

## Note

### **The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process**

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The takedown procedure provision of the Digital Millennium Copyright Act of 1998 (“DMCA”) was designed to balance the rights of copyright holders online with the rights of hosts who have no responsibility for, or knowledge of, third-party material. However, the DMCA fails to provide adequate protections and does not achieve this desired balance between copyright holders and hosts.

This Note delineates the shortcomings of the DMCA takedown procedure and provides possible solutions to these problems. To understand these shortcomings, it is necessary to have a detailed knowledge of the DMCA, specifically the takedown procedure, as well as the reason for its enactment. This Note describes how the DMCA takedown procedure fails to adequately enforce copyrights, leads to violations of copyrights, and is used inappropriately to censor criticism. This Note concludes that the DMCA takedown procedure is an ineffective and shortsighted policy that can nevertheless be remedied by requiring all takedown notices to pass through the U.S. Copyright Office.

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## I. THE DIGITAL MILLENNIUM COPYRIGHT ACT HISTORY, TAKEDOWN PROCEDURE, AND AN EXEMPLARY TAKEDOWN

### A. A BRIEF HISTORY OF THE DMCA

On December 20, 1996, the World Intellectual Property Organization (“WIPO”) adopted a Copyright Treaty.<sup>1</sup> To implement the doctrine of the treaty, the U.S. Congress began crafting online copyright legislation in July 1997.<sup>2</sup> The legislation became an amendment to the Copyright Act in 1998 and provided copyright holders more protection online than the WIPO Copyright Treaty asked of the signatory nations.<sup>3</sup>

Congress designed the DMCA first and foremost to further codify the rights of copyright holders in the digital world. While the overall tone of the DMCA was to delineate explicitly digital copyrights, the takedown section actually describes rights of those who find themselves on the other side of the copyright battle—accused infringers.<sup>4</sup> The safe-harbor provision enables those who wish to host material online to avoid culpability for copyright violations by third parties.<sup>5</sup> The tradeoff for this protection is a quick, court-free method of copyright violation enforcement, initiated by the copyright holder, and overseen by the host. The result is an Internet that is largely self-policing due to the interaction between those who send takedown notices and the hosts that receive them.

### B. BASIC FAIR USE DOCTRINE

The fair use protections arises from section 107 of the

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1. World Intellectual Property Organization Copyright Treaty, *adopted* Apr. 12, 1997, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 152, *available at* [http://www.wipo.int/clea/en/text\\_pdf.jsp?lang=EN&id=4050](http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=4050).

2. Executive Summary: Digital Millennium Copyright Act, [http://www.copyright.gov/reports/studies/dmca/dmca\\_executive.html](http://www.copyright.gov/reports/studies/dmca/dmca_executive.html) (last visited Dec. 4, 2008); Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTEL. PROP. REV. 236, 236 (1999); *see* Anti-DMCA, Frequently Asked Questions (Sept. 7, 2001), [http://www.anti-dmca.org/faq\\_local.html](http://www.anti-dmca.org/faq_local.html).

3. Chilling Effects Clearinghouse, Frequently Asked Questions (and Answers) About Anticircumvention (DMCA), <http://www.chillingeffects.org/anticircumvention/faq.cgi#QID92> (last visited Oct. 12, 2008).

4. Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006).

5. *Id.* § 512(a).

Copyright Act.<sup>6</sup> The Act lists non-infringing purposes of a copyrighted work and four factors used to determine the legality of the use. The allowable purposes are for use “as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . . .”<sup>7</sup> The four factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>8</sup>

Fair use is an affirmative defense to copyright infringement.<sup>9</sup> Still, as the above factors suggest, there is no bright-line rule on fair use; it is decided on a case-by-case basis.<sup>10</sup>

While there are many different statutory criteria for fair use and even Supreme Court cases on the matter, each case is so distinctly particular that it is often difficult to anticipate the validity of an infringement claim.<sup>11</sup> For every statutory criterion, such as non-commercial nature of the use, there is usually a fact pattern that violates that criterion but is nevertheless considered fair use.<sup>12</sup> Thus, it is difficult to predict how courts will interpret various fact patterns. Copyright law encompasses so many different mediums and genres that a uniform law covering them all would be inefficient and unlikely.<sup>13</sup>

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6. 17 U.S.C. § 107 (2006).

7. *Id.*

8. *Id.*

9. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

10. Frank Pasquale, *Toward an Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright's Commons*, 8 *YALE J.L. & TECH.* 78, 81 n.13 (2006).

11. *Id.*

12. *Campbell*, 510 U.S. at 594.

13. For a detailed look at the argued absurdity of copyright law in modern society and the nature of fair use in everyday life, see John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 *UTAH L. REV.* 537. Professor Tehranian walks through a typical day of a typical law professor and points out the copyright infringement done by the professor. It is an interesting look at fair use, with the subsection entitled “The Default Rule of Use as Infringement” especially disconcerting. *Id.* at 548. The article is also a general commentary on fair use.

While case law has existed for hundreds of years on the meaning of fair use, the current trend is to push the limits of what constitutes infringement.<sup>14</sup> Computers and the Internet have created a system for infinite, quick, and essentially free copying of works. Copyright law—even the ten-year-old DMCA—is hopelessly out of date.<sup>15</sup>

### C. THE PROCEDURE OF THE DMCA TAKEDOWN NOTICE AND COUNTER-NOTICE

The DMCA is a compromise between allowing content providers to avoid liability and continuing to grant copyright holders rights online.<sup>16</sup> The DMCA governs the many varied aspects of online copyright protection, including enforcement and remedies.<sup>17</sup> While there are many important implications of the DMCA, one of particular salience derives from the section commonly referred to as the “takedown notice” section.<sup>18</sup> Content, uploaded by users, is commonly hosted online by websites such as YouTube,<sup>19</sup> Google Video,<sup>20</sup> and Scribd.<sup>21</sup> Once material is uploaded, each hosting website becomes a “service provider” as described in the act.<sup>22</sup> To avoid liability for direct infringement, each service provider must have an employee registered with the U.S. Copyright Office as a “registered agent.”<sup>23</sup> The service provider must also be unaware of the infringement.<sup>24</sup>

When a copyright owner discovers that his or her material is viewable (or audible) on a website, the copyright owner can send a notification to the service provider that the material

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14. Infringement Nation: We Are All Mega-Crooks, Cory Doctorow, (Nov. 17, 2008) <http://www.boingboing.net/2007/11/17/infringement-nation.html>.

15. See Digital Copyright Law Under Fire: Millennium Act Already Out of Date, Critics Say, Benny Evangelista, (Aug. 13, 2001) <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2001/08/13/BU192271.DTL> (stating that the DMCA was out of date as early as 2001).

