

**BEFORE THE SUBCOMMITTEE ON INTELLECTUAL PROPERTY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?

Testimony of Joseph C. Gratz

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Chairman Tillis, Ranking Member Coons, members of the Subcommittee: thank you for inviting me to testify on the importance of fair use and § 512 to our thriving online ecosystem, from the point of view of a lawyer who helps intermediaries defend Internet users’ rights to speak online.

Fair use and § 512 need to work together because they drive economic activity and free expression. A large and increasing segment of the United States economy relies on fair use.¹ And free expression, today, increasingly means “free expression through Internet intermediaries.” In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court explained how the Internet democratizes access to speech by allowing every user to speak to—and be heard by—every other connected user:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.²

That remains true—and has become only more true since the late 1990s. Properly applied, copyright law does not stand in the way of free expression, but is an “engine of free

¹ Computer & Communications Industry Association, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use* (2017), at <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

² *Id.* at 870 (citation omitted).

expression.”³ Section 512 and fair use help form the radiator that keeps that engine from overheating and destroying the very free expression it was meant to foster.⁴ In the online environment, the protections of § 512 are necessary to allow important speech to be heard by a broad audience. And they are necessary to continue to provide the economic benefits to creators that come from being able to sell their music on Bandcamp, promote their work through their websites, and connect with their fans through their social media accounts. All of those activities rely on § 512 and involve fair use.

Section 512 and fair use work together to make sure the benefits of the Internet extend not just to big companies, but also to small creators and small intermediaries. In my testimony, I would like to make three points about how to make sure that remains true.

First, that DMCA abuse is a serious problem that has not been adequately addressed.

Second, that automated filtering, including “stay-down” systems, should not be mandated because they can’t account for fair use, since machines can’t consider context.

Third, that termination of accounts under DMCA-mandated “repeat infringer” policies must not be made into a tool for censorship, so the current standard of reasonableness is the right standard.

A. DMCA abuse is a serious problem.

When infringing content is posted by a user, everyone has an interest in that content being removed quickly and efficiently. Those who abuse the DMCA takedown system—

³ *Harper & Row Publishers, Inc., v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

⁴ Indeed, a robust fair use doctrine is necessary to make copyright law compatible with the First Amendment. *Golan v. Holder*, 565 U.S. 302, 329 (2012).

whether intentionally or unintentionally—harm creators, intermediaries, and users. Abusive notices gum up the works of the notice-and-takedown system, and provide reason for intermediaries to treat takedown notices with more scrutiny and suspicion than would be needed in the absence of abuse.

1. Blatant fraud goes unremedied.

For example, a recent article in the Wall Street Journal discussed a scheme whereby bad actors attempt to suppress unfavorable news coverage and other online postings.⁵ That May 2020 article describes virtually the same scheme that was at issue in a case I filed on behalf of Automattic, Inc. in 2013.⁶ In that scheme, the bad actors create a fake website, on which they place the content they want to suppress, and which they back-date to make it look older than the original content they want to suppress. They then send a DMCA takedown notice to a search engine or other intermediary, claiming that the site they want to suppress copied the unfavorable content from their back-dated fake website. The intermediary removes the material, since it appears to have been copied from what looks like a preexisting source. But in fact, the material being removed was original, noninfringing content.

The bad actors can act with impunity because there are no realistic remedies for this abuse. For example, in the *Automattic and Retraction Watch v. Chatwal* case I brought, the stakes were serious but no remedy was available. That case dealt with an issue that is of

⁵ Andrea Fuller, Kirsten Grind and Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, Wall St. J. (May 15, 2020), at <https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001>.

⁶ Complaint, *Automattic Inc. and Retraction Watch, LLC v. Chatwal*, No. C13-05411 HRL (N.D. Cal. Nov. 21, 2013).

particular importance today: the reliability of published medical research papers. The bad actors in that case created a fake version of a legitimate news website as part of a scheme to suppress criticism of a particular medical researcher. They then sent takedown notices targeted at postings on Retraction Watch, a site run by experienced science journalists which highlights and tracks situations where published scientific papers may not be everything they seem. Relying on the representations of copyright ownership in the DMCA notice, the service provider hosting Retraction Watch, Automattic, disabled Retraction Watch's original content. Retraction Watch promptly provided a counter notification, but their content stayed down for a period of 10 days—the time period mandated by the DMCA, even after the legitimate publisher submits a valid counter notification.

