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THE DIGITAL MILENNIUM COPYRIGHT ACT – IN NEED OF A MAJOR SOFTWARE UPDATE

Sabrina Ortega[*]

ABSTRACT

The Digital Millennium Copyright Act (DMCA) unfairly discriminates against copyright holders by allowing online service providers to employ inadequate and outdated takedown protocols of copyright infringement. These protocols promote piracy resulting in illegal advertisement revenue streams. Congress must reform the DMCA to ensure online service providers are held properly accountable when copyright infringement occurs on their platforms. Specifically, the DMCA's existing takedown protocols should be reformed to ensure online service providers cannot benefit from issues associated with advertisements attached to posts containing infringing material. This Note examines the pertinent sections of the DMCA; relevant caselaw concerning the DMCA, online service providers, copyright holders, and internet users; and recommendations for changes to be made to reconstruct the DMCA so that it may fulfill its original purpose. The proposed recommendations address rising tensions between copyright holders and online service providers. These proposed solutions involve revising existing takedown protocol requirements to give copyright holders more freedoms rather than limiting their remedies to a "band-aid" fix that only provides an illusory remedy. Efficient and updated procedures should be added to the DMCA, to ensure that copyright holders are protected from the issues presented by an ever-digital climate. We cannot continue to apply a law written in Short Code[1] to a world living in the Metaverse.[2]

Sabrina M. Ortega, Esq., University of Miami, School of Law, Class of 2024. Thank you to the Ortegas (Omar Sr., Maria, Samantha, and Omar Jr.), Gil Barrios, and my family and friends for your unwavering support. A special thank you to the *Michigan Business & Entrepreneurial Law Review* for their incredible editorial support.

1. *See generally* Andrew Ferguson, *A History of Computer Programming Language*, BROWN UNIV. (Aug. 11, 2004), https://cs.brown.edu/~adf/programming_languages.html.

2. *See generally* Eric Ravenscraft, *What Is the Metaverse, Exactly?*, WIRED (Apr. 25, 2022, 7:00 AM), https://www.wired.com/story/what-is-the-metaverse/.

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INTRODUCTION

Welcome to the internet, the modern version of the Wild West,[3] where copyright violation is rampant, the law is meaningless, and enforcement is scarce. The Digital Millennium Copyright Act[4] (DMCA or the Act) is unable to fully protect copyright holders because of its current inability to deal with new forms of social media that were not envisioned during the Act's inception. The DMCA was once seen as a revolutionary piece of legislation because of its focus[5] on the internet, the expanse of which was completely underestimated in 1998. However, the 24 years from 1998 to 2022 have moved in warp drive[6] to light-years[7] ahead. For example, in 1998 social media simply did not exist.[8] There were no online social media

3. *See Wild West*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Wild%20West (last visited Feb. 21, 2022) (defining Wild West as "the western U.S. in its frontier period characterized by roughness and lawlessness").

4. Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

5. *See generally The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/dmca/ (last visited Nov. 16, 2021).

6. NASA, *Is Warp Drive Real?* (Aug. 7, 2017), https://www.nasa.gov/centers/glenn/technology/warp/warp.html.

7. *See generally What Is A Light-Year?*, NASA SCI. SPACE PLACE (Aug. 27, 2020), https://spaceplace.nasa.gov/light-year/en/.

8. *See* Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media; *see also* Saqib Shah, *The History of Social Networking*, DIGITAL TRENDS (May 14, 2016), https://www.digitaltrends.com/features/the-history-of-social-networking/.

platforms such as Facebook,[9] Instagram,[10] TikTok,[11] Twitter,[12] or YouTube.[13] People were not able to log on to these sites and voice their opinions, share personal anecdotes, keep in touch with long lost friends and family, or generate advertising revenue.[14] Now, YouTube, like most of the social media platforms, allows viewers to upload content of their personal choosing.[15] This means users can upload material that does not necessarily belong to them. In most of these instances, copyright infringement is prevalent.[16] Copyright infringement in the digital space can take a variety of forms.[17] For example, a user may decide to upload a pirated version of a

9. *See generally* Mark Hall, *Facebook*, BRITANNICA (Oct. 18, 2022), https://www.britannica.com/topic/Facebook ("Facebook was founded in 2004 by Mark Zuckerberg, Eduardo Saverin, Dustin Moskovitz, and Chris Hughes, all of whom were students at Harvard University. Facebook became the largest social network in the world, with nearly three billion users as of 2021, and about half that number were using Facebook every day.").

10. *See generally* Dan Blystone, *Instagram: What It Is, Its History, and How the Popular App Works,* INVESTOPEDIA (Jan. 12, 2024), https://www.investopedia.com/articles/investing/102615/story-instagram-rise-1-photo0sharing-app.asp ("Instagram is a photo and video-sharing social media application that was launched in 2010 by Kevin Systrom. . . . The Instagram app was launched on Oct. 6, 2010 and racked up 25,000 users in one day. From the beginning, the primary focus of the app was to feature photographs, specifically those taken on mobile devices. Just prior to Instagram's initial public offering (IPO) in 2012, Facebook acquired the company for $1 billion in cash and stock.").

11. *See generally* Deborah D'Souza, *TikTok: What Is Is, How It Works, and Why It's Popular?*, INVESTOPEDIA (Feb.15, 2024), https://www.investopedia.com/what-is-tiktok-4588933 ("TikTok is a popular social media app that allows users to create, watch, and share 15-second videos shot on mobile devices or webcams. With its personalized feeds of quirky short videos set to music and sound effects, the app is notable for its addictive quality and high levels of engagement. . . . [TikTok was] [l]aunched in its present form in 2018.").

12. *See generally Twitter Launch*es, HIST.: THIS DAY IN HIST. (July 12, 2022), https://www.history.com/this-day-in-history/twitter-launches ("On July 15, 2006, the San Francisco-based podcasting company Odeo officially releases Twttr—later changed to Twitter—its short messaging service (SMS) for groups, to the public. . . . [T]he free application allowed users to share short status updates with groups of friends by sending one text message to a single number ('40404'). Over the next few years, as Twttr became Twitter, the simple 'microblogging' service would explode in popularity, becoming one of the world's leading social networking platforms.").

13. *See generally* William L. Hosch, *YouTube*, BRITANNICA (Nov. 3, 2022), https://www.britannica.com/topic/YouTube ("It was registered on February 14, 2005, by Steve Chen, Chad Hurley, and Jawed Karim, three former employees of the American e-commerce company PayPal. They had the idea that ordinary people would enjoy sharing their 'home videos.' . . . By the summer of 2006, YouTube was serving more than 100 million videos per day, and the number of videos being uploaded to the site showed no sign of slowing down.").

14. *See* Greg McFarlane, *How Facebook (Meta), X Corp (Twitter), Social Media Make Money From You*, INVESTOPEDIA (Dec. 2, 2022), https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx.

15. *See* Hosch, *supra* note 13.

16. *See generally* Julia Alexander, *YouTubers and Record Labels Are Fighting, and Record Labels Keep Winning*, THE VERGE (May 24, 2019, 10:37 AM), https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover (discussing the difficulties of specific content creators when using copyrighted materials).

17. *See* River Braun, *Forms of Copyright Infringement*, LEGAL ZOOM (May 2, 2022), https://www.legalzoom.com/articles/forms-of-copyright-infringement; Jonathan Layton, *How to*

famous movie, or decide to create a personally produced video that contains the unauthorized use of copyrighted music.[18] The possibilities are endless due to the ease with which people can share their posts or content.

These types of copyright infringement have become especially prevalent on social media platforms in the last decade.[19] The DMCA was designed to protect both copyright holders and online service providers equally.[20] When the DMCA was passed in 1998, there was not yet a concept of social media, making it impossible to know the effects the latter would have on copyright infringement. The use of the current DMCA is the equivalent of applying laws created to regulate motor vehicles in the age of Henry Ford's Model T[21] to Elon Musk's Starship.[22] Social media has risen to a level of economic power within the U.S. and the world that most people could not fathom.[23] Social media advertising revenue was $226 billion in 2022 and is expected to grow to $385 billion by 2027.[24]

The huge amount of revenue that social media giants make presents an apocalyptic situation for copyright holders because user posts or content can contain copyrighted material which generates income through advertisements for the user and platforms such as YouTube, effectively circumventing the copyright holder to wrongfully profit from their materials. Rather than preclude copyrighted

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Avoid Copyright Infringement, LEGAL ZOOM (July 28, 2022), https://www.legalzoom.com/articles/how-to-avoid-copyright-infringement.

18. *See* Amir Efrati, *Reappearing on YouTube: Illegal Movie Uploads*, WALL ST. J. (Feb. 8, 2013, 5:04 AM), https://www.wsj.com/articles/SB10001424127887324906004578290321884631206.

19. *See* Carolyn Toto, *Social Media Posting, Copyright Infringement and the Rights Balancing Act*, JD SUPRA (Sept. 30, 2020), https://www.jdsupra.com/legalnews/social-media-posting-copyright-71845/; Jonathan J. Darrow & Gerald R. Ferrera, *Social Networking Web Sites and the DMCA: A Safe-Harbor from Copyright Infringement Liability or the Perfect Storm?*, 6 NW. J. TECH. & INTELL. PROP. 1 (2007).

20. *See* U.S. COPYRIGHT OFF., *supra* note 5; *see also* Doug Mirell & Josh Geller, *Copyright Office Should Call For Further DMCA Rebalancing*, LAW360 (June 5, 2020, 1:52 P.M.), https://www-law360-com.daytona.law.miami.edu/articles/1280194/copyright-office-should-call-for-further-dmca-rebalancing.

21. *See generally Henry Ford: Model T*, THE HENRY FORD (last visited Jan. 9, 2022), https://www.thehenryford.org/collections-and-research/digital-collections/sets/7145.

22. *See generally* Erik Gregersen & Barbara A. Schreiber, *Tesla, Inc.*, ENCYCLOPEDIA BRITANNICA (Mar. 30, 2024), https://www.britannica.com/topic/Tesla-Motors.

23. *See generally* Jeff Desjardins, *How Does Social Media Influence The Economy?*, FORBES (Aug. 2, 2017, 11:58 AM), https://www.forbes.com/sites/quora/2017/08/02/how-does-social-media-influence-the-economy/?sh=2d3a0de844d0; *see also* Johannes Stroebel & Theresa Kuchler, *The Economic Effects of Social Networks*, NAT'L BUREAU ECON. RSCH. (Mar. 2021), https://www.nber.org/reporter/2021number1/economic-effects-social-networks; Robert H. Frank, *The Economic Case for Regulating Social Media*, THE N.Y. TIMES (Feb. 11, 2021), https://www.nytimes.com/2021/02/11/business/social-media-facebook-regulation.html.

