

Statement of Organization for Transformative Works on Section 512 and the Copyright Office Section 512 Report

I. Introduction	1
II. Lawmakers should Consider the Copyright Office Report in Context	3
III. In Assessing the DMCA, Lawmakers Should Re-Center Internet Users	4
A. “Repeat Infringers” and User Interests	5
B. User Interests Concerning the Meaning of “Storage”	7
C. User Interests Concerning “Actual” and “Red Flag” Knowledge	7
D. Users Interests Require OSPs To Be Permitted To Evaluate Takedown Notices	8
E. Fair Use Is Crucial to Users	8
IV. Section 512 is Not, and Should Not Be, About Piracy	10
V. Rules Designed Primarily for Massive Sites Like Google and YouTube Would Harm Countless Smaller OSPs and Their Users	10
VI. Rules Designed Primarily for Large-Scale Copyright Owners Would Harm Countless Individual Users Who Create Transformative Works	11
A. Section 512 Has Been Effective in Helping Transformative Creators Protect Their Works From Infringing Distribution	12
B. Transformative Creators Need Usable Notice-And-Takedown Systems that Do Not Rely On “Trusted Systems” Procedures.	13
C. There is a Need for Processes that Do Not Chill Transformative Creation.	15

I. Introduction

The Organization for Transformative Works (OTW) is a nonprofit organization established in 2007 to protect and defend fans and fanworks from commercial exploitation and legal challenge. We represent artists who make works commenting on and transforming existing works, adding new meaning and insights—from reworking a film from the perspective of the “villain,” to using storytelling to explore racial dynamics in media, to retelling the story as if a woman, instead of a man, were the hero. We represent readers who turn to those fanworks to see themselves represented in stories when popular entertainment all too often overlooks diverse characters and

storylines. We represent individuals who find community and common ground in shared affection for and criticism of media in a world that is all too often divided and isolating. The OTW has over 13,000 donating members, more than 8,500 of whom are U.S. nationals. The OTW's nonprofit website hosting transformative noncommercial works, the Archive of Our Own, has over 2.5 million registered users, hosts over 6 million unique works, and receives almost 350 million page views per week.

The OTW therefore represents the vast community of Internet *users*. We submit this comment to present new empirical data and emphasize the importance of user interests in any consideration of the Digital Millennium Copyright Act. We also write to highlight ways in which the Copyright Office's May 2020 Report of the Register of Copyrights on Section 512 of Title 17 (the "Report"), in framing 17 U.S.C. § 512 ("section 512") as balancing the opposed interests of copyright holders and OSPs, overlooked the crucial interests of users.

As the above facts make clear, internet users are not merely passive consumers of content. Instead, they are passionate and valuable creators and copyright holders in their own right. The interests of internet users as both consumers and rightsholders themselves illustrate exactly how diverse and complex the internet's creative ecosystem is, and why user interests should not be undervalued in any discussion of 512 and its impact.

Discussions of section 512 tend to presume that all "creators" are dissatisfied with section 512 and want to make it easier to have material taken down from the Internet. We write to explain why that is not true. Users--including the hundreds of thousands of user-creators we serve-- are harmed by narrow interpretations of section 512's safe harbors, invalid Internet take-downs, and automated content filtering and removal. Critiques of the DMCA often focus on its age, and claim that updates in the law would serve the new generation of Internet creators. But that new generation is exactly who the OTW serves, and our experience demonstrates that broadly applicable DMCA safe harbors that discourage invalid takedowns and encourage fair use are crucial to those user-creators.

In other words, for all of section 512's seeming imperfections, it fundamentally serves the complex needs of Internet users well--especially the new generation of Internet users who create and consume content. In considering any potential changes to the operation of section 512 or the framework of Internet regulations in which it resides, it is essential to take into account the benefits that section 512 provides to the hundreds of millions of users who consume, interpret, and create Internet content.

II. Lawmakers should Consider the Copyright Office Report in Context

In May 2020, the Copyright Office released a report on the operation of section 512. That report contained some valuable information, but it is important to recognize what the Report is and what it is not. By its stated terms, the Report is not a set of prescriptions or policy recommendations. It is a set of observations. This framing is particularly important when observing the Report’s discussions of court opinions. The Report was not focused on whether court opinions were “good” or “bad” from a policy standpoint; rather, it was constrained by its stated focus on whether judicial applications of section 512 align with what the Copyright Office believed to be Congress’s intent in 1998 statutory drafting.¹ Thus, to the extent that the report critiques judicial interpretation of section 512, the report reflects those constraints. It says little about whether those judicial interpretations serve valuable policy functions.

