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DIGITAL MILLENNIUM COPYRIGHT ACT: NOTICE AND TAKEDOWN ON FAIR USE

❖ NOTE ❖

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ABSTRACT

This Note argues that the current standard for monitoring the DMCA takedown process holds copyright holders to little accountability, allowing abuse of the process and disregarding whether the material was fair use or not. This Note navigates common abuses of the takedown process, from broad automatic algorithms, to issuing DMCA takedown notices to intentionally censor the targeted material. Although the current subjective standard for monitoring the legitimacy of suspect infringing materials requires copyright holders to consider fair use, it outlines no actual process or standard to do so, and creates no incentive for proper monitoring or accuracy. This Note argues that an objective standard would be more appropriate in curbing abuse instead of a subjective standard that incentivizes negligent monitoring.

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I. INTRODUCTION

The battle of the "Dancing Baby" lawsuit has been a long and arduous suit since it was first filed in 2007.[1] Its significance grows as fair use of copyrighted works on the internet becomes ever more prevalent in the daily lives of the public through discussions, education, criticism, and entertainment, especially because of its easily accessible outlet.[2] Parallel to the increasing engagement with fair use works by the public, problems arise when copyright holders follow an increasing pattern in abusing the extrajudicial takedown procedures granted by the Digital Millennium Copyright Act (DMCA).[3]

The DMCA protects "service providers"[4] performing certain functions[5] from copyright infringement liability through the safe harbor provision of Section 512. Focusing on a subset of service providers (those performing functions defined in subsection (c) who host materials[6] and subsection (d) who function as search engines), safe harbor protection is lost if the service provider satisfies the state of mind threshold of knowledge. Actual knowledge is when the provider actually knows that the material or an activity using the

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[1] Lenz v. Universal Music Corp., 801 F.3d 1126 (2015). This case earned the nickname "Dancing Baby." *Important Win for Fair Use in 'Dancing Baby' Lawsuit*, ELECTRONIC FRONTIER FOUND. (Sept. 14, 2015), https://www.eff.org/press/releases/important-win-fair-use-dancing-baby-lawsuit.

[2] Whether a work is fair use is determined on a case by case basis, according to: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2012). The statute provides examples that, materials "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." *Id.*

[3] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[4] Defined in Section 512(k)(1) as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received," for purposes of 512(a). 17 U.S.C. § 512 (2012). For functions (*see infra* note 5) other than subsection (a), it is defined as "a provider of online services or network access, or the operator of facilities therefor." *Id.*

[5] The safe harbor provision only protects service providers performing functions covered in Section 512(a) to (d): (a) transitory digital network communications (b) system caching (c) information residing on systems or networks at direction of users (in other words, hosting user-uploaded materials) (d) information location tools. *Id.*

[6] Such as YouTube, a website that hosts user-generated content. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 38 (2d Cir. 2012).

material on the system or network is infringing.[7] Safe harbor is also lost if the provider has "red flag" knowledge – where it is aware of facts or circumstances from which infringing activity is apparent; or upon obtaining such knowledge or awareness, does not act expeditiously to remove, or disable access to, the material.[8] The service provider also loses safe harbor protection if it has the right and ability to control the infringing activity and receives financial benefit.[9] In acting expeditiously to remove or disable the infringing material, the provider must follow the "notice and takedown" process, and notify the content uploader.[10] If the uploader makes a counterclaim to reinstate the content on the basis that they have a good faith belief it was erroneously removed, the service provider must notify the copyright holder and restore the content in no less than ten and no more than fourteen days, unless the copyright holder gives notice of a suit being filed.[11]

The DMCA places the burden on the copyright holder to seek out infringing material and notify service providers to take them down. Among other requirements to be an effective takedown notification, the claimant must also have 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."[12] To protect the integrity of the process, abuse by "[a]ny person who knowingly materially misrepresents under this section-- (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification," will subject them to liability.[13] Part II of this Note will first discuss a common abuse of the takedown process in employing reckless algorithms, and part III will discuss using DMCA takedowns as a method of intentional censorship. Part IV will discuss the Ninth Circuit decision in *Lenz* and how the decision does little to remedy the problems of part II and III. Finally, this Note will conclude by arguing that copyright holders should be held to a higher standard in monitoring the legitimacy of suspect infringing materials.

