ms. Hammer. The Clinic was specifically tasked with issuing DMCA notices for a recent single release for the song “There’s Only One Person I Hate More Than You.” The release of the single resulted not only in infringements of the single itself, but in renewed interest and infringement of the band’s earlier self-titled album. A variety of sites offered infringing downloads of the entire album, but the majority of these appeared to be phishing schemes where the album could ultimately not be downloaded.

Students identified twenty eight unique potentially infringing sites for the music and sent twenty two takedown notices. The work was removed from fourteen of those sites.

Janyce Stefan-Cole

Janyce Stefan-Cole is the author of two novels “The Detective’s Garden: A Love Story and Meditation on Murder” and “Hollywood Boulevard.” Both were published by the independent publisher Unbridled Books. Before devoting herself full time to writing literature, Ms. Stefan-Cole was an occasional freelance journalist. She is also a visual artist.

Ms. Stefan-Cole has been writing and illustrating since she was a young child. She spent fifteen years channeling her creative energy into visual arts, then found her calling writing short stories. “The Detective’s Garden” began as a short story, which she was encouraged to expand. Stefan-Cole describes writing as an enormous investment in terms of time and demands on her personal life. It took over two years to write each of her novels. Writing is hard work, she says, “there is pride in the work,” but infringers can “steal it in two minutes.”

In the first six weeks after the release of the novel the Clinic consistently found new examples of infringement. After about six weeks, the volume tapered off and only a few new links were identified. Interestingly, it was not until the volume tapered off that more blatant examples of infringement were found. The Clinic was surprised at how few examples of blatant infringement were found in the course of enforcement efforts. The impression we gathered is that sites were primarily using the lure of a free copy of the novel as bait for a phishing scheme.

The students identified eighteen unique potentially infringing sites and sent twenty eight takedown notices. Content was removed from six sites.

Sam Rosenthal – Black Tape for a Blue Girl

Sam Rosenthal leads the band Black Tape for a Blue Girl and runs the thirty-four year old, independent record label Projekt Records. Black Tape for a Blue Girl has released eleven studio albums since its founding in 1986. With over 400 releases in its catalog, Projekt manages and distributes the music of Mr. Rosenthal's band as well as that of other musicians.

Mr. Rosenthal is a passionate advocate for artists' rights. He actively pursues enforcement of his rights through the DMCA, searching online to find infringement and sending notices. Over time, he has educated himself about the DMCA and best practices for enforcement using the DMCA.

The Clinic took over enforcement for Black Tape for a Blue Girl's album "These Fleeting Moments." The album was due to be released, and indeed was released, on August 12, 2016. However, prior to release, Mr. Rosenthal discovered it had already been infringed online. The Clinic began immediate enforcement against infringements of the album beginning on August 6.

The infringement was relentless, with infringement occurring continuously from August 6 until the end of the project in December 2016. Student lawyers were still receiving Google Alerts and finding infringements via searches well after the enforcement period ended. Clinic student lawyers used a combination of searches and Google Alerts to find infringement, and then sent notices to the infringing sites, their ISPs and the search engine that linked to them. In all, Clinic student lawyers identified one hundred sixty four potentially infringing sites and sent three hundred twenty seven

takedown notices. Notices sent to the Google search engine were generally effective, with one hundred fifty links removed from search results out of one hundred sixty three requests. However, students could confirm that the infringing content itself was removed from only twelve sites. Even when infringing copies of the album were successfully removed, new examples of infringement and links to that infringement sprung up continuously.

The Results

In total, the student lawyers identified 231 potentially infringing sites. Of these sites, they were able to confirm the copyrighted works were available for streaming or download in 53% of sites. Of the remaining 47%, some sites purported to have copies of the works, but were really malicious phishing or malware sites. Others required information such as a credit card number to access the materials, which prevented student lawyers from proceeding and from confirming whether the works were available on the site or not. Students sent a total of 427 takedown requests to hosts, ISPs, and search engines. Despite the diligent efforts of the students, which included regular follow up with sites and contact with not only the infringing site but its ISP where possible, infringing copies of works were confirmed removed only from 38 sites, or just 16% of the cases.

In addition to filing takedown requests with the sites themselves, student lawyers filed requests for search engines, usually Google, to remove links to the sites with infringing material. Some were permanently removed immediately, some were removed only after further correspondence with Google (as discussed below) and some were

removed, reinstated, and then removed again after further correspondence with Google. In other instances there was simply no explanation why a link was not removed.

Clinic Results Compared To Other Data Sources

The 16% removal rate in the Clinic study is at odds with, and lower than, most of the data from publicly available transparency reports from social media or Internet platforms. These transparency reports reveal that platforms adopt a wide range of approaches in responding to DMCA notices. Almost all of them report higher removal rates than the Clinic experienced when dealing with other websites.