While the Copyright Office interpreted the statute by 1998 standards, courts interpret statutes based on the state of technology and society at the time they encounter those statutes. As a result, to the extent that Congress agrees with the Copyright Office’s assessment that court opinions have diverged from statutory intent, the current state of technology and society may call for conforming statute to caselaw, rather than the opposite. In the years since the DMCA went into effect, we have learned that the blossoming of the Internet ecosystem enabled by flexible interpretations of section 512 has been a boon to creativity, speech, access to knowledge, and (yes, even) the prosperity of the entertainment industry. The Report did not focus on these benefits because the Report’s goal was backward-looking observation rather than forward-looking policymaking. For lawmakers, however, the benefits to society of the Internet ecosystem of creation, recreation, and communication that 512 has permitted—especially now, as users rely more than ever on OSPs to attend school, conduct business, express themselves, and connect with fellow humans—cannot and should not be overlooked.

The OTW agrees with the Report’s observations that:

- The online ecosystem is not one size fits all. In assessing section 512, policymakers must take into account differences not only among stakeholder classes, but also among them.²
- Voluntary initiatives do not substitute for balanced legislation.³
- Lawmakers should reject proposals to enact radical changes such as “notice and staydown,” other upload filtering mandates, or site blocking.⁴

¹ Report, p. 84.

² Report, p. 72.

³ *Id.*

⁴ Report pp. 71 (filtering proposals would be “overkill” and anti-competitive), 193, 196.

- It is a mistake to look to notice-and-takedown systems as a way to prevent piracy.⁵

However, the Report also disregards the interests of Internet users, overlooks important evidence, and undervalues copyright fair use. In addition, in its effort to reconstruct Congress's original intent as to section 512 specifically, the Report overlooks its role as part of a web of Internet regulations that balance each other.

III. In Assessing the DMCA, Lawmakers Should Re-Center Internet Users

Section 512 is not concerned solely with OSPs and rights-holders. It is also, and perhaps foremostly, concerned with Internet users. This is borne out in the statute's legislative history.⁶ In the decades that have passed since the DMCA was enacted, Internet use has grown and changed dramatically. Users rely on the Internet for learning, communication, entertainment, and community. At no time is the importance of the Internet for users more obvious than now, in the age of COVID-19 social distancing.

One of the most significant changes of the past two decades has been the explosion of user creativity on the Internet. From simple blogs to complex social media phenomena, users are creating content at an impressive rate. Online fan communities provide one example. There have always been fans, but the Internet has allowed them to find an audience with shared affinities and express themselves in unprecedented ways. The millions of works on the Archive of Our Own--which hosts text works, and thus does not even include the enormous bodies of fan creativity in audiovisual, musical, visual art, games, crafts, and other media--is ample evidence of this creative explosion. Through creating and consuming fanworks, fans build community, refine their skills, find their own creative voices, and build personal strength.⁷ This empowering creative output should not be caught in the crossfire of a perceived rivalry between copyright holders and technology providers.

Nevertheless, the Report tended to accept copyright owners' representations (without supporting evidence) that users' counter-notifications are largely wrong, while simultaneously discounting specific examples and extensive quantitative analyses of flawed takedown notices as unreliable or unrepresentative.⁸ The Report relegated to a footnote extensive and well-documented research establishing the malicious use of DMCA takedown notices to harm competitors or silence criticism.⁹ As just one significant example, the *Wall Street Journal* reported on over 52,000

⁵ Report pp. 72.

⁶ See e.g., H.R. Rep. No. 105-551, pt. 2 at 21 (1998) (listing "information users" as part of a triad of balanced interests, along with content owners and service providers).

⁷ NAT'L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, COMMENTS OF ORGANIZATION FOR TRANSFORMATIVE WORKS (Nov. 13, 2013), available at http://www.ntia.doc.gov/files/ntia/organization_for_transformative_works_comments.pdf.

⁸ Report, pp. 146-48.

⁹ Report, p. 148 n 790.

improper takedown notices apparently sent to suppress non-infringing content.¹⁰ The Copyright Office Report’s dismissal of such detailed evidence as “individual anecdotes” obscures the very real and harmful user impact of viewpoint-based takedown notices. As a practical matter, it is irrelevant to users what percentage of takedown notices are invalid--what matters is that the evidence objectively proves that invalid and abusive takedown notices exist, and harm users, usually by removing the only instance of protected speech online. Any assessment of section 512 must acknowledge that real harm.

A. “Repeat Infringers” and User Interests

While the Copyright Office’s Report considered the interests of OSPs and rightsholders in developing recommendations, the Report’s analysis and recommendations overwhelmingly either ignore user interests or work against them. The report’s treatment of judicial opinions is particularly telling: when courts interpret section 512 as imposing the penalty of Internet termination on users accused of (unproven) repeat infringement, the Report advances the court’s interpretation, stating that “repeat infringer” should be defined as repeat *accused* infringer rather than repeat *adjudicated* infringer.¹¹ In contrast, when courts interpret section 512 as safeguarding the ability of users to engage in free expression via fair use by requiring rightsholders to consider fair use before issuing a takedown notice, the Report argues that the court’s interpretation was broader than the statutory language allowed.¹²

Considering the interests of users leads to the opposite conclusions: Terminating the service of users who are merely accused of infringement as “repeat infringers” invites viewpoint censorship, ignores the possibility that users may be accused of infringement when engaged in First Amendment-protected fair use, and punishes non-infringing users as if they were infringers. By the same token, requiring rightsholders to consider fair use before issuing a takedown notice is a straightforward and simple protection both against indiscriminate (typically automated) removal of their expression and against assessing “repeat infringer” penalties against legitimate fair users.

