

Section 512 of the Digital Millennium Copyright Act: User Experience and User Frustration

Emily M. Asp*

ABSTRACT: The DMCA was created at a time when the internet was still relatively new. One of the most important sections of the DMCA is section 512, which provides a safe harbor from liability to internet service providers when their consumers post copyright-infringing material on their websites. Because of section 512, copyright owners who find potentially infringing content on the internet can petition service providers to take down the content. While this has protected many websites and allowed for innovation on the internet, it has been detrimental to consumers. A lack of clarity in the statute combined with dramatic changes in how the internet is accessed and used have created significant problems that go to issues of free speech, privacy, and due process. This Note proposes that Congress amend the DMCA to simplify the language of the statute and to require that service providers give more information to consumers to inform them both of their rights and the nuances of the counter-notification process. While some internet service providers are taking preliminary steps in this direction, the most comprehensive plan has been implemented by P2P file sharing websites. These sites have worked with copyright holders to create a system that promotes knowledge and understanding as well as providing ample time for consumers to correct their behavior prior to removing them from the site entirely. I believe this is the proper approach to bring the law into the 21st century and to protect average consumers.

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* J.D. Candidate, The University of Iowa College of Law, 2018; B.A., Oberlin College, 2013. I would like to thank my friends and family for their support and the *Iowa Law Review* for helping me through the publication process. I would also like to extend a special thank you to my fiancé, Nick Balay, and to my cats, Charlie and Mac. Thanks for everything. Y'all are the best.

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I. INTRODUCTION

The Digital Millennium Copyright Act (“DMCA”) is simultaneously one of the most important and the most divisive laws of the past 20 years. Writers have heralded it as both “the law that saved the web”¹ and “a law that is one of the biggest threats to free speech online.”² Congress passed the DMCA to protect copyrights from excessive infringement on the internet.³ At the same time, Congress sought to protect nascent websites, allowing them to innovate without fear of excessive copyright infringement litigation.⁴ Of the five

1. David Kravets, *10 Years Later, Misunderstood DMCA is the Law that Saved the Web*, WIRED (Oct. 27, 2008, 3:01 PM), <https://www.wired.com/2008/10/ten-years-later>.

2. KEMBREW MCLEOD, *FREEDOM OF EXPRESSION: RESISTANCE AND REPRESSION IN THE AGE OF INTELLECTUAL PROPERTY* 213 (2007).

3. See S. REP. NO. 105-190, at 8 (1998) (discussing the balance between limiting the liability of ISPs while simultaneously protecting copyrights “against massive piracy”).

4. *Id.*

sections of the DMCA, one of the most complex and contentious⁵ is Title II, codified at 17 U.S.C. § 512, otherwise known as the Online Copyright Infringement Liability Limitation Act.⁶ When it was passed, Congress hoped the law would endure for years and that its presence would both stimulate economic growth and protect the rights of innovators and creators for years to come.⁷ Yet despite these lofty sentiments, the DMCA has not only failed to keep up with massive changes in technology, but it has also left behind a group that has been affected the most by its provisions: the average consumer.⁸

With more than 3.7 billion connected to the internet in 2017,⁹ almost half of the people on earth could be considered “average consumers.”¹⁰ Each of these 3.7 billion people is either directly or indirectly affected by Section 512 of the DMCA.¹¹

Section 512 seeks to limit an Internet Service Provider’s (“ISP’s”)¹² liability for when its “subscribers” (whom I will refer to as “consumers”) post content that infringes a valid copyright.¹³ When a copyright holder finds content that she believes infringes on her copyrights, she can submit a notice that requires an ISP to take down the infringing content.¹⁴ While this has protected many nascent websites like YouTube and Myspace,¹⁵ it has also led to a significant amount of potential free speech suppression.¹⁶ This “notice

5. See discussion *infra* Part B.

6. Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, sec. 201-02, 112 Stat. 2877 (1998) (codified as amended at 17 U.S.C. § 512 (2006)).

7. See 144 CONG. REC. 9235 (1998) (statement of Sen. Leahy) (“[I]n voting for this legislation, [senators] will be voting to maintain the intellectual leadership of the United States.”).

8. The “average consumer” or the “consumer” in this Note refers to a person, organization, or company that is not a copyright holder or an internet service provider (“ISP”) who uses ISPs to access content, but to also, in some cases, create their own content.

9. *Internet Users*, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users> (last visited Oct. 24, 2017).

10. *Id.*

11. See 17 U.S.C. § 512 (2012).

12. An ISP is defined in section 512 as both “an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received[,]” and “a provider of online services or network access, or the operator of facilities therefor.” 17 U.S.C. § 512(k)(1) (2012). Both definitions are used to define an ISP in the sections at issue in this Note.

13. *Id.* § 512(a)-(d).

14. *Id.* § 512(b)-(d).

15. Kravets, *supra* note 1.

16. See, e.g., MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? 24-27, 36 (2005) (discussing the chilling effect of the DMCA on classroom experiences, especially its effect on student web-building classes. Notes one professor, “I’m really confused because what if they put up this great [student made web] site, and it’s all re-purposed content that they had no permission to use? Is my school going to be liable for this?”); JENNIFER M. URBAN ET AL., NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 95-97 (2016) (discussing a study showing that one in

and takedown” scheme not only raises questions about the chilling of free speech,¹⁷ it also arguably fails to provide consumers with adequate due process.¹⁸

Although scholars have recognized many problems with the DMCA,¹⁹ consumer experience and accessibility have increasingly become important issues to address. As people’s internet experiences morph and change, the DMCA needs to be able to morph as well. The DMCA should adapt to protect a copyright owner’s right to control his or her intellectual property online. At the same time, the DMCA should change to protect the average consumer’s right to free speech and adequate process to contest an illegitimate takedown. Currently, websites are not required to provide information on the quantity or quality of notices received, limiting the available data to those websites that voluntarily provide it.²⁰ With only selective information, it is impossible to know the real scope of the problems with the DMCA. Additionally, websites are only required to give consumers notice that their content has been taken down, creating an information gap that scares consumers into acquiescing rather than contesting takedowns.²¹ Without proper knowledge on their options going forward, let alone why their content was taken down in the first place, average consumers have little to no chance of successfully fighting a mistaken charge of copyright infringement.

This Note analyzes the problems with section 512 as it applies to average consumers and proposes solutions to reformulate the statute to make it more responsive to the needs of all concerned parties. Part II looks at the history of

fifteen takedown notices had possible fair use defenses); Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 186 (2010) (“The safe-harbor and takedown regime . . . is not even-handed. It distorts the speech environment by excessively removing challenged speech.”).

17. The term “chilling effect” is defined as “a situation where a speech or conduct is suppressed by fear of penalization at the interests of an individual or group.” *Chilling Effect Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/c/chilling-effect> (last visited Oct. 24, 2017). Legal scholars evaluating the suppression of speech online have been using the term “chilling effect” to describe the problems associated with section 512 for a long time, even going so far as to originally call their takedown database “Chilling Effects.” Jennifer Slegg, *Chilling Effects Rebrands to Lumen, Adds New Features & Partners*, THESEMPOST (Nov. 4, 2015, 6:44 AM), <http://www.thesempost.com/chilling-effects-rebrands-to-lumen-adds-new-features-partners>.

18. See URBAN ET AL., *supra* note 16, at 3 (“Without better accuracy requirements for notices, a reasonable ability to respond before action is taken, and an unbiased adjudicator to decide whether takedown is appropriate, counter notice and put-back procedures fail to offer real due process protection to targets.”); Seltzer, *supra* note 16, at 220–21.

19. Many authors have addressed the various problems with the DMCA. For an analysis of fair use and its intersection with section 1201 (anti-circumvention) and section 512 (safe harbor), please see PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 108–26 (2011). See also JAY DRATLER, JR. & STEPHEN M. MCJOHN, CYBERLAW: INTELLECTUAL PROPERTY IN THE DIGITAL MILLENNIUM §§ 2.05[1], 2.05[2][c][iii], 3.02 (2011) (describing flaws in section 1201 exceptions).

20. See *infra* Part III.C.

21. See *infra* Part III.B.2.

copyright law in the 20th century, paying close attention to the forces at work when statutory changes are passed. It then looks specifically at the history of the DMCA and the language that was eventually adopted into law. Part III examines how changes to technology and internet usage, along with specific issues within the language of section 512, have created massive problems with the average consumer experience of notice and takedown. Part IV proposes several solutions to combat these problems by looking at how increased knowledge, information, and communication can help combat the latent issues within the statute. Part V concludes.

II. HISTORY AND ITS IMPACT ON THE DMCA

Although many of the DMCA's problems stem from rapid technological advancement,²² the law's challenges begin at its signing. A brief history of copyright law in the United States is necessary to understand both the pressures associated with revising copyright law and the process any new copyright law must follow to receive support from both lawmakers and stakeholders. Part A discusses changes to copyright law in the 20th century, starting with the passage of the Copyright Act of 1909 ("the 1909 Act").²³ Part B looks at the motivations, negotiations, and machinations that would ultimately lead to the passage of the DMCA, and with it section 512. Part C discusses section 512, specifically the notice-and-takedown procedure and its counterpart, the counter notification and put-back, as these are the two procedures that most impact consumers.

A. A BRIEF HISTORY OF UNITED STATES COPYRIGHT LAW IN THE 20TH CENTURY

Passing copyright law in the United States has always been a balancing act between the interests of copyright owners and the public at large. These competing interests have driven copyright law even before the Constitution was ratified.²⁴ The Copyright Clause of the United States Constitution gave copyright law a prominent place in American law by providing Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

22. See *infra* Part III.A.

23. It is important to note that, while I am choosing to begin discussing United States copyright law with the passage of the 1909 Act, the United States has had federal copyright law since 1790. Copyright Act of 1790, 1 Stat. 124 (1790) (repealed 1909).

24. This delicate balancing act can also be seen in statutes passed before the United States Constitution. See *Resolution Passed by the Continental Congress, Recommending the Several States to Secure to the Authors or Publishers of New Books the Copyright of Such Books* (1783), reprinted in COPYRIGHT OFFICE, BULLETIN NO. 3, COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1 (rev. 1973) (describing to the several states a scheme to protect authors' writing for a limited period of time). All of the states, save Delaware, subsequently enacted copyright statutes. *Id.* at 1–21.

respective Writings and Discoveries.”²⁵ As the Congressional report for the 1909 Act reiterated, copyrights exist “upon the ground that the welfare of the public will be served . . . by securing to authors for limited periods the exclusive rights to their writings.”²⁶ This right is given “[n]ot primarily for the benefit of the author, but . . . for the benefit of the public[,]” because “it will stimulate writing and invention”²⁷ Anytime copyright law is changed, Congress must balance the copyright owner’s interest in protecting her property with the public’s interest in innovation.