The blogging site WordPress reports that in the first half of 2016 they received 4258 DMCA notices for copyright infringement and removed content in 55% of the cases.⁴ Twitter reports it received 24,874 DMCA notices in the same time frame, and removed content in 75% of the cases.⁵ Twitter's reports include both its live streaming app Periscope and its now-defunct video app Vine. In the first half of 2016, Tumblr reports 12,864 takedown requests, with an average removal rate of 83%.⁶ Snapchat's numbers are very small, but the app is growing rapidly. It reports 16 requests for takedown in the first half of 2016, 94% of which resulted in content being removed.⁷ Reddit's numbers are vastly different. In 2014, 38% of 176 copyright DMCA removal requests resulted in removal of content.⁸ However, in 2015, Reddit reports that it

⁴ <https://transparency.automattic.com/intellectual-property/2016-h1/>

⁵ <https://transparency.twitter.com/en/copyright-notices.html>

⁶ <https://static.tumblr.com/zyubucd/JIrofo1pw/iptransparencyreport2016a.pdf>

⁷ <https://www.snap.com/en-US/privacy/transparency/>

⁸ https://www.reddit.com/wiki/transparency/2014#wiki_how_we_handle_requests_for_the_removal_of_user_content

removed content in only 5% of the 190 takedown requests they received.⁹ Reddit does not fully account for the change in its removal rate.

Google reports that in 2016 it removed 89.5% of URL returns in its search function after receiving a DMCA notice, which resulted in 914 million URLs removed.¹⁰ It rejected requests to remove links in 3.5% of cases -- over 35 million links.

With reported removal rates varying from 5% to 94%, it is clear that different sites have different attitudes and responses to copyright removal requests. From the perspective of an artist trying to navigate this landscape, the system is unpredictable and arbitrary.

Characteristics of the Current Internet Ecosystem

1. As noted above, there is great diversity among the categories of content creators and ISPs who comprise the Internet ecosystem. How should any improvements in the DMCA safe harbor system account for these differences? For example, should any potential new measures, such as filtering or stay- down, relate to the size of the ISP or volume of online material hosted by it? If so, how? Should efforts to improve the accuracy of notices and counter- notices take into account differences between individual senders and automated systems? If so, how?

As noted above, the experience of enforcing copyrights online already varies widely from site to site, with frustrating and inefficient results for artists seeking to enforce their rights. While some sites are responsive and responsible, others totally ignore requests. When not dealing with the most well known platforms (as was the case with many of the Clinics enforcement efforts) success is spotty at best. The situation is only growing more challenging as the nature and type of sites providing access to copyrighted works change and proliferate. The Copyright Office should take care to ensure that any remedies it

⁹ https://www.reddit.com/wiki/transparency/2015#wiki_copyright_notices

¹⁰ <https://www.google.com/transparencyreport/removals/copyright>

proposes address as many sites as possible and are broadly accessible to creators, and user friendly. Doing otherwise will only further fragment the enforcement landscape for individuals and small businesses in particular.

When Congress enacted the DMCA in 1998, the Internet was in its beginning form. Websites were accessible via computer using browser software, for the most part, publicly available to anyone who navigated to that site. The Internet exploded and has now reached far beyond anything imagined in 1998. If the internet is defined as a group of computers connected by data streams, the internet can be divided into two groups: 1) content which is on what we think of as the traditional internet, the world wide web, and 2) content sharing platforms which bypass the world wide web to share information directly. While enforcing copyright is difficult on the World Wide Web, it is even more difficult on the expanding Internet, which bypasses the World Wide Web completely.

1. The World Wide Web

The World Wide Web creates great challenges in enforcing copyright.

Infringed content is ubiquitous on the World Wide Web. Clinic students found that infringed content was often hosted on sites based overseas where the DMCA does not reach. These “locker sites” host pirated content and usually are deaf to requests to remove the content. Blogs, social media profiles, and various websites, link to the infringing content of the locker sites but do not host the content themselves. These sites are sometimes overseas and sometimes domestic. This cat and mouse setup allows infringers to hide and evade enforcement. During the Clinic’s work, the students received responses to requests to remove a link to infringing content from blog sites – when responses were

received at all – replying that the blog was not required to remove the link because it did not host the infringing work.

Effectively addressing linking is a challenge. Search engines routinely return links to pirate locker sites, to sites that link to the locker sites, and to sites that purport to have infringing copies of works but in reality are nefarious schemes to extract credit card information or otherwise harm users accessing the site. During the Clinic enforcement project, students submitted long lists of links to remove. In general, search engines were responsive in removing links to infringing content, but blogs and other so called “link farms” were not.

However, timing of sending and acting on notices created an issue that occurred regularly. When student lawyers sent a takedown notice to both the hosting site and the search engine, sometimes the hosting site responsibly removed the offending page. The search engine, usually Google, would follow up on the link provided in the takedown notice and find that there was no page there because it had been removed in response to the takedown request. Google would then send a notice that it would not honor the notice because the link returned no page. This creates two problems. First, if the site with the infringing content is reactivated, the link will again send people to it. Secondly, for reporting purposes, the timing issue creates the impression that the takedown request for the link was inaccurate or improper.