Recent events have further proved the folly of a one-sided approach to takedowns. For example, President Trump’s Twitter and Facebook accounts were recently subject to a takedown because a video he posted contained an image or video clip claimed to be infringing.¹³ Even though the tweet in question was almost certainly a fair use, it was removed. The Copyright Office Report criticizes any attempt to screen properly-formatted notices for facial invalidity no matter how

¹⁰ *Id.*

¹¹ Report, pp. 98-103 (agreeing with *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293 (4th Cir. 2018)).

¹² Report, pp. 148-152 (disagreeing with *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154–55 (9th Cir. 2016)).

¹³ See Theodore Schleifer, Facebook and Twitter took down a Trump campaign video over copyright concerns, Vox, Jun 5, 2020,

<https://www.vox.com/recode/2020/6/5/21281787/twitter-trump-george-floyd-campaign-video-copyright>.

clear it is that the sender is targeting noninfringing material--but this event demonstrates the user harms inherent in such an approach. Notably, President Trump's account has accrued other copyright "strikes" in the past,¹⁴ and if OSPs aren't allowed to exercise their informed judgment about abusive notices, then he (along with other political figures) is at risk of being banned from Twitter and every other service as a repeat infringer. Even if he counter-notifies--which has not happened, in the past--the mandatory waiting period to restore content under the counter-notice system leaves important political speech suppressed for weeks. Failing to account for invalid, improperly motivated notices is not good policy.

It would be unrealistic to assume that all takedown notices reflect infringement; even setting aside malicious notices issued for the purposes of silencing a viewpoint or hampering competition, many notices--especially automated ones--seek removal of non-infringing works. Despite the large number of works housed in the Archive of Our Own, The OTW receives a small handful of takedown requests annually. The majority of those takedown notices come from posters who have disassociated themselves from their accounts and want to remove material that they, themselves created and posted and now want removed. The next largest category of takedown requests do not reflect infringement--instead, they reflect a trademark user seeking to restrict expressive mention of their trademark (a misuse of the DMCA), or they reflect the mistaken identification of a different work with the same title as a rightsholder's work. We receive virtually no takedown notices for actual infringing works. Labeling individuals as "repeat infringers" for having posted works that they later want to remove, for making non-infringing expressive mentions of trademarks, or for posting non-infringing works with similar titles as rightsholders' works, would be manifestly unfair and harmful to users.

The OTW also routinely receives queries from fan-creators who make noncommercial, transformative fanworks works such as "fanvids" that use short clips of audiovisual works to comment on media works. Fanvid creators have sought guidance from the OTW after having their works removed from other sites based on takedown notices that have not accounted for fair use, and they fear having their accounts on those sites terminated based on "repeat infringer" policies. Punishing these users is likewise unfair and harmful.

Accordingly, user interests demand flexible definitions of "repeat infringer," and flexibility in adopting and implementing such policies, that does not require mechanical punishment of users who have been accused of infringement.

¹⁴ See, e.g., Alex Hern, Trump's video taken off Twitter after band Nickelback complains, Guardian, Oct. 3, 2019, <https://www.theguardian.com/us-news/2019/oct/03/donald-trump-video-taken-off-twitter-copyright-nickelback>.

B. User Interests Concerning the Meaning of “Storage”

In addition, the Copyright Office Report suggests clarification of language surrounding the definitions of “storage” at the direction of a user. Courts have interpreted this language to include activities “related to” storage, such as automated recommendation and curation.¹⁵ The Report suggests a contrary interpretation, arguing that the legislative history of section 512 “makes no mention of . . . user experience.”¹⁶ But in 1998, multiple services already engaged in extensive selection and targeting to improve user experience. AOL and other services offered curated and moderated environments, such as chatrooms focused on specific topics, and Congress specifically intended to protect them.¹⁷

The sorts of services that OSPs provide in connection with storage at the direction of a user--such as allowing users to find content of interest from among a vast sea of irrelevant content; optimizing retrieval of content for different devices and bandwidth; or helping users identify content they wish to avoid--are precisely what make OSPs *useful to users*, and for that reason courts have correctly held them to be within the activities permitted for OSPs taking advantage of section 512’s safe harbors.