Changes to copyright law are typically motivated by changes in technology.²⁸ With the 1909 Act, Congress sought to bring copyright law into the new century by involving copyright holders in the lawmaking process. This would ensure that the law was responsive to copyright holders’ needs.²⁹ Congress involved copyright holders by calling a hearing and inviting interested parties to discuss the proposed law and how it would impact their individual interests.³⁰ After a long period of negotiation and discussion among the various parties, Congress eventually passed the 1909 Act.³¹ The 1909 Act was the first modern copyright law, greatly expanding both the term “copyright” and the works that can receive protection.³² Unfortunately, it only took a few years before the 1909 Act needed to respond to new technologies,

25. U.S. CONST. art. I, § 8, cl. 8.

26. H.R. REP. NO. 60-2222, at 7 (1909).

27. *Id.*

28. See JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 27–31 (4th ed. 2015) (giving an overview on how technological advancement in both the creation and dissemination of new works has changed copyright law); JESSICA D. LITMAN, DIGITAL COPYRIGHT 22 (2006) (“Copyright laws become obsolete when technology renders the assumptions on which they were based outmoded. That has happened with increasing frequency since Congress enacted the first copyright law in 1790.”); INFO. INFRASTRUCTURE TASK FORCE, THE WORKING GRP. ON INTELLECTUAL PROP. RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 7 (1995) (“Intellectual property is a subtle and esoteric area of the law that evolves in response to technological change.”).

29. LITMAN, *supra* note 28, at 36–37.

30. *Id.* at 38.

31. *Id.* at 39–40. Industries involved included “representatives of authors, dramatists, painters, sculptors, architects, composers, photographers, publishers . . . and printers’ unions.” *Id.* at 39.

32. Compare Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (repealed 1978) (increasing the copyright term to a maximum of 56 years and adding protection for unpublished works like lectures and performances), with Copyright Act of 1790, 1 Stat. 124 (1790) (repealed 1909) (providing protection for a maximum of 28 years and providing protection to only maps, charts, and books). Note that the Copyright Act of 1790 was amended several times prior to 1909 to add more works and to extend the original copyright term by 14 years. See Law of Apr. 29, 1802, ch. 36, 2 Stat. 171 (repealed 1909) (adding prints); Law of Feb. 3, 1831, ch. 16, 4 Stat. 436 (repealed 1909) (adding musical compositions and extending the original term); Law of Aug. 18, 1856, ch. 169, 11 Stat. 138 (repealed 1909) (adding dramatic compositions); Law of Mar. 3, 1865, ch. 126, 13 Stat. 540 (repealed 1909) (adding photographs); Law of July 8, 1870, ch. 230, 16 Stat. 198, (repealed 1909) (adding works of fine art, including paintings, drawings, and sculptures, among others).

namely motion pictures.³³ In hindsight, lawmakers should have known the Act would need revisions, as the motion picture industry was notably absent from the 1909 Act's preliminary discussions,³⁴ despite there being more than 9,000 movie theaters across the United States at the time of the Act's passage.³⁵ Congress continued to pass periodic changes to the 1909 Act in response to specific industry concerns (including the Townsend Act of 1912, which revised the 1909 Act to address the aforementioned motion pictures).³⁶ Copyright law was not completely overhauled until 1976, when Congress once again convened conferences of various copyright holders to discuss what would become the statute that is still in use today: the Copyright Act of 1976.³⁷

After Congress passed the Copyright Act of 1976, copyright law was relatively stable for two decades, with only a few minor changes made to address specific problems that arose with technological changes.³⁸ These technological advances have drastically altered how people access information. The expansion of VCRs into ordinary American homes,³⁹ the introduction of CDs and CD players,⁴⁰ and, most importantly, the invention

33. See *Townsend Copyright Amendment: Hearing on H.R. 15263 and H.R. 20596 Before the H. Comm. on Patents*, 62d Cong., 2d Sess. 3 (1912) [hereinafter *Townsend Copyright Amendment Arguments*] (statement of Sen. Townsend) (stating that the passage of an amendment “is essential if the moving-picture manufacturers are to continue in business”); see also LITMAN, *supra* note 28, at 40–41 (noting that, following a publisher successfully suing a filmmaker for copyright infringement over the movie *Ben Hur*, filmmakers were “faced [with] the prospect of liability under a statute that had been drafted without [their] interest in mind,” leading directly to the introduction of the Townsend Act of 1912).

34. LITMAN, *supra* note 28, at 41.

35. *Timeline of Greatest Film Milestones and Turning Points in Film History: The Year 1909*, AMC, <http://www.filmsite.org/1909-filmhistory.html> (last visited Oct. 24, 2017). The year 1909 also saw the high-profile case *Harper & Bros. v. Kalem Co.*, which determined that film adaptations of copyrighted works infringing a copyright holder's right to public performance and to dramatization. *Harper & Bros. v. Kalem Co.*, 169 F. 61, 64–65 (2d Cir. 1909), *aff'd*, 222 U.S. 55 (1911).

36. LITMAN, *supra* note 28, at 41. Congress once again asked the various copyright holders impacted by the motion picture industry to come together and give their input prior to passing the Townsend Act of 1912. See *Townsend Copyright Amendment Arguments*, *supra* note 33, at 3–4 (discussing a hearing where copyright holders could come to have their voices heard on any possible amendments to copyright law).

37. LITMAN, *supra* note 28, at 48–63.

38. *Id.* at 58–60. A listing of amendments to the Copyright Act of 1976 and a general description of their purposes can be found in U.S. COPYRIGHT OFFICE, CIRCULAR 92: COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, at v–xii (2016), <https://www.copyright.gov/title17/preface.pdf>. The only change to copyright law since 2011 has been the STELA Reauthorization Act of 2014, which pertains to rebroadcasting television signals. STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (codified as amended in scattered sections of 47 U.S.C. and 17 U.S.C.).

39. Jonah Engel Bromwich, *The Long, Final Goodbye of the VCR*, N.Y. TIMES (July 21, 2016), <http://www.nytimes.com/2016/07/22/technology/the-long-final-goodbye-of-the-vcr.html>.

40. Benj Edwards, *The CD Player Turns 30*, PCWORLD (Oct. 1, 2012, 4:00 AM), <http://www.pcwORLD.com/article/2010810/the-cd-player-turns-30.html>.

of the internet,⁴¹ have all greatly expanded the average consumer's ability to interact with and respond to a diverse array of copyrighted content. This new technology moved Congress to once again change federal copyright law.⁴²

B. PASSAGE OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

More than any other technological advancement that had come before it, the internet signaled a major change to intellectual property rights. Apart from expanding the ability to receive information, the internet made it easy for consumers to upload and send files to anyone in the world, including sending content protected by copyright law. Unlike the VCR, which limited the preservation of copyrighted programming to discrete physical copies intended mostly for personal use,⁴³ the internet gave anyone with a connection the power to obtain illegal copies of copyrighted works almost instantly.⁴⁴ While the internet had the potential to increase the legal distribution of copyrighted works, abuse was, and continues to be, a major source of anxiety for members of different industries heavily reliant on copyright protection.⁴⁵ These concerns, along with the passage of several international treaties on intellectual property rights, spurred the passage of the DMCA.⁴⁶

In an effort to better understand how the internet, then known as the National Information Infrastructure ("NII"), would affect the nation, the Clinton Administration created the Information Infrastructure Task Force in 1993.⁴⁷ One of the subgroups within this study, the Working Group on Intellectual Property Rights ("WGIPR"), looked at how the NII would affect intellectual property. The WGIPR also made policy recommendations to

41. See generally Barry M. Leiner et al., *A Brief History of the Internet*, 39 ACM SIGCOMM COMPUTER COMM. REV. 22 (2009), <https://www.cs.ucsb.edu/~almeroth/classes/F10.176A/papers/internet-history-09.pdf> (providing a brief overview of the history of the internet from some of the scientists and engineers instrumental to its founding and development).

42. See LITMAN, *supra* note 28, at 89–91 (describing how the government began discussions regarding changes to copyright law after the internet gained popularity).

43. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984) (finding that Sony was not liable for contributory infringement for making video recording machines because the practice of "time-shifting" (recording programming for viewing at a later time) is a legitimate and individual use of the technology).

44. INFO. INFRASTRUCTURE TASK FORCE, *supra* note 28, at 10 ("Just one unauthorized uploading of a work onto a bulletin board, for instance—unlike, perhaps, most single reproductions and distributions in the analog or print environment—could have devastating effects on the market for the work.").

45. *Id.* (describing the benefits of the internet for creators, but also recognizing that "[a]uthors are wary of entering [the internet] market because doing so exposes their works to a higher risk of piracy and other unauthorized uses than any of the traditional, current modes of dissemination").

46. See 144 CONG. REC. 9235–36 (1998) (statement of Sen. Leahy) (describing the process and motivations behind creating the DMCA).

47. INFO. INFRASTRUCTURE TASK FORCE, *supra* note 28, at 1.

protect copyright holders.⁴⁸ While the WGIPR found ample potential for the abuse of copyrights through the NII, it also recognized the NII's importance as a vehicle for information dissemination.⁴⁹ The WGIPR proposed amendments that sought to clarify definitions, rather than radically alter the Copyright Act of 1976,⁵⁰ to ensure that the measures already in place could be used to give copyright owners greater protection of their works on the NII.⁵¹

At the same time, the WGIPR was researching the nascent NII, copyright holders, ISPs, and consumers worried about who could be held liable for placing copyrighted material online without permission from the copyright owner. One of the most prominent cases on this subject, *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, greatly influenced Congress in its writing of section 512.⁵² In this case, the Religious Technology Center sued Netcom, the operator of an online bulletin board, for direct, indirect, and vicarious copyright infringement of several important copyrighted Scientology texts.⁵³ Dennis Erlich, a former Scientology minister, placed some of Scientology's sacred texts up on a bulletin board run by Netcom "for discussion and criticism of Scientology."⁵⁴ Ultimately, the Court decided that storing the infringing texts on the bulletin board imputed direct liability on *only* the user who uploaded the content, not the internet service provider or the website that hosted the content.⁵⁵ However, the Court also decided that if Netcom (1) knew about the infringing content, (2) had an easy way to remove said content, and (3) chose not to, it could be liable for contributory infringement.⁵⁶ Similarly, Netcom could be vicariously liable if it was shown to have control over its consumers conduct and if it "receive[d] a direct financial benefit from the infringing activities of its users."⁵⁷ The *Netcom*

48. *Id.* at 2.

49. *Id.* at 10–11. These competing concerns largely mirror the conflict within copyright law as a whole. *See supra* notes 24–27 and accompanying text.

50. INFO. INFRASTRUCTURE TASK FORCE, *supra* note 28, at 17 ("With no more than minor clarification and limited amendment, the Copyright Act will provide the necessary balance of protection of rights—and limitations on those rights—to promote the progress of science and the useful arts.").

51. *Id.* at app. 1.

52. *See generally* *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (establishing that a website hosting service could be liable for contributory infringement in some circumstances if their users post infringing content).

53. *Id.* at 1365–66.

54. *Id.* at 1365.