Automattic, along with the journalists who run Retraction Watch, brought suit under § 512(f) against the party that submitted the notice. But the address on the notice, located in India, turned out not to exist. The telephone number provided on the notice was disconnected, and emails to the address provided on the notice bounced. The complaint in the lawsuit could not be served, so the lawsuit could not go forward.

Thus, even in the most clear and blatant instances of DMCA fraud, § 512(f) provides little comfort to victims. Senders of fake notices can hide behind fake addresses, but in order to keep their safe harbor with respect to the disputed content, intermediaries would need to take down the material nonetheless. And when it turns out that the notice was bogus, the notice sender can disappear in a puff of smoke.

2. Serious harms to speech come from bogus takedowns that result from ignorance of the law rather than from fraud.

Not all bogus DMCA notices result from blatant fraud. But notices that result from

ignorance of the law can cause the same amount of harm to speech on issues of public concern. For example, the website Campus Reform claims to be “a conservative watchdog to the nation’s higher education system” that “exposes liberal bias and abuse on the nation’s college campuses.”⁷ A writer for that website wrote a column critical of a particular academic journal article that a political science professor had written, quoting extensively from the article in the course of criticizing its message.⁸ The post is clearly fair use: it uses only a portion of a copyrighted work for the purpose of criticism, placing the work in a new context and seeking to expose what the writer sees as a faulty argument. The professor sent a DMCA takedown notice to Google in 2018, requesting that Google remove search results linking to that column.⁹ Google did so. The search results remained down until a Wall Street Journal reporter pointed out the situation, at which point the link was restored.¹⁰

The DMCA should not be a tool to silence those with whom a copyright holder disagrees. Bogus notices—whether they are the result of fraud or ignorance of the law—cause real harms to innocent speakers on issues of public importance.

3. The problem is widespread.

Transparency reports released by intermediaries show that the problem of bogus notices is widespread. Current law provides little incentive for intermediaries to leave up material identified in a DMCA notice, even if the material would, upon inspection, clearly be fair use.

⁷ <https://www.campusreform.org/about/>

⁸ <https://www.campusreform.org/?ID=11098>

⁹ <https://www.lumendatabase.org/notices/17053594#>

¹⁰ Fuller et al., *supra*.

Even when the intermediary has a good faith belief that the material is not infringing, for example because it constitutes fair use, the safest path is to take the material down anyway. Nevertheless, some intermediaries place such importance on their users' speech that they give up the safe harbor with respect to particular material that they believe constitutes fair use. Their experiences show that bogus notices are not a rare occurrence.

Automattic, for example, operates the WordPress.com blogging platform, where users publish about 41.7 million new posts each month. Automattic receives a relatively modest number of DMCA notices relative to the amount of material posted by its users—4,851 notices in the second half of 2019, for example.¹¹ Because of its commitment to its users' speech rights and the relatively modest scale of notices it receives, Automattic chooses to analyze incoming notices to see whether they are “directed at fair use of content, material that isn't copyrightable, or content the complaining party misrepresents ownership of a copyright.”¹² Automattic's experience can thus provide a window into how many DMCA notices are directed at noninfringing material. In the most recent reporting period, fully 8% of notices were directed at content that did not infringe the notice sender's copyright. That means that 388 pieces of legitimate speech would have been taken down from sites hosted by Automattic just in that six-month period, if Automattic had not chosen to go above and beyond in protecting its users from bogus takedowns. Since Automattic began reporting statistics in 2014, Automattic has left up 5,960 pieces of content identified in correctly formatted but bogus DMCA notices, out of the

¹¹ <https://transparency.automattic.com/intellectual-property/intellectual-property-2019-jul-1-dec-31/>

¹² *Id.*

75,837 total notices it received during that period. One can only imagine what the corresponding numbers would look like for much larger intermediaries.¹³

4. Possible Solutions

Measures to stem the tide of bogus DMCA notices would benefit the public by increasing access to legitimate speech on important issues and would benefit senders of legitimate notices by preventing bogus notices from gumming up the works. How could that be achieved?

