I. Introduction .................................................................................................................................................. 2

II. Dismantling the DMCA’s Categories of Providers Would Harm Users .................................................. 4

III. Lowered Knowledge Standards or Filtering/Monitoring Obligations for OSPs Would Harm Users ................................................................................................................................. 5

A. “Lowered” Knowledge Standards or “Staydown” Filtering/Monitoring Requirements Would Trample Fair Use, Endanger Small OSPs, and Entrench Current Tech Behemoths ......................................................... 5

1. Technological Limitations Make “Staydown” Filtering Impossible ......................................................... 5

2. Automated Systems Harm Creators and Users and Can’t Adequately Account For Fair Use .......... 8

B. Content Moderation Is Not Knowledge ........................................................................................................ 10

C. Curtailing OSPs’ Discretion To Assess The Merits of Takedown Notices Would Harm Users ............. 11

IV. Copyright Office Oversight Over Standard Technical Measures (STMs) and Repeat Infringer Policies Would Create Shifting Sands, Burdensome Rulemaking, and Potentially Disastrous Consequences for Users ............................................................................................................... 12

V. Requiring OSPs to Negotiate “Voluntary” Agreements Would Squeeze Out Small Participants and Fair Users .................................................................................................................................................. 13

VI. The Discussion Draft Places Unacceptable Burdens on Noninfringing Users ........................................ 14

VII. The Discussion Draft’s Proposed Revisions to Section 1201 Fail To Recognize the Core Problems With Section 1201 ............................................................................................................................................... 16

VIII. The Discussion Draft’s Proposed Revisions to Section 1202 Make it Worse, Not Better ........................................... 18

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. 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 3.4 million registered users, hosts over 7 million unique works, and receives over 350 million page views per week. Through creating and consuming
fanworks, fans create copyrighted works, build community, refine their skills, find their own creative voices, and build personal strength.¹

As the above facts make clear, Internet users are not only consumers of content, but also passionate and valuable creators and copyright holders in their own right. Their endeavors—including the millions of text-based works on the Archive of Our Own and countless other audiovisual works, music, visual art, games, crafts, and other works—are made possible by the DMCA. The interests of Internet users as both consumers and rightsholders illustrate exactly how diverse and complex the Internet’s creative ecosystem is, why user interests should be explicit considerations in any discussion of the DMCA, and how the draft proposal would dismantle the benefits of the DMCA for users.

The OTW appreciates the opportunity to share its experience and appreciates the openness of the current discussion. Copyright issues—especially issues concerning copyright on the Internet—are important for Americans, and the OTW is happy to see decisions regarding copyright policy being approached deliberately, thoughtfully, and inclusively.

I. Introduction

The OTW urges the Judiciary Committee and Sen. Tillis, in framing any proposals concerning online copyright law, to refer to earlier submissions made by the OTW as well as the prior testimony of Professor Rebecca Tushnet.² Those earlier submissions and testimony articulate arguments both similar and complementary to those made here, including numerous examples and illustrations not discussed here. These Comments add to those submissions rather than repeating them.

The OTW believes that line-by-line comments on the “Digital Copyright Act” discussion draft circulated by Sen. Tillis’s Office in December 2020 would be unlikely to be productive, because so many aspects of the discussion draft would benefit from wholesale elimination and reconsideration. Therefore, these Comments discuss the ways in which several aspects of the draft’s proposals would be counterproductive to the goals of progress and creative incentives that the Copyright Act is designed to promote, and would be especially harmful to Internet users.

The DMCA as it currently exists is an impressive and—for the most part—effective set of compromises. Discussions of section 512 tend to presume that all “creators” are dissatisfied with section 512 and want to make it easier to have material removed from the Internet. We write to explain why that is not true. Users—including the hundreds of thousands of user-creators that the OTW serves—are harmed by narrow interpretations of section 512’s safe harbors, invalid Internet take-downs, and automated content filtering and removal. The OTW works directly with Internet creators, and our experience and empirical research demonstrate that those creators depend upon broadly applicable DMCA safe harbors that encourage fair use, enable platform flexibility, and do not require automated filtering or monitoring. In other words, 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, and to avoid making changes that would undermine those benefits.

Although there may be ways in which the DMCA could be improved, the changes proposed in the discussion draft will make things worse rather than better. The DMCA represents a delicate balance of considerations that takes into account the needs and interests of Internet users, Internet providers, and copyright owners. Changes that shift that balance—especially the changes proposed in this discussion draft—come at the expense of Internet users and would harm not only the Internet ecosystem and thriving economic systems surrounding it, but also the free expression that copyright law exists to promote.