24. *Social Media Advertising: Market Data & Analysis*, STATISTA (Dec. 2023) https://www.statista.com/study/36294/digital-advertising-report-social-media-advertising/#:~:text=The%20Social%20Media%20Advertising%20market,US%24385%20billion%20in%202027.

material, the platform benefits from layering advertising on the posts.[25] Even when the platforms do not advertise directly on a particular post, they still generate traffic to other pages which may contain advertisements by using their own algorithms.[26] This is even more alarming when a platform directs the user to the platform's own paid service.[27] While many parties stand to benefit from these arrangements, the copyright holder notably does not.[28] Generally speaking, the copyright holder is placed in a situation where he or she is found to be at the mercy of the online service provider who has no incentive to curb the infringement; on the contrary the online service provider has billions of reasons to promote the infringement.[29] This result cannot be Congress' intended consequence of the DMCA. In a digital world this result would render copyrights meaningless.

The DMCA is out-of-date and does not fulfill its original purpose. [30] The Act allows online service providers to employ inadequate takedown protocols.[31] The current protocols promote piracy resulting in illegal advertisement revenue streams, from which online service providers benefit.[32] To rectify this failure, Congress must reform the DMCA to ensure online service providers are held accountable when copyright infringement occurs on their platforms. The DMCA's takedown protocols[33] should be reformed to ensure online service providers may

25. *See* Andrew Beattie, *How YouTube Makes Money Off Videos*, INVESTOPEDIA (Oct. 31, 2021), https://www.investopedia.com/articles/personal-finance/053015/how-youtube-makes-money-videos.asp; Todd Spangler, *YouTube Will Let Copyright-Disputed Videos Keep Earning Ad Revenue While Claims Are Pending*, VARIETY (Apr. 28, 2016, 11:30 AM), https://variety.com/2016/digital/news/youtube-bogus-copyright-videos-ad-revenue-1201762822/.

26. *See* Alexis C. Madrigal, *How YouTube's Algorithm Really Works*, ATLANTIC (Nov. 8, 2018), https://www.theatlantic.com/technology/archive/2018/11/how-youtubes-algorithm-really-works/575212/.

27. *See*, *e.g.*, William Antonelli, *A Beginner's Guide to YouTube TV, a Live TV App with over 80 Channels and Unlimited DVR*, BUS. INSIDER (Aug. 18, 2020, 1:05 PM), https://www.businessinsider.com/youtube-tv.

28. *See* Julie O'Neill et al., *Social Links: Embedding Social Media Posts Can Be Considered Copyright Infringement . . . But Is It?*, JD SUPRA (Nov. 16, 2021), https://www.jdsupra.com/legalnews/social-links-embedding-social-media-1703143/. *See generally* Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELECOMM. & TECH. L. REV. 2 (2006).

29. *See* Christian C.M. Beams, *The Copyright Dilemma Involving Online Service Providers: Problem Solved . . . for Now*, 51 IND. UNIV. FED. COMMC'NS L. J. 3 (1999); *see also* Sarah Burns et al., *Copyright Office Says Courts Have Construed DMCA Too Favorably for Online Providers*, JD SUPRA (Oct. 29, 2020), https://www.jdsupra.com/legalnews/copyright-office-says-courts-have-72172/.

30. *See* Mirell & Geller, *supra* note 20.

31. *See* 17 U.S.C. § 512.

32. *See e.g.*, Ben Popper, *YouTube to the Music Industry: Here's the Money*, THE VERGE (July 13, 2016, 6:58 AM), https://www.theverge.com/2016/7/13/12165194/youtube-content-id-2-billion-paid.; *see also* Megan Graham, *YouTube Will Put Ads On Non-Partner Videos But Won't Pay the Creators*, CNBC (Nov. 19, 2020, 12:16 PM), https://www.cnbc.com/2020/11/19/youtube-will-put-ads-on-non-partner-videos-but-wont-pay-the-creators.html#:~:text=via%20Getty%20Images-,YouTube%20said%20in%20an%20update%20to%20its%20terms%20of%20service,shares%20ad%20revenue%20with%20creators.

33. *See generally* 17 U.S.C. § 512.

not benefit from advertisements posted on infringing material. Note that, while they are the world's most powerful companies, they also have the most to lose, notably billions in revenue. Accordingly, they must be incentivized to become protectors instead of passive participants in the violations. Additionally, users should maintain their own prospective rights regarding their actions on websites controlled by online service providers. This arrangement should provide for equality amongst online service providers, internet users, and copyright holders.

Part I of this Note will discuss an overview of the DMCA including background information of the Act, a discussion of the relationship between the relevant takedown provisions and advertising forms, and the U.S. Copyright Office's 2020 report on Section 512 of the DMCA itself. Part II will discuss relevant caselaw pertaining to the DMCA. Part III will make recommendations for revisions to the DMCA that truly protect copyright holders, maintain adequate and appropriate liability protection for online service providers, and shield internet users from unfair claims of infringement on online platforms. The Note will conclude with a discussion final thoughts and a conclusion to this dilemma.

I. AN OVERVIEW OF THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

The DMCA was one of the first laws of its kind.[34] Congress enacted the DMCA to recognize the rapidly evolving relationship between copyright law and the internet.[35] The purpose of the legislation was to amend U.S. copyright law to reflect the technological advances made since the internet's inception in the late 1980s.[36] The DMCA was meant to provide copyright holders with peace of mind, knowing that their rights were protected and thoroughly recognized.[37] Additionally, the Act was intended to provide internet users protection from liability under safe harbor provisions.[38]

34. *See, e.g.*, European Commission Press Release IP/21/1807, New EU Copyright Rules That Will Benefit Creators, Businesses and Consumers Start to Apply (June 4, 2021).

35. *See* U.S. COPYRIGHT OFF., *supra* note 5; *see also* Crystal Everson, *The Digital Millennium Copyright Act Explained*, LEGAL ZOOM (May 2, 2022), https://www.legalzoom.com/articles/the-digital-millennium-copyright-act-explained.

36. *See A Short History of the Web*, CERN, https://home.cern/science/computing/birth-web/short-history-web (last visited Nov. 18, 2021).

37. "Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials. . . . Title II clarifies the liability faced by service providers who transmit potentially infringing material over their networks. In short, Title II ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand." *See* S. REP. No. 105-190, at 2 (1998), https://www.congress.gov/congressional-report/105th-congress/senate-report/190/1.

38. *See generally* KEVIN J. HICKEY, CONG. RSCH. SERV., IF11478, DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA) SAFE HARBOR PROVISIONS FOR ONLINE SERVICE PROVIDERS: A LEGAL OVERVIEW (2020).

A. *Background*

President Clinton signed the DMCA into law on October 28, 1998.[39] "The legislation implement[ed] two 1996 World Intellectual Property Organization (WIPO) treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty."[40] The DMCA provided three main revisions to existing U.S. copyright law:

> (1) establishing protections for online service providers in certain situations if their users engage in copyright infringement, including by creating the notice-and-takedown system, which allows copyright owners to inform online service providers about infringing material so it can be taken down; (2) encouraging copyright owners to give greater access to their works in digital formats by providing them with legal protections against unauthorized access to their works (for example, hacking passwords or circumventing encryption); and (3) making it unlawful to provide false copyright management information (for example, names of authors and copyright owners, titles of works) or to remove or alter that type of information in certain circumstances.[41]

The DMCA is divided into five sections: the "WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998" (Title I); the "Online Copyright Infringement Liability Limitation Act" (Title II); the "Computer Maintenance Competition Assurance Act" (Title III); "Miscellaneous Provisions" (Title IV); and the "Vessel Hull Design Protection Act" (Title V).[42] The DMCA added three sections to existing U.S. copyright law: Sections 1201, 1202, and 512.[43]

"[S]ection 1201 implements the obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works."[44] "[I]t prohibits" (1) "circumventing technological protection measures (or TPMs) used by copyright owners to control access to their works," meaning it is illegal to bypass password protected online service providers, and (2) "manufacturing, importing, offering to the public, providing, or otherwise trafficking in certain circumvention technologies, products, services, devices, or components."[45] "Section 1202 makes it unlawful to provide or distribute false copyright management information (CMI) with the intent to induce or conceal infringement."[46]

Finally, Section 512 "(1) enabled copyright owners to have infringing online content removed without the need for litigation, and (2) facilitated the development of the internet industry by providing legal certainty for participating online

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39. *The Digital Millennium Copyright Act of 1998: U.S. Copyright Summary*, U.S. COPYRIGHT OFF., at 1 (Dec. 1998), https://www.copyright.gov/legislation/dmca.pdf.

40. *Id.*

41. U.S. COPYRIGHT OFF., *supra* note 5.

42. U.S. COPYRIGHT OFF., *supra* note 39.

43. *See* U.S. COPYRIGHT OFF., *supra* note 5.

44. U.S. COPYRIGHT OFF., *supra* note 39, at 3.

45. U.S. COPYRIGHT OFF., *supra* note 5.

46. *Id.*

service providers."[47] Section 512 includes safe harbor provisions "shield[ing] online service providers from monetary liability and limits other forms of liability for copyright infringement . . . in exchange for cooperating with copyright owners to expeditiously remove infringing content if the online service providers meet certain conditions."[48] Section 512 remains the most heavily debated area within the DMCA.[49] Arguably, the reasons for this involve understanding the requirements and regulations service providers must abide to in Section 512.[50] "It also requires online service providers to designate an agent to receive copyright owners' notices (and include the agent's contact information on their websites and register them with the Copyright Office)."[51]

B. *The Relationship Between Takedown Procedures and Advertising*

Section 512 has remained the topic of heated controversy between copyright holders and online service providers since its enactment in 1998.[52] Online service providers argue Section 512 should remain in place without revision.[53] Meanwhile, copyright holders are calling for immediate action addressing their concerns regarding the general shield from liability given to online service providers.[54] The reason for this debate is directly related to Section 512's safe harbor provisions. "When it enacted [S]ection 512 in 1998, Congress designed its safe harbors to provide 'strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the online networked environment.'"[55] The safe harbor provisions were intended to protect the uncharted waters of a new form of social connectivity: platforms

47. *Id.*

48. *Id.*

49. *See* Jonathan Band, *Four Takeaways from the Senate Judiciary Section 512 Hearing*, DISRUPTIVE COMPETITION PROJECT (June 4, 2020), https://www.project-disco.org/intellectual-property/060420-four-takeaways-from-the-senate-judiciary-section-512-hearing/; *see also* Stan Adams, *It's Summer, and Copyright Reform is in the Air*, CTR. FOR DEMOCRACY & TECH. (July 20, 2020), https://cdt.org/insights/its-summer-and-copyright-reform-is-in-the-air/; Katharine Trendacosta & Corynne McSherry, *What Really Does and Doesn't Work for Fair Use in the DMCA*, ELEC. FRONTIER FOUND. (July 31, 2020), https://www.eff.org/deeplinks/2020/07/what-really-does-and-doesnt-work-fair-use-dmca.

