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A Proposal to Resolving DMCA Abuse

Abuse of the Digital Millennium Copyright Act to silence free speech is a disheartening reality of the current state of internet copyright regulation. A month ago, Jim Sterling, an online video game critic, had one of his video game reviews pulled from YouTube due to a DMCA violation filed by a video game studio. The studio feared the impact of Sterling’s popularity and subscriber base, so in order to quickly take down the video to minimize viewing of the criticism, the studio resorted to filing for a DMCA takedown regardless of whether or not the video constituted as fair use (Shackford). Last October, a critic of Alison Grimes, a life-long Democrat and running candidate for Senate, posted online an embarrassing forty second video clip of her avoiding an interview question by the *Courier-Journal*’s editorial board. The video was quickly removed under claim of DMCA violation filed by Gannett Co. Inc., a massive media conglomerate that owns many Democrat-oriented publications, including the *Courier-Journal*. After a lengthy investigation process, the video was finally restored (McSherry). Last year, a Spanish law firm sent Google, Twitter, and Vimeo DMCA violations for content critical of the Ecuadorian government to silence political speech and was successful in removing content claimed as “copyright” infringement (Sutton). As a whole, these incidents showcase only a small portion of numerous takedowns used to silence free speech. Whether it is regarding commercial products, United States politicians, or even governments, any person subject to laws like the DMCA can have their voice silenced immediately, without investigation, under claims, however legitimate or not, of copyright infringement.

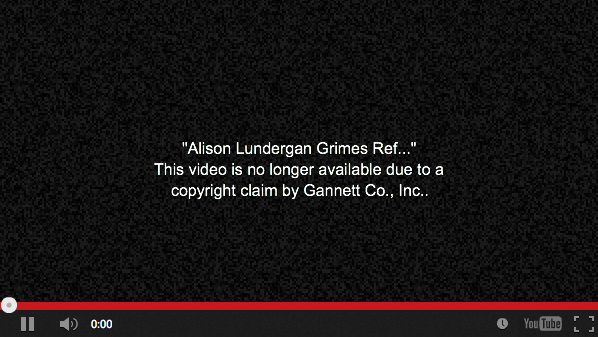


Figure 1. Youtube video takedown due to DMCA. Image by Corynne McSherry, 10 Oct 2012, 21, from EFF, 15 May 2015. <https://www.eff.org/files/2014/10/10/grimestakedown.png>

When discussing the impact of internet copyright laws such as the DMCA on free speech, the discontent from both proponents and opponents of stricter copyright regulation must be noted. On one side, opponents argue that online content that are clearly not meant to infringe, but rather intended to add criticism of commercial entities or political figures, are easily taken down through current provisions of the DMCA violation. This is clearly noted by internet and copyright reform activist Wendy Seltzer, one of the founders of the Chilling Effects Clearinghouse, a project to that tracks and analyzes DMCA takedown notices, who heavily criticizes the ability for legal complaints to be able to immediately remove content from the internet regardless of validity (186). In addition, the Electronic Frontier Foundation (EFF) and the Stanford Law School Center for Internet and Society (CIS), organizations that actively promote public rights on the internet and conduct policy analysis, have also noticed the problem and have actively work to address them. For now, however, only through a lengthy process of counter-notice and fair use evaluation can the content finally be restored. The nature of the internet, given the multitudes of users, massive distribution channels of digital content, and potential for copyright infringement as well as legitimate fair use, complicates the issue of how it is possible to address the issue of abusive takedowns.