In an earlier Statement, the OTW directly addressed the Copyright Office’s Report on Section 512 of the DMCA. In that Statement, although we provided critiques of many of the Report’s findings and suggestions, we agreed with several of the Report’s conclusions. All of these points of agreement have been either overlooked or contravened in the proposed draft. To the extent that the present discussion draft purports to look to the Copyright Office as a source of expertise in copyright law, it should take heed of the Copyright Office’s admonitions 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 stakeholders within the same classes.
- Voluntary initiatives do not substitute for balanced legislation.
- Lawmakers should reject proposals to enact radical changes such as “notice and staydown,” other upload filtering mandates, or site blocking.

---

5 Id.
6 Copyright Office Report at 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.\(^7\)

In addition, discussions of sections 1201 and 1202 of the DMCA often presume that creators are satisfied with them, or that they pose no meaningful burden on non-infringing users. Here, too, the OTW’s experience over decades of section-1201 rulemaking belies those presumptions. Section 1201 unnecessarily burdens creators making fair uses and people whose interests don’t require copying—fair or not—in any ordinary sense but who are looking to repair or control their own devices, from insulin monitors to tractors. While there are some aspects of the draft proposal that begin to recognize these burdens, they do little to address or ameliorate them. Ultimately, the best and most doctrinally coherent way to address these burdens is to connect liability under section 1201—a copyright statute—with acts that infringe copyright, and not to impose copyright liability on acts that do not infringe copyright. Even in the absence of such an “infringement nexus,” rules regarding circumvention of technological protection measures should strive to enable non-infringing activities—not inhibit them—through presumptions of non-infringement rather than relying on an expensive, incomplete, and burdensome exemption process where protecting user interests pits volunteers and law students against some of the most powerful corporations in the country.

Likewise, §1202 was added to the DMCA in the unfounded expectation that copyright management information (CMI) would be part of larger technological tracking systems. As matters have developed, CMI is not generally a meaningful way to deter or detect infringement; instead §1202 claims are added on to a case increase the threat of damages, including in cases of fair use. Nor should the law be amended in ways that threaten to make ordinary plagiarism incidents into federal infringement claims, especially with respect to unattributed copying of a portion of a work, instead of the entire work. Although there are many proposals for increasing the role that attribution rights play for authors in US law, §1202 is an inappropriate model because it lacks clarity. For example, defining “removing” CMI has turned out to be difficult in the digital context, as has determining whether derivative works fall within §1202’s scope at all.

The most important part of §1202, which has mostly kept it from being abused (other than as a coercive add-on in an ordinary infringement case) is that it is tied to knowledge of a connection between removal of CMI and infringement. Changing this requirement would invite harassment of fair users, licensees, and others who are not harming any authorial incentives.

II. Dismantling the DMCA’s Categories of Providers Would Harm Users

The DMCA has different requirements for different types of Online Service Providers (OSPs) for important reasons. Eliminating or merging categories of OSPs harms user interests without providing any corresponding benefits.

\(^7\) Copyright Office Report at 72.
It is almost impossible to overstate the harms to user privacy that would accompany rules that require telecommunications companies, e-mail providers, providers of text messages, videoconferencing services, and countless others to monitor users’ most basic and personal communications—communications made all the more crucial in a time when pandemic restrictions push communications of all kinds, including not only business communications but also intensely personal communications, ever-further online. The potential results of such monitoring—the loss of basic communications in real-time based on the mere possibility that a copyrighted work might be used in an infringing manner—could be catastrophic. Furthermore, such rules would directly contradict other portions of the DMCA that protect encryption.

Moreover, the discussion draft undermines Americans’ rights to Internet access, which is currently governed by §512(a)’s transmission provisions. A household’s Internet access is vital to every aspect of life today, from education to employment to religious services, and should not be cut off based on the misbehavior of a single member, and especially not based on allegations of such misbehavior.

III. Lowered Knowledge Standards or Filtering/Monitoring Obligations for OSPs Would Harm Users

The circulated discussion draft proposes both a “lowered” knowledge standard under which OSPs would more easily be charged with knowledge of their users’ activities, and a so-called “staydown” system that is, in all relevant ways, a filtering or monitoring requirement by another name. Either of these requirements would endanger small OSPs, entrench current tech behemoths, trample fair use, and harm users; together, their harms are multiplied.

A. “Lowered” Knowledge Standards or “Staydown” Filtering/Monitoring Requirements Would Trample Fair Use, Endanger Small OSPs, and Entrench Current Tech Behemoths

These proposals, at their heart, remove safe harbor protections from OSPs, leaving OSPs with a binary choice—either endeavor to conduct intrusive, prohibitively-difficult (and often technologically-impossible) and inevitably over-inclusive monitoring and takedown schemes, or open themselves up to liability for their users’ activities based on the often-overreaching claims of copyright holders and the uncertain judgments of courts.