C. User Interests Concerning “Actual” and “Red Flag” Knowledge

Likewise, lawmakers should consider user interests in considering the definitions of OSP “actual” and “red flag” knowledge of infringement. The OTW appreciates the Copyright Office Report’s acknowledgement that the DMCA maintains a strict rule that OSPs have no obligation to monitor their services, as well as the Report’s support for a “reasonableness” approach to knowledge that would take into account the size and resources of an OSP.¹⁸

However, user interests dictate one major principle that the Report fell short of recognizing. OSPs should be allowed to engage in content moderation without being charged with “knowledge” (whether deemed actual or “red flag”) regarding whether or not that content infringes. Content moderation is of crucial value to users.¹⁹ To the extent any rule equates awareness of content residing on a network with knowledge of whether or not that content infringes, that rule undermines the value of the Internet for users.

It is also important to recognize that content moderation is very different from copyright filtering or monitoring. Users often play major roles in content moderation--users are able to flag and

¹⁵ 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*, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir 2012).

¹⁶ Report, p. 90.

¹⁷ See H.R. Rep. 105-551(II), 1998 WL 414916, at *53 (explicitly including chatrooms as among protected services); *28 (identifying AOL as among testifying participants).

¹⁸ Report, pp. 123-24.

¹⁹ See, e.g., Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (2018) (explaining how content moderation is necessary for websites to remain useful to users, albeit imperfect and evolving).

report content that violates a platform’s terms of service, and many OSPs rely on users to identify such content for purposes of moderation.²⁰ In contrast, users *cannot* flag and identify content that infringes copyright, because users who did not themselves post the content, like the OSPs themselves, simply lack the information required to determine whether a particular copyrighted work was posted with or without the authorization of the copyright holder. Because copyright owners possess unique knowledge regarding whether they have themselves authorized particular uses, definitions of “actual” and “red flag” knowledge cannot presume that either OSPs or users are capable of independently determining whether material is infringing.

D. Users Interests Require OSPs To Be Permitted To Evaluate Takedown Notices

In addition, the Report failed to consider user interests in its discussion of “Extra-Section 512 Processes and Requirements,” especially its discussion of actions OSPs take to verify the validity of a takedown notice before taking down material.²¹ Although the Report framed the issue as about OSPs favoring review of takedown notices, in fact the issue has much more to do with users. As a matter of logic, practices such as reviewing takedown notices to confirm that they correspond to the claimed material, that they were actually issued by copyright holders, that they are based in copyright law, or that they do not seek to remove instances of manifest fair use, represents extra work for OSPs. OSPs therefore do this work not for themselves, but for users.

The OTW, for example, receives takedown notices by e-mail and hand-reviews every notice we receive. Automatically removing every work for which we receive a takedown notice would surely be easier than reviewing those notices for validity and following up with requesters whose notices appear invalid. In our experience, however, taking that easier route would result in the removal of obviously non-infringing material and the punishment of users who have done nothing wrong. Any interpretation of section 512 that would force OSPs to blindly follow notices—no matter how flawed they may be--would invite viewpoint censorship, harassment, and unfair competition; and would harm users.

Therefore, we urge lawmakers to consider users’ interests regarding this topic. OSPs must be permitted to “weed out” and fail to take down material based on improper notices without losing their safe harbors.

E. Fair Use Is Crucial to Users

By shortchanging the interests of users, the Copyright Office Report seriously undervalued the doctrine of fair use. Fair use is fundamentally about users’ ability to become creators in their

²⁰ See Gillespie, *supra*, at 87-97 (identifying various types and uses of user flagging).

²¹ Report, pp. 153-59.

own right. The fair use doctrine enables user/creators to critique and comment upon copyrighted works in ways that are demonstrably beneficial to society--including political critique, educational use and analysis of copyrighted works, and parody by protecting such uses from copyright liability. By definition, because the competitive market impact of a particular use is among the factors considered in the fair use analysis, fair uses are unlikely to harm the owners of copyrighted works.²² As a matter of logic, therefore, removing fair uses creates meaningful harm to society without meaningful benefit to copyright holders. Notice-and-takedown systems that burden fair use, allow fair uses to be taken down without analysis, or discourage OSPs from evaluating whether uses are fair invite viewpoint discrimination and are harmful to free expression.

These principles are reflected in the case of *Lenz v. Universal Music Corp.*, which interprets section 512(f) as requiring copyright holders to engage in a good faith consideration of fair use before issuing a takedown notice.²³ Yet the Copyright Office Report expressed concern that the case places too much responsibility on rightsholders.²⁴ The OTW's experience operating the Archive of Our Own demonstrates the contrary: even after *Lenz*, the OTW has routinely received DMCA takedown notices about which there is no reasonable conclusion other than that the sender failed to consider fair use. These include, for example, notices for works that have the same title as a copyrighted work but contain wholly different substance; and works that contain a short word or phrase from a copyrighted work. Our presumption is that these requests were triggered by automated searches and never reviewed for fair use before being sent. When we have responded to such notices with an inquiry concerning whether the requester considered fair use, the requester has typically failed to respond. In other words, *Lenz* has not proven an impediment to rightsholders' sending notices with (at best) cursory consideration of fair use.