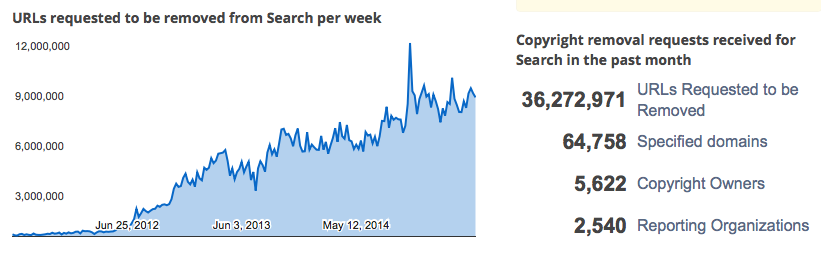
On the other hand, corporations involved in copyright-heavy industries like music and film, are ardent supporters of stricter internet copyright laws. They have historically shown their disapproval with changing the current structure of reforming copyright for addressing free speech issues (Samuelson). Copyright proponent organizations such as the Recording Industry Association of America and the Motion Picture Association of America opposed bills aimed to address issues of the DMCA related to fair use, including the Digital Media Consumers’ Rights Act and FAIR Use Act. Annually, they have argued that the copyright system brings in a trillion dollars and millions of jobs to the economy (MPAA). The recent MegaUpload takedown, which displayed the potential for copyright criminals to earn hundreds of millions of dollars by illegally sharing copyrighted material (Justice), is one of many cases used to substantiate their claims. Furthermore, corporations will also leverage the use of politicians to support their agendas at promoting increased copyright protection laws (Hartford). For instance, according to the Center for Responsive Politics, in the 2014 election cycle alone, the entertainment industry contributed over $29 million in political contributions (OpenSecrets). These numbers indicate a strong corporate will to ensure that copyright protection is upheld in legislation, and attempted legislation like SOPA and PIPA, anti-piracy oriented laws but highly controversial and opposed by the general public and major technology companies due to the ability to shut down entire legitimate websites instead of just removing potentially infringing content, are strong indicators of how serious corporations are.

Considering the complexity of the problem and the current dissatisfaction of both parties with how copyright stands, left unaddressed it will continue hindering the publication and discussion of socially valuable speech, produce costly litigation cases, and still leave corporations wanting more copyright regulations. Although no single solution may perfectly tackle all facets of the problem, there is one that bests solves the issue of DMCA abuse while not enabling greater online piracy. The long term focus is to create a government administrative agency that determines the legitimacy of the copyright claims through a set of fair use guidelines created to prevent wrongful takedown and avoid litigation costs. In the short term, because legislative creation of such an agency is slow, a collaboration by existing nonprofit organizations to collect, analyze, and distribute information on existing DMCA takedowns and provide fair use and practical guidelines to filing counter-notices will set precedents to what potential guidelines that the agency will use to determine fair use, which historically has been used to defend against copyright infringement.

The intermeshing of copyright and internet free speech can be traced back to regulations and court case rulings that responded to technological developments. The Copyright Act of 1976 addressed the outgrowth of technological advancements of the twentieth century was the. With its passing, copyright provisions that applied to past mediums such as written texts that were well established by the Copyright Act of 1909 now encompassed film, television, sounds recordings, and the radio. The Copyright Act of 1976 was especially relevant for companies who flourished during this time of experimentation with different mediums and production of artistic works and content never before attempted. The passing of the act made it possible for companies to easier litigate against potential violators of copyright material. However, the act also codified the defense of fair use and its corresponding factors in determining copyright infringement.

The context of fair use has changed over time. One of the court cases that exhibited the application of the fair use doctrine was the Supreme Court case *Sony Corp. of America v. Universal City Studios, Inc*.(1984), commonly known as the Betamax case*.* In a 5-4 ruling, the Court decided that technologies with “substantial non infringing uses” constituted as fair use, and the providers would not be subject to secondary infringement. The case helped established that cases of copying were permissible as long as it constituted as fair use. Furthermore, the case shows that interpreting the law based on principles such as fair use is often necessary given the nature of changes in technology and its uses. Nonetheless, questions regarding copyright led to the creation of the DMCA in 1998, which has been controversial due to the safe harbor provision it offers online service providers from liability of copyright infringement as long as they act “expeditiously to remove, or disable access to, the [infringing] material.” The ambiguity of the wording, combined with the lack of incentive for online service providers to first notify the ones who posted the disrupted material, gives leeway for an online service provider, such as YouTube, to immediately remove disputed material. Furthermore, notable Supreme Court cases such as *Studios, Inc. v. Grokster, Ltd.* (2003), increased the willingness of online service providers to comply swiftly with DMCA takedown notices due to liability of secondary infringement. Not to mention, despite court cases such as *Lenz v. Universal Music Corp.* (2007), which ruled that complainants must consider fair use when filing a takedown notice, abuse has not stopped and the policy of immediate takedown of contested content has remained largely unchanged despite the multitude of problems that have occurred.