16. See Cohen, *supra* note 2.

17. Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006).

18. *Id.* (“Information Residing on Systems or Networks at Direction of Users”).

19. YouTube, <http://www.youtube.com> (last visited Nov. 15, 2008).

20. Google Video, <http://video.google.com> (last visited Nov. 7, 2008).

21. Scribd, <http://www.scribd.com> (last visited Nov. 7, 2008).

22. 17 U.S.C. § 512(c)(1).

23. *Id.* § 512(c)(2).

24. *Id.* § 512(c)(1)(A)(i).

must be removed.<sup>25</sup> The notification letter must comply with a number of statutory requirements; otherwise, it is void.<sup>26</sup> The service provider must notify the user who uploaded the material after taking it down.<sup>27</sup> If the user chooses to send a counter notification, the service provider must:

replace[] the removed material and cease[] disabling access to it not less than 10, nor more than 14, business days following receipt of the counter-notice, unless its designated agent first receives notice from the person who submitted the notification . . . that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material . . .<sup>28</sup>

In practice, takedown notifications are often sent to “service providers,” counter notifications are rarely sent, and, to date, there have been only a few lawsuits filed after this initial procedure.<sup>29</sup> There are three current abuses of the DMCA. First, takedown notices often supersede the fair use doctrine. In one case, for example, the National Football League (“NFL”) sent a takedown notice to YouTube over a video posted by Wendy Seltzer, a law professor. The video in question was a short clip of the NFL’s copyright and broadcast policy. The takedown was almost certainly illegitimate because the video was posted for criticism, comment, and research.<sup>30</sup>

The second abuse is more complicated because it involves a situation where the person sending the takedown notice is not actually the copyright holder of the material. In this case, the

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25. See *id.* § 512(c)(3).

26. See *id.*

27. *Id.* § 512(g)(2)(A).

28. *Id.* § 512(g)(2)(C).

29. See JENNIFER M. URBAN & LAURA QUILTER, EFFICIENT PROCESS OR “CHILLING EFFECTS”? TAKEDOWN NOTICES UNDER SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT (2005), available at [http://mylaw.usc.edu/documents/512Rep-ExecSum\\_out.pdf](http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pdf). The suit is a high profile case between two large Internet and copyright industry players: Viacom and YouTube. See Posting of Peter Lattman to Law Blog—WSJ.com, *Google Answers Viacom Lawsuit and Won't Back Down*, <http://blogs.wsj.com/law/2007/05/01/google-answers-viacom-lawsuit-and-wont-back-down> (May 1, 2007, 11:31 EST).

30. See Wendy.Seltzer.org: Legal Tags, The Blog, *NFL Clip Down Again*, [http://wendy.seltzer.org/blog/archives/2007/03/18/nfl\\_clip\\_down\\_again.html](http://wendy.seltzer.org/blog/archives/2007/03/18/nfl_clip_down_again.html) (Mar. 18, 2007, 10:38 EST); see also Jacqui Cheng, *NFL Fumbles DMCA Takedown Battle, Could Face Sanctions*, ARS TECHNICA, Mar. 20, 2007, <http://arstechnica.com/news.ars/post/20070320-nfl-fumbles-dmca-takedown-battle-could-face-sanctions.html>; Posting of Peter Lattman to Law Blog—WSJ.com, *Law Professor Wendy Seltzer Takes on the NFL*, <http://blogs.wsj.com/law/2007/03/21/law-professor-wendy-seltzer-takes-on-the-nfl> (Mar. 21, 2007 12:27 EST).

legitimate copyright holder's rights are violated for the ten to fourteen days that the copyrighted material is taken down. For instance, Christopher Knight, an independent filmmaker, produced a video that was posted on YouTube and then featured on a Viacom show on cable television. Knight then reposted the portion of his video with accompanying commentary from the Viacom show. Viacom sent 100,000 takedown notices to YouTube, including the video Knight reposted.<sup>31</sup> Knight discovered the video was taken down and filed a counterclaim notification with YouTube, which then reposted the video.<sup>32</sup> Another example involved the Science Fiction Writers of America ("SFWA"), which sent a similar mass takedown notice to Scribd.com, a public document database.<sup>33</sup> This mass takedown included copyrighted works not owned by the SFWA.<sup>34</sup> Several people objected and the matter was mostly resolved with the SFWA, but the possibility for litigation still remains.<sup>35</sup>

Third, parties have abused the DMCA by using it for censorship instead of its intended purpose, which is to protect legitimate copyright holders' rights online.<sup>36</sup> Repeated examples exist of takedown notices superseding the First Amendment or being sent where the underlying material is not copyrightable. In one instance, Akon, a rapper, and United Music Group, the company that produces his records, issued a takedown notice to Michelle Malkin, a blogger who spoke

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31. Greg Sandoval, *Viacom Demands Google, YouTube to pull 100,000 clips*, Cnet News, [http://news.cnet.com/8301-10784\\_3-6155737-7.html](http://news.cnet.com/8301-10784_3-6155737-7.html) (Feb. 2, 2007, 9:20 PST).

32. The Knight Shift, *YouTube/Viacom Aftermath—Part 2: The DMCA Counter-Notification Claim*, <http://theknightshift.blogspot.com/2007/09/youtubeviacom-aftermath-part-2-dmca.html> (Sept. 19, 2007, 7:25 EST); see also Cade Metz, *YouTube, Viacom Bow to Light-Sabre Wielding Defender of Online Justice*, REGISTER, Sept. 13, 2007, [http://www.theregister.com/2007/09/13/youtube\\_viacom\\_bow\\_to\\_light\\_sabre\\_wielding\\_video\\_maven](http://www.theregister.com/2007/09/13/youtube_viacom_bow_to_light_sabre_wielding_video_maven).

33. Posting of Cory Doctorow to Boing Boing, *Science Fiction Writers of America Abuses the DMCA*, <http://www.boingboing.net/2007/08/30/science-fiction-writ-1.html> (Aug. 30, 2007, 23:36 EST).