1. Technological Limitations Make “Staydown” Filtering Impossible

As a threshold matter, technology simply does not allow the sort of “staydown” that the discussion draft contemplates, particularly in light of its relaxation of requirements for takedown notices. The name of a copyrighted work or an author is simply not enough to identify a work, and it is especially not enough to identify what exactly is supposed to “stay down.” Further data about the work is required. This is particularly true for fair-use derivative works—to suggest otherwise would be to suggest a system in which every book report and tweet about Harry Potter...
and the Sorcerer’s Stone would risk being caught in a filter. Moreover, although certain kinds of text, audio, and video are at least sometimes searchable, the same is not true for the remaining universe of copyrighted works. Encrypted material, some kinds of text, software, visual materials, games, physical goods, and countless other types of works are simply impossible to assess by technological means, and it is relatively easy for even sophisticated filtering technologies to be circumvented.

To the extent that such programs would even be technologically feasible, only the largest OSPs would be able to afford them. Other OSPs simply do not have the resources to undertake the sort of filtering and monitoring that the discussion draft would require, and are existentially endangered by a “lowered” knowledge standard. This is especially those like the OTW’s nonprofit Archive of Our Own, which is run by a small team of volunteers but hosts an enormous amount of noncommercial and archetypally fair-use material. Like most other online services outside of the dominant sites, the OTW does not have, and could not build, word or hash filtering.

---

8 See, e.g., See Vance Ikezoye, President and CEO, Audible Magic Corp., Statement before the House Science and Tech. Comm. 8 (June 5, 2007) (available at https://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/060507_ikezoye.pdf) (“The reality is that encryption technology can prevent the detection of content transfers at the file level such as that performed by our product.”); DeviantArt, Re: Request for Comments on Department of Commerce Green Paper: Copyright Policy, Creativity, and Innovation in the Digital Economy [Docket No. 130927852-3852-01] https://www.ntia.doc.gov/files/ntia/deviant_art_comments.pdf, at 10 (“In addition to obvious forms of visual art that implicate ‘remix’ practices such as photo manipulation, digital collage, mixed analog/digital collage, stock photography, stock illustration, fractals, multi-media, vectors files, digital wire frames, 3D renderings and many others, traditional art forms such as painting, drawing and sculpture increasingly rely on digital techniques to reference or incorporate other works. All of these forms and categories are found in great numbers on deviantART.”); Google, Comments: Department of Commerce Green Paper, Copyright Policy, Creativity, and Innovation in the Digital Economy, Docket No. 130927852-3852-01 (October 3, 2013), https://www.ntia.doc.gov/files/ntia/google_comments.pdf, at 4 (“As an initial matter, Content ID will never include reference files for every copyrighted work that might be included in every remix uploaded to the site. While Content ID currently has over 15 million reference files in its database, that represents a tiny fraction of all the audio, video, and imagery that falls within the scope of copyright. In other words, no matter how comprehensive Content ID’s database of reference files may one day become, there will always be an important role for fair use when it comes to remixes on YouTube.”); Scribd, https://www.scribd.com/copyright/bookid (last visited Jan. 26, 2017) (explaining that scanning text with optical character recognition produces results that “make it very difficult, if not impossible, to detect matches,” and that false positives are common because many books “contain long excerpts of classic literature, religious texts, legal documents, and government publications that are typically in the public domain. This can occasionally result in the removal of uncoprighted, authorized, or public domain material from Scribd.… Unfortunately, the volume of reference samples and uploads to Scribd prevent any sort of manual oversight or notification prior to effecting removals.”).

9 Given the ability to upload documents using HTML and CSS—basic building blocks of online content—a filter-defeating change can be something invisible to the naked eye, such as putting a nonbreakable space (&nbsp;) in place of a regular space, or adding random sentences and hiding them with CSS. More generally, a simple filter is trivially easy to evade: it is easy to recode media in a new file format and get a different hash. See also Elizabeth Dwoskin & Craig Timberg, Inside YouTube’s struggles to shut down video of the New Zealand shooting — and the humans who outsmarted its systems, Mar. 18, 2019. https://www.washingtonpost.com/technology/2019/03/18/inside-youtubes-struggles-shut-down-video-new-zealand-shooting-humans-who-outsmarted-its-systems.
that could identify unauthorized, infringing works and distinguish them from non-infringing works.

Regardless of genre or medium, “staydown” filtering requires databases of ownership, which are not feasible to create; particularly in light of multiple or conflicting claims of ownership. As the Digital Media Licensing Association explained about photographs, “[i]f images are distributed by multiple representatives, or licensed on a non-exclusive basis, it can be nearly impossible to distinguish an infringing use from a licensed use.” The predictable result of filtering in such genres is that properly licensed uses will be taken down both to the detriment of the copyright owner and the licensed user. Moreover, in areas like music, where it is technologically impossible for filtering software to distinguish between licensed and unlicensed recordings of a public domain work, the inevitable result of “staydown” filtering or monitoring will be to suppress performing artists’ livelihoods.