55. *Id.* at 1372–73. The Court noted that imputing direct liability on anyone other than the user who placed the information online would "create unreasonable liability," as the processes used by the bulletin board to facilitate were entirely automated and Netcom, the internet provider, did not even have a direct relationship with Erlich. *Id.* at 1372.

56. *See id.* at 1374.

57. *Id.* at 1375–76.

decision influenced Congress to add the notice and takedown provisions to the DMCA.

In addition to concerns within the United States, Congress passed the DMCA because of pressure created by the passage of two international treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The WIPO Copyright Treaty, adopted on December 20, 1996, sought to create principles and rules that would protect copyrighted content around the world. The WIPO Copyright Treaty also sought to balance author rights with the right of the public to have access to copyrighted works for education and research.⁵⁸ The WIPO Performances and Phonograms Treaty, also adopted on December 20, 1996, applied these same principles to performances and phonograms.⁵⁹ However, since neither treaty was self-executing,⁶⁰ the United States and the other signing countries needed to act to make the provisions binding. A desire to comply with and enforce these treaties at home motivated the Clinton Administration to submit both treaties to the Senate on July 29th, 1997. At approximately the same time, Senators Orrin Hatch and Patrick Leahy submitted the first drafts of what would become the DMCA to both the House and the Senate.⁶¹

Speaking to the Senate floor on the importance of passing the DMCA, Senator Hatch said that without protection from piracy, “copyright owners [would] hesitate to make their works readily available on the Internet.”⁶² Senator Hatch also stressed balancing “massive piracy”⁶³ concerns with protecting ISPs from liability for the actions of their consumers.⁶⁴ It was not until late in the discussions that Congress addressed the question of user rights and responsibilities.⁶⁵

58. WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (“[A]uthors . . . shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means . . .”).

59. WIPO Performances and Phonograms Treaty preamble, Dec. 20, 1996, S. Treaty Doc. No. 105-17.

60. *Id.* at art. 23; WIPO Copyright Treaty, *supra* note 58, at art. 20.

61. S. REP. NO. 105-190, pt. 2, at 5 (1998). As stated by then-Senator Joe Biden, passage of the DMCA would bring the United States in line with the rest of the world and “give tougher international protection to software makers and the recording industry.” 144 CONG. REC. 9243 (1998) (statement of Sen. Biden).

62. 144 CONG. REC. 9234 (1998) (statement of Sen. Hatch).

63. *Id.*

64. *Id.* (“Without clarification of their liability, service providers may hesitate to make the necessary investment to [improve their services].”).

65. See LITMAN, *supra* note 28, at 122 (noting that it was only after release of the Information Infrastructure Task Force’s report that “[l]ibrary groups, online service providers, consumer organizations, writers’ organizations, computer hardware manufacturers, Internet civil liberties groups, telephone companies, educators, consumer electronics manufacturers, and law professors registered” complaints about the proposals). Other authors have noted that the general public has not been a part of Congressional discussions of copyright laws and the policies behind them. See COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, COMPUT. SCI. & TELECOMMS. BD. COMM’N ON PHYSICAL SCIS., MATHEMATICS,

These discussions on the Senate floor prompted Senator John Ashcroft to add an amendment giving consumers protection from inaccurate or mistaken takedowns of their uploaded material.⁶⁶ While Senator Ashcroft “applauded the efforts of the affected industries to resolve the [I]SP liability issue,” he also worried about “protection for the small user, not just for the big content promoters.”⁶⁷ These discussions and compromises produced the notice and takedown system and the counter notification system.

C. NOTICE AND TAKEDOWN

Section 512 of the DMCA limits service provider’s liability for copyright infringement. It is organized around the types of technology used to store data over the internet.⁶⁸ The DMCA allows ISPs to avoid liability for contributory or secondary infringement if they follow specific procedures, including compliance with a formal takedown process.⁶⁹ The data transfer methods enumerated in the DMCA are system caching,⁷⁰ service providers that store files at the request of consumers,⁷¹ and information location tools.⁷² A formal takedown notice must include: (1) a signature of an individual who

& APPLICATIONS & NAT’L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 71–73 (2000) [hereinafter THE DIGITAL DILEMMA] (describing the lack of public input into copyright law and the unique interests of the public that are often ignored by those organizations that have previously worked as the public’s proxies).

66. 144 CONG. REC. 9237–38 (1998) (statement of Sen. Ashcroft).

67. *Id.* at 9238 (“I think of a little girl, perhaps, who puts on her Internet site the picture of a duck she draws. We shouldn’t allow Disney to say, ‘We own Donald Duck. That looks too much like Donald,’ and be able to bully a little girl from having a duck on her web site.”).

68. 17 U.S.C. § 512 (2012).

69. *Id.*

70. 17 U.S.C. § 512(b). System caching works by storing files for short periods of time to improve the speed of web browsing and to prevent slow load times. *See* Amos Ndegwa, *What is a Web Cache?*, MAXCDN (May 23, 2016), <https://www.maxcdn.com/one/visual-glossary/web-cache>.

71. 17 U.S.C. § 512(c). Any website that allows consumers to upload content and give others access to said content uses this model. A good example is YouTube, which permits consumers to upload videos to a personal account, making them available to others. *See Upload Videos*, YOUTUBE: YOUTUBE HELP, https://support.google.com/youtube/answer/57407?hl=en&ref_topic=2888648 (last visited Oct. 24, 2017).

72. 17 U.S.C. § 512(d). An example of an information location tool that would fall under this section would be the Google search engine, which locates websites on the internet and indexes them based on an algorithm designed to help locate the desired content when consumers type in a search term. *See How Search Works*, GOOGLE: SEARCH, <https://www.google.com/search/howsearchworks> (last visited Oct. 24, 2017). The other system mentioned, transitory digital network communications (“TDNCs”), are not covered by notice and takedown. TDNCs do not have to comply with the notice and takedown procedures because, unlike data transfer, caching, and websites, TDNCs provide a service that is automated without any interference by the ISP except in providing the forum with which to share files. *See* 17 U.S.C. § 512(a) (defining transitory digital network communications); *see also* DRATLER & MCJOHN, *supra* note 19, § 6.02[1], at 6-44 (explaining that TDNCs require that the material be “selected by the user, sent between points specified by the user, and not modified from what the user selected”). It is also important to note that one of the most widely used forms of file sharing, peer-to-peer networking, does not fall under any of the four categories. *See id.* § 6.03, at 6-44.30 to 44-32 (explaining the definition of peer-to-peer networking and its absence from section 512).

can act on a right owner's behalf; (2) identification of the work or works that the right owner claims have been infringed; (3) identification of the material that is infringing and where that material is located; (4) the claimant's contact information; (5) a statement that the claimant "has a good faith belief" that the material used is unauthorized; and (6) a statement under penalty of perjury that the information given is accurate and that the actor is authorized to do so.⁷³ The individual who sends the takedown notice must write and provide notification to the designated agent who the ISP identifies on their server.⁷⁴

Once an ISP receives proper notification of an alleged copyright violation, it must move quickly to take down any content identified as potentially infringing.⁷⁵ A failure to do so can jeopardize the ISP's safe harbor and subject it to potential liability for infringement.⁷⁶ At the same time, the ISP must "take[] reasonable steps promptly to notify the subscriber that it has removed or disabled access to [potentially infringing] material" to protect it from suit by the user if the material is later found to not be infringing.⁷⁷

After a consumer is notified that his or her material has been taken down for copyright infringement, he or she can send a counter notification. A counter notification gives the user the opportunity to contest the claimant's allegation of infringement.⁷⁸ In order for the counter notification to be effective, it must contain: (1) the subscriber's signature; (2) information about the removed material along with its location; (3) "[a] statement under penalty of perjury that the [user] has a good faith belief that the material was

73. 17 U.S.C. § 512(c)(3)(A). It has been shown that, in some instances, takedown notices missing some of the elements will be enough to trigger a takedown of the allegedly infringing material. See DRATLER & MCJOHN, *supra* note 19, § 6.03[2], at 6-92.11 (stating that "[t]he signature requirement, the declaration of good-faith belief in one's claim, and the declaration of accuracy and authority" are all not considered absolutely necessary components to the takedown request (footnotes omitted)).

74. 17 U.S.C. § 512(c)(3)(A). Written notification can be received in many different ways. Larger websites, including Google and Twitter, use automated forms that allow copyright holders to answer a series of questions, leading to the automated generation of a formal complaint, which is then sent to the designated agent for each company. See *Removing Content from Google*, GOOGLE, <https://support.google.com/legal/troubleshooter/1114905?hl=en> (last visited Oct. 24, 2017) (portal for requesting content removal on Google); *Report Copyright Infringement*, TWITTER: HELP CENTER, <https://support.twitter.com/forms/dmca> (last visited Oct. 24, 2017) (portal for initiating takedown notices on Twitter).

75. *Id.* § 512(c)(1)(C) (An ISP must "upon notification of claimed infringement . . . respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity."). See *id.* § 512(b), for laws relating to system caching and *id.* § 512(d), for information location tools.

76. *Id.* § 512(c)(1). See *id.* § 512(b)(2)(E) (explaining laws relating to system caching); see *id.* § 512(d) (explaining information location tools).

77. *Id.* § 512(g)(2)(A).

78. See 144 CONG. REC. 9238 (1998) (statement of Sen. Ashcroft) (stating that the notification and counter notification system "gives [consumers] a right to initiate a process that allows them to put their material back online [sic] without the need to hire a lawyer or go to court").

removed or disabled as a result of mistake or misidentification”; and (4) the user’s name, address, and telephone number, as well as a statement that the user consents to the federal district court of his or her address, and an acceptance of process.⁷⁹ An ISP that receives a valid counter notification must send it to the party who originally sent the notification along with a statement that it will put the material back in ten business days unless a court order is filed preventing the user from infringing any copyrights.⁸⁰ An ISP that doesn’t hear from the notifying party can enable access to the material 10–14 business days later.⁸¹

III. RAPID INTERNET INNOVATION AND EXPANSION AND ITS IMPACT ON THE AVERAGE CONSUMER

Although some have called the DMCA “the law that saved the web,”⁸² it has been very damaging to one group in particular: average consumers. Even at the time of the law’s passage, Congress only considered consumers as an afterthought.⁸³ Because of this neglect, the law that Congress hoped would keep the United States on the vanguard of technological innovation has stifled some of the internet’s newest innovators. While the notice and takedown procedures of the DMCA have stopped instances of obvious piracy and copyright infringement,⁸⁴ these procedures have also accidentally taken down content that is not infringing. Removal of non-infringing content has caused confusion and made many consumers fearful of sharing content that would be considered fair use under normal circumstances.⁸⁵ This fear has

79. 17 U.S.C. § 512(g)(3) (2012). If the user lives outside of the United States, they must consent to the federal judicial district where their ISP can be found. *Id.* § 512(g)(3)(D).

80. *Id.* § 512(g)(2)(A)–(C).

81. *Id.* § 512(g)(2)(C).