34. *Id.*

35. *Id.*

36. See, e.g., Jason Lee Miller, *YouTube Caught in Malkin, EFF, UMG Crossfire*, WEBPRONNEWS, May 11, 2007, <http://www.webpronews.com/topnews/2007/05/11/youtube-caught-in-malkin-eff-umg-crossfire>.

negatively of Akon.<sup>37</sup> In another, a man named Michael Crook sent takedown notices to various content providers who had a picture of him. The picture was posted, likely as a fair use, and it was not owned by Crook, who clearly intended the takedown to censor the picture.<sup>38</sup> In yet another example, a 128-bit hexadecimal number was used to crack DVD burning protection, and filmmakers attempted to suppress the number via DMCA notices.<sup>39</sup> Takedown notices such as this are rarely effective because material can easily be reposted moments later, regardless of the notice.<sup>40</sup>

#### D. AN EXAMPLE OF THE DMCA TAKEDOWN

The following is an example of a DMCA takedown. Suppose Jack records a video of his band's song (which sounds somewhat like a famous power ballad) and uploads the file to YouTube. A record label employs a search company to find possible copyright violations on YouTube. The company finds Jack's recording and notifies the record label. The record company then sends an electronic letter to the registered agent of YouTube stating a number of requirements mandated for YouTube under the guidance of section 512 of the Copyright Act. The letter must "Identif[y] the copyrighted work claimed to have been infringed," contain contact information for the copyright holder, a statement of "a good faith belief that the use of the material complained of is not authorized by the copyright owner," and a signature.<sup>41</sup> Finally, the letter must contain a statement as to the truth of all the elements and a claim of ownership or agency for the copyright under penalty of perjury.<sup>42</sup> YouTube must take down the potentially copyrighted material or risk liability.<sup>43</sup> This is similar to a

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37. *Id.*

38. Posting of Xeni Jardin to Boing Boing, *Michael Crook Sends Bogus DMCA Takedown Notice to Boing Boing*, <http://www.boingboing.net/2006/11/02/michael-crook-sends-.html> (Nov. 2, 2006, 10:52 EST); *see also*, Plagiarism Today, *How NOT to Use the DMCA*, <http://www.plagiarismtoday.com/2006/11/03/how-not-to-use-the-dmca> (Nov. 3, 2006).

39. Rudd-O.com, *Spread This Number*, <http://rudd-o.com/archives/2007/04/30/spread-this-number> (Apr. 30, 2007, 15:30 EST).

40. *Id.*

41. Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(3) (2006); YouTube.com, *Copyright Infringement Notification*, [http://youtube.com/t/dmca\\_policy](http://youtube.com/t/dmca_policy) (last visited Oct. 12, 2008).

42. § 512(c)(3).

43. *Id.* § 512(c)(1).

preliminary injunction undertaken by courts. YouTube must then take reasonable steps to notify Jack that his video has been taken down.<sup>44</sup> Jack then has the opportunity to send a counter-notice to YouTube with similar provisions as the takedown notice.<sup>45</sup> YouTube cannot legally immediately repost the video; however, it must wait ten to fourteen days for the record company to file a lawsuit in the district court Jack identified in his counter-notice.<sup>46</sup> However, if the record company does not file a lawsuit, YouTube may repost the video and the issue is over.

The DMCA takedown procedure is rife with controversy and confusion. It offers little protection for copyrights, but allows for harassing behavior, which is contrary to public policy interests. The main issue is the lack of consequences for any of these misuses of the DMCA.

## II. THE CONSEQUENCES OF DMCA ABUSES (FAIR USE, LACK OF PROTECTION, AND CENSORING) GREATLY OUTWEIGH THE PROPOSED BENEFITS

### A. FAIR USE IN THE CONTEXT OF THE DMCA TAKEDOWN PROCEDURE

Fair use is a nebulous doctrine with little judicial oversight. It is determined on a case-by-case basis subject to some ranges of acceptable use.<sup>47</sup> While a paragraph from a full novel might be a fair use post, a paragraph of a paragraph-long short story probably would not qualify.<sup>48</sup> The analysis is even more difficult when it comes to pictures and words. Pictures of people pose a non-legal problem because generally the object of the picture does not own the copyright to the picture; rather, the photographer does, though both may try to assert control of the copyright, enforcement of the copyright, or a fair use.<sup>49</sup>

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44. *Id.* § 512(g)(2)(A).

45. *Id.* § 512(g)(2)(B); § 512(g)(3).

46. *Id.* § 512(g)(2)(C).

47. Fair Use Frequently Asked Questions (And Answers), (March 21, 2002), [http://w2.eff.org/IP/eff\\_fair\\_use\\_faq.php](http://w2.eff.org/IP/eff_fair_use_faq.php).

48. Ursula K. Le Guin, SFWA, Piracy, and Serious Literature—An Open Letter (Oct. 12, 2007), <http://www.ursulaklequin.com/Note-OpenLetter.html>.

49. As an example, a family sued Virgin Mobile for using a photo of a family member taken by a photographer and posted on the popular picture website Flickr. Posting of Gary E. Sattler to Blogging Stocks, *Dallas lawsuit: Flickr Photo Cause Headaches for Ad Execs, Virgin*,



Words create legal complications in copyright because while each individual word is not copyrightable, a string of words might be. Furthermore, each phrase in a longer document is likely to be copyrightable on its own, meaning that even a short quotation of a text might violate a copyright.

One example of an extreme fair use case involved a short story posted to a popular website.<sup>50</sup> The issue arose when a paragraph from the story was posted, and its author read it.<sup>51</sup> The short story consisted solely of this one paragraph, so, actually, the entire story had been posted to the website.<sup>52</sup> While a paragraph from a full-length novel might typically be acceptable, and the intention here was not to display the entire story, it nevertheless resulted in the author's feeling that his copyright had been infringement. The situation was resolved without the legal system because those involved handled the situation amongst themselves.<sup>53</sup> This story is a good example of a rarely successful situation that does not often become public, namely the vast scope of copyright problems being dealt with between people without any legal process or legal guidance. If the law is trying to define fair use to no avail, what possible chance do ordinary people have?

Despite these shortcomings, however, fair use is an important policy that is being eroded by the inherent incentives the DMCA provides to copyright holders. The DMCA encourages abuse of fair use because an injunction can be obtained with minimal effort, and counter-notices are rare. This occurs despite the prevalence of boilerplate forms, instructions, and websites facilitating counter-notices.<sup>54</sup> This dichotomy likely exists because those who are aware of counter-notices and the DMCA are also usually aware of copyright law and tend to over-comply with its terms; those who do not know about counter-notices are more likely to be one-time uploaders,

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<http://www.bloggingstocks.com/2007/09/21/daughters-virgin-photo-puts-dallas-family-in-a-bad-mood> (Sept. 21, 2007, 17:03 EST).

50. Posting of Cory Doctorow to BoingBoing, *An Apology to Ursula K. Le Guin*, <http://www.boingboing.net/2007/10/14/an-apology-to-ursula.html> (Oct. 14, 2007, 10:03 EST).

51. *Id.*

52. *Id.*

53. *Id.*

54. See, e.g., Dave Touretzky, Do-It-Yourself Counter Notification Letter, <http://www.cs.cmu.edu/~dst/Terrorism/form-letter.html> (last visited Oct. 12, 2008); Chilling Effects Clearinghouse, DMCA Counter-Notification, <http://www.chillingeffects.org/dmca/counter512.pdf> (last visited Oct. 12, 2008).

oblivious to copyright law.<sup>55</sup> When counter-notices are sent, sometimes it is nothing more than the person sending the counter-notice intentionally setting up the action in the first place.