Moreover, even if it were possible to do, creating and maintaining a database of all works for which infringement has been claimed—which seems to be what the discussion draft would contemplate—is impossible for all but the wealthiest OSPs. Furthermore, using that database to conduct the sort of monitoring, notice-sending, and counter-notice analysis contemplated by the discussion draft would require person-power that is unavailable to all but the wealthiest OSPs. Requirements that infringement-monitoring technologies be offered at reasonable and nondiscriminatory pricing do nothing to address these person-power costs for nonprofit, small, or volunteer-run OSPs. Nor can pricing guarantees address the problem of over-aggressive or abusive notices that challenge fair uses or other non-infringing uses.

---

10 The OTW’s Systems team notes that, because it is made up of part-time volunteers, we couldn’t expect even minimal progress on such an algorithm for years.

11 See, e.g., Stephen Worth, Amazon, U.S. Copyright Office Section 512 Public Roundtable 05-12-2016, transcript at 218 (“It also puts OSPs in a situation where we’re asked to mediate disputes between artists and songwriters and labels and publishers. So, you know, rights move around, and rights change, and sometimes labels lose rights. Sometimes publishers lose rights. Sometimes there’s a dispute about that. And if rightsholders can’t keep track of licenses or properly determine what fair use is, it seems incorrect from my perspective to ask OSPs to do that.”); id. at 219 (noting that in music, “the metadata is notoriously poor. Again, rightsholders don’t even know what content they’re licensing to us when we sign a deal with them ….”); National Ass’n of Realtors, Section 512 Study, Additional Comments, https://www.regulations.gov/document?D=COLC-2015-0013-92461 (explaining the problems caused by conflicting ownership claims for realtors and real estate agencies).


13 Cf. Alex Feers, Medium, U.S. Copyright Office Section 512 Public Roundtable 05-12-2016, transcript at 74-75 (describing “the experience of having a large-scale rightsholder license a photograph to somebody launching a Web magazine on Medium. We got a takedown for it and scuttled the launch of that magazine. And it turns out it had been licensed.”).

14 See Mike Masnick, Harry Fox Agency Claims Copyright Over Public Domain Work By Johann Strauss, TECHDIRT.COM (Nov. 6, 2012, 10:02 AM), https://www.techdirt.com/articles/20121102/13164120919/harry-fox-agency-claims-copyright-over-public-domain-work-johann-strauss.shtml; Chris Morran, YouTube’s Content ID System Will Take Away Your Money If You Dare Sing “Silent Night,” CONSUMERIST.COM (Dec. 26, 2013), http://consumerist.com/2013/12/26/youtubers-content-id-system-will-take-away-your-money-if-you-dare-sing-silent-night/ (“YouTuber Adam ‘The Alien’ Manley ran up against the idiocy of Content ID twice in the last week, with multiple music publishers claiming that his recent rendition of ‘Silent Night’ violated their copyright, in spite of the fact that the song, an English version of a nearly 200-year-old German Christmas carol . . . has been in the public domain for more than a few years.”).
2. Automated Systems Harm Creators and Users and Can’t Adequately Account For Fair Use

“Staydown” filtering and monitoring create especially acute problems for fair uses, which often must use distinctive elements of copyrighted works to achieve their fair and non-infringing expressive purposes, and would inevitably be caught in even the most sophisticated of filtering technologies. Hosting user content inevitably means hosting fair uses—and hosting fair uses means hosting non-infringing material that copyright holders may nonetheless believe is infringing. Yet monitoring and filtering technologies cannot assess transformativeness or other fair use factors. How are OSPs to treat such material under a “lowered” knowledge standard or a “staydown” filtering/monitoring regime?

- Take the case of *Lenz v. Universal*,15 in which the Ninth Circuit Court of Appeals found that a video of a toddler dancing to Prince’s “Let’s Go Crazy” was obviously fair use. Yet once the song “Let’s Go Crazy” had been the subject of a takedown notice, the discussion draft would seem to require OSPs to hunt down and remove the very video that the Ninth Circuit held was “wholly authorized by the law,”16 or else risk losing their safe harbors.

- Or take recent news stories about the Beverly Hills Police and other police departments playing popular music during raids so that citizen videos of their activities will be filtered by popular social media sites, preventing the police from being held accountable to the public for violent actions.17 The discussion draft would not only permit, but *require* an OSP to engage in the sort of filtering that enables that sort of exploitation, or else risk losing their safe harbors.