With the rise of social media such as Facebook and Twitter, many links to infringing content are behind a privacy wall of social media, a wall that search engines do not adequately penetrate. Thus, a Facebook profile may have tens of thousands of followers and may post infringing content, but depending on its privacy settings, a search for that

content would not return the result to the artist trying to find where his work was being infringed.

The vastness and international nature of the World Wide Web makes copyright enforcement a daunting task for individual artists. The first challenge is finding infringing copies of works. The second challenge is finding out how to send a DMCA request when each site has different protocols for sending requests. The third challenge is monitoring the results of the request once sent.

2. Rise of Content-sharing Platforms

The most exponential growth in the Internet today is happening outside of the World Wide Web. Traditional web sites and social media maintain a footprint on the World Wide Web, but newer ways of communication do not have any searchable presence on the World Wide Web at all.

a. Mobile Device Based Apps

Phone-based, or other mobile device, applications enable users and brands to share information directly from one phone to another. For instance, Snapchat is a photo-messaging app that allows users to take photos or videos, edit them with creative and silly filters, and broadcast them to their followers. One Snapchat feature sets it apart from other apps: photos and videos disappear within seconds of viewing. The receiver views the photo or video for three to ten seconds and then it is erased and irretrievable.¹¹

Snapchat claims 100 million users, 10 billion videos a day, and 350% growth in 2015. Its

¹¹ Despite the disappearing nature of photos and videos on Snapchat, nothing prevents a receiver from saving the content by taking a screenshot, recording it with a third party app, or even recording it with another device.

most popular account, Kylie Jenner, purports to have 10 million followers.¹² Kik is a different messaging app that facilitates texting group chats in which parties can send each other images and videos. These group chats can involve tens of thousands of individuals. Kik claims 230 million users worldwide.¹³ Discord is a voice and text messaging app aimed at gamers which facilitates large group chats. It has 25 million users and is growing exponentially. These are some of the most popular apps on the market, but there are many similar apps.

Unlike social media such as Twitter, Facebook, or Instagram in which users access the platform through mobile devices but have a profile on the World Wide Web, Snapchat, Kik, Discord, and other apps like them never even create a profile for users on the World Wide Web.¹⁴ A snap may go out to millions of followers, but will not be searchable or viewable on a website.¹⁵ Some of the snaps and messages are commercial in nature. If these snaps and messages were to contain infringing content, it would be distributed to millions of viewers but would never appear in search engine results on the world wide web.

¹² Unlike other social media, Snapchat does not make follower numbers public.

¹³ Snapchat, Kik, and other messaging apps are significant commercial enterprises. First, they make money by attracting users and advertising directly to those users. They frequently collaborate with products, movies, or services on branded campaigns. Secondly, celebrities and brands use their accounts to reach fans and customers. Those celebrities' brands use the platform to advertise themselves and their products to millions of followers. Celebrities are often paid to feature products or events on their social media. The third commercial aspect of these apps is that media outlets such as the Daily Mail and People Magazine produce stories for Snapchat about celebrities, current events, or recipes.

¹⁴ Although they are not part of what we traditionally consider the internet, Snapchat, Kik, and Discord have all signaled their belief they qualify for the DMCA safe harbor and their intent to use the safe harbor by setting in place DMCA policies.

¹⁵ The snaps are not viewable on the world wide web unless, of course, the user or a third party captures them and posts them, something that happens quite frequently with celebrity snaps.

b. Live Streaming Apps

Along with mobile device apps, the last few years have seen an explosion of live streaming platforms that allow anyone to send live video from a phone or other mobile device to the phones of followers and/or a web site. These expanding and changing online ecosystems create great value for the public, allowing information to be shared at lightning speed and enabling connectivity on levels never imagined in the past. They also create opportunities and challenges for copyright holders, as discussed below.

Periscope, a subsidiary of Twitter, hosts thousands of live streams on its web site and allows users to easily stream live via their Twitter feed. It has been used to broadcast information and breaking news in places like war zones, and the floor of the US House of Representatives. Facebook Live is a similar service that integrates through Facebook, allowing brands and individuals to stream live video through their Facebook pages. Twitch is an online platform that broadcasts live video of people playing video games, creating an online sports network for video game enthusiasts. All three platforms allow users to record, save, and post the content they stream.

These platforms are popular and growing fast. In 2016, Twitch was fourth in peak streaming data numbers, behind Netflix, Google, and Apple.¹⁶ In 2014, its broadcast of a video game world championship had 32 million viewers, more than either the NBA finals or the World Series.¹⁷ While some individual artists use these live streaming apps to connect directly with fans, they find they are a double edged sword as they also allow fans to broadcast live events to people who did not buy tickets.