The only examples of this sort of abuse occur in cases where a counter-notice is filed. One such instance was with the NFL's broadcast policy. The NFL sent a takedown notice over a video that was posted and contained its copyright policy as broadcast on national television. A law professor named Wendy Seltzer then filed a counter-notice, and the video was restored. Per proper DMCA takedown procedure, at this point, the NFL should have filed a civil suit against Seltzer if it still believed that its copyright was being violated. Instead it sent a second takedown notice.<sup>56</sup>

This not only raises the issue of the fair use but also the procedural sanctity of the DMCA. Seltzer put the video up in order to critique and comment on the policy.<sup>57</sup> By using the video in an educational setting, for purposes of critique and comment, with no monetary gain involved, and by using only a small portion of the copyrighted video which airs dozens of times a week, this surely falls under the category of a fair use.<sup>58</sup> While it is not entirely clear that her purpose was to elicit a DMCA takedown notice, Professor Seltzer was attempting to comment on copyright law in general when she posted the NFL's broadcast policy.<sup>59</sup> The procedural misuse is probably due to a lack of proper understanding of the DMCA on the part of the NFL. Clearer procedures and a governmental intervention are necessary to prevent this sort of misuse in the future.

Copyright law creates many difficult legal questions. In the case of photographs, the issue is especially complex. As mentioned before, often the subject of the picture believes he or she has a claim to the copyright, but usually it is only the photographer who retains the copyright.<sup>60</sup> This is not true in a

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55. Takedown FAQ, (May 15, 2008) <http://www.plagiarismtoday.com/2008/05/15/takedown-faq/>.

56. 17 U.S.C. § 512(g)(2)(C).

57. Wendy.Seltzer.org, *supra* note 30.

58. 17 U.S.C. § 107 (2006).

59. *See, e.g.*, Wendy.Seltzer.org, *supra* note 30.

60. U.S. Copyright Office, What Does Copyright Protect?, <http://www.copyright.gov/help/faq/faq-protect.html> (last visited Oct. 12, 2008).

work-for-hire situation.<sup>61</sup> A significant problem in this scenario occurs when the subject of a picture does not approve of the manner in which the picture is being used, as in the case of Michael Crook.

Michael Crook repeatedly sent takedown notices for a picture in which he was the subject but not the copyright holder.<sup>62</sup> This was a clear abuse of the DMCA because Crook had no claim to owning the copyright or disapproving of the way the photograph was used. Crook is not the only example of this type of abuse.<sup>63</sup> While he chose to abuse the DMCA and copyright law to deal with his disapproval of the use of his photograph, there are likely better solutions.

#### B. THE DMCA CONFERS SOME PROTECTION ON ENTITIES WITH A LARGE NUMBER OF COPYRIGHTS, BUT RELATIVELY LITTLE PROTECTION ON THOSE ENTITIES WITH ONLY A FEW COPYRIGHTS.

The DMCA is somewhat effective for copyright holders who have a large number of copyrights or groups that represent a large number of copyrights, but offers poor protection to those who own only a few copyrights. There are two reasons that small copyright holders are hurt by the DMCA. The first is that effective use of the DMCA requires the copyright holder to either monitor the entire Internet to ensure that copyrights are not violated or join a cartel of other copyright holders, such as the Recording Industry Association of America or the Motion Picture Association of America. Thus if a copyright does not fit into a common group, is denied access to the cartel, cannot afford membership, or simply does not wish to participate, his or her copyright enforcement will suffer. Further, there is a separate economic question as to whether these sorts of cartels are preferable to individual enforcement, but that is beyond the scope of this Note. These examples simply highlight the fact that under the DMCA, cartels are de facto preferred, and, especially in the case of a copyright not fitting a common group,

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61. 17 U.S.C. §§ 101, 201(b) (2006); *see* Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (describing the “works made for hire” exception to the general rule that copyright ownership vests in the author of the work).

62. Jardin, *supra* note 38.

63. *See, e.g., Virgin Sued for Using Teen’s Photo*, SYDNEY MORNING HERALD, Sept. 21, 2007, <http://www.smh.com.au/news/technology/virgin-sued-over-photo/2007/09/21/1189881735928.html>.

holders of a small number of copyrights are at a disadvantage.

The second reason the DMCA hurts copyright holders is that illegitimate takedown notices are prevalent and inflict damage mostly on small copyright holders, stopping the spread of the material. An illegitimate takedown notice is one sent by someone who does not own the copyright or act on behalf of the copyright owner. These are often sent by mistake as part of a large number of takedown notices sent in bulk.<sup>64</sup> For example, in 2007, Viacom sent 100,000 takedown notices to YouTube, en masse, including takedown notices for materials to which it did not own the copyright.<sup>65</sup>

Many examples of illegitimate takedown notices exist, making this the most obvious form of DMCA abuse.<sup>66</sup> When an illegitimate takedown notice is sent, the true copyright owner must send a counter-notice. Instead of protecting the copyrights of this inconvenienced holder, he or she must instead spend time and resources counteracting the DMCA and restoring the work online. Under section 512(g)(2)(C) of the DMCA, a service provider must remove or disable access to the allegedly infringing content for between ten and fourteen days after receiving the takedown notice, regardless of the legitimacy of the counter-notice.<sup>67</sup> This delay can cause major problems for the true copyright holder, for the holder of only a few copyrights usually depends on word-of-mouth and distribution of his or her work in order to gain popularity.

Any takedown could cause irreparable damage to the copyright holder's reputation, because it is an accusation of fraud and theft. Similar to the other ways in which the DMCA confers advantages on those who own many copyrights, this has a greater negative impact on holders of small numbers of copyrights. The small copyright holder cannot know every online replication of his or her work, and therefore cannot know of every takedown notice sent. Often a small copyright holder wants open and free copying of his or her work so that word spreads; these takedowns can stifle that dissemination.

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64. See Doctorow, *supra* note 33.

65. Anne Broache & Greg Sandoval, Viacom Sues Google Over YouTube Clips, (March 13, 2007) [http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030\\_3-6166668.html](http://news.cnet.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.html).

66. See, e.g., Jardin, *supra* note 62; Doctorow, *supra* note 33.

67. Digital Millennium Copyright Act, 17 U.S.C. § 512(g)(2)(C) (2006).

Takedowns can be devastating to art online.<sup>68</sup> A consequence of the lost two weeks of online existence for the artist is the damage to the artist's legitimacy, integrity, and reputation. Essentially, a claim for copyright infringement is a statement that the artist stole the work from someone else. This claim undermines any later assertion by the artist that his works are his own, which can make funding, gallery space, and collaborations much more difficult to secure. Furthermore, there is no remedy available to the artist for damage to his reputation.