50. *See generally* U.S. COPYRIGHT OFF., *supra* note 39, at 8-13; 17 U.S.C. § 512.

51. U.S. COPYRIGHT OFF., *supra* note 5.

52. *See* Band, *supra* note 49.

53. *See* Trevor W. Barrett, *How Do the Wealth Gap and YouTube Polices Benefit Powerful Media Entities?*, AM. BAR ASS'N (July 9, 2020), https://www.americanbar.org/groups/litigation/committees/intellectual-property/practice/2020/schneider-v-youtube/.

54. *See generally* Joel D. Matteson, *Unfair Misuse: How Section 512 of the DMCA Allows Abuse of the Copyright Fair Use Doctrine and How to Fix It*, 35 SANTA CLARA HIGH TECH. L.J. 1 (2018); Lauren B. Patten, *From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course*, 10 VAND. J. ENT. & TECH. L. 179 (2007).

55. *Copyright Office Releases Report on Section 512*, U.S. COPYRIGHT OFF.: NEWSNET (May 21, 2020), https://www.copyright.gov/newsnet/2020/824.html.

provided by online service providers.[56] Before the DMCA existed, copyright infringement was taking place[57] in a more physical or concrete setting.[58] The original intent of the DMCA was to forge a path of guidance for the internet and everyone who would explore its various realms.[59]

Under Section 512, some online service providers qualify for limitations on liability from copyright infringement that takes place on their platforms.[60] Threshold requirements for protection are in place to protect against illegitimate or frivolous claims for avoiding liability.[61] These requirements are included under § 512(i): Conditions for Eligibility.[62] An online service provider must "(1) [a]dopt and [r]easonably [i]mplement a [q]ualifying [r]epeat [i]nfringer [p]olicy" and "(2) [a]ccommodate and not [i]nterfere with [s]tandard [t]echnical [m]easures."[63] There is "[n]o [a]ffirmative [d]uty to [m]onitor" under Section 512.[64]

56. *See* Steven Vaughan-Nichols, *Before the Web: Online Services of Yesteryear*, ZDNET, (Dec. 4, 2015), https://www.zdnet.com/article/before-the-web-online-services/.

57. "On May 31, 1790, the first copyright law is enacted under the new United States Constitution. Modeled off Britain's Statute of Anne, the new law is relatively limited in scope, protecting books, maps, and charts for only fourteen years with a renewal period of another fourteen years. There was no Library of Congress or Copyright Office at the time, so works had to be registered in the U.S. District Court where the author or proprietor lived." *See generally Highlight: Congress Passes First Copyright Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html (last visited Jan. 24, 2022).

58. "The Copyright Act of 1909 . . . was signed into law by President Theodore Roosevelt and went into effect on March 4, 1909. The 1909 act granted protection to works published with a valid copyright notice affixed on copies. Accordingly, unpublished works were protected by state copyright law, but published works without proper notice fell into the public domain." *See generally Highlight: Congress Passes First Comprehensive Copyright Law of the Twentieth Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html (last visited Jan. 24, 2022). This law was one of the first of its kind intended to protect original creations such as commercial art, motion pictures, music, and prints and labels. *See generally id.*; *Copyright Timeline: A History of Copyright in the United States*, ASS'N RSCH. LIBR., https://www.arl.org/copyright-timeline/ (last visited Jan. 13, 2022); Janet Fries & Jennifer T. Criss, *Debunking Copyright Myths*, AM. BAR ASS'N (Aug. 5, 2019), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/july-august/debunking-copyright-myths/.

59. *See* Kim Zetter, *Hacker Lexicon: What Is the Digital Millennium Copyright Act?*, WIRED, (June 6, 2016, 7:00 AM), https://www.wired.com/2016/06/hacker-lexicon-digital-millennium-copyright-act/.

60. *See Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., https://www.copyright.gov/512/ (last visited Nov. 18, 2021).

61. *See* 17 U.S.C. § 512.

62. *See* 17 U.S.C. § 512(i).

63. *See id.*; *see also* U.S. COPYRIGHT OFF., *supra* note 60.

64. *See* 17 U.S.C. § 512(m).

The Act identifies four types of online service providers: transitory digital network communications (§ 512(a) "mere conduit"[65]); system caching[66] (§ 512(b)); information residing on systems or networks at direction of users (§ 512(c) "hosting"[67]); and information location tools (§ 512(d) "linking"[68]). Only three of the four types of online service providers "must comply with the requirements of the notice-and-takedown system to qualify for the safe harbors."[69] "The notice-and-takedown system allows rightsholders to send a notification to the online service provider regarding infringing material that appears on the service provider's system."[70] A notice must contain the following information:

> (i) the signature of the copyright owner or an authorized agent; (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple works are on a single site, a representative list of such works; (iii) identification of the infringing material or activity (or the reference or link to such material) and information reasonably sufficient to permit the OSP to locate the material (or the reference or link); (iv) contact information for the copyright owner or authorized agent; (v) a statement that the person sending the notice has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notice is accurate, and under penalty of perjury, that the person sending the notice is authorized to act on behalf of the copyright owner.[71]

The key question is how does this work in practice? "Once the online service provider has received a compliant notice, it must act expeditiously to remove or disable access to the infringing material. The service provider must then promptly notify the user that originally uploaded the material that it has been removed."[72] This means that platforms such as YouTube, Instagram, TikTok, Twitter, and Facebook (Meta) need to have round-the-clock resources to make sure they are not violating the "expeditious" requirement under the DMCA's takedown

65. The "mere conduit" category involves online service providers "serving as a conduit for the automatic online transmission of material as directed by third parties." U.S. COPYRIGHT OFF. SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 23 (2020); *see also* 17 U.S.C.A. § 512(a).

66. System caching involves situations in which online service providers "temporarily stor[e] material that is being transmitted automatically over the internet from one third party to another." U.S. COPYRIGHT OFF. SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 23 (2020); *see* 17 U.S.C. § 512(b).

67. Online service providers "host" when their platforms "stor[e] material at the direction of a user on an OSP's system or network." U.S. COPYRIGHT OFF. SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 23 (2020); *see* 17 U.S.C.A. § 512(c).

68. Linking occurs when online service providers "refe[r] or lin[k] users to online sites using information location tools, such as a search engine." U.S. COPYRIGHT OFF., *supra* note 60; *see* 17 U.S.C. § 512(d).

69. U.S. COPYRIGHT OFF., *supra* note 60.

70. *Id.*

71. *Id.*

72. *Id.*

provision. Although there is no duty to monitor[73] under Section 512, online service providers can benefit from conducting their own monitoring systems to ensure their platforms are adhering strictly to the DMCA's provisions.[74] No online service provider wants to find itself in a position that eliminates its liability protection under the safe harbor provisions. Additionally, some online service providers such as YouTube[75] and Facebook[76] have started to generate their own content on their websites. This means that these online service providers could be using infringing material for their own benefit as well.[77]

Some platforms, including YouTube,[78] have created their own software technology to target copyright infringement.[79] YouTube states on its YouTube Help site that copyright owners who meet a specific criteria,[80] can use the software system called Content ID to identify and manage their content on YouTube.[81] According to YouTube, Content ID functions by "[scanning] videos uploaded to YouTube … against a database of files that have been submitted to [them] by content owners."[82] Additionally, YouTube claims copyright holders have the ability to control what happens when "content in a video on YouTube matches a work they own."[83] When Content ID detects a match, a Content ID claim is issued.[84]

In accordance with Section 512's threshold and notice-and-takedown requirements,[85] YouTube maintains that it gives copyright holders "three different actions to take on material that matches theirs."[86] Copyright owners can choose to "(1) [b]lock a whole video from being viewed, (2) [m]onetize the video by running ads against it and sometimes sharing revenue with the uploader; or (3) [t]rack the video's viewership statistics."[87] However, there is no option for copyright holders

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73. *See* 17 U.S.C. § 512(m).

74. *See id.*

75. *See generally YouTube TV*, YOUTUBE, https://tv.youtube.com/welcome/?utm_servlet=prod&zipcode=33016 (last visited Jan. 31, 2022).

76. *See* Jeremy Laukkonen, *Facebook Watch: What It Is and How to Use It*, LIFEWIRE (Dec. 30, 2021), https://www.lifewire.com/what-is-facebook-watch-4175805.

77. *See infra* note 244.

78. *YouTube Help: How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en (last visited Nov. 18, 2021); *see also* Katharine Trendacosta, *Unfiltered: How YouTube's Content ID Discourages Fair Use and Dictates What We See Online*, EFF (Dec. 10, 2020), https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online

79. *See* Diane Bonney, *How Does YouTube Content ID Work?*, ABSOLUTE, https://absolutelabelservices.com/how-does-youtube-content-id-work/ (last visited Nov. 18, 2021).

80. *See Qualify for Content ID*, YOUTUBE, https://support.google.com/youtube/answer/1311402 (last visited Jan. 24, 2022).

81. *See* YOUTUBE, *supra* note 78.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See generally* 17 U.S.C. § 512.

86. *See* YOUTUBE, *supra* note 78.

87. *Id.*

to recover the entirety of any advertisement revenue that infringing content has generated during its existence on the platform.[88] Accordingly, the platform retains the revenue the infringing material generated while it was posted.

Two of the world's largest social media platforms, Facebook and Instagram, are owned by Meta.[89] These platforms share relatively similar copyright infringement protocols and schemes.[90] Copyright holders have three options under Instagram's copyright infringement protocol: (1) the holder can report the alleged infringement directly to Instagram using a company-provided form; (2) the holder can report the infringement to Instagram using Brand Rights Protection, a tool which enables a copyright holder to identify and report content for intellectual property violations; or (3) the holder may contact Instagram's designated agent under the procedures of the DMCA.[91] When Instagram receives a DMCA counter-notification, it is forwarded to the reporting party.[92] Additionally, if Instagram provides the counter-notification to the reporting party, and "[the reporting party does not] notify [Instagram] that they have filed a court action seeking an order to keep the content down, [Instagram] will restore or cease disabling eligible content under the DMCA."[93] There is still a considerable amount of time that passes where copyright holders do not benefit from any advertisement revenue that infringing content generates while the post remains intact and available to viewers.[94]

Facebook's copyright infringement protocol includes the same three options for copyright holders.[95] However, Facebook does employ one additional tool for protecting copyright holders which it calls "Rights Manager." "Rights Manager, Facebook's rights management technology, allows copyright owners to upload and maintain a reference library of video content they want to monitor and protect, including live video streams."[96] Nonetheless, copyright holders are left without adequate and speedy remedial measures when posts are not found to constitute infringement, if there is no entry of the copyrighted material into the reference library.[97] Although copyright holders are given the opportunity to claim

88. *Id.*

89. *See* Kyle Encina, *When Did Facebook Buy Instagram and How Much Did It Pay?*, SCREEN RANT (Dec. 1, 2020) https://screenrant.com/facebook-instagram-acquisition-buy-when-how-much-explained/#:~:text=Facebook%20announced%20and%20finalized%20the,announcement%20from%20the%20company's%20CEO; *see also* Salvador Rodriguez, *Facebook Changes Company Name to Meta*, CNBC (October 28, 2021, 8:56 AM), https://www.cnbc.com/2021/10/28/facebook-changes-company-name-to-meta.html.