¹⁶ <http://www.gamespot.com/articles/twitch-ranked-4th-in-peak-internet-traffic-ahead-of-valve-facebook-hulu/1100-6417621/>

¹⁷ <http://ftw.usatoday.com/2014/05/league-of-legends-popularity-world-series-nba>

Live streaming apps pose a variety of problems for artists and venues wishing to sell event tickets, as nothing prevents multiple parties from streaming concerts. Large copyright stakeholders such as the National Football League, other sporting venues, and big-name musicians combat this threat by enforcing a ticket license that explicitly prohibits streaming the event in the venue and by aggressively sending DMCA takedown notices in real time.¹⁸ During a boxing match between Mayweather and Pacquiano, which was broadcast on pay per view, Periscope received 66 DMCA complaints and removed 30 streams. The rest ended before they could be removed.¹⁹ To solve the problem of infringing live streams, some big players such as the NFL have reached joint agreements with Periscope that limit the scope of the use of the app.²⁰

Solutions aimed at solving current problems with the DMCA on the world wide web should not overlook the rapid pace of evolution of services, and that many services already exist where DMCA enforcement is not realistically possible for individuals and small businesses. The Copyright Office should ensure that if new services are to benefit from the DMCA's protections, they adequately account for infringement of copyrighted works and that enforcement and remedies are practically accessible to all categories of artists.

2. Several commenters noted the importance of taking into account the perspectives and interests of individual Internet users when considering any changes to the operation of the DMCA safe harbors. Are there specific issues for which it is particularly important to consult with or take into account the perspective of individual

¹⁸ <http://www.mercurynews.com/2015/09/20/anti-piracy-battle-unfolds-in-real-time-on-periscope-live-streaming-apps/>

¹⁹ <http://www.nbcnews.com/tech/internet/periscope-responds-mayweather-pacquiao-piracy-n353921>

²⁰ <https://nflcommunications.com/Pages/National-Football-League-and-Twitter-Announce-Streaming-Partnership-for-Thursday-Night-Football.aspx>

users and the general public? What are their interests, and how should these interests be factored into the operation of section 512?

In the Clinic's enforcement work, perhaps the greatest factor that stood out was the astounding danger lurking for individual Internet users looking to access a song, movie, TV show, or visual art online. As student lawyers followed search results to sites that claimed to have downloads of the work they were protecting, they encountered malicious intent on 71% of the sites. Unscrupulous people on the internet use the bait of illicit, or in some cases seemingly legitimate, downloads to lure internet users into giving up personal data and credit card information or into allowing malicious software to be downloaded on their computers. The gauntlet of phishing schemes, malware, and hoaxes that confront an Internet user when trying to find a work was, frankly, astonishing. This danger is equally problematic for individual artists seeking to enforce their rights online because they must navigate these same sites and demonstrate that their work is available for download or streaming at a given URL before most websites, search engines or ISPs will honor a DMCA notice.

This danger lurked when users were trying to download works that they should have known were infringing, but even more surprising, many dangerous sites could be mistaken for legitimate. Some sites that purported to have access to a song or movie that was unlicensed appeared to be legitimate, having a professional looking appearance, a familiar subscription process to become a member, and even purporting to sell the works for the amount a consumer would legitimately expect to pay. Because the Clinic students did not want to expose themselves to danger, the project did not extend to entering credit card numbers, but the dangers of entering such information on suspicious sites is self-evident.

Many sites required downloading of software, purportedly for streaming the music or video. Other sites, or in some cases the same site, had popup windows that tried to trick the user into downloading software onto the computer. Often, a large, bright button would be labeled “Play,” “Download,” or “Stream,” but when clicked would initiate downloading malicious software onto the computer. On occasion, the popup window locked up the entire computer unless one clicked the button allowing the download of the software, a fate the student could escape only by doing a hard reboot of her computer.

Even if the user did not fall prey to phishing or malware schemes, many sites purporting to have downloads of a particular song or movie required the user to click through endless buttons, each page with advertising, often from unsavory advertisers. Some of the ads that popped up were pornography, gambling sites, or animated games that looked like pornography.

Perhaps most offensive, in at least two cases, when the student lawyer clicked on the link purporting to lead to information about DMCA reporting, the link instead attempted to download malicious software to her computer.

The challenge with such phishing schemes and malicious sites is that the current 512 process is not designed for a creator to enforce their rights against sites which use the promise of copies of their works as bait for unwary consumers. While cover art for the novel or film is often displayed and infringed in these cases, these works may have different authors, and thus if the author’s own work is not readily accessible without entering credit card information it may not be possible to enforce a DMCA notice.

There is much legitimate debate about the scope of copyright enforcement online, but it is in no one's interest to have Internet users seeking to legitimately access works, or artists issuing DMCA notices subjected to the dangers described above. Users, some of them presumably young and inexperienced, are subjected to fraud, phishing, malware, and unsavory content. Creators suffer as well because not only do they lose the income of fans buying their work on legitimate sites, but their brands are tarnished by association with such activities. No band wants their song to be used to sell pornography, for example. Neither is it in the tech community's interest to allow users of their platforms and services to be abused. Obviously, these risks are also not acceptable to the users themselves. The only people benefiting are unsavory website operators. It should be possible to find a solution agreeable to all.