C. THE DMCA ENCOURAGES CENSORSHIP OF FREE SPEECH AND TAKEDOWNS OF UNCOPYRIGHTABLE MATERIAL BECAUSE THERE ARE OFTEN NO CONSEQUENCES FOR PERJURY IN THE TAKEDOWN NOTICE.

There is an additional issue with the procedure of the DMCA beyond abuse of fair use and the violations of small copyright holders. DMCA procedure favors copyrights over free speech.<sup>69</sup> It also provides certain incentives that encourage unlawful behavior—clearly against public policy.

As previously discussed, the DMCA takedown procedure only requires a statement asserting the truth of the claim to the copyright, under penalty of perjury, without any judicial oversight. This simple statement of truth has powerful effects. After a takedown notice is sent, the allegedly offending material is taken down, but no further inquiry into the truth of the statement is ever made unless a counter-takedown notice is sent. DMCA takedown procedure, in a worst-case scenario, arguably resembles censorship. For example, a company criticized in a video might send a takedown notice for the video despite not owning the copyright to the video. A common misperception exists that the subject of a piece owns some copyright interest in the piece. This is not true.<sup>70</sup> Michael Crook attempted to assert a takedown notice over a picture to which he did not own the copyright because it was taken *of* him but

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68. See Cory Doctorow, *Online Censorship Hurts Us All*, GUARDIAN (London), Oct. 2, 2007, <http://www.guardian.co.uk/technology/2007/oct/02/censorship>.

69. Unintended Consequences: Seven Years Under The DMCA, (April, 2006), <http://www.eff.org/wp/unintended-consequences-seven-years-under-dmca>.

70. U.S. Copyright Office, *supra* note 60.

not by him.<sup>71</sup> Even if the company or individual that sent the takedown notice knew it was false, the result of the takedown still might be worth the perjury. If the material is taken down and no counter-notice is sent, then the perjurer gets away with the lie. If a counter-notice is sent, then the perjurer may simply choose not to file a lawsuit and the perjurious statement, though ineffective, is therefore never challenged. Since counter-notices are extremely rare, the DMCA, arguably, encourages perjury to censor critiques. This situation occurred in a takedown filed over a criticism of the rapper, Akon. Michelle Malkin criticized Akon for one of his music videos, and United Music Group (“UMG”), Akon’s record company, sent a takedown notice to YouTube for the video that Ms. Malkin posted.<sup>72</sup>

The use of the copyrighted material that UMG is claiming, was a fair use under section 512 of the copyright act because it criticized and was used for education. The problem with this situation is that the First Amendment right of Ms. Malkin to criticize Akon’s video is obstructed by the allowances of the DMCA takedown procedure. In effect, the constitutional right to free speech, might, in some circumstances, be curtailed by the takedown, and priority is given to the copyright over the free speech. There is a predictable lack of legal precedent on the issue because for this to go into litigation, the party seeking to stifle the speech would need to be the one to file the complaint. The only remedy for Ms. Malkin is to file a counter-notice and publicly criticize UMG for its actions. However, the damage might already be done. The content could not be restored for ten to fourteen days, which might cause the issue to pass out of the public spectrum before the criticism is reinstated. The time loss might not be relevant in this case, but the implications for future, similar criticisms are apparent.

A somewhat different corporate technique for “using” the DMCA takedown notice procedure is demonstrated in the actions of a desperate company seeking to do the impossible: censor a number on the Internet. A group named the Advanced Access Content System Licensing Administrator (“AACSLA”) created advanced encoding software that protected Hi-Definition Digital Video Disc (“HD DVD”) copyrighted material

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71. Jardin, *supra* note 38.

72. Miller, *supra* note 36.

from being copied by others.<sup>73</sup> In order to allow the original copyright holder to make copies, a key code is an essential part of the software. Third parties determined the code and posted it to various blogs online. In an effort to combat the censorship of the hexadecimal<sup>74</sup> key code number, many websites encouraged its dissemination.<sup>75</sup> The counteraction online shows a need for reform in this procedure. Subsequent development of software to implement this key code rendered the copy protection ineffective. This led the AACCS LA to attempt to retract every single instance of the number online by claiming a copyright over the number and sending DMCA takedown notices to providers who had the number posted.<sup>76</sup>

The first question this raises is whether a number is a copyrightable material. Even if it is material that one could copyright, does the claim of copyright extend to posting the number online?

A common issue with copyright law is whether certain generic information, such as prices for goods, is copyrightable. While it is clear from a number of Supreme Court cases that advertisements showing any artistic aspects are definitely copyrightable (assuming all other elements are satisfied), facts are not copyrightable.<sup>77</sup> This leads to an interesting situation with online ads for what is commonly called Black Friday (the day after Thanksgiving in the United States). The ads are typically posted online a few days to a few weeks before Black Friday so that people can plan where they are going to go that day to shop. There are a number of unrelated websites that function by somehow obtaining the prices and posting them before they are officially published online by the companies

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73. See Chilling Effects Clearinghouse, AACCS Licensor Complains of Posted Key, <http://www.chillingeffects.org/anticircumvention/notice.cgi?NoticeID=7189> (last visited Oct. 31, 2008).

74. Hexadecimal numbers comprise digits zero through nine or A through F, with A through F corresponding to decimal numbers ten through fifteen. See generally Wikipedia, Hexadecimal, <http://en.wikipedia.org/wiki/Hexadecimal> (last visited Oct. 29, 2008) (explaining the use of hexadecimal in mathematics and computer science).

75. *E.g.*, Rudd-O.com, *supra* note 39; Posting of Arnezami to <http://forum.doom9.org/showthread.php?t=121866> (Feb. 5, 2007, 9:31 GMT +1).

76. *E.g.*, Chilling Effects Clearinghouse, *supra* note 73.

77. See, *e.g.*, Rural Telephone Serv. Co. v. Feist Publ'ns, Inc., 499 U.S. 340 (1991); BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436 (11th Cir. 1993).

themselves. Best Buy threatened to send DMCA takedown notices to BlackFriday.info if that website did not take the prices down.<sup>78</sup> Fatwallet.com has received DMCA takedown notices by many major retailers in prior years, including Best Buy and Wal-Mart.<sup>79</sup> The law in this scenario is based on cases decided before the rise of the Internet, and thus there is a specific problem still undecided.<sup>80</sup> If these prices are construed as just facts, then they are not copyrightable. If they are presented artistically, then they may have a copyright claim. Fair use issues also arise in this situation. Revealing copyrighted information before it is published usually does not fall under the qualification of fair use.<sup>81</sup> If the information is not copyrightable though, fair use is not a problem. This raises a complicated question. If the prices are not copyrightable because they are facts then using them is legal, but if the prices are part of an advertisement that is copyrightable, then revealing prices before they are published is probably an illegal use of part of a copyrighted work. All of this underscores the problem with DMCA takedown notices.