82. Kravets, *supra* note 1.

83. 144 CONG. REC. 9239 (1998) (statement of Sen. Ashcroft) (noting that, although he supported the legislation crafted by ISPs and copyright holders, “there was one issue which the industry agreement did not address—what protections would be given [to] the typical users of the Internet”).

84. See URBAN ET AL., *supra* note 16, at 114 (stating that notice and takedown is recognized by major copyright holders as having “some success” in dealing with infringement). *But see* Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 430 (2014) (noting that while high takedown rates and low numbers of counter notifications could be a sign of success, it could also be seen as indicative of other problems within the system).

85. See AUFDERHEIDE & JASZI, *supra* note 19, at 32 (citing growing risks and statutory damages as scaring consumers away from using even a small amount of copyrighted materials); HEINS & BECKLES, *supra* note 16, at 37 (citing fear as a significant factor in artist’s reluctance to cite fair use in DMCA counter notifications). The fair use defense to copyright infringement is a balancing test which weighs different facts about a particular use of copyrighted material. The four factors of a fair use analysis are set out in 17 U.S.C. § 107. These factors are: “(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . ; and (4) the effect of the use upon the potential market for . . . the copyrighted work.” 17 U.S.C. § 107.

contributed to a significant amount of chilled speech, and the problem will only get more pronounced so long as the DMCA fails to be retooled.⁸⁶

In the years following the passage of the DMCA, the landscape of the internet has dramatically changed. With advances in technology, the internet is faster and more affordable than it was in 1998. In 1998, only a select number of countries had widespread access to the internet.⁸⁷ Today, over 3.7 billion people around the world are connected to the internet, with more consumers going online every second.⁸⁸ This dramatic increase has pushed the limits of the DMCA, making it difficult for even the most sophisticated ISPs to keep up with the influx of takedown requests.⁸⁹ This influx has exacerbated the problems that existed when the law was first passed, especially the problem of overall user experience. These issues can be seen in many first-hand accounts of user frustration, especially on the world's most popular websites. This section discusses the fundamental flaws of the DMCA as it currently exists. Part A discusses how the landscape of the internet has changed since the DMCA was passed in 1998 and how these changes have made section 512 hopelessly out of date. Part B looks at how fundamental flaws in the wording of the statute have produced a myriad of questions with few answers. Finally, Part C examines the experiences of both sophisticated and unsophisticated consumers with the notice and takedown procedures to illustrate the fundamental user experience issues contained in the DMCA.

A. *RAPID INNOVATION AND THE INCREASINGLY INEFFECTIVE DMCA*

Although the drafters of the DMCA intended “to bring . . . copyright law into the digital age,”⁹⁰ technological advances soon fundamentally changed the landscape upon which the law was drafted. These technological changes transformed the way consumers interacted with the internet and made it even easier to upload and share content. Seventy-three percent of Americans now

86. See *infra* Part III.C.

87. *SuperPower: Visualising the Internet*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/8552410.stm> (last visited Oct. 24, 2017). The year the DMCA was passed, only 85 million people in the United States had internet access. *Id.* Since the population of the United States was around 270 million at that time, this means that only 31% of the population of the United States was connected to the internet. U.S. CENSUS BUREAU, RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE, AND HISPANIC ORIGIN: APRIL 1, 1990 TO JULY 1, 1999, WITH SHORT-TERM PROJECTION TO NOVEMBER 1, 2000 (Jan. 2, 2001), <https://www.census.gov/population/estimates/nation/intfile3-1.txt>.

88. *Internet Users*, *supra* note 9; Press Release, Int'l Telecomms. Union, ITU Releases 2015 ICT Figures: Statistics Confirm ICT Revolution of the Past 15 Years (May 26, 2015), http://www.itu.int/net/pressoffice/press_releases/2015/17.aspx.

89. See Duncan Riley, *YouTube Admits It Has a Copyright Takedown Problem, Creates New Team to Deal with It*, SILICONANGLE (Feb. 28, 2016, 9:46 PM), <http://siliconangle.com/blog/2016/02/28/youtube-admits-it-has-a-copyright-takedown-problem-creates-new-team-to-deal-with-it> (commenting on YouTube's recognition that the site has issues with takedowns).

90. 144 CONG. REC. 9238 (1998) (statement of Sen. Ashcroft)

have access to high speed internet at home.⁹¹ Seventy-seven percent of adults in the United States own phones that allow them to access the internet anywhere.⁹² Smartphones have become so ubiquitous, the Supreme Court has even remarked that “the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”⁹³ As technology has advanced, it has also become increasingly affordable for Americans. Prices for personal computers and software have steadily declined since 1997.⁹⁴

In addition to advances in technology, the types of websites used by average consumers have changed dramatically since 1998. That year saw the incorporation of Google,⁹⁵ a search engine known for its “uncanny knack for returning extremely relevant results.”⁹⁶ In 2005, YouTube was launched.⁹⁷ YouTube’s creators originally intended it to be almost exclusively for people to upload personal videos to the internet.⁹⁸ In 2004, Facebook was introduced,⁹⁹ and Twitter followed in 2006.¹⁰⁰ Today, these four websites are in the top fifteen websites accessed by internet consumers, with Google, YouTube, and Facebook in first, second, and third respectively.¹⁰¹ Yahoo is the only website in the top ten¹⁰² that existed when the DMCA was passed.¹⁰³

With more people using the internet at faster speeds, both copyright holders and ISPs have found it difficult to use the DMCA to effectively police copyright infringement. In recent years, the amount of infringing material accessed over the internet has gone up, with almost a quarter of bandwidth in North America, Europe, and Asia being used to provide and access infringing

91. *Internet/Broadband Fact Sheet*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/internet-broadband>.

92. *Mobile Phone Ownership*, PEW RES. CTR.: INTERNET & TECH. (Jan. 11, 2017), <http://www.pewinternet.org/chart/mobile-phone-ownership>.

93. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

94. *Long-Term Price Trends for Computers, TVs, and Related Items*, BUREAU LABOR STAT. (Oct. 13, 2015), <http://www.bls.gov/opub/ted/2015/long-term-price-trends-for-computers-tvs-and-related-items.htm>. While the price for internet services has stayed relatively constant since 2007, it has decreased since the DMCA was enacted. *Id.*

95. *Our Story: From the Garage to the Googleplex*, GOOGLE, <https://www.google.com/about/our-story> (last visited Oct. 24, 2017).

96. Don Willmott, *The Top 100 Web Sites*, PC MAG., Feb. 9, 1999, at 118.

97. *A Brief History of YouTube*, YOUTUBE5YEAR, <https://sites.google.com/a/pressatgoogle.com/youtube5year/home/short-story-of-youtube> (last visited Oct. 24, 2017).

98. AUFDERHEIDE & JASZI, *supra* note 19, at 117.

99. Sarah Phillips, *A Brief History of Facebook*, GUARDIAN (July 25, 2007, 5:29 PM), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

100. Nicholas Carlson, *The Real History of Twitter*, BUS. INSIDER (Apr. 13, 2011, 1:30 PM), <http://www.businessinsider.com/how-twitter-was-founded-2011-4>.

101. *The Top 500 Sites on the Web*, ALEXA, <http://www.alexa.com/topsites> (last visited Oct. 24, 2017). Google is in the top ten twice, with both its English and Indian search engines. *Id.*

102. *Id.*

103. 144 CONG. REC. 9239 (1998) (statement of Sen. Ashcroft). Yahoo is noted by Senator Ashcroft as being an example of “true entrepreneurship” on the internet and stating that it will be protected by the safe harbor provisions of section 512. *Id.*

material.¹⁰⁴ Additionally, websites are finding it more and more difficult to keep up with the overwhelming influx of notices received every day.¹⁰⁵ This increase has made complying with and enforcing the provisions of the DMCA difficult, especially for larger ISPs. The biggest ISPs have turned to automated processes that sort through takedown requests, increasing the chance of erroneous takedowns.¹⁰⁶

Changes in how consumers access the internet have also made the categories designated in section 512 obsolete in practice. Websites as they exist today frequently use multiple different methods to store and process data. For instance, many websites covered by section 512(c)¹⁰⁷ also use system caching as described in section 512(b)¹⁰⁸ to improve run times and to allow content to load faster.¹⁰⁹ The DMCA requires that websites using multiple categories of services enumerated in the statute must comply with each category's specifications.¹¹⁰ This requirement makes it difficult for websites to ensure that they are following the DMCA's complex safe harbor provisions. Moreover, the DMCA's discrete categories fail to include some of the sites that see the most egregious forms of copyright infringement, including peer-to-peer ("P2P") hosting services.¹¹¹ These uncategorized services have forced the ISPs providing them to separately negotiate with copyright holders to create entirely different monitoring systems.¹¹²

104. Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81,862, 81,862 (Dec. 31, 2015).

105. See Tracy Moore, *Inside YouTube's Massive Copyright Wars*, VOCATIV (July 2, 2016, 9:00 AM), <http://www.vocativ.com/329883/inside-youtubes-massive-copyright-wars> (describing the conflict between YouTube's content creators and copyright holders, noting that the service has already had to pay over \$3 billion to record labels alone for infringement); *Reddit, Inc. Transparency Report, 2015*, REDDIT, <https://www.reddit.com/wiki/transparency/2015> (last visited Oct. 24, 2017) (stating that, with the growth of Reddit, there was a "spike" in the number of takedown notices received); *Requests to Remove Content Due to Copyright*, GOOGLE, <https://transparencyreport.google.com/copyright/overview> (last visited Oct. 24, 2017) (showing that the total number of URLs requested to be removed is over three billion).

106. See URBAN ET AL., *supra* note 16, at 54 ("Unable to evaluate every takedown request or fail to act on valid ones without risking their safe harbor protection, [I]SPs may take down material even where there is doubt about the substance of the claim.").

107. See 17 U.S.C. § 512(c) (2012).

108. See *id.* § 512(b).

109. See Ben Cook, *Dynamic Sites at Static Speed: The Art of Website Caching*, WEBDESIGNERDEPOT (Nov. 12, 2015), <http://www.webdesignerdepot.com/2015/11/dynamic-sites-at-static-speed-the-art-of-website-caching> (describing the usefulness of web caching). This includes popular websites like YouTube. See *Clear Cache and Cookies*, YOUTUBE HELP, <https://support.google.com/youtube/answer/32050?hl=en> (last visited Oct. 24, 2017) (explaining how website caching works on YouTube).

110. DRATLER & MCJOHN, *supra* note 19, § 6.03, at 6-44.29 to -44.30.

111. See *id.* § 6.03, at 6-44.30 to -44.33 (noting that the DMCA's failure to address P2P sharing has, in the author's words, "rendered Section 512 irrelevant in large part").