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[7] 17 U.S. C. § 512 (2012).
[8] *Id.*; *Viacom*, 676 F.3d at 31.
[9] § 512.
[10] *Id.*
[11] Lenz v. Universal Music Corp., 801 F.3d 1126, 1131 (2015).
[12] 17 U.S. C. § 512 (2012).
[13] *Id.*

II. THE PROBLEM OF RECKLESS ALGORITHMS

Yet, the seemingly straightforward and simple procedures of Section 512 are betrayed by the perplexities that plague the notice and takedown process. The burden to seek out and investigate copyright infringement is on the copyright holder, and the service provider is given no choice but provide notice and take down the material, if notified by the holder.[14] However, the sheer mass of the internet as a whole, the fast speed at which information spreads, and the large volumes of infringements daily is enough to overwhelm even the largest copyright holders.

The rapid development and dependence on information technology has eliminated the human presence in infringement investigations for a more quick and efficient process of automated algorithms because the "laboriousness of identifying infringing materials and generating takedown notices sharply constrained the system's overall scale."[15] As the scale of the task grew, automated systems overtook the job of human employees searching and assessing each material by hand, "deploying automated systems that search sites for title matches, artist matches, or other indicators of unauthorized content. By design, such systems are intended to address large-scale Internet infringement by moving far beyond human capacity to search for and identify possible infringements."[16] The efficiency of these systems skyrocketed takedown notices received by service providers. In 2009, the major service provider, Google, received 4,275 notices, but in 2012, the number of notices it received increased to 441,370.[17] This statistic is compounded by the fact that in each notice to a service provider, there may contain numerous takedown requests. For example, the 441,370 notices sent to Google in 2012 contained over 54 million requests.[18] The speed at which the volume of notices has multiplied is demonstrated by Google's receipt of takedown requests between 17 and 21 million per week in early 2016.[19] With these numbers, it is no surprise that mistakes are bound to happen. False positives include when takedown notices are issued against completely legitimate uses of copyrighted work.

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[14] *Id.*
[15] JENNIFER M. URBAN, JOE KARAGANIS & BIANNA L. SCHOFIELD, U.C. BERKELEY, NOTICE AND TAKEDOWN IN EVERYDAY PRACTICE 31 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.
[16] Urban et al., *supra* note 15, at 31.
[17] Urban et al., *supra* note 15, at 32.
[18] *Id.*
[19] *Id.*

Distressingly, the amount of improper takedowns speaks less of genuine mistakes bound to happen in even the most careful process, but rather from a reckless overbroad issuing of takedown claims.[20] A recent study documenting over 108 million claims during a six-month period, nearly 30% of the approximate total of 108 million takedown claims were of questionable validity.[21] The study also noted that in 4.5 million requests, the targeted copyright content did not even match that of the supposedly infringing material.[22] The breadth of these automated systems matching targeted copyright work with that of infringing material on the web has enjoyed some notoriety, where "[o]verbroad matching algorithms lead copyright owners to send takedown notices targeting mere reporting on their works, and even to demand takedowns of links to their own websites."[23] Given the low cost and lack of consequence for frivolous claims, copyright holders can only be expected to take advantage of the process leveraged in their favor. Why would any copyright holder expend the time, money, and resources to closely monitor the legitimacy of suspect materials when there is neither incentive nor consequence to do so?