To resolve this issue, a court should rule on whether these prices are copyrightable and whether revealing these prices is fair use. However, that will never happen under the current regime. Both websites served with the notices mentioned trepidation about being shut down and chose to comply with the takedown notices (or the threat) without challenging them.<sup>82</sup> The loss of business from being shut down likely would be irreversible for them, so they cannot afford to challenge the legality of the claims. Fatwallet.com did attempt to challenge the Wal-Mart claim,<sup>83</sup> but Wal-Mart simply dropped the

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78. Eric Bangeman, *Best Buy Tries to Copyright Sales Prices*, ARS TECHNICA, Nov. 14, 2006, <http://arstechnica.com/news.ars/post/20061114-8218.html>; Posting of Greg Beck to Consumer Law & Policy Blog, *The Digital Millennium Copyright Act—A New Thanksgiving Tradition*, [http://pubcit.typepad.com/clpblog/2006/11/the\\_digital\\_mil.html](http://pubcit.typepad.com/clpblog/2006/11/the_digital_mil.html) (Nov. 24, 2006, 16:34 EST).

79. Posting of Chief Mucky Muck to FatWallet.com, <http://www.fatwallet.com/forums/arcmessageview.php?catid=33&threadid=126042> (Nov. 20, 2002, 10:21 EST).

80. David Kravets, *Black Friday Takedown Notices Hitting Mailboxes*, (Nov. 14, 2008) <http://blog.wired.com/27bstroke6/2008/11/black-friday-ta.html>.

81. *Harper & Row v. Nation Enters.*, 471 U.S. 539, 550-51 (1985).

82. Bangeman, *supra* note 78; see Mucky Muck, *supra* note 79.

83. Posting of Mike Masnick to Techdirt, *FatWallet Challenges Abusive DMCA Claims*,



notice.<sup>84</sup> The president and founder of FatWallet explained, “Wal-Mart’s subpoena gave us no choice but to fight back. Unless a court rules otherwise, we’re not going to give up personal information about our users when the underlying copyright claim is baseless.”<sup>85</sup> If just one step in the procedure of takedown notices was different, this situation could be resolved. If the websites were not forced to remove the information without even a preliminary ruling of some sort, or a way to check the validity of the claim through a national office, or any other solution, this would have never become an issue.

To further complicate matters, the Harvard bookstore recently ejected a few people for writing down prices of books because it was worried the prices would be posted online.<sup>86</sup> This can be characterized as almost an extension of the mentality of abusers of the DMCA takedown procedure. The DMCA creates incentives for holders of a large number of copyrights to send takedown notices as soon as there is even suspected infringement and to determine the copyrights later. A holder of a large number of copyrights will also be likely to know the law well, as it is in the holder’s best interest to be very familiar with copyright law. As noted above, there is no actual consequence for perjury in the takedown notice. Therefore, a company pushing the limits would likely send takedown notices not only when the copyright is legitimately owned and a takedown is proper, but additional reasons, including censorship, takedown of material the holder does not own or is not copyrightable, and when the use is fair use. All of the above scenarios, except the first, are illegitimate uses of the DMCA takedown notice procedure. These uses undermine the copyrights they are meant to protect, abuse others’ rights, and encourage perjury, but they ultimately lead to little or no consequences.

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<http://www.techdirt.com/articles/20021202/212226.shtml> (Dec. 2, 2002, 21:02 EST)..

84. Declan McCullagh, *Wal-Mart Backs Away from DMCA Claim*, CNET NEWS, Dec. 5, 2002, <http://news.cnet.com/2100-1023-976296.html> (last visited Nov. 15, 2008).

85. Posting of Chief Mucky Muck to FatWallet, <http://www.fatwallet.com/forums/arcmessageview.php?catid=18&threadid=129657> (Dec. 2, 2002, 16:25 EST).

86. Posting of Cory Doctorow to Boing Boing, *Harvard Bookstore: Our Prices are “Property,”* <http://www.boingboing.net/2007/09/19/harvard-bookstore-ou.html> (Sept. 19, 2007 6:13 EST).

III. TAKEDOWN NOTICES SHOULD PASS THROUGH THE COPYRIGHT OFFICE PRIOR TO BEING SENT TO HOST WEBSITES, A CAUSE OF ACTION AND PUNITIVE DAMAGES BASED ON PERJURY OF THE TAKEDOWN NOTICE SHOULD BE ESTABLISHED, AND A “NOT FAIR USE” CLAUSE SHOULD BE ADDED TO ALL TAKEDOWN NOTICES.

A. THE TAKEDOWN NOTICE SHOULD FIRST BE SENT TO THE COPYRIGHT OFFICE WHERE AN EXAMINER SHOULD BRIEFLY ANALYZE THE CLAIM TO DETERMINE ITS VALIDITY.

Many viable alternatives to the DMCA takedown procedure exist that would deter abuse, properly rank free speech and copyright protection, protect fair use, and still allow copyright holders adequate enforcement of their rights. The first alternative is to conduct a preliminary truth inquiry within the U.S. Copyright Office.

An additional branch of the Copyright Office would be necessary to complete these searches and preliminary findings. While it is certainly possible that the Copyright Office would experience similar backlogs to the U.S. Patent and Trademark Office, the level of skill required to examine copyrights in this way is significantly less than the level of skill required to review patents. A similar backlog is therefore unlikely, but would nevertheless depend on adequate staff and funding.

Similar in nature to the Patent and Trademark Office, the Copyright Office would oversee the initial online enforcement of copyrights after takedown notices. Under current law, a copyright owner has the option to register its copyright.<sup>87</sup> A procedure for takedown would proceed much the same way as under the DMCA, but instead of sending the request for takedown straight to the service provider, the copyright holder would first send the request to the Copyright Office. An examiner would look at the takedown notice and perform a quick review of the notice and the underlying copyright checking for two qualifications: 1) whether the takedown notice originated from the same entity that holds the valid, registered copyright, and 2) whether the use was fair use. This preliminary look into the claim of the copyright need only

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87. 17 U.S.C. § 408(a) (2006) (“[R]egistration is not a condition of copyright protection.”).

comprise the steps of reviewing the posted material then performing a search in the copyright database for the relevant copyright—hardly a daunting task. Yet, it would quickly eliminate many of the issues present in the current procedure. By checking the copyright, the issues of the illegitimate takedown notice would be mostly overcome. Also, by looking into the possibility of fair use, the examiner would stop the illegal censoring of free speech. Finally, since each copyright would need to be registered, the problem of questionable copyright material (such as the hexadecimal number) would be overcome.