112. See *infra* Part IV.B.

B. FLAWS IN SECTION 512 OF THE DMCA

While innovations in technology have changed the way the internet is used today, consumer challenges can be traced back to section 512's creation. Scholars have stated that the DMCA as a whole is the victim of "poor drafting."¹¹³ Section 512 has been specifically noted as "the most gravely flawed portion of a badly flawed statute."¹¹⁴ Section 512 has also been called "badly organized . . . execrably drafted . . . [and] unnecessarily and gratuitously complex."¹¹⁵

These clarity issues can be traced back directly to the drafting process. Although Congress recognized the wide reach of the DMCA and sought to make it a balanced piece of legislation,¹¹⁶ the lack of input from advocates for ordinary consumers is striking. This oversight in the drafting process led to numerous issues for consumers in both the notification and counter notification process.

Although copyright law has been seen as mystifying to non-copyright lawyers for quite some time,¹¹⁷ the DMCA compounds this confusion, making it difficult for even the most sophisticated party to understand how to comply. Prior to the passage of the DMCA, the Report of the WGIPR in 1995 acknowledged that, without education, the average citizen would not understand copyright law and how individual actions could affect both creative works and their economic power.¹¹⁸ Rather than simplify the copyright rubric for the digital consumer, the DMCA has made it even more complex. It requires consumers to know not only the basics of copyright infringement and fair use, but also the specific procedures of the notification/counter notification process, along with the policies and procedures of individual ISPs.

1. Who's In and Who's Out

One of the major flaws with the DMCA is the parties that were not present at its development. Represented groups included "individual copyright

113. See, e.g., LITMAN, *supra* note 28, at 145 (noting that "[t]he DMCA is long, internally inconsistent, [and] difficult even for copyright experts to" understand); DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 12B.07[D] (2017) (stating that it is necessary to go in depth to understand how safe harbor applies to different types of websites).

114. DRATLER & MCJOHN, *supra* note 19, § 6.03[3], at 6-104 ("Section 512 is the most gravely flawed portion of a badly flawed statute.")

115. *Id.* § 6.03[3], at 6-105.

116. 144 CONG. REC. 9237 (1998) (statement of Sen. Ashcroft) ("This measure will have as broad an impact on the American public as virtually any measure we will address.")

117. Melville B. Nimmer, *Preface to the Original Edition* of MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT (2017) ("[T]he inordinate number of 'open questions' which pervade the law of copyright offer both a challenge and a charm . . . Here the law comes to grips with what William Faulkner has described as the process of 'creating out of the materials of the human spirit something which did not exist before.'")

118. INFO. INFRASTRUCTURE TASK FORCE, *supra* note 28, at 201-02.

owners . . . small ISPs . . . representatives of libraries, archives and educational institutions . . . broadcasters, computer hardware manufacturers, and consumers.”¹¹⁹ Despite the wide range of voices heard by Congress, average consumer concerns were not given much weight during the creation of the DMCA. When first introduced in the House, section 512 contained no protections whatsoever for consumers.¹²⁰ Instead, the section focused on protecting ISPs from direct liability as suggested in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*¹²¹ Congressman Howard Coble even stated that the DMCA, named the “*On-Line Copyright Infringement Liability Limitation Act*,” came into being in response to “concerns raised by a number of on-line service and Internet access providers regarding their potential liability” for copyright infringement.¹²² Protections for consumers were not added until much later, when Senator Ashcroft introduced changes that allowed for greater protection of consumers and their fair uses of copyrighted material online.¹²³

Consumers did not have a direct voice in DMCA negotiations because there was no one specifically advocating on their behalf. Because the internet was so new, few groups advocated for consumer rights at the time of the DMCA discussions. Instead, library groups and recording machine manufacturers “represented” the interests of ordinary consumers, despite these interests only being partially aligned.¹²⁴ These groups ultimately advocated for specific concessions protecting their interests rather than the interests of average consumers.¹²⁵ Once these specific concerns were addressed, the groups agreed to support the bill, recognizing that the deal presented was likely the best they could hope for.¹²⁶ The absence of a support

119. 144 CONG. REC. 9234 (1998) (statement of Sen. Hatch).

120. *WIPO Copyright Treaties Implementation Act; And Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the H. Subcomm. on Courts & Intellectual Prop. of the Comm. on the Judiciary*, 105th Cong. 22-25 (1997) [hereinafter *WIPO Copyright Treaties Implementation Act*].

121. See *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1372, 1375 (N.D. Cal. 1995) (“Only the subscriber should be liable . . . as the contributing actions of the [ISP] are automatic and indiscriminate.”) (“[I]t is fair, assuming Netcom is able to take simple measures to prevent further damage to plaintiffs’ copyrighted works, to hold Netcom liable for contributory infringement where Netcom has knowledge of [the user’s] infringing postings yet continues to aid in the accomplishment of [the user’s] purpose of publicly distributing the postings.”).

122. *WIPO Copyright Treaties Implementation Act*, *supra* note 120, at 26 (statement of Rep. Coble) (“While several judicially created doctrines currently address the question of when liability is appropriate, providers have sought greater certainty through legislation as to how these doctrines will apply in the digital environment.”).

123. See *supra* notes 66-67 and accompanying text.

124. LITMAN, *supra* note 28, at 127.

125. *Id.* One of these specific concessions was a clause in section 1201 that protected certain libraries from liability for circumventing copyright protection systems. See 17 U.S.C. § 1201(d) (2012).

126. LITMAN, *supra* note 28, at 145.

group aimed at representing consumers separately from other interests allowed the bill to pass with only a fleeting concern for how the law would be construed by the average consumer.

2. Problems with Notice & Takedown

As it currently exists, the notice and takedown system acts like a prior restraint on free speech. A prior restraint on speech occurs when a system shuts down speech prior to its publication, a practice long disfavored by the Supreme Court.¹²⁷ Because a valid takedown notice alerts ISPs to potentially infringing content on their websites, any long delay in removing material can eliminate a provider's protection under section 512.¹²⁸ This emphasis on speed incentivizes ISPs to act as quickly as possible, often before either a consumer or an independent judge can evaluate the merits of the takedown.¹²⁹ As noted by Wendy Seltzer, a noted researcher specializing in online expression and intellectual property, these incentives, combined with the structural pieces of the DMCA,¹³⁰ create a framework that acts as a prior restraint on speech.¹³¹ By allowing ISPs to take down content prior to determining whether the content is within the bounds of fair use, ISPs can silence content which serves important purposes before that content is properly evaluated.

The notice and takedown system in its current form also contributes to a system which significantly impedes a consumer's ability to contest an unjustified takedown. Although notifying consumers of a content takedown is an integral part of the process, the statute describing the procedure is vague and filled with flaws. As it is written, section 512(g)(2)(A) merely requires ISPs to "take[] reasonable steps [to] promptly . . . notify the subscriber that it has removed or disabled access to the material."¹³² Although there have been many cases addressing the notice required to initiate a proper takedown notice,¹³³ there has been a notable absence of cases that discuss what ISPs are

127. See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) ("[I]t has been generally . . . considered that it is the chief purpose of [freedom of the press] to prevent previous restraints upon publication.").

128. 17 U.S.C. § 512(c)(1)(A)(iii) (2012) (stating that once a service provider gains actual knowledge of infringing content, they must "act[] expeditiously to remove, or disable access to, the material").

129. See Seltzer, *supra* note 16, at 186 (noting that, as ISPs become larger and more risk averse, they are more likely to be compelled to act expeditiously, even if they had previously been more inclined to fight takedowns).

130. See *supra* Part II.C.

131. See Seltzer, *supra* note 16, at 190–93 (comparing the notice and takedown scheme to key components of systems that have been found to be prior restraints on speech).

132. 17 U.S.C. § 512(g)(2)(A).

133. See, e.g., *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1157 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 416 (2016), *cert. denied*, 137 S. Ct. 2263 (2017) (recognizing that a copyright holder

required to tell consumers. This lack of clarification creates a wide range of notifications a consumer can receive if his or her content is taken down. Indeed, while some websites work to provide consumers with information about takedown requests, the applicable copyright law, and their right to file a counter notice,¹³⁴ other websites, like Facebook, provide little to no information about what is triggering a takedown, let alone who is making the claim.¹³⁵ Under this system, consumers can be denied information about who is bringing a claim, what specifically about their content was infringing, and what they can do to assert their rights. Since copyright law is already an enigma to even sophisticated parties,¹³⁶ a denial of this basic information makes it very difficult for consumers to use what process is available to them to contest an errant takedown.

3. Problems with Counter Notification

The counter notification system presents several problems for consumers. To begin, scholars have noted that the counter notification's highly technical process is in and of itself a barrier to consumers.¹³⁷ The language of the counter notification procedure, much like the notice and takedown procedure, is highly imprecise and creates problems for even sophisticated consumers. The specific language of the statute provides for counter notification only in the event of "mistake or misidentification of the

must consider fair use prior to initiating a takedown request); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 34–38 (2d Cir. 2012) (analyzing the difference between willful blindness and the takedown requirements in section 512(c)); *Tuteur v. Crosley-Corcoran*, 961 F. Supp. 2d 329, 332 (D. Mass. 2013) (recognizing that the takedown notice at issue followed the requirements of the DMCA and that a notice-giver does not need to alert the infringer of possible affirmative defenses to comply).

134. Jonathan McIntosh, "Buffy vs Edward" *Remix Unfairly Removed by Lionsgate*, ARS TECHNICA (Jan. 9, 2013, 9:40 PM), <http://arstechnica.com/tech-policy/2013/01/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>. Note that this article also addresses the issue of YouTube's Content ID system, a program that preemptively reviews videos for potential copyrighted content to further protect YouTube from liability in the event of a lawsuit. YouTube Help, *YouTube Content ID*, YOUTUBE (Sept. 28, 2010) <https://www.youtube.com/watch?v=gg2U12SsRns>. While this type of a system is not required under statutory law, many larger websites are seeing this as a way to both get ahead of the heavy influx of takedown requests they receive and to create goodwill with copyright holders. See URBAN ET AL., *supra* note 16, at 1–2.

135. Ken Fisher, *Facebook Shoots First, Ignores Questions Later; Account Lock-Out Attack Works (Update X)*, ARS TECHNICA (Apr. 28, 2011, 1:37 PM), <http://arstechnica.com/business/2011/04/facebook-shoots-first-ignores-questions-later-account-lock-out-attack-works>. While Facebook appears to have changed its system to give more information to alleged infringers, it is still providing little to no information to consumers who receive notice of a takedown. See Jenn Hoffman, *Facebook Unbans 'Trump Baby Dick' Artist, But Won't Let Her Post Images*, MOTHERBOARD (Mar. 22, 2016, 8:00 AM), <http://motherboard.vice.com/read/facebook-wont-let-the-artist-behind-trump-baby-dick-post-images-anymore-illma-gore-dmca> (describing a more recent instance of takedown on Facebook).