3. Participants expressed widely divergent views on the overall effectiveness of the DMCA safe harbor system. How should the divergence in views be considered by policy makers? Is there a neutral way to measure how effective the DMCA safe harbor regime has been in achieving Congress' twin goals of supporting the growth of the Internet while addressing the problem of online piracy?

The Clinic's work on behalf of artists in sending DMCA notices had mixed results. In some cases, both the infringing content and links to infringing content were removed from websites and search engine results. However, in many other cases, the results obtained did not seem to justify the time and effort spent. Student lawyers were able to confirm removal of infringing content from sites in 38 out of 231 cases, or 16%. For link removal, the removal rate was higher, with links being eventually removed from search engines in 93% of cases. Removal of infringing links, rather than removal of infringing copies of works themselves, thus seems to be the primary path to enforcement at least for individuals and small businesses.

One particular case is illustrative of the challenges faced when dealing with individual websites. In enforcing against infringement of Black Tape for a Blue Girl's latest album, the student lawyer identified the album available for download on an infringing site at the domain itune5music.com. The user merely needed to click on a link and a download started. The student found DMCA compliance information for the host, Cyrus One, LLC, and sent a takedown notice. The student also researched and found the site was hosted by an ISP called Hostgator. The student sent a takedown request to Hostgator on September 30. The student received a response from Cyrus One denying it hosted the site. On October 4, five days later, the student received a response from Hostgator asking for clarification on whether the takedown request was regarding cover art or the album. Student responded it was for the album. The next day, student received the following response:

Linking to other websites is not a violation of our terms of service. However, we will be happy to forward your request to the domain owner for their consideration. Per our privacy policy, we cannot provide any 3rd party with your contact information without your permission, and we need to send your email address to our client so they can respond to you if they wish. Do we have your permission to provide the domain owner with your email address?

Student requested that Hostgator send the information to its client and copy the student. Hostgator replied with "We have forwarded your request to the domain owner with instructions to respond to you directly if they wish to do so. Please let us know if there is anything else we can help you with." Student never heard from Hostgator or its client again. The student lawyer had no way of following up with Hostgator's client, or of confirming the email had even ever been sent. The student had reached a dead end. The infringing material was never removed.

The law student in question has had training on the DMCA, its legal requirements, and best practices in sending takedown notices. Yet she was left confused about whether Hostgator had complied with the DMCA, where the infringing content was actually hosted, whether Cyrus One was being honest as to hosting the site, who the responsible party was, and what steps she could pursue to get the content removed. Furthermore, she had spent a considerable amount of time on an attempt to remove infringing content, an attempt that was completely futile.

An artist attempting to enforce his or her copyright in most cases does not have the same benefit of legal training or guidance from experts in the field on best practices. Moreover, unlike law students enrolled in a Clinic, an artist's primary professional obligation is to spend her time creating her work. Even if she were able to navigate the DMCA process as readily as a Clinic student with guidance was able to do, she would be spending time that was ultimately wasted. This process multiplied by dozens of varying sites simultaneously hosting infringing content is why many artists find the DMCA process overwhelming and choose to avoid it altogether.

Furthermore, in the expanding world of platforms that host content, individual creators find themselves even more unable to address infringement of their work. Many of the clients we worked with had given up hope of enforcing their copyrights on the world wide web. Emerging platforms create yet another level of enforcement difficulty. Creators already struggle with enforcement on social media platforms like Facebook when the work is not readily searched for or protected by privacy settings. Protected social media platforms make it virtually impossible for individual copyright owners to find infringement and report it. Apps like Snapchat are even more challenging. Because

snaps disappear within twenty-four hours, authors would have to constantly monitor streams from Snapchat users, if they were able to gain access in the first place. Finding infringement becomes almost impossible.

In enacting the DMCA, Congress intended to balance “the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet.”²¹ Lawmakers highlighted the priorities of “promoting the continued growth and development of electronic commerce; and protecting intellectual property rights.”²² Congress also considered the interests of information users, including provisions to protect their privacy and security in the emerging online environment.²³

Based on these identified goals, the DMCA could be measured a success if it 1) had a positive effect on the growth of electronic commerce; 2) protected intellectual property rights; and 3) protected the interests of information users.

By any measure, the growth of the Internet since 1998 has been extraordinary. The DMCA, to the extent it contributed to that explosion, can be said to be successful in achieving the goal of having a positive effect on the growth of electronic commerce. However, there has been less success in achieving the two other goals. As discussed throughout these comments, the current system does not adequately protect the property rights of copyright owners. Not only are large volumes of work infringed, but copyright owners are discouraged from using the DMCA system at all because infringement is rampant, online enforcement is difficult and confusing, and the results of using the

²¹ H. Rep. No. 105-551, pt. 1, at 21 (1998).

²² *Id.* at 23.

²³ *Id.* at 27.

DMCA's tools are mixed at best. The Internet remains a wild, wild west of infringement. With the still exponential growth of both the world wide web and new platforms, the wild wild west shows no signs of being tamed with the resources currently at hand..