90. *Compare* Copyright, FACEBOOK, https://www.facebook.com/help/1020633957973118 (last visited Jan. 6, 2022), *with Copyright*, INSTAGRAM, https://www.facebook.com/help/instagram/126382350847838 (last visited Jan. 6, 2022).

91. INSTAGRAM, *supra* note 90.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* FACEBOOK, *supra* note 90.

96. *Id.*

97. *See* Sarah Perez, *Facebook's New Rights Manager Tool Lets Creators Protect Their Photos, Including Those Embedded Elsewhere*, TECH CRUNCH, (Sept. 1, 2020, 10:25 AM),

advertisement revenue on infringing content, Facebook takes fifty-five percent of all advertisement revenue, including the revenue generated by infringing content.[98]

Although the software systems and policies that are currently used by social media companies were originally created to combat copyright infringement, the policies and systems are unfairly benefitting the online service providers themselves and victimizing the owners of the copyrights.[99] Critics argue the systems provide online service providers with an opportunity to stall takedowns or benefit from the infringing material on their platforms.[100] Advertisements on posts containing infringing material create an issue for copyright holders because most online service providers require copyright holders to split any advertisement revenue earned on the infringing post without the copyright holder having any say in the matter.[101]

C. *The U.S. Copyright Office's Unprecedented 2020 Report of Section 512*

1. Background

The U.S. Copyright Office released its unprecedented five-year report of Section 512 of the DMCA on May 21, 2020.[102] The Office concluded the DMCA "no longer strikes a proper balance between rights owners and rights users."[103] Notably, the Office focused on the "how the safe-harbor provision of the Digital

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https://techcrunch.com/2020/09/21/facebooks-new-rights-manager-tool-lets-creators-protect-their-photos-including-those-embedded-elsewhere/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMV7AoMvcZzzrlDlcHBHrnarE5OJalgQ5r60tyV5Lpsczeh7qlVglwHPD95KetOtL-s8fMFarbnDeJ37NwbvegtOWg0edvK6y-YW2ZF0AcgJjup0mw2Nvt5h2g-W3wpN2JFi-5nb7bJ0TaIzksiGputG9QSru5tczUgCgU7OUoSD. *See generally Rights Manager*, FACEBOOK, https://rightsmanager.fb.com/ (last visited Jan. 25, 2022).

98. *See* Josh Constine, *Facebook Lets Content Owners Claim Ad Earnings*, TECHCRUNCH (Apr. 27, 2017, 4:15 PM), https://techcrunch.com/2017/04/27/not-so-freebooting/.

99. *See* Keach Hagey & Jeff Horwitz, *Facebook Allows Stolen Content to Flourish, Its Researchers Warned*, WALL ST. J. (Nov. 9, 2021, 4:43 PM), https://www.wsj.com/articles/facebook-stolen-content-copyright-infringement-facebook-files-11636493887; *see also* Andy Day, *Instagram Might Not Care About Copyright Law and It Could Land Them in Trouble*, FSTOPPERS (Sept. 9, 2021), https://fstoppers.com/social-media/instagram-might-not-care-about-copyright-law-and-it-could-land-them-trouble-577898.

100. *See* Nathan Hale, *Movie Collection Owner Says YouTube Profits from Piracy*, LAW360 (May 4, 2021, 5:50 PM), https://www-law360-com.daytona.law.miami.edu/articles/1381249/movie-collection-owner-says-youtube-profits-from-piracy.

101. *See*, *e.g.*, *Monetization Policies*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/monetization-policies/#overview (last visited Jan. 10, 2021); *see also* Jake Plovanic, *YouTube (Still) Has A Copyright Problem*, WASH. J. L., TECH. & ARTS (Feb. 29, 2019), https://wjlta.com/2019/02/28/youtube-still-has-a-copyright-problem/; *see also* Spangler, *supra* note 25.

102. U.S. COPYRIGHT OFF. SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (2020).

103. Eriq Gardner, *Copyright Office Says Landmark Piracy Law Needs Fine-Tuning*, HOLLYWOOD REP. (May 21, 2020, 10:50 AM), https://www.hollywoodreporter.com/business/business-news/copyright-office-says-landmark-piracy-law-needs-fine-tuning-1295488/.

Millennium Copyright Act now favors tech companies over rights-holders."[104] This conclusion is a crucial step towards gaining the attention of the legislature. However, the report's conclusion did not go far enough to remedy the situation and instead opted to recommend that Congress "fine-tune" the statute. This conclusion fails to comprehensively reform the DMCA's current approach as Part IV of this Note will recommend.[105]

The report was "the first comprehensive study issued by a U.S. government agency on the operation of Section 512."[106] Its objective was to understand and analyze the effects technological advancements have on the current language of Section 512.[107] The Office was concerned with verifying that Congress' original intent was still understood in the judicial system's application to matters related to Section 512.[108] The Office noted that it did not recommend any "wholesale changes to Section 512."[109] Instead, it recommended a fine-tuning approach of this portion of the statute.[110] The focus of the Study was to understand stakeholders' perspectives regarding qualification for the Section 512 harbors (the eligible categories of online service providers, repeat infringer policies, and knowledge requirements); the notice-and-takedown process; and other Section 512 statutory provisions.[111]

2. The Report's Findings

The Office identified a series of findings in its report, calling for Congress to reevaluate its previous legislation.[112] Specifically, the Office reiterated the importance of maintaining copyright protection laws that are meaningful and effective.[113] Additionally, it confirmed that the goal of Section 512 has always been to maintain a "[balanced] mechanism for the efficient and effective removal of infringing content online."[114] This balance is only possible with cooperation between online service providers and rightsholders, as Congress intended.[115] "As a number of [the] Study participants note, the ideal approach to addressing the limitations of the current notice-and-takedown system would be the

104. *See id.*
105. *Id.*
106. *See* U.S. COPYRIGHT OFF., *supra* note 102, at 3.
107. *Id.*
108. *See id.*
109. *Id.*
110. *See id.* at 7.
111. *See id.*
112. *See* U.S. COPYRIGHT OFF., *supra* note 102, at 7.
113. *Id* at 64.
114. *Id*. at 64-65.
115. *See id.* at 66.

development of new approaches pursuant to this same type of broad-based, multi-stakeholder consensus."[116]

The Office expressed its view that, without political guidance from Congress, there can be no revisions or evolution of Section 512.[117] Notably, the Office called for Congress to reform and improve the existing notice-and-takedown system to better serve the system's purpose of providing uniform protection for all stake-holders.[118] "The choice to redefine the existing balance or establish a new balance lies within the purview of Congress."[119] Once again, the Office restated that it was not interested in reconfiguring the entire "copyright liability regime."[120] Rather, its focus remains on making recommendations for improvements to be made to Congress' enacted laws and policies.[121]

Throughout the development process of the DMCA, Congress believed it was critical to give online service providers "'greater certainty . . . concerning their legal exposure'" while providing copyright holders with "'reasonable assurance that they [would] be protected against massive piracy online."[122] The purpose of Section 512 was to create incentives for online service providers and copyright owners to join forces to monitor copyright infringement that took place in the digital realm.[123] The goal has always been to instill a system in which copyright holders inform online service providers of allegedly infringing material available on their platforms.[124] This way, copyright holders can "obtain the benefit of having the material removed expeditiously without the time or cost of resorting to litigation."[125] Ideally, copyright holders would be in control of situations where their copyrights were being exploited on the worldwide web.[126] Although

116. *Id.*

117. *Id*. at 68.

118. *See* U.S. COPYRIGHT OFF., *supra* note 102, at 68.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (citing H.R. REP. NO. 105-551, pt. 2, at 49-50 (1998); S. REP. NO. 105-190, at 8 (1998)).

123. *See id.* at 66.

124. *See id.*

125. U.S. COPYRIGHT OFF., *supra* note 102, at 72.

126. "The provisions of § 512(c)(1) allow courts to distinguish between those services that are materially participating in copyright violations with knowledge of their activities from those entities that can be used for infringement along with non-infringing activities. A service may avoid material participation if entity 'responds expeditiously to remove, or disable access to' the material that is claimed to be infringing. The examples of this distinction may be more self-evident than the tests suggest. . . . While some of the users [of these online platforms] are undoubtedly uploading content that infringes exclusive rights of copyright owners, these services do not seek out these customers, provide preferential tools for infringement, or promote infringing activities in their materials. . . . [I]n separating these provisions, the courts tend to look at § 512(c)(1)(A)(ii), which imposes a duty when the content host becomes 'aware of facts or circumstances from which infringing activity is apparent.' "). Jon. M. Garon, *Tidying Up the Internet: Takedown of Unauthorized Content Under Copyright, Trademark, and Defamation*, 41 CAP. UNIV. L. REV. 513, 519 (2013); *see* 17 U.S.C. § 512.

incentives for copyright holders[127] and online service providers[128] to cooperate with each other exist, both parties remain divided on the question of "how effectively [S]ection 512 balances their respective interests in practice."[129] Notably, the heavy burden of monitoring for instances of online copyright infringement and informing online service providers of these instances has always been placed on rightsholders.[130]

a. Section 512 Safe Harbor Qualifications

To avoid liability, an online service provider must meet the eligibility requirements[131] of the safe harbor provisions of Section 512 of the DMCA.[132] As the law currently states, online service providers receive protection from liability in certain situations.[133] The DMCA currently provides that "safe harbors greatly limit service providers' liability based on the specific functions they could perform: (1) transitory digital network communications, (2) system caching, (3) storage of information on systems or networks at direction of users, and (4) information location tools."[134] However, in its report the Office discussed its concerns regarding courts' interpretation of what is "covered" under these safe harbors.[135] Congress probably could not have possibly envisioned that this many new technologies would have

127. "As the legislative history explains, 'copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights,' but they have incentive to do so because 'neither actual knowledge nor awareness of a red flag may be imputed to a service provider based on information from a copyright owner or its agent that does not comply with the notification provisions of subsection [512](c)(3).' " U.S. COPYRIGHT OFF., *supra* note 102, at 72.

128. "Similarly, OSPs [online service providers] have the incentive to act expeditiously to remove or disable access to the material upon receiving a notice from the copyright owner in order to qualify for section 512's limitation on liability. While an OSP is free to refuse to 'take down' the material or site, even after receiving a notification of claimed infringement from the copyright owner, it would then forfeit the benefit of the safe harbor if found liable for infringement." *Id.* at 72-77.