III. INTENTIONAL CENSORSHIP

More maliciously, the low cost, effective nature, and lack of consequence for illegitimate takedown claims provides an economical tool in the takedown process for businesses to silence competitors. It also provides a means to curtail poor reviews of a company's products and for politicians to subdue criticisms. Unfortunately, abusing DMCA takedowns by intentionally attacking certain material under the guise of copyright infringement is not uncommon. It is fast, effective, and costs next to nothing, in comparison to filing a lawsuit for defamation.[24]

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[20] Urban et al., *supra* note 15, at 2.
[21] *Id.*
[22] *Id.*
[23] Rebecca Tushnet, *Fair Use's Unfinished Business*, 15 CHI. KENT J. INTELL. PROP. 399, 401 (2016).
[24] Initiating a DMCA takedown is a simple and costless process on major websites. For example, Twitter offers a webpage form on which the copyright holder or an authorized representative of the copyright holder may fill out the required information to issue a notice. *Report Copyright Infringement*, TWITTER HELP CENTER, https://support.twitter.com/forms/dmca (last visited Feb. 20, 2017). For websites with no such web-form, issuing a takedown notice still incur no more than a nominal cost for postage, as it an be physically or electronically mailed to the designated agent of the service

The use of the DMCA takedown notice as a tool to remove unfavorable internet content extends beyond the United States' borders. Even foreign businesses have found the handiness of U.S. law; it is a cheap and easy tactic to force removal of criticisms of their services.[25]

The takedown process also notably creates a special advantage for parties who are politically motivated to suppress criticisms of individual web-based creators. "There are short timeframes in which speech can have influence," and in requiring a ten-day delay before a counterclaim can be effective, a takedown often has the effect of removing the material to the realm of irrelevance.[26] "A speaker's ability to engage in political speech . . . is stifled if the speaker must first commence a protracted lawsuit."[27]

The DMCA takedown procedure is thus hugely leveraged in the claimant's favor. In any instance a takedown claim is received, service providers are forced to take the approach of "guilty until proven innocent" in regards to the challenged material.[28] Few have the ability or resources to challenge copyright infringement claims, in fear that it would open them up to being dragged through lengthy and expensive litigation in court.

IV. THE NINTH CIRCUIT DECISION IN *LENZ*

The battle over the rights of internet users like Stephanie Lenz brought to light copyright holders' blatant disregard of legitimate fair use of their copyrighted works. Lenz sought to upload to YouTube a twenty-nine second video recording of her toddler son dancing to Prince's "Let's Go Crazy."[29] Universal, the copyright holder of Prince's song, at the time employed monitors to seek out infringing YouTube content and file DMCA takedown claims.[30] The employees were given a standard of evaluating whether a video may be infringing, but did not consider whether the video

provider (which is required of service providers, to be eligible for safe harbor protection). 17 U.S. C. § 512 (2012).

[25] Alex Hern, *Revealed: How Copyright Law is Being Misused to Remove Material from the Internet*, THE GUARDIAN (May 23, 2016), https://www.theguardian.com/technology/2016/may/23/copyright-law-internet-mumsnet/ (reporting that a London building firm forced the delisting of an entire thread from the Google search engine by filing a DMCA takedown claim with Google because the thread contained one post that reviewed its services poorly).

[26] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 334 (2010).

[27] *Id.*

[28] 17 U.S.C. § 512 (2012).

[29] Stephanie Lenz, *"Let's Go Crazy" #1*, YOUTUBE (Feb. 7, 2007), https://www.youtube.com/watch?v=N1KfJHFWlhQ.

[30] Lenz v. Universal Music Corp., 801 F.3d 1126, 1129 (9th Cir. 2015).

may be fair use.[31] The Ninth Circuit held that because fair use is not copyright infringement, the copyright holder must consider whether the material is fair use.[32]

However, the court's decision–which at first blush is a seemingly major step forward towards resolving the issue of improper takedown claims in its jurisdiction–does little to mend the issue. With respect to the legal question of whether Universal knowingly misrepresented the material as infringing, the rule laid down by the court's decision only requires the copyright holder to "form a subjective good faith belief that a use is not authorized."[33] To comply with the Section 512 takedown procedures, the court's decision seems to do little more than have copyright holders introduce a statement in the notice that they believe it the material is not fair use.[34] The court confirms that the consideration "need not be searching or intensive" and "does not require investigation."[35] Though the court acknowledges that mere "lip service" to the consideration of fair use is not enough, the requirement creates no more than an illusory process, which easily allows negligent or devious copyright holders to comply with the low standard.