It is also questionable whether the DMCA is doing a good job protecting the interests of information users. While the online universe offers vast constellations of opportunities to gain information, connect with others, and voice one's own opinions, exploration of this universe too often entails peril. Users, whether innocent or complicit in infringement, face a gauntlet of unscrupulous sites that seem to offer works users seek but often have malicious motives. The business models of websites Clinic students encountered appear to be evolving to rely on phishing and other schemes as heavily as on direct infringement – at least with respect to the works Clinic students represented. The DMCA does not adequately address this development because it does not offer tools to report and remove such hazards. Moreover, as described here, creators and their representatives must face the same perils as users of websites where their works are purportedly offered in order to issue notices. This makes proper DMCA enforcement ever more challenging for individuals and small businesses.

4. Several public comments and roundtable participants noted practical barriers to effective use of the notice- and-takedown and counter-notice processes, such as differences in the web forms used by ISPs to receive notices or adoption by ISPs of additional requirements not imposed under the DMCA (e.g., submission of a copyright registration or creation of certain web accounts). What are the most significant practical barriers to use of the notice-and-takedown and counter-notice processes, and how can those barriers best be addressed (e.g., incentives for ISPs to use a standardized notice/counter-notice form, etc.)?

Clinic students discovered that finding the appropriate means to report infringement for each particular site can be a daunting task in itself. Some sites required the user to fill out webforms while others required an email to the DMCA agent, and a

few allowed either. Sometimes the DMCA agent was hard to find and was not listed in logical parts of the site, or was otherwise not accessible. In one instance, for example, the site purported to have a DMCA agent and invited the user to send an email to the agent by clicking a link, but the link itself was dead and the email address was not visibly listed. When the DMCA agent information was not available, students sought out information about the ISP host and sent a takedown notice to that host's DMCA agent, an investigative process that could take a significant amount of time.

Since this project began, the Copyright Office updated its DMCA agent registration requirements for websites. We hope that when fully implemented this change will help individual artists and small businesses trying to find the appropriate contact.

Students had mixed results with standard forms for sending takedown requests. In some cases, the forms were straightforward and easy to send. In others, they required a captcha, registration with the site, or multiple steps. One problem that was nearly ubiquitous with online web forms was trouble with tracking the results. The form is sent into the site usually with no confirmation to the sender. If a response came by email, it could be quite confusing to figure out to which takedown request that response was linked. For an artist sending takedown requests to multiple sites, this could become very confusing. In addition, there was no way to follow up on the takedown request other than simply sending a new takedown request.

Finally, a standard form is inherently limited in the information a creator can provide. Standard forms usually do not provide creators the option to identify and alert search engines and website hosts to examples where sites may be using copyrighted material or the promise of such material for malicious purposes. This is especially an

issue for individual creators and small creative businesses that, like the Clinic, do not have the ability to provide credit card information in order to identify if their work is actually being infringed.

Responses from sites were equally mixed. Some sites responded promptly and professionally, acknowledging the takedown request and removing the material. Twitter, for example, sent a confirmation immediately, followed by action the same day. However, the Clinic did receive some responses that were less than cooperative.

In two cases, instead of removing links to infringing content, Google sent a follow up email questioning the sender's authority to send a takedown request, despite the fact that the sender had already filled out a standardized form and sworn under penalty of perjury that she was authorized by the copyright owner to send notices on his behalf:

Hello,

Thanks for reaching out to us.

It is unclear to us whether or not you are the authorized copyright agent for the content in question. Only the copyright owner or an authorized representative can file a DMCA Infringement Notice on his/her behalf. Please note that you will be liable for damages (including costs and attorneys' fees) if you materially misrepresent that a product or activity is infringing your copyrights.

If you or your client is not the copyright owner for this content, we cannot process your notice. Please have the copyright owner file a DMCA notice with us. If you or your client is the copyright owner, please provide more detail explaining how this is the case.

*Regards,
The Google Team*

Google is not the only site which endorses this practice. Looking through the transparency reports of several well-known web platforms, it is clear that many sites have assumed for themselves the authority to investigate and adjudicate takedown requests before removing the content. It is important to differentiate between reviewing takedown requests to see if they comply with the statute in providing all the information and statements required in §512(c)(3)(A) and reviewing takedown requests for copyright issues such as fair use or allegedly improper motive for sending the notice.

A review of different platforms' transparency reports shows a wide range of policies in this area. Tumblr reviews for compliance with the statute but does not state that they review for fair use or other factors. Likewise, Tumblr checks to be sure the takedown requests comply with the statute, reporting that 83% of requests they received were determined valid under the statute.²⁴

Twitter says they "Carefully review each report received, and follow up with the reporter as appropriate, such as in cases of apparent fair use."