These examiners would need a salary and each examination would cost money. However, there are two reasons this cost would not be prohibitive. The searches are not labor intensive, nor do they require a significant amount of training. More importantly, the benefits would far outweigh these costs. The Internet is a fundamental staple of business, social life, and intellectual property use. The current problems with the DMCA takedown procedure will only get worse as the Internet expands and more users realize that there is no consequence to lying. Therefore, it is preferable to create a solution to these problems before they are exacerbated. These issues must be faced and this solution would create a standard with which it is easy to comply, leading to a streamlined, understandable procedure. This standard procedure would also help anticipate potential future problems with the current DMCA takedown procedure, which may include intentional fraudulent assertions of copyright ownership or even various forms of personal harassment. Both of these possible future problems are easily solved by running all takedown notices through the Copyright Office. The fraudulent assertions of copyright would be weeded out by the first copyright inquiry, and the harassment would be apparent after the fair use inquiry.

The natural delay in the takedown need not be overly problematic because the balance between the truth of the claim and the speed of the takedown should be compared. As a benefit, fewer counter-notices will be sent because of this procedure. Also, if the counter-notices are also examined, the filter effect will be felt there as well, and the delay of the search time there offsets the initial takedown notice delay due to the examination.

B. A CAUSE OF ACTION SHOULD BE ESTABLISHED TO PERMIT  
RESTITUTION FOR KNOWING TRANSMITTAL OF ILLEGITIMATE  
TAKEDOWN NOTICES, INCLUDING MANDATORY PUNITIVE  
DAMAGES TO DISCOURAGE PERJURY.

The biggest flaw in the DMCA takedown procedure is the lack of any consequence for lying in the takedown notice. In order to solve this problem, in addition to the counter-notice, a cause of action should be created for the entity that uploaded to sue when the original takedown notice is knowingly perjurious. That is to say, when a takedown notice is sent by an entity aware that it is not the owner of the copyright at issue, the entity that is inconvenienced by the takedown should be able to sue for damages. While there are foreseeable actual damages, they would likely be difficult to calculate. Loss of momentum of word of mouth and other similar damages cannot be quantified. Therefore, a statutory punitive damage should also be established in order to easily quantify damages to deter potential misrepresentations. This would initially increase social costs due to the increase in litigation, but it would ultimately decrease overall social costs because fewer illegitimate takedown notices would be sent. This procedure would also ensure that each entity pays attention to the initial takedown notice, making sure it is legal, valid, and thoughtfully written.

The punitive damages and cause of action should apply to knowingly false counter-notices as well. This creates equal incentives for everyone involved to proceed truthfully at all times. A penalty for perjury that does not include a tangible consequence is not an effective deterrent.

One result of this solution would be significant judicial precedent on fair use, the DMCA takedown procedure in general, and what constitutes perjury in this context. Judicially defining fair use would serve to settle the law and give notice to those who upload videos and those who own copyrights. Takedown notices are sent in situations where it is often unclear whether the posted material is a fair use. Furthermore, fair use is often confusing, misconstrued, and even those who usually agree on copyright law sometimes disagree; The Motion Picture Association of America and the Recording Industry Association of America disagree over fair use, with the Motion

Picture Association of America believing that making a copy of a movie is not fair use<sup>88</sup> and the Recording Industry Association of America believing that making a copy of a song is fair use for certain uses, although that view is eroding.<sup>89</sup> This conflict obviously cannot be reconciled, and one choice or the other must necessarily win out in the end.<sup>90</sup>

Aside from actually defining fair use, there is an additional problem of enforceability. This goes to a basic mindset about fair use. Often those who act substantially as copyright owners tend to be of the mindset that there is no such exception as fair use and that all uses of a copyrighted work should be subject to licenses or fines. Those who predominantly act as consumers or users of copyrighted material tend to think that any use is fair use or that at least that each use is fair enough. The problem is that copyright owners often pool their copyrights. The Recording Industry Association of America, the Motion Picture Association of America, the Science Fiction Writers of America and other groups represent many copyright owners all at once, often without any input from the copyright owners themselves.<sup>91</sup> This creates two problems. The first is that the groups are solely focused on enforcing the copyrights without thinking about how users of copyrights often further the works and make them more popular. The second is that the users often forget that the copyright is owned by a person and not the large impersonal group fighting for the copyrights. Although complicated incentives created by this structure are not addressed, this peripheral look at the set up suggests that if

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88. See Motion Picture Association of America, Frequently Asked Questions, [http://www.mpaa.org/DVD\\_FAQ.asp](http://www.mpaa.org/DVD_FAQ.asp) (last visited Nov. 6, 2008).

89. See Recording Industry Association of America, Piracy: Online and on the Street – The Law, [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy\\_online\\_the\\_law](http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law) (last visited Nov. 6, 2008). But see Posting of Fred von Lohmann to Deeplinks Blog, *RIAA Says Ripping CDs to Your iPod is NOT Fair Use* (Feb. 15, 2006), <http://www.eff.org/deeplinks/2006/02/riaa-says-ripping-cds-your-ipod-not-fair-use>; Eric Bangeman, *Sony BMG's Chief Anti-Piracy Lawyer: "Copying" Music You Own is "Stealing,"* ARS TECHNICA, Oct. 2, 2007, <http://arstechnica.com/news.ars/post/20071002-sony-bmgs-chief-anti-piracy-lawyer-copying-music-you-own-is-stealing.html>.

90. Nate Anderson, *MPAA: We Are Committed to Fair Use, Interoperability, and DRM,* ARS TECHNICA, Apr. 26, 2007, <http://arstechnica.com/news.ars/post/20070426-mpaa-drm-must-be-interoperable-dvds-should-be-rippable.html>; von Lohmann, *supra* note 89.

91. University of Tennessee Knoxville, Office of Information Technology, Consequences of Copyright Infringement, <http://oit.utk.edu/copyright/consequences> (last visited Nov. 2, 2008).

the structure of the DMCA takedown procedures is altered to remove the abuses, it may also serve to seriously curtail the major problems with fair use by evening the scales for those who own copyrights and those who use them. Establishing judicial precedent for fair use is in the best interests of everyone and the future of the Internet.