129. *Id.* at 73.

130. *See id*. at 79-80.

131. *See generally Safe Harbors for Online Service Providers*, JUSTIA (Oct. 2023), https://www.justia.com/intellectual-property/copyright/copyright-safe-harbor/.

132. "The safe harbors shield qualifying online service providers from monetary liability for copyright infringement based on the actions of their users, in exchange for cooperating with copyright owners to expeditiously remove infringing content and meeting certain conditions." *See* CONG. RSCH. SERV., *supra* note 38; *see also* U.S. COPYRIGHT OFF., *supra* note 60.

133. Darrow & Ferrera, *supra* note 19, at 1 ("The subsection of the DMCA that most directly applies to social networking sites is § 512(c), which creates a safe harbor from liability for service providers for 'information residing on a service provider's systems or networks at the direction of users,' provided certain conditions are met.").

134. CONG. RSCH. SERV., SAFE HARBOR FOR ONLINE RESEARCH PROVIDERS UNDER SECTION 512(C) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT, R43436 (2014).

135. "Over the past twenty years, the courts have broadly applied the four categories of safe harbors under section 512, covering OSPs engaged in a wide range of activities, such as providing a marketplace for the sale of hard goods, modification by the OSP of user-uploaded content, and financial services offered by payment processers." *See* U.S. COPYRIGHT OFF., *supra* note 102, at 86.

ever existed when the DMCA's safe harbor provisions were enacted.[136] Over time and as the digital realm has rapidly evolved, courts have used their discretion to identify whether an opposed activity is sufficiently related to one of the "core activities"[137] in order to warrant protection.[138]

The Office conducted public roundtables during the Study to ask for the public's opinion regarding courts' interpretation of the four safe harbor categories.[139] Generally, the stakeholders debated whether courts have interpreted the four safe harbor provisions beyond Congressional intent.[140] "With respect to application of the [S]ection 512(a) [Transitory Digital Network Communications] safe harbor, some rightsholders' comments reflected a feeling that courts have interpreted it over broadly, though others assert that the statutory definition was too broad in the first place."[141] In identifying the eligible channels for 512(a) safe harbor, Congress reshaped telecommunications law to better fit the relevant internet sector that the DMCA was designed to govern.[142] The Office noted that Congress intended for this safe harbor provision to "protect backend, internet infrastructure services like 'providing connectivity for a world wide web site.'"[143] Online service providers were not meant to incur liability when infringing material "incidentally traveled" through their channels.[144] The Report cited *In Re Aimster Copyright Litigation* to pose a very specific policy question: is it "a good policy outcome to have liability or safe harbor protections for a file-sharing service turn on [when] users pull from a central server managed by the service

136. "As new online services and technologies have developed, courts have been asked to determine whether such new services and technologies meet the threshold requirements for section 512's safe harbors. At times, activities that lie outside the four corners of the text have been found to be sufficiently 'related' or ancillary to one or more of the core section 512 activities to enjoy the protections of the safe harbors." *Id.*

137. *Id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *Id at 86*; *see also* CONG. RSCH SERV., *supra* note 134, at 5-6 ("[w]hen a service provider acts as a data conduit at the request of a third party by 'transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider,' it will be shielded from liability for copyright infringement. This safe harbor also protects the service provider for any intermediate and transient storage of the material in the course of conveying the digital information. However, qualification for this safe harbor is subject to several conditions, including the following: [(1)] Data transmission occurs through an automated technical process without selection of the material by the service provider. [(2)] The service provider does not determine the recipients of the material. [(3)] Intermediate or transient copies stored on the provider's system or network must not be accessible to anyone other than the designated recipients, and such copies must not be retained on the system longer than is reasonably necessary. [(4)] The provider must not have modified the content of the transmitted material.").

142. *See* U.S. COPYRIGHT OFF., *supra* note 102, at 91.

143. *Id.*

144. *See id.*

provider or, as in *Aimster*, pull directly from other users with the service provider just providing the connections?"[145]

According to the Office, Section 512(b) and 512(d) safe harbors do not cause as much discord among stakeholders as the other safe harbor provisions do.[146] The report highlighted that in interpreting section 512(b), some courts have "'ignored…critical limitations' in the statute by holding that 'intermediate' or 'temporary' can mean 20 days, [in reference to the statute's temporal requirement for storage of the infringing material on a platform]."[147] Interpretations of the temporal requirement have raised concerns because the statute does not specify what "intermediate or temporary" means.[148]

The safe harbor provided by Section 512(c) remains the largest source of debate among online service providers, copyright holders, and users.[149] The debate stems from whether courts have properly interpreted Section 512(c)'s scope to incorporate and protect "services that go beyond serving up content 'at the direction of a user.'"[150] Courts have interpreted Section 512(c) to protect "video-hosting sites, . . . online storage lockers, . . . and e-commerce sites."[151]

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145. *Id.*; The Office reiterated that "any re-evaluation of the contours of covered section 512(a) activity, though, will need to be kept somewhat broad so as to future-proof the statute for tomorrow's new technologies." *Id.*

146. *Id.* at 92.

147. "Caching helps to reduce the service provider's network congestion and increase download speeds for subsequent requests for the same data. Immunity for service providers that utilize system caching is provided on the condition that the ISP complies with the following: [(1)] The content of cached material that is transmitted to subsequent users is not modified by the service provider. [(2)] The provider complies with industry standard rules regarding the refreshing, reloading, or other updating of the cached material. [(3)] The provider does not interfere with the ability of technology that returns 'hit' count information that would otherwise have been collected had the website not been cached to the person who posted the material. [(4)] The provider must impose the same conditions that the original poster of the material required for access, such as passwords or payment of a fee. [(5)] The provider must remove or block access to any material that is posted without the copyright owner's authorization, upon being notified that such material has been previously removed from the originating site, or that the copyright owner has obtained a court order for the material to be removed from the originating site or to have access to the material be disabled." *Id.* at 87. *See also* CONG. RSCH. SERV., *supra* note 134, at 6 (quoting 17 U.S.C. § 512(b)(2)(A)-(E)).

148. "[I]n *Field v. Google, Inc.* [12 F. Supp. 2d 1106, 1124 (D. Nev. 2006)], the court deemed storage of 14 to 20 days as 'temporary,' and thus covered by section 512(b). The court also ruled that a copyright owner directed their content to another person (the search engine) when the copyright owner posted content online without using the robots.txt script, which tells search engines not to crawl the content." U.S. COPYRIGHT OFF., *supra* note 102, at 92.

149. *See* CONG. RSCH. SERV, *supra* note 134, at 7 ("[Section 512(c)] protects against copyright infringement claims due to storage of infringing material at the direction of a user on ISP systems or networks. Such storage includes 'providing server space for a user's website, for a chat room, or other forum in which material may be posted at the direction of users.' ").

150. U.S. COPYRIGHT OFF., *supra* note 102, at 87 (quoting 17 U.S.C. § 512(c)(1)).

151. "Courts have held that section 512(c) to extend liability to video-hosting sites that make copies of videos in different encoding schemes (transcoding), deliver videos to a user's browser cache at the user's request (playback), use algorithms to identify and display related videos, and syndicate content to a third party. [O]nline storage lockers … are used to display or disseminate

Specifically, courts have found that this protection is extended because these activities are sufficiently related to storage of user-uploaded content.[152] In its report, the Office discussed the landmark decision in *Viacom International, Inc. v. YouTube, Inc.*[153] In response to Viacom's allegations that YouTube allowed users to upload videos containing copyrighted material, YouTube argued it was entitled to the safe harbor for its software functions of "transcoding, playback, and related videos."[154] According to YouTube, these functions were sufficiently related to the storage component of the safe harbor.[155] Ultimately, the district court and Second Circuit agreed.[156] Their focus was on the "'automated' nature of YouTube's processes in determining whether to apply the safe harbors, rather than focusing on whether the particular processes themselves fell within one of the enumerated safe harbors."[157]

The result is the broadening of protections the safe harbor offers to online service providers. The Office expressed its concern for "such a broad interpretation of the activities covered by the [S]ection 512(c) safe harbors," especially since this type of coverage could extend beyond Congressional intent.[158] "The Office is unconvinced that Congress, in 1998, intended to protect any additional services *related* to the storage of content, beyond the act of storage or providing access to the content."[159]

Notably, it is unclear what courts meant by "by reason of the storage."[160] The Office posed that Congress could have intended " 'by reason of' to refer to the various exclusive rights that can be infringed through the act of content hosting and providing access."[161] Additionally, the Office recommended that Congress provide some clarifications to the judicial system so that no assumptions are made as to what type of activities are protected under the safe harbor.[162] For example, the Office discussed that even though it may be reasonable to extend protection in situations involving activities related to access to content, it does not necessarily mean that "services that promote consumption of specific user-uploaded content are likewise insulated from liability."[163]

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copyright-protected content. [E]-commerce sites that provide a platform for users to market and sell their products." *Id.* at 88.

152. "Courts have reasoned that these services qualify for the section 512(c) safe harbor because their activities are 'related' to the activity of storing user-uploaded content." *Id.*

153. CONG. RSCH. SERV., *supra* note 134, at 10-15.

154. U.S. COPYRIGHT OFF., *supra* note 102, at 88.

155. *Id.*

156. *Id.*; *see* Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *aff'd in part, rev'd in part, and vacated by* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir 2012).

157. U.S. COPYRIGHT OFF., *supra* note 102, at 89.

158. *Id.*

159. *Id.*

160. *Id.* at 90.

161. *Id.*

162. *Id.*

163. *Id.*

b. The Notice-and-Takedown Process

Section 512's notice-and-takedown process continues to be a hotly contested portion of the DMCA.[164] The Office heard the stakeholders' concerns regarding the pros and cons of the current notice-and-takedown provisions of Section 512.[165] Specifically, the Office noted that "while participants in the Study disagree about many topics related to the notice-and-takedown system, one point of agreement has become apparent: to be effective, any changes to the current system must take into account differences within and among stakeholder classes."[166] Some stakeholders have expressed their dissatisfaction with the current notice-and-takedown process as "burdensome and ineffective" because of the sheer volume of infringement prevalent on the internet.[167] Copyright holders must invest an extraordinary amount of time and financial resources to address each instance of infringement by providing a singular takedown notice for each instance.[168]

Conversely, online service providers have expressed that rather than viewing the growing number of notices as a pause for concern, the situation should be viewed as a reflection of "free, automated tools developed by service providers and a growing market of enforcement vendors have reduced cost, increased efficacy, and thus increased demand for takedowns."[169] Online service providers argue that limiting or changing the current system would negatively affect the growth of innovations for all stakeholders.[170] Additionally, others claim any changes to the current system would "upset the balance of the 'roles, responsibilities, liabilities, and immunities of all impacted stakeholders.'"[171]

II. THE CASE LAW

A. *The Old and Established*

Arguably one of the most important cases regarding the DMCA is *Viacom Int'l, Inc. v. YouTube, Inc.*[172] in 2007, Viacom filed a lawsuit against YouTube and its parent company Google in the Southern District of New York.[173] Viacom alleged YouTube's users had participated in copyright infringement.[174] The

164. U.S. COPYRIGHT OFF., *supra* note 102, at 73.

165. *Id.* at 64.