Wordpress, which hosts vast amounts of blogs, states that it may "decline to remove content if a notice is abusive. 'Abusive' notices may be formally complete, but are directed at fair use of content, material that isn't copyrightable, or content the complaining party misrepresents ownership of a copyright."²⁵

Reddit states that after reviewing DMCA notices for statutorily required information, it performs further analysis. "Each DMCA takedown notice is reviewed carefully and, in circumstances where content is actually hosted on our servers, we assess whether the existence of the content on Reddit can fall under an exception, such as 'fair

²⁴ <https://static.tumblr.com/zyubucd/JIrofo1pw/iptransparencyreport2016a.pdf>

²⁵ Wordpress transparency report.

use' of the copyrighted material. If we believe the existence of the content can be defended or falls under an exception under copyright law, then we may request further information from the requesting party that will assist us in our review.”²⁶

By adopting such DMCA policies, the sites put themselves in the place of a court of law, deciding such complex legal issues as fair use and copyrightability. In this court, however, the platform profits from the work remaining on the site. Even the most well intentioned of ISPs has an incentive to err on the side of allowing works to remain up. This conflict of interest is exactly why the DMCA makes no such provision to set the ISP or website owner up as a judge. When site operators request additional information or documentation not required by the statute, they put effective use of the DMCA even further out of reach for individuals and small businesses who may not be able to satisfy such improper requests.

5. A number of study participants identified the timelines under the DMCA as a potential area in need of reform. Some commenters expressed the view that the process for restoring access to material that was the subject of a takedown notice takes too long, noting that the material for which a counter-notice is sent can ultimately be inaccessible for weeks or months before access is restored. Other commenters expressed the view that the timeframe for restoring access to content is too short, and that ten days is not enough time for a copyright holder to prepare and file litigation following receipt of a counter-notice. Are changes to the section 512 timeline needed? If so, what timeframes for each stage of the process would best facilitate the dual goals of encouraging online speech while protecting copyright holders from widespread online piracy?

The results from the Clinic's work showed two patterns: When a site responded to a DMCA notice, it was usually within 24 hours. Responsible sites acted quickly to remove the work. However, in many (most) cases, no response was ever received. In no instance did the clinic receive a DMCA counter notice. Our experience is consistent with

²⁶ Reddit transparency Report

experiences reported by various web platforms, although only a few platforms included counter notice data in their transparency reports.

Tumblr reports that .01% of posts removed in response to a takedown requests were restored via counter notice.²⁷ Wordpress reports that less than 2% of valid DMCA takedown notices resulted in a counter notice.²⁸ Finally, Snapchat received zero counter notices, out of only 16 removal requests. The data on counter notices is clearly lacking. For instance, Google did not include information on counter notices in its transparency report. It is hard to make the case that large amounts of legitimate content is wrongfully removed with such scanty information on counter notice rates.

The creators the Clinic served were all middle class artists, people who have sacrificed and invested in their art and expect to make a living at it, but who do not see the type of revenue and corporate resources some larger copyright owners have. Because they are average middle class artists without a team of lawyers at their disposal, these creators say that the idea of filing a lawsuit within ten days is impossible. The logistics in filing a lawsuit would take much longer to pull together and would be cost prohibitive.

Rather than adjusting timelines in the section 512 process, which appear to impact very few cases, both senders and recipients of DMCA notices would benefit if a streamlined and cost effective process for adjudicating such claims outside the federal

²⁷ From January to June 2016, Tumblr received a total of 85 counter-notices from users requesting the restoration of content that had been removed pursuant to a DMCA takedown notice. Of those 85, 32 were deemed valid (38%). Of the 61,053 posts that were removed pursuant to a takedown notice, 0.1% were restored using the counter-notice process.

²⁸ Wordpress received 39 counter notices out of 2342 removals. They say “During this reporting period, less than 2% of the valid DMCA notices we received were later subject to a counter notice; of those cases, we’re aware of further action being taken by the original DMCA complainant only once.”

courts were established. The Copyright Office has proposed and Congress is currently considering policy proposals to create a “small claims tribunal” within the United States Copyright Office that could hear infringement claims of relatively modest economic value as well as claims for improper notices. Such an approach makes sense.

The creators the Clinic represented would be well served by a small claims court approach. Bringing a costly lawsuit whether in the context of DMCA enforcement or otherwise would not make economic sense to them. The licensing fees or sales revenue they lose from infringement run in the hundreds or thousands of dollars per infringement, not in the higher ranges which make a federal lawsuit feasible. The money they would spend in pursuing a lawsuit would dwarf the money they would recover. And yet losses due to infringement are not insignificant to them. A few hundred or few thousand dollars has a significant impact on their ability to provide for themselves and their families. When multiplied by repeated infringement across dozens of sites on the internet, those small losses mean the difference between being able to pursue a lifetime career in their field or having to find another job. Those losses mean the difference between spending their days practicing, perfecting, and creating their art and doing something else to provide for themselves. Any avenue to recover those losses would make a large difference to middle class artists.

Of course the small claims tribunal would not be a full solution to the challenges faced by creators in enforcing their rights online – one must presume that sites which have not responded to a DMCA notice would likely not respond to a summons to appear in a small claims tribunal – particularly if they are located outside the jurisdiction of the United States courts, and that it would not be practical to enforce a judgment against such

sites. Nevertheless, having resort to a more cost effective and streamlined yet expert venue than the federal courts in which to hear copyright owner and user claims would be a welcome addition.