V. CONCLUSION

Despite the major flaws of the DMCA takedown process, entities such as the Motion Picture Association of America (MPAA), an association representing six major Hollywood studios, is pushing for stronger copyright holder protection in a reform of the notice and takedown process with a "notice and stay-down" process.[36] On the copyright holder's side, a major problem is that more popular works are likely to be promptly reposted by either the same or different users after the first infringement is taken down, likened to as the "whack-a-mole" problem.[37] Proponents of the "notice and stay-down" process push for the DMCA safe harbor protection to be

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[31] *Id.*
[32] *Id.* at 1133–34.
[33] *Id.*
[34] *Id.* at 1135.
[35] *Id.*
[36] Colin Mann, *MPAA: "Takedown Must Mean Stay-down"*, ADVANCED TELEVISION (Mar. 24, 2014), http://advanced-television.com/2014/03/24/mpaa-takedown-must-mean-stay-down/.
[37] U.S. DEP'T OF COMMERCE, DEPARTMENT OF COMMERCE MULTISTAKEHOLDER FORUM ON IMPROVING THE OPERATION OF THE DMCA NOTICE AND TAKEDOWN POLICY: SECOND PUBLIC MEETING, 88 (May 8, 2014), http://www.uspto.gov/sites/default/files/ip/global/copyrights/2nd_forum_transcript.pdf.

contingent on service providers to put in place filtering systems – that after a provider receives a takedown notice, its automated filtering system should prevent the copyrighted material from being posted on its service platform again. Calling for a "both more efficient and more effective" process that "actually reduces online infringement," the MPAA seeks to have the takedown process be a permanent removal of the challenged material, with no chance of reinstatement.[38] However, the proposal that service providers, themselves, filter content neglects that it bears the same issues brought by copyright holders' broad algorithms. Already demonstrated by large service provides such as YouTube, where a large portion of uploaded content is, in fact, fair use, its automated filtering system "Content ID"[39] holds the same adverse effects of stifling independent creators, and opens users to abuse of the Content ID procedure as intentional censorship.[40]

The Ninth Circuit in *Lenz*, in response to the plaintiff's request to impose an objective standard, stated that "Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement."[41] However, a subjective evaluation standard of fair use is no standard at all because monitors can arbitrarily decide the fate of allegedly infringing material, and therefore creates no incentive for copyright holders to change their automated algorithms to consider fair use. Meanwhile, the content poster must shoulder the high burden of proving the copyright holder had actual subjective knowledge that the material was not infringing.[42] Having the playing field leveraged in favor of the copyright holder from the beginning–starting with the takedown process, to having the impossible burden of proving actual knowledge that the material was not infringing–essentially nullifies Section 512's safeguards against the misuse of takedown notice against all but the most extreme cases where evidence of actual knowledge is discoverable. The future of the DMCA

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[38] Mann, *supra* note 36.

[39] *Using Content ID*, YOUTUBE, https://support.google.com/youtube/answer/3244015?hl=en&ref_topic=4515467 (last visited Feb. 20, 2017).

[40] Channel Awesome, *Where's The Fair Use? - Nostalgia Critic*, YOUTUBE (Feb. 16, 2016), https://www.youtube.com/watch?v=zVqFAMOtwaI. Fair use content creators who focus on reviewing films have videos taken down no matter if "review" is in the title of the video, or if the video had no visual imagery of the film being critiqued; independent filmmakers who receive poor video reviews can easily silence the criticism by filing a takedown notice on the video. *Id.*

[41] Lenz v. Universal Music Corp., 801 F.3d 1126, 1134 (2015).

[42] *Id.* at 1137.

should not be what the MPAA wants, i.e. a more stringent standard that permanently brings down content with a single notice. Instead, the DMCA should hold copyright holders accountable for their overly broad algorithms and misuse of the takedown procedure by evaluating their takedown claims under a different standard, and that standard should be what copyright holders reasonably should have known.