The OTW’s constituents regularly report that their transformative videos have been blocked by filtering software, notwithstanding that they are fair uses. This is incredibly damaging but hardly surprising, when even the most highly-touted filtering software cannot account for fair uses.18 The pandemic revealed, for example, that Audible Magic’s celebrated technology can’t

---

15 *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).
16 Id. at 1132.
distinguish between different performances of the same classical works, blocking orchestras from the only way they had to reach their audiences.\(^{19}\) Content ID has suppressed legitimately authorized, time-sensitive uses such as awards shows and political conventions.\(^{20}\) Overdetection occurs in countless circumstances.\(^{21}\) As one artist explained,

> It is up to me to prove myself innocent by asking eighteen different publishing companies through an automated system to revoke the automated claims. Each publisher has a month to reply, with no obligation to even do so. If even one of the eighteen publishers says ‘nope’ then it’s back to square one . . . . Any financial loss or restrictions on my channel are entirely on me, and will not be compensated for once the claim is lifted.\(^{22}\)

Filtering simply cannot substitute for a public, judicial dispute process. While a DMCA counternotice allows a fair user to litigate the issue of the lawfulness of her use, “staydown” filtering does not even give a fair user the opportunity to challenge mistakes. Mandating filtering or requiring OSPs to hunt down non-reported instances of a reported work creates fundamental problems of fair notice in suppressing free expression that—at best—contravene due process.

The regime contemplated by the discussion draft therefore entrenches tech behemoths, squeezes small and nonprofit OSPs, and tramples fair uses without producing a corresponding benefit. Experience teaches that while filtering and monitoring regimes like YouTube’s Content ID do sometimes help copyright holders monetize their works, they are not solutions for infringement. Rather, they not only enable the sort of copyright-based exploitation that the Beverly Hills Police Department has cynically undertaken, but they also place enormous burdens on fair uses,\(^{23}\) and (at least according to the reports of the entertainment companies they favor) they are also inadequate to prevent infringement.\(^{24}\)

---


\(^{20}\) See, e.g., Tim Cushing, *Copyright Killbots Strike Again: Official DNC Livestream Taken Down By Just About Every Copyright Holder*, TECHDIRT.COM (Sept. 5, 2012, 1:32 AM), http://www.techdirt.com/articles/20120904/22172920275/copyright-killbots-strike-again-official-dnc-livestream-taken-down-just-about-every-copyright-holder.shtml (automated content protection measures suppressed a stream of an awards show because officially licensed clips from Dr. Who were present; the same thing happened to the Democratic National Convention’s official channel, on behalf of multiple copyright claimants).


\(^{23}\) See infra.

Faced with the choices dictated by the discussion draft, a rational OSP would either remove anything that even remotely whiffs of infringement regardless of fair use, or go out of business. Faced with the risk and expense of the filtering and monitoring required by a “staydown” regime, a potential new entrant into the Internet space would simply give up before starting. The burden of these choices falls directly on Internet users, who lose the ability to engage in fair use from the outset—either because their uses are filtered, or because the sites that would host them cannot afford to exist.

**B. Content Moderation Is Not Knowledge**

OSPs should, however, be allowed to engage in content moderation without being charged with “knowledge” (whether deemed actual or “red flag”) regarding whether or not content residing on their network infringes. Although OSPs cannot be aware of everything that takes place on their networks and are ill-equipped to determine whether copyrighted material is used without authorization, OSPs can and should be permitted—to the extent they wish to do so—to assign informational tags to user-posted material, promote material that users may find particular value in, set their own standards regarding what material they will host, and remove material that violates those standards when and if they become aware of it. These sorts of content moderation are different from monitoring and filtering in both magnitude and kind, and they are crucially valuable to users. 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.

One reason why content moderation is so different from copyright filtering or monitoring is that users often play major roles in content moderation—users are able to flag and report content that violates a platform’s terms of service, and many OSPs rely on users to identify such content for purposes of moderation. 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 OSP knowledge for purposes of safe harbors cannot presume that either OSPs or users are capable of independently determining whether material is infringing.

---

“susceptible to user manipulation of the content that is often designed to circumvent the technology”); Reply Comments of Warner Music Group, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 5 (complaining that Content ID doesn’t sufficiently identify videos “incorporating” recordings or live performances); Reply Comments of Sony Music Entm’t, before the Copyright Office, Library of Cong., Section 512 Study, Docket No. 2015-7, at 3, 12-13 (claiming that nearly 1.5 million infringing works since December 2012 weren’t identified by Content ID, and that even one copy renders Content ID and “fingerprinting” meaningless).