6. Participants also noted disincentives to filing both notices and counter-notices, such as safety and privacy concerns, intimidating language, or potential legal costs. How do these concerns affect use of the notice-and-takedown and counter-notice processes, and how can these disincentives best be addressed?

This Clinic submitted a Comment in response to the Copyright Office's December 31, 2015 request for comments on the effectiveness of Section 512 in which the Clinic addressed these issues. The Comment identified several types of problems that artists said they encountered when attempting to use the DMCA notice and takedown system. Artists reported encountering intimidating language when filing reports. They expressed their fear when their identifying information and contact information was turned over to infringers by the platform without the artist being given the same information about the infringer. They expressed concern and felt bullied by having their takedown requests, including their names, publicly posted on the site where the work had been infringed, and publicly posted on the Lumen (previously known as the Chilling Effects) database. This public display of personal information is particularly damaging to individual artists as they do not have a law firm or professional enforcement company to shelter their personal information from the eyes of internet users who might seek to harass them.

They also expressed the impossibility in many cases of bringing a lawsuit for infringement when the damages from the infringement cost far less than the costs incurred in bringing a lawsuit.

As noted above, the need to confirm infringement in order to send a takedown request opens the copyright owner up to all sorts of dangerous material, including phishing schemes, malware, and malicious sites. These dangers alone provide a disincentive to enforcement of copyright online.

Finally, the stern language encountered in both the process to send in DMCA notices and in the responses received from DMCA agents is daunting to many copyright owners. Most individual artists do not know the law well. They want to comply with the law and have no desire to break it. A stern warning that if they make a mistake they may be liable for fees and punished for perjury gives well-intentioned citizens pause in enforcing their copyrights. If sites were required to use standardized language and approaches to DMCA notices that are consistent with and do not exceed the requirements of the statute it would be a positive first step in addressing some of these challenges. Additional resources and education to individuals and small businesses from a neutral and expert source such as the Copyright Office would also be helpful.

7. Some participants recommended that the penalties under section 512 for filing false or abusive notices or counter-notices be strengthened. How could such penalties be strengthened? Would the benefits of such a change outweigh the risk of dissuading notices or counter-notices that might be socially beneficial?

As noted above, false notices and counter notices do not appear to be a problem based on reports by major recipients of notices. This Clinic would oppose any stricter penalties for sending notices because there is no evidence that large numbers of false notices is a problem that needs to be addressed, and additional penalties would only serve to further discourage individuals and small businesses from using the DMCA tools available to them.

Furthermore, because there is no system for sending notices for sites that have evolved their business models in ways that are dangerous to users but do not neatly fit into the DMCA reporting mechanisms, such as sites which purport to have infringing content but may only be using the promise of such content for malicious purposes, it would be counterproductive and unfair to penalize artists attempting to notify platforms of these problems. Similarly, considering notices reporting such sites as false notices also seems to run counter to common sense.

Finally, the Clinic found that some true and good faith notices were likely to be counted as improper notices because of timing. As described above, if a notice is sent both to a site and a search engine and the site promptly removes infringing content, as is required by the law and the search engine subsequently does not find the infringing work because it was removed promptly, it appeared from correspondence that the search engine counts that as a false notice. This is not an issue of bad faith, rather one of effective enforcement strategies, and given that the Clinic experienced relatively unimpressive success rates seeking removal of works from individual websites, but fairly good results seeking the removal of links from search engines, it is practical to send notices to both simultaneously. Google reports that it rejects and refuses to remove 3.5% of the URLs reported as infringing and another 1.3% are invalid. It would be interesting to know what percentage of those URLs is a result of this timing issue.

Because of these cases adding ambiguity to the issue of false claims, greater penalties are unjustified.

9. Many participants supported increasing education about copyright law generally, and/or the DMCA safe harbor system specifically, as a non- legislative way to improve the functioning of section 512. What types of educational resources would

improve the functioning of section 512? What steps should the U.S. Copyright Office take in this area? Is there any role for legislation?

Individual creators appear to know very little about the DMCA. It seems confusing, complicated, time consuming, and intimidating to use. Greater effort should be made to provide artists with resources, education, and advice about the DMCA system and tools and tips on how to send notices properly and efficiently. They need education about finding the right parties to send notices to, how to avoid the phishing schemes and malicious sites that lurk online, and what their rights are under the DMCA. The ever-changing ecosystem of sites and platforms would require the Copyright Office to have a technology team that can keep on top of developments and changing business practices of infringing sites, which adapt and reorganize in response to enforcement patterns. But investing in such a technology resource would also ensure that the Copyright Office is aware of developments as they occur.

On behalf of the Arts and Entertainment Advocacy Clinic at Antonin Scalia Law School, George Mason University, we thank you for the opportunity to share our experiences and views. We stand ready to be of assistance as the Copyright Office continues work on these issues and would welcome the opportunity to aid creators of copyrighted works should there be an appropriate role for the Clinic to serve.

Respectfully submitted,

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