The best way forward would be to strengthen § 512(f), the anti-abuse provision of the DMCA, in two ways.

First, courts have interpreted 512(f) to set a very low bar: even an *objectively unreasonable* notice that no reasonable person would believe is valid still does not violate § 512(f). Instead, in order to violate § 512(f), courts have ruled that a notice sender must

¹³ Google’s transparency report website, for example, provides examples of search result delisting requests that they did not comply with, but does not indicate how many of the requests it receives were rejected for having identified noninfringing activity. *See* <https://transparencyreport.google.com/copyright/>. The underlying data files downloadable from that website indicate that, since the beginning of 2019, about 5.6% of notices were “from someone [Google] believe[s] to be abusing the process.” Those files show that, during that time period, about 24% of reported URLs *that were indexed* were not removed, while the remaining 76% were removed. Notably, about 45% of all *reported* URLs hadn’t been indexed in the first place; in other words, almost half of the time, copyright holders were asking Google to remove URLs from its search engine that didn’t even appear in its search engine. Facebook’s transparency report provides the percentage of the time content was removed in response to copyright removal requests (78% for the most recent reporting period on Facebook, 92.5% on Instagram), but does not separately indicate whether content was left up because the notice was incomplete or, instead, because the request was “fraudulent, erroneous, or submitted in bad faith.” *See* <https://transparency.facebook.com/intellectual-property>. Twitter’s transparency report likewise provides the percentage of the time content was removed in response to copyright removal requests (45% for the most recent reporting period), but likewise does not separately indicate what the reason was for declining to remove the identified material. *See* <https://transparency.twitter.com/en/copyright-notices.html>.

subjectively believe that their notice is bogus, and send it anyway.¹⁴ Under this standard, learning about copyright law is the last thing a notice sender would want to do: if they don't know enough to know they're wrong, they can't possibly be punished under § 512(f). An anti-abuse provision that rewards a pure heart but an empty head does not address the full scope of the problem.

Second, even where the notice sender subjectively believes they are sending a bogus notice, the statute currently only permits a court to order the notice sender to pay actual damages and attorney's fees. To the extent statutory damages are necessary as a deterrent in the copyright-infringement context, they should likewise be imposed in the 512(f) context. This is particularly true because many of the most serious harms that come from bogus notices are not economic harms, but are instead speech harms. It would be difficult to put a dollar amount on the harm that comes from taking down noncommercial investigative journalism about activist groups, or from improper removal of a candidate's advertisement during the final week before an election. And, indeed, a court has ruled that reputation and speech harms do not count as damages under § 512(f).¹⁵ Statutory damages—either in the range provided for copyright infringement in § 504, or in the range provided for other DMCA violations in § 1203—would help to deter abusive notices, and provide meaningful remedies when they occur.

Both of these measures should be applied equally to those who send notices and those who send counternotifications.

¹⁴ See *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004) (imposing a "subjective good faith standard" and rejecting an "objective reasonableness" standard under § 512(f)).

¹⁵ *Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1031–32 (N.D. Cal. 2015).

Strengthening § 512(f) is the most straightforward way to begin addressing DMCA abuse. But it would not solve the entire problem: in the Retraction Watch case, for example, even these measures would not have helped, because the notice sender disappeared after sending the fraudulent notice. Elsewhere in the legal system, parties requesting that action be taken on a claim are often required to post a bond before action is taken in reliance on their claims. Such a bond may be the only way to ensure that those who cause damage via misrepresentations are held to account.