26 See Gillespie, supra, at 87-97 (identifying various types and uses of user flagging).
C. Curtailing OSPs’ Discretion To Assess The Merits of Takedown Notices Would Harm Users

As the 2014-2015 Patent and Trademark Office/National Telecommunications and Information Administration roundtables addressing takedown notices and counter-notices made clear, OSPs are not standardized, copyright owners are not standardized, and uses of copyrighted material are not standardized. As a result, it does not make sense to require standardized forms for notice and counter-notice beyond the information specified in the statute. Instead, the PTO/NTIA roundtables developed a set of good, bad, and situational practices to guide both notice senders and notice recipients. Takedown practices in the current marketplace reflect this variation: OSPs may, and often do, develop procedures to guide small notice submitters through the process to ensure they have the requisite information and also to ensure that they have a real copyright claim, not a defamation or privacy or other objection.

Congress should not deter OSPs from creating procedures that are tailored to their own users, types of works on their networks, and unique challenges. OSP procedures should, and sometimes do, involve reviewing takedown notices for substantive matters as well as formatting compliance—for example, 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. The OTW, for example, receives very few takedown notices, and therefore is able to hand-review every notice we receive. It may be impossible for OSPs that receive large numbers of notices to engage in this sort of bespoke review; mandating that such review occur would therefore be a mistake. At the same time, any interpretation of section 512 that would force OSPs to blindly follow properly-formatted notices—no matter how flawed they may otherwise be—would invite viewpoint censorship, harassment, and unfair competition; and would harm users.

For that reason, section 512 should explicitly provide that developing procedures for reviewing takedown notices does not eliminate section 512 safe-harbor protection for an OSP. Any implication in the discussion draft that there are penalties (such as loss of safe harbor) for failing to remove non-infringing material that is the subject of a properly formatted takedown notice by someone who is not on a database of malicious actors is, at best, counter-productive and harmful to users and small OSPs alike.

---


IV. Copyright Office Oversight Over Standard Technical Measures (STMs) and Repeat Infringer Policies Would Create Shifting Sands, Burdensome Rulemaking, and Potentially Disastrous Consequences for Users

The discussion draft’s suggestion of giving the Copyright Office authority over periodic assessment of STMs is ill-advised. The OTW’s experience with §1201 exemptions has demonstrated that the Copyright Office is already overburdened and outside its competence when dealing with technologies rather than with the creative works to which those technologies are applied. While the Copyright Office could certainly facilitate multi-stakeholder discussions, giving it regulatory authority would likely replicate previous failures with technological mandates, such as the Audio Home Recording Act’s detailed regulations of digital audio tape, which contributed to the commercial failure of that medium.

In addition, the discussion draft tasks the Copyright Office, in consultation with NTIA, to develop a model repeat infringer policy that would set the minimum baseline for safe harbor protections. But as noted above, among the core lessons of the 2014-2015 Patent and Trademark Office/National Telecommunications and Information Administration roundtables is that OSPs are not standardized and infringement allegations are not standardized.29 The idea that the Copyright Office and NTIA could develop “best practices” that would apply across different kinds of OSPs has already been amply disproved.

In addition, definitions of “repeat infringer” must be permitted to vary based on the situation. Even setting aside malicious notices, it would be unreasonable to assume that every takedown notice represents infringement. Therefore, the only way to prevent undue prejudice to users is to base “repeat infringer” policies on infringement, not on allegations of infringement. Even within that framework, “repeat infringers” will look very different in different situations. The OTW’s experience is informative. Despite the large number of works housed in the Archive of Our Own, the OTW receives only 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 also 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

29 Id.
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.

Simply put, “best practices” are not, and should not be, laws. 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. Any system that turns best practices into law—especially a system that would attempt to develop “best practices” among the wide range of OSPs governed by the DMCA and the wide variations in types of copyrighted works and uses on the Internet—is a recipe for user harm.

V. Requiring OSPs to Negotiate “Voluntary” Agreements Would Squeeze Out Small Participants and Fair Users

The DMCA permits voluntary agreements between OSPs and copyright holders, and in some circumstances those agreements have demonstrated moderate success. However, those agreements should not be seen as models for others, and voluntary agreements are no replacement for balanced copyright.

Content ID—YouTube’s specialized program for audiovisual content hosted on its own servers—demonstrates some of the pitfalls of such agreements. First, the benefits of Content ID are available only to large-scale copyright holders, entirely cutting out independent creators and individuals such as the user-creators that the OTW represents. In fact, the OTW’s empirical research shows that Content ID often improperly prevents the posting of fair uses,30 which works against progress rather than for it. Second, a licensing model risks entrenching current behemoths’ near-monopoly on the market, since later entrants are unlikely to be able to negotiate deals as good as the deals available to an established market giant.31

The discussion draft’s mandate that service providers have a process for entering into voluntary agreements therefore serves only to benefit those who have the market power to create such agreements, and places enormous burdens on small and non-profit OSPs. The OTW, for example, would have no capacity to enter into voluntary agreements with the thousands of media companies whose works fans made fair uses of in their fanworks posted on the Archive of Our Own—nor would there be any need for such agreements, since those fanworks are likely to be fair uses that copyright holders have no legal right to prevent or benefit from.