166. *Id.* at 71.

167. *Id.* at 137.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* Viacom Int'l, Inc. v. YouTube, Inc. 676 F.3d 19 (2d Cir. 2012).

173. Complaint at 1, Viacom Int'l Inc. v. YouTube Inc., 253 F.R.D. 256 (S.D.N.Y. 2008) (No. 07 Civ. 2103).

174. *Id.* at 2.

complaint stated that "user generated" video content posted on YouTube contained copyrighted works belonging to Viacom.[175] Some examples included: "SpongeBob Square Pants," "The Daily Show with Jon Stewart," "The Colbert Report," "South Park," "Ren & Stimpy," "MTV Unplugged," "An Inconvenient Truth," and "Mean Girls."[176] Viacom sought $1 billion dollars in damages.[177] This case was driven by Viacom's dissatisfaction with the DMCA's safe harbor provisions.[178] Viacom had sent YouTube over 100,000 takedown notices, claiming the allegedly infringing video clips represented about 1.20 billion video streams.[179] In March 2010, the defendants filed a motion for summary judgment, arguing the safe harbor provisions were fulfilling their purpose.[180] The court sided with the defendants and granted summary judgment. Specifically, the court found:

> Although by a different technique, the DMCA applies the same principle, and its establishment of a safe harbor is clear and practical: if a service provider knows (from notice from the owner, or a "red flag") of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement. General knowledge that infringement is "ubiquitous" does not impose a duty on the service provider to monitor or search its service for infringements.[181]

Viacom appealed and was met with approval by the appellate court who vacated the defendant's motion for summary judgment.[182] Notably, the appellate court held that "a reasonable jury could conclude that YouTube had knowledge or awareness under § 512(c)(1)(A) … and remanded the cause [to] determine whether YouTube had knowledge or awareness of any specific instances of infringement."[183] On remand, the lower court found that Viacom had not provided sufficient evidence to prove that YouTube was "willfully blind."[184] The court noted that the examples Viacom provided "give at most information that infringements were occurring with particular works, and occasional indications of promising areas to locate and remove them."[185]

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175. *Id.*

176. *Id.*

177. *See Viacom v. YouTube*, EFF, https://www.eff.org/cases/viacom-v-youtube (last visited Jan. 7, 2022).

178. *See Safe Harbors for Online Service Providers*, JUSTIA (Oct. 2021), https://www.justia.com/intellectual-property/copyright/copyright-safe-harbor/; *see also* CONG. RSCH. SERV., *supra* note 39.

179. *See Viacom Demands YouTube Remove Videos*, FORBES (Feb. 2, 2007, 7:25 PM), https://www.forbes.com/2007/02/02/viacom-youtube-google-markets-equity-cx_lh_0202markets20.html?sh=9c9150f61c57.

180. *See* Def.'s Mem. Supp. Summ. J., Viacom Int'l Inc. v. Youtube, Inc., Nos. 07-CV-2103 (LLS), 07-CV-3582 (LLS), 2010 (S.D.N.Y. Mar. 18, 2010), 2010 WL 1004562.

181. *Id.*

182. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 41 (2012).

183. *Id.*

184. Viacom Int'l, Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 116-17 (S.D.N.Y. 2013).

185. *Id.* at 116.

Additionally, the court rejected the notion that YouTube encouraged its users to engage in copyright infringement on its platform.[186] The court stated there was no evidence that YouTube "induced its users to submit infringing videos, provided users with detailed instructions about what content to upload or edited their content, prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users."[187] The parties opted to avoid litigation and agreed to an undisclosed settlement agreement in March 2014.[188] The court's decision left copyright holders defeated, while online service providers celebrated a "victory."[189]

B. *Out with the Old, In with the New*

The DMCA has continued to endure intense scrutiny for its shortcomings and inadequacies.[190] Copyright holders are demanding a response from Congress, which seems to be listening with open ears.[191] Specifically, stakeholders want the DMCA's takedown[192] and safe harbor provisions to better serve their intended purposes. The Section 512 Report confirms that copyright holders, online service providers, and internet users are divided on their opinions of the law's efficiency and protective effect.[193]

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186. *Id.* at 121.

187. *Id.*

188. *See* Leslie Kaufman, *Viacom and YouTube Settle Suit Over Copyright Violations*, N.Y. TIMES, (Mar. 19, 2014), https://www.nytimes.com/2014/03/19/business/media/viacom-and-youtube-settle-lawsuit-over-copyright.html.

189. In interpreting the DMCA's 'safe harbor' provision, the court continued the trend of denying an online service provider any duty in the battle against copyright infringement in the battle against copyright infringement on the Internet beyond a response to a takedown notice properly in the battle against copyright infringement on the Internet beyond a response to a takedown notice properly issued by the rights holder Steven Ward Gaches, *Balancing Interests: The DMCA Debacle in Viacom v. YouTube*, 19 U. BALT. INTELL. PROP. L.J. 65 (2010).

190. *See generally* Roger Montti, *Senate Explores Changing DMCA*, SEARCH ENGINE J. (Dec. 4, 2020), https://www.searchenginejournal.com/changes-to-dmca/389625/.

191. *See* David Hayes & Diana Lock, *Sweeping Changes Proposed to the DMCA's Notice-and-Takedown System*, JD SUPRA (June 1, 2021), https://www.jdsupra.com/legalnews/sweeping-changes-proposed-to-the-dmca-s-2305255/; *see also* Jem Aswad, *Senator Thom Tillis Seeks Suggestions for Reform of Digital Millennium Copyright Act*, VARIETY (November 11, 2020, 12:03), https://variety.com/2020/music/news/senator-thom-tillis-dmca-digital-millenium-copyright-act-letter-1234829353/.

192. "Copyright owners are unhappy with the amount of expense and effort the system requires for such paltry results. Online services are unhappy with the burden of having to process and respond to all of those notices. Users are unhappy with inconsistent enforcement and occasional, inevitable mistakes. The problem is that notice-and-takedown has been pressed into service in a role for which it was never intended." *See* Bruce Boyden, *The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem*, GEO. MASON SCH. L. CTR. FOR PROT. INTELL. PROP. (Dec. 2013), https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf.

193. "While this divided opinion by itself is not conclusive, the fact that one of the two principal groups whose interests Congress sought to balance is virtually uniform in its dissatisfaction with the

> [S]maller creators and OSPs have voiced in Study comments and roundtable participation increasing frustration not only with the notice-and-takedown framework not meeting their needs to protect their works or to serve their customers but also the absence of any satisfactory opportunities to shape policies and practices that fuel the process.[194]

Many copyright holders, both small and large, have decided to fight back to hold online service providers accountable for their abuse of the current copyright infringement protocols in place.[195]

Most recently, a Grammy Award-winning composer argued she was not afforded the same copyright protections as major record labels or larger media companies since she was a smaller "ordinary creator."[196] In July 2020, Maria Schneider[197] filed a putative class action in U.S. District Court for the Northern District of California.[198] The complaint fiercely stated its distrust of YouTube's efforts to protect against copyright piracy on its platform. Specifically, Schneider criticized YouTube claiming that it had "facilitated and induced [a] hotbed of copyright infringement through its development and implementation of a copyright enforcement system that protects only the most powerful copyright owners such as major studios and record labels."[199] Additionally the complaint alleged that YouTube deliberately employs inconsequential enforcement tools to "maximize YouTube's . . . focused but reckless drive for user volume and advertising revenue."[200]

According to the Schneider, YouTube's Content ID system unjustly favors companies who have the requisite means and resources to produce enough takedown notices to address the sheer volume of copyright infringement on internet platforms.[201] The complaint alleged that "smaller rights holder[s]" are denied access to Content ID and must resort to "manual means of trying to police and manage their copyrights such as scanning the entirety of YouTube postings, searching for keywords, titles, and other potential identifiers."[202] The

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current system suggests that at least some of the statute's objectives are not being met." *See* U.S. COPYRIGHT OFF., *supra* note 102, at 83.

194. *Id.*

195. *E.g.*, Complaint, Schneider v. YouTube, LLC, No. 20-cv-04423-JD, 2022 U.S. Dist. LEXIS 136221 (N.D. Cal. Aug. 1, 2022).

196. *See id.* at 2.

197. "Maria Schneider . . . [is an] American composer and conductor who was instrumental in revitalizing the popularity of big band music in the 21st century by enlivening modern classical arrangements with unique melodies written to the strengths of the musicians within her ensemble—works that she often referred to as jazz chamber music." Barbara A. Schreiber, *Maria Schneider*, BRITANNICA (Dec. 5, 2023), https://www.britannica.com/biography/Maria-Schneider-American-musician.

198. *See* Complaint, Schneider v. YouTube, LLC, *supra* note 195, at 1.

199. *Id.* at 2.

200. *Id.*

201. *See id.* at 2-3.

202. *Id.* at 4.

complaining parties included a comparison of what disparities existed for different types of copyright holders:

> Content ID: (1) Screening is performed at the moment of upload, before a video is published on YouTube preventing public availability through YouTube of the infringing material; (2) Screening is performed automatically using the digital fingerprint system provided by YouTube that automatically compares the actual content of each uploaded video with the entire catalog of Content ID-protected works; and (3) Content ID automatically imposes the rights holder's enforcement option to block the infringing video from publication on the platform, to monetize the infringing video through advertising revenue, or monitor download statistics of the infringing video.
>
> Ordinary Rights Enforcers: (1) Screening is performed only after a video is uploaded, published on YouTube and the infringing material is available to the general public; (2) Screening (if any) must be performed through keyword searches in an attempt to identify infringing works via titles, authors, and keywords attached to the video by the uploader; and (3) Once the rights holder identifies infringing videos, the rights holder must file a takedown notice with YouTube for each offending video, specifying the URL location of the offending work, and providing evidence of the holder's right to enforce the copyright. After a delay of days or weeks during which the infringing material remains publicly available and the harm caused by the infringement continues, YouTube may suspend or remove the video.[203]

Without a solution to this problem, copyright holders like Schneider are left without any proper course of action to efficiently assure that their work is being protected on online platforms.[204] Notably, "[i]f a rights holder does not have the economic clout to qualify for Content ID, YouTube refuses to add their works to the Content ID catalog for prepublication protection even if those works have previously been infringed on YouTube hundreds or even thousands of times."[205]

The complaint alleges direct copyright infringement, inducement of copyright infringement, and contributory and vicarious copyright infringement.[206] The

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203. *Id.* at 5.