The OTW's experience provides two crucial principles for incorporating user interests into assessments of section 512. First, as discussed above, OSPs must be permitted to evaluate takedown notices. Second, to the extent that lawmakers believe that the law contains any ambiguity regarding whether the section 512 notice-and-takedown framework requires consideration of fair use, it should explicitly add such a requirement that goes beyond the requirement of a "good faith" consideration of fair use to require takedown senders to engage in a *reasonable* good faith consideration of fair use.

²² 17 U.S.C. § 107.

²³ 815 F.3d 1145, 1154–55 (9th Cir. 2016).

²⁴ Report pp. 150-52. The Report also indicated that there may be ways other than Section 512(f), such as unfair competition law, to address the problem of takedown notices that fail to consider fair use. While it is possible that such other mechanisms may *also* exist, section 512(f) is specifically designed to address the problem of improper takedown notice. The Copyright Office's implication that consideration of fair use should not be required because it poses a burden to rightsholders is a rejection of the very purpose of 512(f).

IV. Section 512 is Not, and Should Not Be, About Piracy

Section 512 is about safe harbors for legitimate sites. There are also rogue sites dedicated to copyright infringement online, and, as testimony previously established, they are already subject to liability under the current system.²⁵ They do not comply with §512. They do not care about notice-and-takedown (or staydown, or filtering) because they are not interested in safe harbors.

Making safe harbors more difficult to obtain or maintain will not curb pirate sites; it will only stifle legitimate sites and hurt users, and may even drive more people to pirate sites if non-dominant but legitimate sites are eliminated by onerous technological requirements.

Many disagreements about the effectiveness of 512 likely trace back to rightsholders' assertions that 512's failure to solve piracy is a failing of 512, when in fact 512 is simply not about piracy. Rather, 512 is about making it possible to distinguish piracy sites, who fall outside its safe harbors, from those that foster a healthy Internet by facilitating (for example) user expression, information location, and communication, who fall within those safe harbors.

V. Rules Designed Primarily for Massive Sites Like Google and YouTube Would Harm Countless Smaller OSPs and Their Users

As the Copyright Office Report pointed out, the online ecosystem is not one-size-fits-all. Although it is tempting to focus on a few of the behemoth OSPs, the experiences of those OSPs are not typical in any way. They may, for example, have resources to engage in voluntary copyright and monetization programs like YouTube's Content ID program--but the countless smaller OSPs that users rely on do not, and would be crushed by the imposition of more stringent responsibilities in connection with safe harbors.

Crucially, "small" does not mean low-traffic or unimportant. The OTW's website hosting transformative noncommercial works, the Archive of Our Own, has over 2.5 million registered users, hosts over 6 million unique works, and receives almost 350 million page views per week. During this time of quarantine, one especially cannot deny the importance of Internet connectivity and sites like the Archive of Our Own, Wikipedia, Kickstarter, videoconferencing services, public library sites, and distance education services. The Archive of Our Own, for example, experienced an unprecedented rise in users when COVID-19 lockdowns began, and that user rise has persisted.²⁶

Notwithstanding this importance, small sites, especially nonprofit ones like the OTW's Archive of Our Own, have very limited resources, both in terms of financial and human capacity. The

²⁵ See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Columbia Pictures Industries v. Fung*, 710 F.3d 1020 (9th Cir. 2013); *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 2015 WL 1873098 (S.D.N.Y. Apr. 23, 2015).

²⁶ See AO3 Statistics 2020: A Look Behind the Scenes, May 9, 2020, https://archiveofourown.org/admin_posts/15931.

OTW's entire legal team, for example, consists of seven volunteers who also have other full-time responsibilities. Under the current system, these sites are capable of fulfilling the responsibilities of the DMCA's safe harbor; evidence shows that among the more demanding of these responsibilities is distinguishing between valid and invalid takedown notices.²⁷ Any system that treats small sites as if they had the resources of large ones--whether by requiring "staydown," forcing adoption of technological filtering mechanisms, or imposing more stringent "red flag" knowledge requirements--would not do anything to improve matters for rightsholders, considering the low volume of takedown notices received by small sites. But it would be disastrous for the users who rely on small platforms, and would serve mostly to strengthen the behemoths by putting the survival of small OSPs and new market entrants at risk.

VI. Rules Designed Primarily for Large-Scale Copyright Owners Would Harm Countless Individual Users Who Create Transformative Works

Just as assessment of section 512 should take into account the experiences and needs of small OSPs, it should also take into account the experiences and needs of small-scale creators. The experiences of user-creators who make transformative works such as fanworks are instructive.