Indeed, the OTW’s experience has shown that when platforms do create voluntary agreements with copyright holders, the result is content restrictions on uses that would otherwise be allowed. In multiple situations, platform policies restrict noninfringing uses, often discriminating against precisely those uses that are most likely to be fair because they are critical of the original.32 For example, Kindle Worlds, a fanwork licensing scheme by which Amazon tried to monetize acceptable fanworks, featured extensive limits on “offensive content,” vague requirements that characters be “in-character,” along with bans on “profane language,” graphic violence, “references to acquiring, using, or being under the influence of illegal drugs,” and “wanton disregard for scientific and historical accuracy.” In G.I. Joe works, the character Snake Eyes couldn’t be portrayed as a Yankees fan.33

These systems compound their harms to fair use by being unstable themselves, since even a work that pleases the copyright owner may be removed for business reasons: Anyone who relied on Kindle Worlds as an alternative, like anyone who relied on FanLib (a previous attempt to create a similar licensing scheme) would have lost all the content that they created when Amazon shut down the service, since they weren’t authorized to post it elsewhere.34

VI. The Discussion Draft Places Unacceptable Burdens on Noninfringing Users

In earlier Statements, the OTW has discussed the problem of abusive and improper DMCA takedown notices, and has suggested ways of addressing the problem, including requiring copyright holders to engage in objectively reasonable good faith consideration of fair use prior to sending a takedown notice and clarifying that recklessness in sending notice is actionable. We have also suggested that more aggressive measures, such as enacting a federal anti-SLAPP law or replacing the current notice-and-takedown regime with a notice-and-notice regime that does not result in automatic removal of accused material without an opportunity for response, would also aid in deterring overreaching and bad-faith takedown notices.

The discussion draft does none of these things, instead gesturing at user interests by proposing penalties against those who issue bad faith or extortionate takedown notices. While such penalties could be beneficial in addressing some of the most egregious of DMCA abuses, they do not come close to resolving the problem of overreaching and improper DMCA takedowns. Any provision that does not require a takedown notice to be objectively reasonable will not act as a meaningful deterrent to those who would use the DMCA to overreach. Penalties that are limited to bad faith or extortionate claims do nothing to help a user whose non-infringing work is removed from the Internet for ideological or personal reasons that are veiled in a thin gauze of colorable but overreaching copyright claims; whose non-infringing work is removed based

32 See Rebecca Tushnet, All of This Has Happened Before and All of This Will Happen Again, 29 BERKELEY TECH. L.J. 1447 (2014).
33 Id. at 1471.
on overreaching claims grounded in trademark law but styled as copyright complaints; or whose non-infringing work is removed based on the sloppy expediency of an automated search. These misuses of the DMCA account for a large proportion of the takedown requests that the OTW receives, but would likely fall through the cracks of the discussion draft’s regime. Instead, the discussion draft ensures that the burden of confronting such takedowns—including erroneous but good-faith notices and notices initiated by automatic or mechanically-generated systems—remains squarely on users who can least afford to carry that burden.

These problems are compounded by being combined with a proposed “staydown” system that would require OSPs to engage in filtering or monitoring for un-reported material that matches a copyrighted work. In such a system, it would be definitionally impossible for a takedown notice to take fair use into account. By its nature, fair use must be assessed by the circumstances of a particular accused use of copyrighted material, not by the mere existence of that copyrighted material on a network. When a copyright owner reports an infringing instance of “Let’s Go Crazy,” and as a result of that report a non-infringing video of a toddler also gets removed, the fair user—an innocent victim of copyright overclaiming—should have recourse without having to establish that the copyright owner was acting in bad faith.

Nor should the burden of asserting fair use rest on users who engage in fair use. Copyright owners simply do not have the right to prevent or benefit from fair uses and users should not need to invest in legal counsel simply to have non-infringing work put back up; and yet, the discussion draft would increase the already-onerous burden of counter-notifying by compelling a counter-notifying party to make legal fair use arguments, under penalty of perjury, in a counter-notification. Placing the premature burden of legal argumentation on users, who typically do not and should not need to obtain counsel just to deal with a mistaken takedown—is counterproductive and silences those who are most harmed by overreaching takedowns. The discussion draft proposes no parallel responsibility for copyright holders to make legal arguments, and there is no evidence to suggest that counter-notifiers under the current system—who must submit to legal process in a Federal court—are falsely claiming fair use in counter-notices. And surely there is nothing to be gained—other than piling expense and burden on users—from a copyright holder who has just obtained a statement under penalty of perjury that a work is not infringing, along with explicit consent to federal service of process, also being able to challenge a counter-notification. Yet the discussion draft would inexplicably require that takedown senders be permitted to make such challenges.