And whether important speech stays available or is taken down should not depend on the largesse of an intermediary who decides to give up its safe harbor to defend its users' speech. The statute could be amended to expressly preserve the safe harbor in cases where the service provider has an objectively reasonable good faith belief that the notice of claimed infringement contains misrepresentations, even if the material is later found by a court to be infringing. Alternately, 17 U.S.C. § 504(c)(2) could be modified to add the words "service provider (as defined in section 512(k))" after the word "library" in each instance in which it appears, so that intermediaries who act in good faith to defend their users' speech rights could not be liable for statutory damages for having done so. Either of these changes would provide intermediaries with greater incentives to reject abusive notices of claimed infringement.

B. Automated filtering, including "stay-down" systems, cannot account for fair use and would harm political expression and distance learning.

Fair use is all about context, and machines can't consider context. That means machines can't make reliable fair use determinations.

Consider, for example, three different uses of the exact same song:

- The song was playing in the background at a political rally or protest where someone

says something of significant public interest. Using that clip, including the audio, in order to show what was said at that rally or protest is clearly fair use, because the use of incidentally recorded music is necessary to accurately convey what happened at that rally or protest.

- The song is used as underscoring to a political advertisement. Depending on the specifics, the use may or may not be fair use, because the use may be necessary to a political message (for example, criticizing Beto O'Rourke using the music of his former band Foss) or may not be (for example, using music because it conveys a positive and inspiring mood).
- A candidate uploads an entire popular music video to their campaign's social media account to generate interest in the campaign from those who wish to view the music video. This is not fair use.

Notably, all of these situations sound exactly the same to a computer. The computer cannot tell that in some situations the song is being used to prove a point or criticize a politician, and elsewhere the song is being used purely for its original aesthetic purpose. And so a computerized filter will remove all of those uses, even those that are clearly fair use.

Next, consider three different uses of the exact same photograph, all in the context of distance learning:

- The photograph is used in the materials for a photography class, and those materials analyze the techniques the photographer used to achieve a particular effect. This is clearly fair use, because it is necessary to an educational use which comments on the aesthetics of the photograph itself.
- The photograph is used as part of a historical timeline in materials for a history class,

at reduced size and intermingled with text and other graphic elements. This is likely to be fair use, because it is necessary to ensure the reader's recognition of the historical context discussed in the timeline.¹⁶

- The photograph is used on the cover of an electronic textbook, because it is a striking and dynamic photograph. This is not fair use.

As with the music examples, an automated filter has no way to distinguish between these three uses. In all of them, the entirety of a photo is used—but in some cases that use is clearly fair use, and in others it is clearly infringement.

Even the most advanced filtering systems in the world still make these basic errors—not because they are insufficiently advanced, but because the inability to consider context is *inherent* in automated filtering. Just last week, for example, the YouTube Content ID system took down a live stream of a panel about Star Trek organized by that show's producers, apparently because some of the sound effects from the show were used during the presentation.¹⁷ Because machines can't consider context, the machine couldn't tell that the sounds were being used in an obviously authorized live presentation being run by the show's creators. Nor is this an isolated incident: the same thing happened to a NYU Law School video of a class about music copyright law.¹⁸

¹⁶ See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (finding fair use on similar facts).

¹⁷ Kate Cox, *CBS' Overzealous Copyright Bots Hit Star Trek Virtual Comic-Con Panel*, Ars Technica (July 23, 2020), at <https://arstechnica.com/tech-policy/2020/07/cbs-overzealous-copyright-bots-hit-star-trek-virtual-comic-con-panel/>.

¹⁸ Engelberg Center on Innovation Law & Policy, *How Explaining Copyright Broke the YouTube Copyright System* (Mar. 4, 2020), at <https://www.law.nyu.edu/centers/engelberg/news/2020-03-04-youtube-takedown>.

And it happened to Senator Rand Paul during the event announcing his 2015 presidential bid.¹⁹

Every “take down, stay down” system is an automated filtering system, and that is why every “take down, stay down” system will have the same problems as other automated filtering systems. The use of a photo on the cover of an electronic textbook would be the proper subject of a takedown notice—but that doesn’t mean the system should take down the same photograph when it appears in the context of a photography-class analysis. The use of a song in a pirated music video would be the proper subject of a takedown notice—but, likewise, that doesn’t mean the system should take down the same song when it appears in the background in a video of a political rally or protest. The work may be the same, but the context may be different. That is why “take down, stay down” requirements would be incompatible with fair use. And because fair use is what makes copyright compatible with the First Amendment, “take down, stay down” requirements would be incompatible with the First Amendment.