136. See Nimmer, *supra* note 113.

137. HEINS & BECKLES, *supra* note 16, at 5.

material to be removed or disabled.”¹³⁸ Although Senator Ashcroft intended for this counter notification procedure to protect fair use,¹³⁹ scholars have noted that the DMCA’s language does not specify whether questions of fair use actually fall into the language of “mistake or misidentification.”¹⁴⁰ This ambiguity creates a potential for mass suppression of otherwise acceptable speech, compromising First Amendment rights for many consumers across the web. Additionally, there is no language that allows consumers to dispute ownership over material,¹⁴¹ making it difficult for legitimate copyright holders to assert their rights online.¹⁴²

In addition to problems of ambiguity within the counter notification procedure, there are significant problems with maintaining the privacy of consumers. Section 512(g)(3)(D) requires that anyone sending a counter notification provide the user’s “name, address, and telephone number” along with a statement consenting to being placed under the jurisdiction of a federal district court to ensure that the notifying party can continue legal proceedings if they so choose.¹⁴³ This requirement creates several problems. For one, a counter notice can only be made by the subscriber,¹⁴⁴ an issue if the content taken down is a link to their website through a third party, like Google.¹⁴⁵ Additionally, requiring consumers to identify themselves in this manner, although making it easier for legal action to proceed if necessary, forces consumers out into the open. Some consumers wish to remain anonymous

138. 17 U.S.C. § 512(g)(3)(C) (2012).

139. 144 CONG. REC. 9239 (1998) (statement of Sen. Ashcroft) (“If material is wrongly taken down from an Internet user’s home page because the original notice mistakenly did not take into account that the Internet user was only making a fair use of the copyrighted work, my amendment ensures that the end-user will be given” due process.).

140. Ira S. Nathenson, *Looking for Fair Use in the DMCA’s Safety Dance*, 3 AKRON INTELL. PROP. J. 121, 158–59 (2009) (noting that Congress had the opportunity to explicitly protect fair use but decided not to). It should be noted that a recent decision out of the Ninth Circuit, *Lenz v. Universal Music Corp.*, ruled that a copyright owner or its agent must look at fair use as a part of its certification of a good faith belief that the content is not authorized under section 512(c). *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1157 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 416 (2016), *cert. denied*, 137 S. Ct. 2263 (2017).

141. DRATLER & MCJOHN, *supra* note 19, § 6.03[2], at 6-92.18 n.312.

142. Evidence of problems relating to this issue has already started to pop up on services like Facebook, which has experienced issues with copyright owners having their pages taken down because of unsubstantiated claims. Sarah Perez, *Anyone Can Take Down Facebook Pages with a Fake Email Address*, READWRITE (Apr. 28, 2011), http://readwrite.com/2011/04/28/anyone_can_take_down_facebook_pages_with_a_fake_email_address; *see also infra* Part III.C.2.

143. 17 U.S.C. § 512(g)(3)(D).

144. DRATLER & MCJOHN, *supra* note 19, § 6.03[2], at 6-92.16 n.310, 6-92.18 n.312.

145. Websites become a part of web searches through a complex system run by the search engine itself. *See* Google, *How Search Works*, YOUTUBE (Mar. 4, 2010), https://www.youtube.com/watch?time_continue=45&v=BNHR6IQJGZs. If Google is asked to remove a link from their search engine, while they will inform the website owner, if the website owner and the content creator are different people, there’s no way to know if the message will be passed along.

because of issues of personal safety.¹⁴⁶ Requiring consumers to identify themselves in order to make a counter notification discourages some of the most vulnerable members of society from speaking freely on issues with potentially high value to society at large. If even 2008 presidential candidate John McCain, who had both the political and legal power to fight against false takedown notices, witnessed his videos being continuously barred from YouTube,¹⁴⁷ what chance do minority viewpoints have of seeing their speech protected?¹⁴⁸ As more and more takedown notices are sent out, many with fundamental flaws,¹⁴⁹ it is increasingly likely that speech vital to political and cultural discourse is falling through the cracks of the DMCA.

The time delay in restoring content which has been falsely taken down also presents an enormous problem for consumers. While takedowns can happen in hours, even minutes, put-backs are measured in days.¹⁵⁰ For particularly topical or time sensitive content, like John McCain's campaign ads in 2008,¹⁵¹ a delay of even several days renders the speech essentially useless. Providing copyright holders ample time to file necessary court documents may seem like a good idea on paper, but in practice it sounds the death knell for many consumers, especially those who make money from the content they post online.

One consumer whose livelihood has been impacted by the DMCA is Rebecca Prince. Rebecca Prince is a content creator who goes by the name of Becky Boop on the popular video sharing platform YouTube.¹⁵² In a roundtable discussion with other stakeholders in the DMCA takedown process, Ms. Prince described how, thanks to the convoluted problems associated with the notice and takedown process, she had "lost the majority of

146. See URBAN ET AL., *supra* note 16, at 45 n.131 (addressing the possibility that an abusive partner could use a DMCA complaint to get the other's current address).

147. Sarah Lai Stirland, *Stifled by Copyright, McCain Asks YouTube to Consider Fair Use*, WIRED (Oct. 14, 2008, 10:25 AM), <https://www.wired.com/2008/10/stifled-by-copy>.

148. YouTube content creators have begun to ask these questions, noting that although some may have enough viewers to receive attention, others might not be so lucky. See Channel Awesome, *What the Hell YouTube?*, YOUTUBE (Jan. 28, 2016), https://www.youtube.com/watch?v=bC3NIdiZF_E (expressing disbelief at YouTube's takedown process as it has applied to said user's movie criticism videos).

149. See *infra* Part III.C.2.

150. 17 U.S.C. § 512(g)(2)(C) (2012).

151. See Stirland, *supra* note 147 (discussing John McCain's problems with having his content unjustly taken down from YouTube). See also Letter from Trevor Potter, Gen. Counsel, McCain Presidential Campaign, to Chad Hurley, CEO, YouTube et al. 2 (Oct. 13, 2008), https://www.wired.com/images_blogs/threatlevel/files/mccain_youtube_copyright_letter_10.13.08-3.pdf ("10 days can be a lifetime in a political campaign, and there is no justification for depriving the American people of access to important and timely campaign videos during that period.").

152. Rebecca Prince/Becky Boop's YouTube channel can be found at *Its Becky Boop*, YOUTUBE, <https://www.youtube.com/channel/UC8TFQ3rocrVRytiziQSHxXA/featured> (last visited Oct. 24, 2017).

[her] revenue” that she would normally receive through her videos.¹⁵³ Ms. Prince expressed frustration with both YouTube’s and copyright holders’ use of the takedown process.¹⁵⁴ She remarked that copyright holders will often ignore the counter notifications sent by individuals who believe their content was taken down in error.¹⁵⁵ Then, once the claim had run out and the content was restored by YouTube, copyright holders would “use a different branch of their company under a different contract with YouTube to come back and start another claim,” effectively taking down videos permanently.¹⁵⁶

Prince has not only suffered monetary losses from the time delay, but she has also experienced a suppression of her speech. “[ISP’s] can keep your content down for months, which not only affects the type of content you produce, but it also has a chilling effect that makes you not want to produce that content [any]more because you can lose your entire account.”¹⁵⁷ Without a change to the system as it currently exists, consumers like Ms. Prince could stop creating content altogether. More vulnerable consumers who, for political or social reasons, have less access to the resources to fight illegitimate takedown notices, could be deterred from even beginning to create content at all.

C. HOW HAS THE DMCA IMPACTED CONSUMERS GENERALLY?

Since the passage of the DMCA, the number of internet consumers has skyrocketed.¹⁵⁸ The more people who connect to and interact with the internet, the more likely it is that those same consumers will face issues relating to copyright and copyright infringement. Although the number of consumers has increased and the volume of takedowns has grown exponentially,¹⁵⁹ studies on the notice and takedown procedure have been few and far between. The DMCA does not require ISPs to publish information on the takedown requests they receive,¹⁶⁰ so researchers are severely limited in their ability to analyze the volume and quality of takedown notices submitted. Furthermore, ISPs do not voluntarily publish takedown

153. U.S. COPYRIGHT OFFICE, TRANSCRIPT OF SECTION 512 PUBLIC ROUNDTABLE 153 (May 2, 2016) (statement of Rebecca Prince), https://www.copyright.gov/policy/section512/public-roundtable/transcript_05-02-2016.pdf.

154. *Id.* at 152–53.

155. *Id.* at 153–54.

156. *Id.* at 153. This process, Ms. Prince notes, is exacerbated by the addition of YouTube’s self-policing Content ID system, which gives companies an additional way to silence videos that they are unhappy with. *Id.* at 154.

157. *Id.* at 153.

158. See *supra* notes 91–94 and accompanying text.

159. The British Phonographic Industry by itself has sent 200 million takedown requests to Google alone. Ernesto, *BPI Hits 200 Million Google Takedowns, Calls for “Notice and Stay Down,”* TORRENTFREAK (Mar. 24, 2016), <https://torrentfreak.com/bpi-hits-200-million-google-takedowns-calls-for-notice-and-stay-down-160324>.

160. Seng, *supra* note 84, at 378.

information, because they fear potential legal consequences. Copyright holders also fear the consequences of pirates learning their strategies for sending takedown notices.¹⁶¹ The volume of takedown notices has also made it difficult to document all known instances of takedown.¹⁶² Despite these difficulties, studies analyzing the impact of the notice and takedown procedure have overwhelmingly shown that there is an imbalance in the system as it currently exists.

1. User Impact Surveys: What the Limited Data Tells Us

The data available to researchers indicates that the DMCA creates an asymmetrical and ineffective system, especially for consumers. In one study, researchers found that of the over 500,000 takedowns surveyed, only 166 consumers filed counter notices.¹⁶³ While it is unclear whether this gap is because most of the uses were infringing, consumers do not want to be exposed to legal claims, or because they do not understand the system,¹⁶⁴ it is clear that the system is lopsided in favor of removing content. Other studies have also noted this trend since the DMCA was passed.¹⁶⁵

In another recent study, fundamental flaws in takedown requests combined with the low number of counter notifications showed a high probability of chilling speech that would normally be allowed under fair use. Of the takedowns studied, 4.2% of the requests were fundamentally flawed, 28.4% had “characteristics that raised questions about their validity,” and 6.6% raised questions of fair use.¹⁶⁶ The study also notes that, while many ISPs inform their consumers about the counter notification process, they still fail to adequately inform the user of their rights or correct the power imbalance between the user and the notifier, usually a large entertainment company.¹⁶⁷

2. User Frustration and User Acquiescence

Although empirical data on takedowns is highly limited, news articles have reported numerous examples of scared, resigned, and confused consumers. For the website ArsTechnica, a takedown of their official Facebook page was met with confusion and frustration.¹⁶⁸ In an article

161. URBAN ET AL., *supra* note 16, at 4.

162. See Seng, *supra* note 84, at 379 (“[T]he sheer volume of takedown notices sent has complicated efforts to document the notices and requests, let alone study them.”).

163. *Id.* at 462 tbl.12.

164. *Id.* at 430.