Fanworks and other forms of transformative creation (often described as "remix") are important for myriad reasons. Substantial percentages of Americans online create remix, and millions more enjoy the results.²⁸ Remix empowers new speakers and allows them to develop skills and build creative communities.²⁹ It provides a particularly valuable tool for underrepresented speakers to provide political and cultural insights,³⁰ and enables speakers to engage in compelling political and personal expression.³¹ The value in fanwork creation, in particular, is personal rather than commercial. The fanworks on the Archive of Our Own are available for free. However, the non-commerciality of these fanworks does not diminish their importance. Through creating and consuming fanworks, fans create community, refine their skills, find their

²⁷ See Statement of Professor Rebecca Tushnet, Harvard Law School Before the U.S. Senate, Committee on the Judiciary Subcommittee on Intellectual Property on "The Digital Millennium Copyright Act at 22: What is it, why was it enacted, and where are we now?" February 11, 2020, at 10 (citations omitted):

Some very big sites, like [the OTW's site], Wikipedia, and the blogging site Medium, [receive] relatively few copyright claims and a relatively large proportion of invalid claims out of those few. Kickstarter, the crowdfunding portal, is another example: In 2015, it received copyright infringement claims targeting only 215 projects, despite having hosted hundreds of thousands of them. Of those, Kickstarter only disabled access to 78: 64 percent of the copyright infringement claims were invalid. Even [for] Amazon's large Kindle Direct program ... half of the takedown requests it receives for Kindle Direct are from competitors trying to suppress another person's book.

²⁸ See Organization for Transformative Works, *Comments to the National Telecommunications and Information Administration and the U.S. Patent and Trademark Office*, Nov. 13, 2013, § II, <http://www.transformativeworks.org/wp-content/uploads/old/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>.

²⁹ See *id.* at § III.B-C.

³⁰ See *id.*

³¹ See, e.g., St01en Collective, "Fellowship of the Ring of Free Trade" YouTube (March 27, 2011), <https://www.youtube.com/watch?v=GNn54ctPwtQ> (which adds subtitles to clips from the popular movie *The Lord of the Rings* to comment on the recent history of international free trade agreements and the efforts to oppose them).

own creative voices, improve and maintain mental health, and build personal strength.³² In these trying times of COVID-19 quarantine, fan communities and creative outlets are all the more important.

In addition to the fundamental user needs discussed in section III, empirical evidence establishes several important principles about the application of section 512 to transformative user/creators. First, section 512 is not only for large-scale copyright owners. It has been effective in helping transformative creators protect their works from unauthorized exploitation. Second, transformative creators need to be able to rely on notice-and-takedown systems that do not rely on “trusted system” extra-legal mechanisms like technological filtering and ContentID. Third, there is a need for notice-and-takedown systems that take fair use into account to avoid chilling transformative creation.

In 2017, OTW collaborated with academics to conduct a survey of fan creators that focused on experiences with and attitudes about copyright. In addition to two questions that asked specifically about knowledge of and experiences with section 512, a third question about general experiences with copyright also solicited a number of answers about takedown notices.³³ There were over 2,000 survey respondents, and our qualitative analysis of these answers reveals a number of salient points drawn from real-world experiences with DMCA takedowns.

A. Section 512 Has Been Effective in Helping Transformative Creators Protect Their Works From Infringing Distribution

Some survey respondents explained that they have successfully used takedown notices to protect their fanworks.³⁴ In particular, responses focused on “scraping sites,” which repost fanfiction without the authors’ permission and charge users for access to work originally made available for

³² NAT’L TELECOMM. & INFO. ADMIN., REQUEST FOR COMMENTS ON DEPARTMENT OF COMMERCE GREEN PAPER, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY, COMMENTS OF ORGANIZATION FOR TRANSFORMATIVE WORKS (Nov. 13, 2013), available at http://www.ntia.doc.gov/files/ntia/Organization_for_transformative_works_comments.pdf; Hannah Krishna, *How Writing Fanfic Helped Me Work On My Mental Health*, A Series of Random Thoughts (blog), June 4, 2019, <https://seriesofrandomthoughts.wordpress.com/2019/06/04/how-writing-fanfic-helped-me-work-on-my-mental-health/>.

³³ Q34. Are you familiar with the Digital Millennium Copyright Act (DMCA)? 1. No, I have never heard of it; 2. I have heard of it, but I do not know what it is; 3. Yes, and I think the DMCA is: _____; Q35. Do you know what to do if your fanwork is the subject of a takedown notice on YouTube? 1. I do not know what a takedown notice is; 2. I have received a takedown notice and here is what I did do: ____; 3. I am familiar with takedown notices but would not know what to do; 4. Here is what I would do if I received a takedown notice _____; Q44. Have you ever experienced an issue with copyright related to your fanwork? (e.g., your work being taken down, or finding out that someone else copied your work) 1. No; 2. Yes (please explain what happened).