Given the emphasis on fair use, the short term goal revolves around a project that collects, analyzes, and distributes information on existing DMCA takedowns and provides fair use and practical guidelines to filing counter-notices that is easily understandable. A collaboration by major organizations like the EFF, CIS, and Chilling Effects to create this project would be feasible given their expertise in the field and existence of current projects like the CIS’s Fair Use Project that gives free and comprehensive legal representation to current content makers that face unmerited copyright claims. Extending these projects to specifically address DMCA takedown and counter-notice provisions to the general public and provide them with the necessary information through easily comprehensible practical guidance and clear explanations of the DMCA, which the Chilling Effects has demonstrated success (Heins and Beckles 36). The reason why this is necessary is due to current state of misinformation. Although internet users may be aware of fair use and often times rely on it when publishing content, there often exists a vague sense of what it means and mistaken information regarding what they can use or borrow (28). The need for accurate information is important given the substantial amount of questionable cease and desist and takedown notices. In a review of over three hundred letters filed in the Chilling Effects database, twenty percent of the letters had strong claims to fair use and First Amendment defense, and another twenty-seven percent had possible defenses (29). This portion is nearly half of all letters filed, which reflects a substantial disconnection between the law and claims made. Although the sample size was only sample size of a few hundred, the study poses the question of exactly how much legitimate content is blocked daily, especially considering that tens of millions of search results that large data companies such as Google removes monthly (Figure 2). Thus, a collaborative project that addresses this is the first step. The next step is to archive and analyzing complaints that could later be used for an administrative agency to set fair use guidelines, which would be a longer term process enabled by legislation.

  
Figure 2. Graph of URL removal by Google over time. Image by Google, 16 May 2015, 21, from Google May 16 2015. [http://www.google.com/transparencyreport/removals/copyright](http://www.google.com/transparencyreport/removals/copyright/)

In the long term, legislation needs to be reformed to better incorporate fair use to enact meaningful change. The history of courts establishing precedents through cases like the Betamax trial and *Lenz v. Universal* indicate the importance of fair use in rulemaking. Nonetheless, legislation itself may not be enough. For instance, Seltzer argues that targets of notifications are presumably guilty and is punished with the loss of speech and hinders only the respondent and not the accuser. To remedy this, she states one way is to allow time for response before takedown and a series of increasing sanctions instead of immediate takedown (232). However, simply extending the time for response is ambiguous, still capable of abuse, and may be opposed by companies who favor immediate takedown instead, especially for blatantly infringing content. On the other hand, Pamela Samuelson, a Distinguished Professor of Law and Information at UC Berkeley, argues that problems with the DMCA stem from the Copyright Act of 1976 due to it being “too long, complex, incomprehensible, and unbalanced” and that “bloat” clusters the 1976 Act due to industry-specific measures and compromises (19). She notes that development of a new copyright law should address all of these problems, first starting by the creation of a legislative delegation of rule-making authority to the government office responsible for carrying out copyright-related responsibilities (23). The possibility of changing legislation exists, but any change, especially radical ones, will be heavily lobbied against by the RIAA and MPAA. Still, although huge legislative changes may be difficult to enact, the idea of a legislative delegation that addresses copyright is the long term answer.