165. HEINS & BECKLES, *supra* note 16, at 37 (noting that even if consumers had a reasonable fair use claim, many chose not to file a counter notice because of legal fees, “fear, intimidation, and the emotional cost of defying an IP owner”); see URBAN ET AL., *supra* note 16, at 44–46 (noting that, in a survey of ISPs and copyright holders, most reported receiving no counter notifications and only one “reported receiving more than a handful per year”).

166. URBAN ET AL., *supra* note 16, at 11–12.

167. *Id.* at 44–45.

168. Fisher, *supra* note 135.

discussing the takedown, ArsTechnica questioned why they received no prior notice or warnings of any infringing content¹⁶⁹ and also remarked that the notice itself was “rather useless” and provided “[n]o details about the alleged infringement.”¹⁷⁰ The article was updated numerous times with other consumers and organizations telling their own stories of confusing takedown notices and the inefficient counter notice regime, with some consumers noting that their counter notices were completely ignored.¹⁷¹ While ArsTechnica’s Facebook page was eventually restored, the website noted that the response it received from Facebook was tepid at best and that there are still fundamental issues with Facebook’s system, many due to issues with the DMCA.¹⁷²

A similar phenomenon has been happening on YouTube. Many YouTube consumers, nicknamed “YouTubers,” have been seeing their videos taken down and their accounts blocked because of illegitimate or completely unfounded takedowns.¹⁷³ While much of the frustration with the system as it exists on YouTube stems from the mechanics of YouTube’s complex combination of DMCA takedown notices and its additional Content ID system, the effect of the takedown and the counter-notification process are the same for both.¹⁷⁴ The most vocal YouTubers who are experiencing these problems tend to be those who make money from the videos they post,¹⁷⁵ but this does not mean that other, less powerful consumers are not also suffering. As YouTuber Channel Awesome remarks, “[Channel Awesome has] been around for years. If [problems communicating with ISPs and copyright holders] can happen to us with no explanation, no reason why . . . what chance do people just putting up their family videos have? What chance do

169. *Id.* (“Prior to the account lockout, we had received no notices of infringement or warnings.”). Neither notice or warnings are required under the statute. See 17 U.S.C. § 512(g) (2012). However, it seems reasonable to believe that more information should be required to help consumers understand why their content is being taken down and what they can do about it. See *supra* notes 133–35 and accompanying text.

170. Fisher, *supra* note 135.

171. *Id.*

172. *Id.* The article also notes that, at the time of the last update to the article, many consumers were still struggling with the system. *Id.* It is unclear whether these consumers ever had their pages restored, especially since these consumers do not have the platform that ArsTechnica has to get the word out.

173. Moore, *supra* note 105. It is important to note that some of the recent issues with YouTube have also been due to its Content ID system. This system, while also fundamentally flawed, is not covered by the DMCA and will therefore not be analyzed in detail in this Note. For a commentary on why YouTube’s Content ID system is fundamentally flawed, see Paul Tassi, *The Injustice of the YouTube Content ID Crackdown Reveals Google’s Dark Side*, FORBES (Dec. 19, 2013, 10:00 AM), <http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/#56e58afa6247>.

174. Moore, *supra* note 105.

175. Channel Awesome, *supra* note 148.

people just starting off . . . have against this?”¹⁷⁶ While there can be no doubt that copyright infringement does occur on YouTube,¹⁷⁷ the societal cost of accidentally silencing legitimate speech is massive.

What is most alarming about the many instances of confusion and frustration with the takedown and counter-notification scheme is not the stories that get reported, but the ones that go unnoticed every day. With so little information available for consumers and extensive confusion about the notice and takedown process, even for sophisticated parties like presidential candidates,¹⁷⁸ it is highly unlikely that the average consumer will be able to successfully navigate the DMCA landscape. Consumers lack enough information to understand the system, and since consumers can be restricted from accessing websites for repeated offenses,¹⁷⁹ ignorance of the law can have huge consequences on a consumer’s ability to speak on highly visible platforms. If ignoring notices can mean suspension from websites, and fighting can lead to either attorney’s fees or statutory damages,¹⁸⁰ information about the DMCA is absolutely necessary to give consumers the ability to protect themselves and to keep themselves connected to services that matter to their personal well-being.

IV. WHERE TO GO FROM HERE

Although there are numerous and substantial issues with section 512 of the DMCA as it applies to consumers, there is hope that change could be on the horizon. On December 31, 2015, the United States Copyright Office announced that it was beginning a public study to “consider the costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public.”¹⁸¹ While this study presents a great opportunity for change to the statutory regime, copyright holders have begun to push for changes in the wrong direction. Copyright holders want a notice provision that give more power to ISPs to

176. *Id.*

177. Ryan Cooper, *Copyright Laws Are Breaking YouTube. Here’s How to Fix the Problem.*, WEEK (Mar. 7, 2016), <http://theweek.com/articles/608700/copyright-laws-are-breaking-youtube-heres-how-fix-problem>.

178. Letter from Trevor Potter, *supra* note 151.

179. 17 U.S.C. § 512(i)(1)(A) (2012) (stating that one of the conditions for eligibility for safe harbor is implementing “a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers”). Some examples of different policies for account termination can be found at the following sites: *Copyright Strike Basics*, YOUTUBE, <https://support.google.com/youtube/answer/2814000> (last visited Oct. 24, 2017); *Intellectual Property Policy*, ETSY, <https://www.etsy.com/legal/ip> (last updated Mar. 10, 2017).

180. 17 U.S.C. § 512(f).

181. Section 512 Study: Notice and Request for Public Comment, 80 Fed. Reg. 81,862, 81,862 (Dec. 31, 2015). On January 27th, 2017, the Copyright Office extended the comment period. Section 512 Study: Extension of Comment Period, 82 Fed. Reg. 8629 (Jan. 27, 2017).

take down content and keep consumers from reposting content, a so-called “notice and stay down” provision.¹⁸² While the issue of piracy is a legitimate one, changing an already flawed system to one that removes consumers from the system entirely for even an innocent infraction would stifle speech to a dangerous degree. No parties are satisfied with the system as it currently exists,¹⁸³ but “notice and stay down” is not the answer.

While any change to section 512 will involve a great deal of negotiating between the different interested parties, this Note argues for small statutory changes that will simplify and clarify section 512, making the system both easier to understand and more transparent. Some of these innovations are already in place in a system created to address websites that were not covered by section 512: the Copyright Alert System (“CAS”).¹⁸⁴ The CAS, created to solve the problem of piracy in P2P networks,¹⁸⁵ provides a framework for addressing copyright issues online and balancing the needs of copyright holders, ISPs, and consumers. This system, created in collaboration with major ISPs like AT&T, Comcast, and Verizon, as well as members of the Recording Industry Association of America and Motion Picture Association of America,¹⁸⁶ is founded on the principles of understanding consumer attitudes, developing a notice system that alerts consumers as well as informing them, and stopping piracy through education.¹⁸⁷ These are the foundations upon which a new statute to replace section 512 should be built.

A. CHANGE THE STATUTE TO ALLOW FOR GREATER TRANSPARENCY

If any reform of section 512 is to be successful, it will be necessary for the system to be more transparent. Without comprehensive information on how notification and counter-notifications are being used, it is difficult to know if

182. Press Release, Record of the Day, “Urgent Reform” Needed to Notice and Takedown as Removal of 200 Millionth Illegal Search Result from Google Approaches (Mar. 24, 2016), <https://www.recordoftheday.com/news-and-press/urgent-reform-needed-to-notice-and-takedown-as-removal-of-200-millionth-illegal-search-result-from-google-approaches>.

183. See MCLEOD, *supra* note 2, at 213 (recognizing that some copyright owners use the notice and takedown system to silence speech that they do not like, for instance, parodic work); URBAN ET AL., *supra* note 16, at 30–31 (discussing the differences in takedown systems for ISPs and their anxiety about not doing enough to ensure continued protection under safe harbor); Press Release, *supra* note 182 (stating that the British Phonographic Industry believes the system is flawed). Recent roundtable discussions put on by the Copyright Office in an effort to discuss section 512 have also emphasized widespread dissatisfaction among many different parties. See generally U.S. COPYRIGHT OFFICE, *supra* note 153 (discussing grievances and potential solutions with different parties affected by section 512).

184. *The Copyright Alert System*, CTR. FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system> (last visited Oct. 24, 2017).

185. See CTR. FOR COPYRIGHT INFO., *THE COPYRIGHT ALERT SYSTEM: PHASE ONE AND BEYOND 1* (2014), <http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And-Beyond.pdf> (describing the motivations behind creating CAS).

186. *Id.* at 13 n.4.

187. *Id.* at 4.

the system is working. This absence of information has led to various stakeholders claiming either qualified success¹⁸⁸ or total and complete failure.¹⁸⁹ These opinions are based to a large degree on personally perceived problems with the system, rather than a comprehensive knowledge of how the system is working on a mass scale. Individualized experiences with the system as it exists, while necessary to understand how it affects the average consumer, are not sufficient to fully illustrate the statute's strengths and flaws.

Fortunately, the seeds of transparency have already been sown. In the roundtable discussions spurred by the Copyright Office's notice, there have already been calls by both scholars and consumers for increased transparency.¹⁹⁰ Outside of the roundtable discussions, academics have also cited transparency as one of the DMCA's central issues in empirical studies of the statute's effectiveness.¹⁹¹ Ensuring that the revised section 512 has a provision that requires data collection on both takedown notices and counter notifications is an important first step to understanding exactly what is going on in the system.

Transparency requires several important changes to be put into section 512. First, section 512 should be simplified to remove the categorization of ISPs, moving instead to a unified rule for all ISPs.¹⁹² While this task will be complicated, Congress could ultimately make this change by removing sections 512(a), (b), and (d), leaving only section 512(c).¹⁹³ The language of

188. See URBAN ET AL., *supra* note 16, at 114 (noting that safe harbor is necessary and incorporated into how ISPs are run and that, despite its flaws, "notice and takedown continues to provide an efficient method of enforcement in many circumstances—especially compared to lawsuits"); Kravets, *supra* note 1 (providing statements of internet attorney Fred von Lohmann stating, "You couldn't run MySpace, AOL without [notice and takedown].") Additionally, "YouTube spokesman Ricardo Reyes" agreed, saying, "We definitely depend on the safe-harbor provisions.").

189. See U.S. COPYRIGHT OFFICE, *supra* note 153, at 152–54 (statement of Rebecca Prince) (discussing the problems YouTube content creators face with the Notice and Takedown system and how it affects their ability to both make money and continue creating content); Letter from Bryan Adams et al., to the U.S. Copyright Office, Songwriters' and Artists' Perspective on DMCA: A Threat to the Future of Creating Music (Mar. 31, 2016) (on file with author) (stating in reference to section 512 that "[t]his outdated law forces us to stand by helplessly as billions of dollars in advertising is sold around illegal copies of our work").