Many of the problems with the DMCA takedown procedure also apply to copyright fraud in general. Thus, while the problems are distinct (copyright fraud occurs outside the Internet as well as on it, while DMCA abuses often involve legitimately copyrighted works), they may have a similarly rooted solution. In an article entitled *Copyfraud*, professor Jason Mazzone reveals two solutions for fixing copyright fraud, which also can be applied to takedown notices.<sup>92</sup> The first is to establish a standard for fraudulent violations of copyrights (or takedown notices) that would subject the defrauder to civil liability.<sup>93</sup> The second is to grant broad standing to those injured by the fraud beyond those who can demonstrate personal injury.<sup>94</sup> Either of these solutions can be incorporated into a DMCA takedown notices analysis. Those who send fraudulent takedown notices would be subject to liability as described in the solution section of this paper. In addition, anyone who wished to watch the video, read the work, or listen to the posting, and was unable to as a result of the takedown, would be able to sue the fraudulent takedown sender; standing would not be limited to the person whose work was the object of the takedown notice.

Other solutions are discussed as a part of a fair use analysis by professor Thomas Cotter in his article, *Fair Use and Copyright Overenforcement*.<sup>95</sup> The solutions are generally analyzed in the context of fair use problems, but they may also be helpful in the context of the takedown procedure. Professor Cotter analyzes the effectiveness of six proffered solutions,<sup>96</sup> three of which may be easily integrated with a DMCA takedown notice setting. He notes that others have recommended “modifying some aspects of damages law so as to

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92. Jason Mazzone, *Copyfraud*, 81 N.Y.U. L. REV. 1026 (2006).

93. *Id.* at 1072.

94. *Id.* at 1078.

95. Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271 (2008).

96. *Id.* at 1291–1316.

encourage more defendants to assert the fair use defense.”<sup>97</sup> Applying this to the DMCA, encouraging more defendants to file counter-notices would be preferable. Professor Cotter also discusses sanctions and awarding attorney’s fees against the copyright owner in cases where the use is determined fair (or in the DMCA setting, when the takedown should not have been sent).<sup>98</sup> All of these solutions could serve to even the playing field and allow people to use copyrighted works without the serious fear of being the target of litigation or harassment.

Gigi Sohn, president of Public Knowledge, a public interest group, recently gave a speech about fair use and the Internet.<sup>99</sup> In it, Sohn suggests that fair use has devolved to a point of near ineffectiveness. Sohn remarks, “[A]ided by damages that would bankrupt most companies and individuals, these powerful companies regularly threaten litigation for even the most incidental uses of copyrighted works, turning ‘fair use’ into what Lawrence Lessig calls ‘the right to hire a lawyer.’”<sup>100</sup> Sohn quotes renowned copyright commenter professor Lawrence Lessig from his book *Free Culture*:<sup>101</sup>

But fair use in America simply means the right to hire a lawyer to defend your right to create. And as lawyers love to forget, our system for defending rights such as fair use is astonishingly bad—in practically every context, but especially here. It costs too much, it delivers too slowly, and what it delivers often has little connection to the justice underlying the claim.<sup>102</sup>

Since fair use is the underlying problem that causes many DMCA takedown notice claims, it is important to consider. Lessig launched Creative Commons, a non-profit organization that releases licenses to be used by those who wish to copyright their works but not restrict them the way U.S. copyright law

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97. *Id.* at 1299.

98. *Id.* at 1301–08.

99. Gigi B. Sohn, Address at the New Media and the Marketplace of Ideas Conference, Boston University College of Communication: Six Steps to Digital Copyright Sanity: Reforming a Pre-VCR Law for a YouTube World (Oct. 26, 2007), *available at* <http://www.publicknowledge.org/pdf/gbsohn-speech-20071026.pdf>.

100. *Id.*

101. LAWRENCE LESSIG, *FREE CULTURE* 187 (2004), *available at* <http://www.free-culture.cc/freeculture.pdf>. <http://www.free-culture.cc/freeculture.pdf>. Any discussion of copyright law would likely be incomplete without at least mentioning professor Lessig. His comments, articles, and books on the subject only begin to scratch the surface of what he has contributed.

102. *Id.*

does.<sup>103</sup> The Creative Commons License allows for the creator of the work to specify certain attributes that he or she wishes the work to retain, and then lets the creator release the rest of his or her copyrights to the general public domain.<sup>104</sup> It is important to note that this license is available as an alternative to typical copyright schemes. This free market solution is a good choice for creators who believe that copyright law oversteps its bounds. However, it is not a viable solution when copyright over-enforcement is sought by the copyright holder, since the license is not mandatory. It is therefore somewhat limited in scope.

C. A “NOT FAIR USE” CLAUSE SHOULD BE ADDED TO ALL  
TAKEDOWN NOTICES TO ENCOURAGE THE COPYRIGHT HOLDER  
TO ACTUALLY INVESTIGATE THE USE.

Finally, those who send DMCA takedown notices should be made to offer additional proof of copyright and a statement asserting that the use is not a fair use. Each takedown notice should include an additional statement that the copyright holder believes the use is not a fair use. This would put pressure on the notice sender to check the alleged infringer’s use instead of doing a keyword search or some other generic method for detection of copyright violation. The Science Fiction Writers of America action was an example of a keyword search for copyrighted material that resulted in numerous false positives.<sup>105</sup> If this statement were required for actions like that one, then perhaps they would be further reviewed and not sent inadvertently or fraudulently. Specifically, if an additional clause had been necessary for the Science Fiction Writers of America, then many takedown notices likely would not have been sent because the use was, in a few cases, as little as one word. An additional benefit would be to educate copyright holders that some uses are fair uses, and perhaps encourage some to learn what constitutes fair use.

While including a “Not Fair Use” provision in the takedown notice does not seem on the surface to accomplish anything beyond an additional form statement to be ignored by

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103. Creative Commons Home Page, <http://creativecommons.org> (last visited Oct. 12, 2008).

104. Creative Commons, License Your Work, <http://creativecommons.org/license> (last visited Oct. 12, 2008).

105. Doctorow, *supra* note 33.



copyright holders, it actually would perform a significant role. This provision would serve as a starting point for the person defending the use. Right now there is nothing in the takedown notice that a defendant of DMCA litigation can point to in order to establish the abuse undertaken by the takedown notice sender. Including this additional provision allows a defendant to point out a specific instance of perjury and fraud by the takedown notice sender and to be more likely to be successful in court. It also would encourage those subject to takedown notices to take them seriously and pay more attention to whether the claim is legitimate. It will work the other way as well by lending more credibility to legitimate DMCA takedown notices.

#### IV. CONCLUSION

The DMCA takedown procedure fails to enforce copyrights adequately, leads to violations of copyrights, and it is used inappropriately to censor criticism. This Note concludes that the DMCA takedown procedure is an inherently ineffective policy that can be fixed by ensuring that all takedown notices are cleared with the Copyright Office before they are sent to the service providers.

The solution proposed tries to solve the problems of the current procedure and does not significantly add to the social cost of the procedure. It is an efficient solution, which tries to bear in mind both sides of the issue and current problems. Finally, it is easily amendable for any subsequent concerns or issues.