The idea of creating a government entity that regulates copyright has also been considered by Jason Mazzone, a law professor at the University of Illinois and nationally recognized expert in the fields of constitutional law and intellectual property law. He describes this as necessary when “legal directives are required to guide people’s behavior but neither Congress nor the courts are able to regulate with sufficient clarity” (412). Indicators of this include past court cases such as *Lenz v. Universal Music Corp*, which seven years later has yet to reach a final verdict despite ruling that fair use must be considered when filing a complaint. Proposed laws close to passing such as SOPA and PIPA serve as reminders that Congress alone may not have the expertise for enacting copyright infringement law.

The proposed course of action is to shift fair use to rules instead of standards and to administration instead of litigation. This is where an administrative agency comes in to enforce civil penalties for interfering with fair use of copyrighted works. In determining fair use, input is taken from copyright owners, those who wish to use copyrighted material, and relevant industries and interest groups. Once fair use regulations are made and enacted, courts can first defer to the agency’s policy before the case is taken in for removal or litigation. Whether commercial speech or political speech, any speech that follows the guidelines of the regulations will not be subject to removal without review, and those who post contested material, as long as it is under fair use, will be protected from litigation. Individuals will know beforehand if their content constitutes fair use, the ambiguity of fair use will be removed from litigation, and precision in lawmaking will increase. Moreover, there are multiple examples the effectiveness of this streamlined process in dealing with complaints, including the Internet Corporation for Assigned Names and Numbers, which resolves internet domain name registration disputes, and the Equal Employment Opportunity Commission (419). As for placement within current government agencies, some have proposed that it can extend under the branch of the Copyright Office to lessen the cost of this regulatory approach, while others have stated that it should be a new agency altogether that can be self-sufficient from the collection of fees gained from resolving disputes (Liu 66). This reflects that despite the potential of this solution, there are many smaller aspects of this proposition to be resolved over time.

Before further this proposal of this short and long term oriented process, the arguments against this stance must be mentioned. The major issue with the creation of an administrative agency is the need for it to pass in Congress. This is difficult, which Samuelson points out, because other issues such as global warming, immigration reform, and tax reform. “In the grand scheme of things, copyright law just isn’t very important” (18). Moreover, she notes that a reform project would require significant time, money, and energy. It will also bring about highly contentious issues like those manifested in struggles that led to the DMCA (20). No doubt will companies in the entertainment industry become involved, and if the legislation they do not find proposal satisfactory, no proposed legislation may pass, which history has shown. In addition, it is uncertain whether the proposed administrative agency will be effective and not be given too much power. In addition, considering the millions of complaints filed on a daily basis, the question arises regarding how an agency will be capable of handling all of them (Figure 2). Not to mention, in the short term, creation of a clearinghouse does not answer the fundamental question of preventing abuse in the first place.

Despite these concerns, the proposed solution is a right step in the area of enacting much needed copyright reform. Although reforming copyright law is a significant monetary and time consuming project, it is still remains an important issue, given the large public outcry, protests, and even internet blackout over SOPA and PIPA. Moreover, reforming copyright would welcomes a restoration of a positive and more appealing version of copyright law for those subjected to its jurisdiction. This shift in mentality for general public to contribute to the discourse and creation of practices that constitutes as fair use alongside corporations is necessary for the passage of anti-piracy laws favored by copyright-heavy industries. After all, no change will occur with public outcry shutting down anti-piracy laws and corporate lobbying ending copyright reform. Not to mention, regulations created and disputes handled by an administrative agency prevents takedowns and gives courts a useful resource when problems of ambiguous copyright statutes arise. In other words, litigation cases can be shortened if not eliminated. Finally, although it may be true that a clearinghouse does not prevent abuse, there is no easy solution. However, ensuring DMCA education and notice and analysis will better enable and motivate people to take action, spread awareness, and provide analysis for abuse cases which future a future administrative agency can consider for enacting specific regulation based principles to addressing the issue of takedown abuse and copyright regulation as a whole. Small steps need to be taken if huge leaps are to abound.

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