190. U.S. COPYRIGHT OFFICE, *supra* note 153, at 147 (statement of Brianna Schofield, teaching fellow, University of California School of Law) ("[T]his is not a transparent system that allows researchers to really get to the bottom of these questions that would benefit everybody that's trying to participate in this conversation . . ."). This call for increased research and study is hardly new. Two years after the passage of the DMCA, the Computer Science and Telecommunications Board National Research Council was already stressing the importance of "research and data collection . . . to support informed decision making." THE DIGITAL DILEMMA, *supra* note 65, at 225.

191. See URBAN ET AL., *supra* note 16, at 131–32 (detailing how transparency can be used to improve problems present within section 512); Seng, *supra* note 84, at 441 (noting lack of transparency as being one of many issues present with the notice and takedown system).

192. See *supra* notes 68–70 and accompanying text.

193. See 17 U.S.C. § 512(a)–(b), (d) (2012).

section 512(c) could then be modified to refer to ISPs in general rather than to “Systems or Networks at Direction of Users.”¹⁹⁴ By creating a single standard for all ISPs, ISPs will not need to worry about meeting the standards of multiple categories. This will make it easier for ISPs to understand how to comply with section 512’s statutory requirements for safe harbor. Additionally, consumers will have an easier time reading and understanding what the language of the statute is saying, improving the transparency of the system.

Second, ISPs need to collect and preserve data on how many notices they receive, how many takedowns they instigate, and how many counter notifications they receive in return. A clause could be added to section 512(i)(1), which gives the conditions for eligibility of service providers, to require that service providers “collect and preserve data on takedown notices and counter notifications and periodically send this information to a designated agent in the copyright office.”¹⁹⁵ Adding this clause will allow for more studies to be done to show exactly how the system is working. Third, there needs to be a central location where ISPs can send this data. The Lumen database already does this work, receiving data from ISPs like Google and Periscope and making it available for everyone.¹⁹⁶ As proposed earlier, the Copyright Office could provide an agent to receive this data and store it, with the goal of studying and understanding how the current notification and counter notification system works in practice.

There have been challenges to increased transparency, especially from ISPs.¹⁹⁷ The anxieties expressed by ISPs could be allayed by inserting specific language into section 512 to address their concerns. For instance, if all ISPs were required by statute to submit information on notice and takedowns, language could be added to the statute stating that reporting information does not constitute constructive knowledge of infringement. Additionally, a provision could be written into the statute to stagger the release of information to give content owners time to implement new strategies for

194. *Id.* § 512(c).

195. This would be added to the current language, which states:

(1) The limitations on liability established by this section shall apply to a service provider only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

17 U.S.C. § 512(i)(1)(A)–(B). Subsection C would read “collects and preserves data on takedown notices and counter notifications and periodically sends this information to a designated agent in the copyright office.” This would require adding “; and” to 17 U.S.C. § 512(i)(1)(B).

196. *About Us*, LUMEN, <https://lumendatabase.org/pages/about> (last visited Oct. 24, 2017).

197. See *supra* notes 160–61 and accompanying text.

issuing takedown notices. These changes could be negotiated with all copyright holders.¹⁹⁸ In any case, these fears should not prevent Congress from making statutory changes to collect and disseminate this valuable information.

B. REQUIRE ISPs TO PROVIDE INFORMATION AND RESOURCES TO THEIR CONSUMERS

One of the starkest problems with the current statutory regime is the lack of resources and information for consumers who receive notice that their content was taken down. While some websites, like YouTube, provide resources that help consumers understand how the system works,¹⁹⁹ many other websites, like Etsy, do not.²⁰⁰

Copyright law must address these concerns by providing greater information and resources for consumers. A good example of how this change could be brought about can be found in the CAS system.²⁰¹ Recognizing that one of the fundamental problems with P2P sharing was a lack of knowledge in what copyrights were and how these rights can be violated,²⁰² one of the central tenets of the CAS system was to provide information and resources with every notice a user was given.²⁰³ Over the course of ten months, 72% of the notices sent to consumers were educational rather than punitive, with only 8% of alerts having consequences on the

198. See *supra* notes 119–26 and accompanying text (describing the discussions between Congress and copyright holders during the passage of the DMCA). See also *infra* Part IV.C (describing bringing consumer advocates to the table for any discussions regarding statutory changes to section 512).

199. YouTube's materials do a good job of explaining copyrights and the takedown/put-back process for its consumers. Its resources include comic takes on the basics of copyright law as it applies to their users as well as a whole page examining fair use, complete with examples and links to additional resources if people desire more information. See YouTube Help, *YouTube Copyright Basics*, YOUTUBE (Dec. 2, 2013), <https://www.youtube.com/watch?v=OQVHWsTHcoc>; *What is Fair Use?*, YOUTUBE, <https://www.youtube.com/yt/copyright/fair-use.html#yt-copyright-resources> (last visited Oct. 24 2017). It seems that the issues for YouTube consumers are a lack of information on YouTube's automated system, as well as the time it takes for content to be put back up. See McIntosh, *supra* note 134.

200. Etsy's website merely rephrases the text of section 512. *Submit a DMCA Counter Notice*, ETSY: OUR HOUSE RULES, <https://www.etsy.com/legal/ip-counter> (last updated Nov. 11, 2015).

201. See generally CTR. FOR COPYRIGHT INFO., *supra* note 185 (discussing the motivations behind the Copyright Alert System and analyzing its effect on copyright infringement in P2P networks after implementation).

202. *Id.* at 3.

203. See *id.* at 4 (explaining the goals of the CAS system). The alert system instigated through the CAS system provided consumers with a total of six alerts. *Id.* at 6. The first two alerts are informational in nature, giving the user resources for how they can prevent further infringement as well as places to access media legally. *Id.* at 7. The next two alerts require consumers to acknowledge that they have received the alerts. *Id.* The last two alerts not only require acknowledgment, but also have consequences for the user, either a review of copyright education materials, "[a] temporary reduction in Internet speed," or a downgrade in a user's internet service tier. *Id.*

consumers' access to websites or services.²⁰⁴ This reduction, while likely not entirely attributable to the system itself,²⁰⁵ promotes the idea that a system based on information rather than drastic action can provide positive results. Moreover, a system encouraging the promotion of knowledge supports one of the original tenets of the first study by the WGIPR on the internet's impact on intellectual property.²⁰⁶ The report states, quite clearly, that "[p]ublic awareness of the importance of intellectual property in the information age is essential to the successful implementation and growth of the [internet]."²⁰⁷ By reaffirming this important tenet in the text of the DMCA, Congress can educate consumers and foster a greater understanding of what intellectual property is and why it is important to preserve these rights.

In the spirit of the encouraging success of the CAS system, section 512 should be changed to require all ISPs to provide information and resources to consumers when they are sent a takedown notice. This clause could be inserted into section 512(g)(2)(A) and require that service providers, in addition to "tak[ing] reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material" also "provide subscribers with resources and materials on copyright infringement, options for preventing infringement in the future, and information on the counter notification process."²⁰⁸ This information should be standardized by the Copyright Office to promote consumers receiving a base level of knowledge. Not only would these materials include a consumer's right to a counter notice, but also why copyrights are important, the basics of fair use, and ways to prevent receiving notices in the future. This base level of information would allow consumers to gain a greater understanding of their rights as consumers along with an understanding of copyright infringement's damaging effect on copyright holders. The website could inform citizens in an interactive and amusing manner like YouTube,²⁰⁹ or an ISP could provide links to a website created for this purpose by the United States Copyright Office.²¹⁰ These pages,

204. *Id.* at 8.

205. *Id.* at 10.

206. INFO. INFRASTRUCTURE TASK FORCE, *supra* note 28, at 201-02 ("Users must learn enough about [intellectual property] to appreciate just what respect for intellectual property laws can do for them, and why a seemingly harmless transaction on a computer network may have a great effect on the benefits they get from the intellectual property system.").

207. *Id.* at 201.

208. 17 U.S.C. § 512(g)(2)(A) (2012). With the added text, the statute would read that an ISP will be liable for takedowns "unless the [ISP]—(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material *and provides subscribers with resources and materials on copyright infringement, options for preventing infringement in the future, and information on the counter notification process.*" *Id.* (emphasis added).

209. *See supra* note 199 and accompanying text.

210. The Copyright Office already has a page which provides a database of cases relating to fair use and its nuances, although it is not very easy to navigate without some base legal knowledge. *See U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/fair-use> (last updated Sept. 2017).

while acknowledging that they should in no way be viewed as providing legal advice, should be created with the average user in mind. While this increase in information would not likely deter some of the more egregious copyright infringers, it would help both innocent infringers and creators of fair use content understand the system better.

C. BRING CONSUMERS INTO THE NARRATIVE

Regardless of the changes that are made to section 512, it is absolutely imperative that the Copyright Office and Congress insert consumers into the narrative. The Copyright Office is already off to a great start, with over 92,000 responses in the first public comment period on section 512.²¹¹ However, this momentum cannot end with the public comment period. Consumers must be able to advocate for their own interests rather than through organizations with ulterior motives. Unlike when the statute was first enacted,²¹² many organizations now advocate for consumers.²¹³ Congress must give these organizations an opportunity to participate in the discussions surrounding changes to the DMCA to ensure that the law reflects the concerns of the average consumer. This way, Congress will ensure that consumers will be able to give insight into how their interests will be affected by any proposed changes to section 512.

V. CONCLUSION

Copyright has always been a very difficult area of law for most people to understand. With technology rapidly expanding and changing the ways in which individuals communicate, it has become increasingly necessary to reformat how all parties, whether they are copyright holders, website owners, or average consumers, interact with copyrighted materials online. If Congress can change the statute to both provide information to consumers and collect information for researchers, they can begin to improve a system that works for no one. In addition, restructuring the system through dialog, knowledge, and understanding will ensure that any changes to section 512 will endure much longer than the original version of the DMCA, especially as it concerns average consumers. However, any change cannot be made in a vacuum. All parties involved in the restructuring must monitor the system to ensure that

211. *Requests for Public Comments: Digital Millennium Copyright Act Safe Harbor Provisions*, REGULATIONS.GOV, <https://www.regulations.gov/docketBrowser?rpp=25&so=ASC&sb=title&po=o&dct=PS&D=COLC-2015-0013&refID=COLC-2015-0013-0002> (last visited Oct. 24, 2017).

212. See *supra* notes 118–20 and accompanying text.

213. See, e.g., ELECTRONIC FRONTIER FOUND., <https://www.eff.org> (last visited Oct. 24, 2017) (stating the foundation is “[t]he leading nonprofit defending digital privacy, free speech, and innovation”); FREEPRESS, <http://www.freepress.net/work> (last visited Oct. 24, 2017) (advocating for free access to information and freedom of speech on the internet); ORG. FOR TRANSFORMATIVE WORKS, <http://www.transformativeworks.org> (last visited Oct. 24, 2017) (advocating for fans and the content they create on the internet).

it is working properly and that it does not leave any parties behind like it has left behind average consumers. Constant vigilance is the only way for the parties with stakes in the outcome of the copyright system to ensure that their rights are being protected.