204. "The DMCA, though, does not require YouTube or any other service provider to offer as sophisticated a mechanism as Content ID to comply with the act's claim and take-down rules. YouTube provides the platform to assist and arguably mutually benefit rights holders that can be trusted to elicit the DMCA take-down procedures responsibly and legitimately. The real question is whether the alternative to the Content ID system is enough to satisfy the requirements of the DMCA summarized above. The class argues that it is not, alleging that YouTube's 'current approach to copyright infringement, including the operation of the Content ID system, fails to satisfy the requirements mandated in order to be protected under the DMCA safe harbour.'" Trevor W. Barrett, *How Do the Wealth Gap and YouTube Policies Benefit Powerful Media Entities?*, AM. BAR ASS'N (July 9, 2020), https://www.americanbar.org/groups/litigation/committees/intellectual-property/practice/2020/schneider-v-youtube/.

205. Complaint at 5, Schneider v. YouTube, LLC, No. 20-cv-04423-JD, 2022 U.S. Dist. LEXIS 136221 (N.D. Cal. Aug. 1, 2022).

206. *Id.* at 36-39; *see also* Hailey Konnath, *Composer Says YouTube Fosters 'Hotbed' of Copyright Piracy*, LAW360 (July 2, 2020, 8:41 PM), https://www.law360.com/articles/1289174/composer-says-youtube-fosters-hotbed-of-copyright-piracy.

parties seek injunctive relief "requiring YouTube to provide Content ID to all users and barring the companies from distributing the copyrighted works as well as unspecified damages, attorney fees and court costs."[207] In its answer to the complaint, YouTube identified the lawsuit as "badly misguided."[208] Specifically, YouTube argues its Content ID system must be protected and "used with care" because "[the] copyright management tools are so powerful."[209] YouTube argues that misuse of this system can lead to videos being censored although users have the right to share them on the platform.[210] Additionally, YouTube's position is that it should permit violations to avoid the potential that it accidentally censors a rightful user. YouTube does not explain why the potentially censored user could not seek to remedy the censorship or why this result must come at the expense of a legitimate copyright holder.

"Larger" copyright holders, including those copyright holders involved with the movie and television industry have also voiced their complaints against the DMCA's shortcomings and inadequacies in recent years.[211] In May 2021, Athos Overseas, Ltd. filed a complaint against YouTube, Inc. and Google LLC alleging copyright infringement.[212] Athos, the largest holder of copyrighted Mexican movies, accused the Defendants of extortion by insisting that Content ID would only be available if the Plaintiff agreed to forgo substantial revenue from the exploitation of the movies.[213] Athos' complaint challenges the continued validity of precedent that has protected YouTube's safe harbor procedures.[214] The Plaintiff details how the three-strike policy employed by YouTube and approved in past litigation is now outdated in light of the development of Content ID.[215]

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207. Konnath, *supra* note 206.

208. Answer to the Complaint at 2, Schneider v. YouTube, LLC, No. 20-cv-04423-JD, 2022 U.S. Dist. LEXIS 136221 (N.D. Cal. Aug. 1, 2022).

209. Bill Donahue, *YouTube Calls Piracy Class Action 'Badly Misguided'*, LAW360 (Sept. 22, 2020, 6:03 PM), https://www.law360.com/articles/1312738.

210. *See id.*

211. *See* Athos Overseas, Ltd. v. YouTube, Inc. et al, 2022 U.S. Dist. LEXIS 57302 (S.D. Fla. Mar. 29, 2022).

212. *See* Complaint, Athos Overseas, Ltd. v. YouTube, Inc. et al, 1:21CV21698, (S.D. Fla. May 2021).

213. *See id*. at 1-2.

214. *See* Hale*, supra* note 100; *see also* Peter Hayes, *Google, YouTube Hit with Pirating over Mexican Movies*, BLOOMBERG L. (May 4, 2021, 12:11 PM), https://news.bloomberglaw.com/ip-law/google-youtube-hit-with-pirating-suit-over-mexican-movies.

215. "YouTube appears compliant with the DMCA, as it purports to combat and successfully eliminate most of the copyright infringement taking place on its platform through its copyright, three-strike policy. However, YouTube's copyright policy only applies when a takedown notice is issued, and the repeat infringer accrues three strikes within ninety (90) days. YouTube's own Help page states that ninety-eight (98) percent of its copyright claims are resolved through its use of Content ID. Thus, it is imperative to note that any copyright infringement detected by Content ID is not recorded nor subject to YouTube's copyright, three-strike policy. As a result, most of the copyright infringement occurring on YouTube goes undetected and unpunished because most copyright holders do not have the resources to effectively detect and combat the extensive infringing of copyrighted materials on

III. PROPOSED CHANGES

The Section 512 Report included suggestions and recommendations for revising Section 512 to better serve all stakeholders.[216] Notably, the Office considered alternative stakeholder proposals that "(i) involve adoption of statutory measures that would live alongside either the existing section 512 framework or a new online-liability framework; (ii) require significant statutory changes to the section 512 framework; or (iii) involve adoption of an entirely new statutory framework for addressing online liability."[217] As for any changes to the current legislation, Congress should consider feedback from all stakeholders. Most importantly, Congress must consider what the future might look like for all stakeholders involved.[218] The key to addressing any issues regarding Section 512 is to correctly identify concerns copyright holders, online service providers, and internet users have with specific aspects of the legislation.[219] Specifically, Congress should focus on finding solutions for issues regarding takedown notices, safe harbor provisions, and the actual knowledge requirement.

A. *Updating the System*

As the current takedown system stands, copyright holders must participate in a relatively lengthy process to remove infringing content from an online service provider's platform. A takedown notice must include:

> (i) the signature of the copyright owner or an authorized agent; (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple works are on a single site, a representative list of such works; (iii) identification of the infringing material or activity (or the reference or link to such material) and information reasonably sufficient to permit the OSP to locate the material (or the reference or link); (iv) contact information for the copyright owner or authorized agent; (v) a statement that the person sending the notice has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notice is accurate, and under penalty of perjury, that the person sending the notice is authorized to act on behalf of the copyright owner.[220]

Copyright holders are responsible for sending takedown notices to online service providers for each instance of copyright infringement.[221] In theory, the system is organized and efficient because it addresses a specific instance of infringement and notifies the online service provider that the uploaded material

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YouTube's platform." Complaint at 15, Athos Overseas, Ltd. v. YouTube, Inc. et al. (S.D. Fla. May 2021) (No. 1:21CV21698).

216. *See generally* U.S. COPYRIGHT OFF., *supra* note 102, at 83.

217. *Id.* at 180.

218. *See id.*

219. *See id.*

220. U.S. COPYRIGHT OFF., *supra* note 60.

221. *See id.*

must be removed. However, this process becomes redundant and costly in requiring copyright holders to send a takedown notice for the same infringing material posted on another user's account. Further, the online service provider has no legitimate way of preventing the same user from creating similar accounts streaming the same content.[222]

To rectify this endless cycle Congress should include more specific language to the takedown notice policy. Specifically, when a post containing infringing material is identified and taken down, the online service provider should be charged with the responsibility of categorizing that material as copyright infringement indefinitely. Ideally, a copyright holder should not have to send a second takedown notice for identical infringing content on another user's profile or platform. If the current system were to stay in place, copyright holders will continue to bear the costs of acting as "protectors" of their copyrights such as the manpower necessary to find instances of copyright infringement, creating takedown notices, and working with online service providers to discuss and process these claims.

One major issue that requires Congress' attention concerns copyright surveillance software, such as Content ID[223] and Rights Manager.[224] Section 512[225] should include language requiring these systems to act as mechanisms for issuing a takedown notice for all posts containing infringing material once a video of copyright infringement is detected. An online service provider deciding to implement a system for filtering content for copyright infringement should also bear the burden of filtering for repeated instances of the same infringing content.[226] Conversely, the online service provider should be required to make the copyright surveillance software available to all copyright holders, without extorting them in the process. It would be in the best interest of online service providers to conform with the former option since it would limit its own liability and ensure conformity with the safe harbor provisions.

Another issue involves advertisement revenue stemming from user uploaded posts containing copyright infringement.[227] Most online service providers—including YouTube—require a portion of any advertisement revenue obtained from a post or upload be given back to the online service provider,[228] with content creators retaining the remaining proceeds.[229] A problem arises when these posts

222. *See generally What is a Social Media Bot?| Social Media bot definition*, CLOUD FARE, https://www.cloudflare.com/learning/bots/what-is-a-social-media-bot/ (last visited Feb. 20, 2022).

223. *See generally* YOUTUBE, *supra* note 78.

224. *See generally*, FACEBOOK, *supra* note 90.

225. *See generally* 17 U.S.C.A. § 512.

226. *E.g.,* YOUTUBE, *supra* note 78.

227. *See* McFarlane, *supra* note 14.

228. *See generally How Does YouTube Make Money*?, YOUTUBE, https://www.youtube.com/howyoutubeworks/our-commitments/sharing-revenue/#:~:text=How%20does%20YouTube%20make%20money,%2C%20channel%20memberships%2C%20and%20merchandise (last visited Jan. 31, 2022).

229. *See generally id.*

or uploads contain content that is copyrighted. Copyright holders are still required to split any advertisement revenue with online service providers on any posts that they have requested be taken down due to illegal use of their copyrighted material.[230] This is an absurd result since a post containing infringing material should not be eligible for profit. Further, and more importantly, the online service provider should not be able to monetize the infringement.

The most obvious solution to this dilemma is to include statutory language prohibiting online service providers from obtaining profit when a takedown notice is issued and correctly resolved, especially if a post is taken down because of copyright infringement that has already accrued advertisement revenue. Any revenue obtained during this "waiting period" should be returned to the copyright holder. The obvious rationale for this is that pirating material should not bear profits, since by its very nature it is an illegal action.[231]

B. *Saving the Safe Harbors*

The safe harbor provisions require an online service provider to have knowledge of copyright infringement on their platform. However, Congress never defined what constituted "knowledge." In the absence of any statutory definitions, courts attributed their own meanings for "actual knowledge"[232] or "red flag knowledge."[233] As the Office proposes, Congress should determine which standard it intended to apply for safe harbor provisions rather than leaving it up to judicial interpretation.[234] Hopefully, this would allow for uniform application of the knowledge requirement so no discrepancies exist between which online service providers could qualify for protection under the safe harbor provisions."[235] Congress should strive to strike a balance between copyright holders and online service providers by implementing an inclusive system allowing for the knowledge requirement to be met either through actual or red flag knowledge. By providing concrete language, online service providers are given fair warning

230. *See generally* YOUTUBE, *supra* note 78.

231. *See generally* 17 U.S.C.A. § 512.

232. "As Congress recognized, OSPs can obtain actual knowledge in a number of different ways: by personally using the service and uncovering infringing material or activity, having a monetizing system repeatedly identify a content match, or receiving an email that points out infringement of an unreleased work on the site, in the absence of undertaking to affirmatively monitor the service for infringements." U.S. COPYRIGHT OFF., *supra* note 102, at 113.