³⁴ “a friend alerted me that my work had been plagiarized and the names edited to another fandom. contacted the poster who plagiarized, asked them to remove it or i’d report the work/account. they did not remove it so i reported it and it was removed by the website.” [Q44 P212]; “Somebody took my entire story and posted it word for word on ff.net. I reported it and many of my friends put in abuse notices, and the story was taken down.” [Q44 P339]; “Found out that someone posted one of my stories under their name. I notified the website and they took the fic down and deleted the other account.” [Q44 P391].

free. Participants cited broad success with sending takedown notices. Participants mentioned that they were informed about the takedown process on social media by fan communities.³⁵ In most instances where participants reported successfully sending a takedown notice when their own works were infringed, the work was fanfiction.³⁶ Fan art was another context where participants successfully sent takedown notices.³⁷

B. Transformative Creators Need Usable Notice-And-Takedown Systems that Do Not Rely On “Trusted Systems” Procedures.

Participants reported shared experiences demonstrating a power imbalance in platforms’ application of the DMCA.³⁸ Most instances where participants reported that their works were accused of infringing another’s copyright involved fanvids, generally on Youtube.³⁹ When responding to the question about what the participant did when they received a takedown notice, participants suggested that Youtube’s application of Section 512 does not consider fair use and adversely impacts works that constitute fair use solely because its automated system flags content that contains any amount of copyrighted work found in its system.⁴⁰ When a video is

³⁵ “There have been a few scams in fandom where a for-profit group scrapes AO3 or another archive and puts up the works for its own profit, and sometimes my work was involved in that. I never thought of that as a copyright issue though. As far as I know, those scammy websites were taken down. In one of the cases, I sent a notice myself, but I don't know how it works -- I was just following the instructions of the people who did.” [Q44 P109]; “my fics have been changed into ebooks and distributed where I didn't want them. I submitted DMCA and they were taken down” [Q44 P53].

³⁶ “Someone posted some of my fic to a site where you had to pay to view fic (it was mined off AO3.) I got it taken down.” [Q44 P769]; “Some of my fanfic got copied onto wattpad without my permission. I complained to wattpad and they took it down.” [Q44 P850]; “I've had my fic copied and pasted to Wattpad without permission. I reported it to Wattpad and it was removed.” [Q44 P856].

³⁷ “I've had the issue that people have reposted my fan art both on tumblr and Facebook. And on tumblr I just contacted the support team and they fixed it and removed the copy within 24 hours.” [Q44 P56]; “I did once many years ago find someone claiming my art as their own, it was fan art of left 4 dead I believe. I resolved the issue with the website, giving them proof it was mine, and they deleted the fake account and made sure the person stopped using my and other peoples art.” [Q44 P996].

³⁸ “The copyright-holder is supposed to first exclude “fair use” before sending a DMCA-notice, but many doesn't. And the sites often takes down content immediately after receiving a notice, without evaluating if it was/could be “fair use”. Both sites and the copyright-holders may also run bots to flag and/or remove content automatically, which again take no consideration to fair-use.” [Q34, P1509]; “I think the DCMA is an attempt to address the distribution and use of copyrighted works on digital platforms. I also think that it was poorly designed and attempted to curtail/amend/revoke rights previously avoided to the consumer, giving the power to the producer of the content rather than the purchaser.” [Q34, P1521.]; “An American takedown system easily abused through automation, and by entities who are unaware of what they have the right to send a notice on.” [Q34, P1220.]; “I've had problems with people stealing and selling my original artwork online. I'm pretty sure almost every artist has. I can usually get it taken down but it's a hassle and there's not really much you can do about it. Most of us don't have money for lawyers.” [Q44 P310].

³⁹ “I posted copyrighted content on YouTube and it got deleted” [Q44 P448]; “it was just a youtube video with a song that was copyrighted. the video was blocked and that was that.” [Q44 P511].

⁴⁰ “I know that I can contest a work, but I must swear that it is my own work, and since the images in my fan vids, do come from a TV show, they would still be denied by You Tube.” [Q35, P821]; “I knew there was a chance I could contest it, but I thought even if my vids were legal YouTube might not know that and might just tell me they

taken down because a platform's automated system flags it, the burden shifts to users to have their work reinstated. At the same time, fan creators don't enjoy the benefits of the automated system because it generally does not include their works, imposing affirmative burdens on the creator to seek out instances where their works are infringed and send a takedown notice. Because fan creators' own works are apparently not protected by platforms' automated systems but are frequently flagged by those automated systems as infringing without considering fair uses of copyrighted material, fan creators don't benefit from automated systems.⁴¹