This is not to say that automated systems have no role to play. Systems like YouTube’s Content ID and Facebook’s Rights Manager, as well as third-party systems like TinEye, can help rightsholders identify uses of their material, so they can decide whether they have a basis to request removal of that material. And voluntary agreements about automated systems between intermediaries and copyright holders provide one pathway for addressing the burdens of identifying infringement online. But Congress should not mandate the use of automated filtering

¹⁹ See, e.g., Philip Bump, *YouTube’s Copyright System Has Taken Rand Paul’s Presidential Announcement Offline*, Washington Post (Apr. 7, 2015), at <https://www.washingtonpost.com/news/the-fix/wp/2015/04/07/youtubes-copyright-system-has-taken-rand-pauls-presidential-announcement-offline/> (reporting on automated blocking of Rand Paul presidential announcement by Warner Music Group because the background music at the event, the song “Shuttin’ Detroit Down” by John Rich, caused the video to be detected as infringing).

systems, including “take down, stay down” systems.

C. The flexible “reasonableness” standard for terminating “repeat infringers” protects fair use by allowing intermediaries to consider the totality of the circumstances.

One aspect of the DMCA that has received increased attention in recent court decisions is the requirement that an intermediary “has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

Recent decisions have emphasized that the terms “reasonably implemented” and “appropriate circumstances” permit service providers to take into account the totality of the circumstances in deciding when and how to terminate repeat infringers, and permit courts to take into account the intermediary’s circumstances in determining whether a repeat infringer policy was reasonably implemented. For example, while it might not be reasonable for a large intermediary to lack a systematic way to track how many notices a particular account has received, it is reasonable for a small intermediary that receives a modest number of notices to operate without such a system. For example, in one case, the court found that where a site operator “uses his judgment, not a mechanical test, to terminate infringers based on the volume, history, severity, and intentions behind a user’s infringing content uploads” in deciding whether to terminate an account, that exercise of judgment complies with the statute’s requirement that repeat infringers be terminated in “appropriate circumstances.”²⁰ In that case, even though the implementation was “unsystematic,” it was nonetheless effective, and the court, considering all

²⁰ *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 617 (9th Cir. 2018).

of the circumstances, ruled that it was reasonably implemented.²¹

This flexibility is one factor that has allowed the DMCA to accommodate the substantial changes in the place of the Internet and online services in American life. Today, losing one's Internet service can mean losing one's job or access to one's education. Losing access to a social media account can mean losing contact with distant family and friends. Losing access to a video-hosting account can mean losing a fan base. None of those things were true in 1998, and it is the flexibility built into the statute that allows all of the circumstances to be taken into account.

Engaging in fair use online shouldn't mean risking termination of Internet access or of accounts on important services. That is why intermediaries, when considering whether "appropriate circumstances" for termination exist, should take into account whether the repeated claims of infringement were valid. And that is why intermediaries should also take into account whether the user's behavior presented an arguable question of fair use, even if the intermediary is ultimately of the view that a court probably would not regard it as fair use.

Indeed, the importance of access to social-media sites in our civic life is so great that the Supreme Court has ruled that even convicted sex offenders may not be barred from using those sites.²² If it is unconstitutional for the government to kick a convicted sex offender off of Facebook or Twitter because of their past misdeeds, surely it is not appropriate for a teenager who has over-enthusiastically uploaded clips of her favorite TV show to be barred for life from those same sites as a result of those bad choices. The flexibility the statute provides ensures that consequences for reports of infringement are appropriate and proportional. Even those with

²¹ *Id.*

²² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

mistakes in their pasts have contributions to make to our culture, and so measures taken against repeat infringers must be tailored to the circumstances.

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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee, thank you for your continued work to ensure that § 512 accommodates fair use, so that American creativity, American innovation, and American free expression continue to thrive.