233. "The phrase 'red flag' does not appear in the statute, but Congress used that phrase to refer to 'facts or circumstances from which infringing activity is apparent.' Congress intended for this red flag standard to obligate OSPs to remove or disable access to infringing content for which they learned *enough* information to indicate a likelihood of infringement—but short of obtaining actual knowledge." *Id.*

234. "The Copyright Office reads the current interpretations of red flag knowledge as effectively removing the standard from the statute in some cases, while carving an exceptionally narrow path in others that almost requires a user to 'fess up' before the OSP will have a duty to act." *Id.* at 123.

235. "If Congress intends for the actual knowledge and red flag knowledge standards to be distinct, then Congress may wish to add statutory language to that effect." *Id.*

and clear guidelines for situations where the knowledge requirement has been met. It certainly should not be left to the service provider to set the rules when it is the copyright owners who own the protected content.

Issues related to the willful blindness doctrine should also be addressed in these proposed statutory revisions.[236] "The willful blindness doctrine, as it is known, asks whether an online service provider (OSP) blinded itself to possible exposure to infringing activity by its users."[237] Once more, the statute lacks specific language relating to willful blindness. Instead, courts—such as the *Viacom* court—have interpreted willful blindness to "require a conclusion that [the OSP] consciously avoided learning about specific instances of infringement."[238] Rightsholders have rightfully criticized this standard, "questioning how an OSP can be willfully blind to a specific infringement if the conscious avoidance of information shields the OSP from ever learning about the specific infringement."[239] As the Office argues,[240] this standard does not reflect prior precedent holding that willful blindness "requires something more than evidence that the OSP has 'constructive knowledge of the fact that [their] customers may use that [service] to make unauthorized copies of copyrighted material.' "[241]

The best solution to this tension is for Congress to establish a broader interpretation of the willful blindness standard.[242] By requiring specific instances of copyright infringement to be identified "rather than facts relating to infringement of specific copyrighted content"[243] copyright holders have much higher burdens to meet. It is difficult to envision what more could constitute willful blindness than to have companies like YouTube advertising on copyrighted content for its own channel and defending its actions by asserting it did not receive a takedown notice.[244] Congress must add specific language to the safe harbor provisions to ensure that courts have an adequate ability to apply a willful blindness standard.

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236. *Id.* at 124.

237. *Id.* at 124-125.

238. U.S. COPYRIGHT OFF., *supra* note 102, at 124-25.

239. *Id.* at 125.

240. "The wording of section 512 does not offer specific guidance on how to address the inherent 'tension between the doctrine of willful blindness and the DMCA's explicit repudiation of any affirmative duty on the part of service providers to monitor user content,' and courts have not yet settled upon a consistent standard." *Id.* at 126.

241. *Id.*

242. "In any event, the interpretation certain stakeholders urge—that willful blindness may be imputed to an OSP only if they have evidence of a specific incidence of infringement occurring at a specific URL—is unsupported by either the text of section 512 or the contours of the common law standard for willful blindness." *Id.* at 127.

243. *Id.* at 126.

244. *See* Complaint Exhibit A at 3, Athos Overseas, Ltd. v. YouTube, Inc. et al. (S.D. Fla. May 2021) (No. 1:21CV21698); *see also* Appendix A.

C. *Looking for Inspiration Overseas*

Another way to remedy the current system's inadequacies would be to introduce U.S. copyright infringement policies based on Europe's current copyright infringement policies.[245] As stakeholders suggested to the Office during the study discussed above, the legislature should "look to elements of international models—such as notice-and-staydown systems or broader site-blocking injunctions[246]—to address the continued problem of online infringement despite the various provisions of section 512."[247] These systems function by shifting "more of the burden for addressing online infringement from rightsholders to online service providers."[248] As many stakeholders argue, it is time for this change to be made to Section 512 and the DMCA as a whole. Specifically, the internet and its surrounding technological industries have advanced far beyond what the original drafters of the DMCA could have imagined in 1998.[249]

Online service providers possess the necessary resources to oversee such a "policing" role. Many larger online service providers have already developed monitoring software that filters content for instances of infringement. Suggesting that this is a burden is suspect when online service providers already do this voluntarily for their own content and content they do not want on their sites,[250] such as pornography.[251] It is time for online service providers to take a more comprehensive role in the investigative process which would retain fair protections under the safe harbor provisions. The only change would impact how broadly protections are extended. As one rightsholder reiterated to the Office, "it is particularly unfair for large OSPs whose 'business model is predicated on monetizing user-generated content (not vetted for copyright),' to place the burden of identifying infringements

245. *See* European Commission Press Release IP/21/1807, *supra* note 34; *See generally* Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130/92).

246. "Some rightsholders also advocated for a more extensive system of no-fault injunctions to address websites primarily dedicated to piracy. . . . Rightsholders supporting the proposal of expanded injunctive relief report that such systems have been largely effective in addressing the most egregious cases of infringement. There are different technologies and mechanisms available for blocking and filtering websites primarily dedicated to copyright infringement. Most website blocking techniques block websites either by preventing the users' computer from resolving or accessing the domain name (such as "copyright.gov"), or by denying access to the Internet Protocol address ("IP") (such as 140.147.239.123) address at which the website is located." U.S. COPYRIGHT OFF., *supra* note 102, at 182.

247. *Id.*

248. *Id.*

249. *See id.*

250. *See id.*

251. *See* Ellie Zolfagharifard, *'YouTube Backdoor' Allows Porn Pirates to Secretly Upload X-Rated Content On the Video Sharing Site*, DAILY MAIL (January 17, 2017, 7:06 PM), https://www.dailymail.co.uk/sciencetech/article-4127276/YouTube-backdoor-lets-porn-pirates-upload-adult-content.html; *see also Nudity and Sexual Content Policy*, YOUTUBE, https://support.google.com/youtube/answer/2802002?hl=en-GB (last visited Feb. 20, 2022).

on the rightsholder."[252] The argument for this being "that such "OSP[s] should be required, by law, to implement some form of digital fingerprinting to prevent infringing material from being uploaded in the first place."[253]

A proposed notice-and-staydown system requires that, "[o]nce a webhost is on notice that a work is being infringed, it should not receive continued safe harbor protection unless it takes reasonable measures to remove any copies of the same work reposted by the same user and also takes down *all* infringing copies of the work that bear the same reasonable indicia provided by the rightsholder."[254] This proposal would benefit rightsholders who currently must send individual takedown notices for multiple instances of infringement of the same content, as discussed above.[255] As the Office expressed, adoption of such a system in the U.S. does require necessary precautions in the interest of maintaining a proper balance between rightsholders and online service providers.[256]

The Office noted that it had not yet established "empirical evidence from countries that have adopted a widely-applicable staydown requirement,"[257] making it difficult to "gauge efficacy of such a system."[258] One positive example of the application of such a system can be observed by Germany's *Störerhaftung* principle.[259] "In a 2013 opinion elaborating upon the doctrine, the German Federal Supreme Court found that RapidShare had a heightened obligation to search for and remove additional copies of infringing content as a result of the *characteristics of the platform*[260] and associated marketing."[261] The technological climate has changed and online service providers have the proper tools at their

252. *See* U.S. COPYRIGHT OFF., *supra* note 102, at 184.

253. *Id.*

254. *Id.* at 186.

255. *E.g.*, Appendix A (reflecting that the copyright movie has had 606,335 views as of February 20, 2022, despite the takedown notice identified in the Athos Overseas Ltd. Complaint, *supra* note 212).

256. "As noted above, adoption of a staydown requirement, with or without an affirmative filtering requirement for all (or even most) OSPs, would represent a fundamental shift of intermediary liability policy in the United States." U.S. COPYRIGHT OFF., *supra* note 102, at 191.

257. *Id.*

258. *Id.*

259. *Id.* at 192.

260. "The court cited the following facts to support such a heightened obligation: [I]ts structure bears the risk of massive copyright infringements, to an extent which permits making the Defendant subject to significantly increased examination and action obligations in order to prevent copyright infringements; [] the Defendant had gone beyond the position of a neutral intermediary; [] at the time the infringements were committed . . . Defendant had significantly targeted its service . . . at the massive committing of copyright infringements; [] private users were encouraged to distribute the uploaded files as widespread and extensively as possible; [] it is obvious that a download frequency of more than 100,000 acts [as advertised by Defendants] cannot be reached within the framework of confidential commercial or private communications, but only with highly attractive, and therefore usually unlawful, content; [and] the Defendant furthermore significantly enhanced unlawful activities via its service through the awarding of Premium Points which was linked to the frequency of file download." *Id.* at 192.

261. *Id.*

disposal to ensure that multiple instances of infringement of the same content can be addressed at once. There is no reason for online service providers to be absolved from liability when the proper software currently exists and is in place to identify instances of infringement on these platforms. As the Office confirmed, the best course of action would be to gradually implement such a system after an "additional study [is conducted,] including [one] of the [possible] non-copyright implications [the new system] would raise."[262]

CONCLUSION

Copyright infringement on the digital level will continue to take place, no matter what precautions are taken to protect against it. However, society should not ignore the problem and allow the internet to become the black market of copyrighted material, free from punishment and beyond the law. The focus going forward should be directing governmental attention toward implementing proper strategies to mitigate harm caused by copyright infringement on digital platforms created by online service providers. The Copyright Office's conservative words-manship does not minimize the glaring inadequacies of the Act as it stands. The DMCA's original text currently does more harm than good, protecting the infringer (uploader) and the facilitator (the platform) at the expense of those it was intended to protect (the copyright holder). As the Office concluded, the Act must be reevaluated to better suit its original needs. The DMCA has facilitated online service providers' ascent into the largest, wealthiest, and most untouchable companies of the world. It is time for Congress to use its Force[263] to turn its attention on the Death Star[264] of copyright infringement if society is to protect the Galaxy[265] and its copyrighted work.

262. *Id.* at 193.

263. *See* JV Chamary, *'Star Wars: The Last Jedi' Finally Explains the Force*, FORBES (Jan. 6, 2018, 5:01 PM), https://www.forbes.com/sites/jvchamary/2018/01/06/star-wars-last-jedi-force/?sh=73cd0d977a32.

264. "The Death Star was the Empire's ultimate weapon: a moon-sized space station with the ability to destroy an entire planet." *Death Star*, STAR WARS, (last visited Feb. 20, 2022), https://www.starwars.com/databank/death-star.

265. *See* Phil Plait, *Star Wars: Was It Really a Long Time Ago in a Galaxy Far, Far Away*?, SYFY (May 4, 2017, 8:45 AM), https://www.syfy.com/syfy-wire/star-wars-was-it-really-a-long-time-ago-in-a-galaxy-far-far-away.