When a platform, typically Youtube, removed a video, many participants reported that they did not file counter-notices.⁴² Some participants tried to educate themselves by searching for what to do online, but their confusion about whether they could file a counter-notice discouraged them from doing so.⁴³ Although most participants who received takedown notices expressed a sense that submitting a counter-notice would be futile, those who did send counter-notices were largely successful.⁴⁴ Some respondents were unsuccessful despite arguing that their work was a non-infringing use, but this appears to be more the exception than the norm.⁴⁵ Participants reported general success in using counter-notices to have their work reinstated,⁴⁶ suggesting that simply because a work was removed it was not necessarily infringing. Some participants filed more specific counter-notices including details about why the work constitutes a fair use.⁴⁷

Since the counter-notices were filed by individual users and did not seem to involve much more analysis than what the platform could do itself if it analyzed whether the work constituted fair use itself, these responses suggest that platforms remove content without considering whether the

were illegal, so it wasn't worth bothering. Currently, my YouTube account bans uploads and has had a banner on it for months about how I need to attend "copyright school." I find that just plain condescending and humiliating, so I don't bother with them. If I start making vids again I'll just put them on tumblr instead." [Q35, P1563].

⁴¹ "Youtube's notorious for taking down fanvids. I've had art being copied by others, and posted without permission but most sites have a system against such persons, which relies on the content creator's effort to take down the copies." [Q44 P603].

⁴² "I had a YouTube video taken down once. I was too scared to do anything about it (except not use YouTube for fan vids)." [Q44 P519].

⁴³ "I googled stuff but was scared my appeal would fail so I did nothing." [Q35, P1165]; "i sent back a 'fair use' claim? something like that? the wording is very scary though because they make it sound like theyre going to take you down[.]" [Q35, P1238].

⁴⁴ "I appealed the claim and explained how my work fell under the fair use exception. I got the video back, but had to change the audio to a different song. (weird, bc the claim was for the video and came from the original network, but oh well)" [Q35, P65]; "I appealed Youtube's decision and explained that I believed the content was being used in the context of fair use law." [Q35, P1446].

⁴⁵ "i tried to explain that it's fair use in my country, they did not cooperate and i deleted my work[.]" [Q35, P105].

⁴⁶ "I've had issues with my fanwork being temporarily removed from YouTube and especially Soundcloud, attempts to take down song covers from my website, and issues where someone plagiarized my own work. In every DMCA case except the soundcloud issue I was able to argue successfully for reinstation / left alone. I've also been successful at getting my plagiarized works removed from the sites where they've been posted." [Q44 P778].

⁴⁷ "I file a counter-complaint specifying the ways in which I believe the file is a transformation or enhancement of the original work, and thus a fair use of the original work copyrighted to me and not the original rights-holder." [Q35, P778].

work was a fair use or not. Furthermore, since users are often reluctant to file counter-notices in the first instance, one can reasonably conclude from these responses that platforms frequently remove non-infringing fanworks.

C. There is a Need for Processes that Do Not Chill Transformative Creation.

Our survey results indicate that fan creators are not motivated by a desire for economic gain: fans make their fanworks available for free and rely on takedown notices to prevent others from exploiting their works financially or taking credit for their works. This indicates that section 512 is capable of promoting fan creators' interests in self-expression and community.

Overwhelmingly, however, participants viewed the lack of balance in takedown processes discussed above as hindering fanwork creation and stifling creativity.⁴⁸ Participants identified platforms' tendency to protect economic interests when implementing takedown systems as one possible reason for this hindrance.⁴⁹ Other participants discussed the chilling effect of shifting the burden from rights holders to fan creators;⁵⁰ and identified other reasons for declining to file a counter-notice, such as privacy.⁵¹ The harm of failure to consider fair use was particularly powerful: Participants whose works were removed explained that they believed that their works constituted fair use, offered examples of uses that fit squarely within fair use by being noncommercial and being used for criticism and parody, and discussed how removal of those works stifled their creativity and communities.⁵²

Respectfully submitted,
Betsy Rosenblatt
On behalf of the Organization for Transformative Works
June 9, 2020

⁴⁸ "Someone can tell you to take your fanwork down from the internet." [Q34, P256].

⁴⁹ "Overblown with takedowns for time-consuming fan work. It mainly hurts fandom love, not the people who make monetary gains off of the product." [Q34, P1368].

⁵⁰ "I felt too unmotivated and busy to do anything but it was definitely unfair because the one taken down was a clip I modified into a parody which is perfectly legal for fair use." [Q35, P1374].

⁵¹ "I've had a couple of podfic removed by MediaFire, presumably because I used pieces of music. I thought about fighting it, but then didn't feel like exposing my fannish identity too much, so I just used another download service." [Q44 P840].

⁵² "Nothing. I think my video was fair use (a small handful of clips from a movie series rearranged to highlight the director's use of racism) but I was too scared to fight it." [Q35, P519]; "Therefore a take down means that the work is lost and can not be showed to the larger community. It takes work out of the commons and silences it." [Q35, P821].