Shockingly—and surely unconstitutionally—the discussion draft would also require counter-notifiers to submit to the jurisdiction of the Copyright Claims Board for claims that fall within the Copyright Claims Board’s monetary limits. Even setting aside more general objections to the Copyright Claims Board’s jurisdiction and ability to engage in fine-grained fair use analysis, such a provision would require users to waive their right to a jury, merely for the privilege of submitting a counter-notification. It would undermine the opt-out nature of the Copyright Claims Board. And it would require a user attempt the impossible task of predicting
how much the submitter of a takedown notice—maybe even a takedown notice that wasn’t even directed at their work—would think its claim is worth.

In fact, the OTW’s experience shows that the counter-notification system is already woefully under-utilized because non-infringing users find the system too intimidating. Any proposal should make counter-notification more accessible to non-infringing users, not less so. One of the chief reasons that counter-notifiers are over-deterred is the requirement that they provide personally identifying information including their name, address, and telephone number. The discussion draft’s discussion of personally identifying information fails to recognize the complicated relationship between such information and state privacy law, state data protection law, and concerns about equity. The discussion draft’s proposal would only exacerbate the ease of relying on takedown notices for the improper purpose of learning a subscriber’s name, address, and telephone number—something that should require good cause and a subpoena. This state of affairs chills Constitutionally-protected pseudonymous speech (such as political speech) by forcing speakers to choose between identifying themselves and having their non-infringing speech removed from the Internet and not replaced. While a bad-faith notice can be punished—even under the current system, and barely more so under the discussion draft’s proposal—the damage is done the moment the counter-notifier provides their personally identifying information. To address this overdeterrence, the OTW recommends that counter-notices be able to be made pseudonymously when the allegedly infringing material was posted pseudonymously.

VII. The Discussion Draft’s Proposed Revisions to Section 1201 Fail To Recognize the Core Problems With Section 1201

Rather than delicately balancing the interests of users with OSPs and rightsholders, Section 1201 of the DMCA has unnecessarily burdened users and their advocates with an unwieldy process that gobbles advocacy resources for no meaningful gain. In triennial rulemaking procedures, law students and nonprofit advocates do the bulk of work representing user interests, while massive corporations argue that users should be punished for non-infringing activity, much of which is manifest fair use for purposes of education, commentary, or criticism, and much of which—such as security research and automotive repair—bears no relationship to copyright at all. In all the cases of which the OTW is aware, when a use enabled by circumvention is noninfringing, it stays noninfringing even if markets and technologies change.

In the discussion draft, the OTW sees some movement toward recognizing that existing permanent exemptions to section 1201’s anti-circumvention provisions are too narrow. But exemptions will inevitably remain too narrow so as long as Congress and the Copyright Office rely on procedures that define technologies and technological practices in advance. Making forward-looking decisions based on educated guesses about where technology is headed is a sure way to lag behind progress.
While explicitly directing the Register of Copyrights to renew unopposed exemptions (something the Copyright Office already does as a matter of course) and to convert long-standing exemptions into permanent ones are beneficial steps, they do not address the more fundamental problems of the triennial rulemaking approach to anti-circumvention measures. Opponents of existing exemptions should bear the burden of showing that a targeted exemption has led to increased infringement in order to invalidate it. It should never be enough that a technological measure supports a particular business model, such as planned obsolescence or restricting users to particular sales channels. Moreover, temporary exemptions tied to particular uses and technologies—even ones that are renewed as a matter of course—will always lag behind user practices, and the burden of keeping such exemptions up to date will still fall disproportionately on users and their advocates.

That is why section 1201 should be entirely revamped to include an “infringement nexus” that punishes circumvention of TPMs only when that circumvention is connected with acts of infringement. An infringement nexus would be both extremely flexible in finding bad actors and extremely protective of good actors in areas like education, criticism, commentary, and standard security research.

By the same token, the OTW agrees with the discussion draft’s movement toward permitting third-party assistance for exempted conduct. It seems nonsensical that section 1201 does not already explicitly permit such assistance. Such assistance is often necessary for ordinary users to take advantage of exemptions: neither teachers making fair use video clips nor owners of insulin pumps are usually capable of creating the necessary technology themselves. Here, too, however, the simplest way to permit third-party assistance for exempted conduct would be to amend §1201 to require an infringement nexus, which would include both direct liability for infringing circumvention and liability for inducing or knowingly facilitating infringement. Specifically, an infringement nexus would mean that circumvention for the purpose of engaging in non-infringing activity would explicitly not violate §1201; as a result, inducing or knowingly facilitating circumvention for the purpose of engaging in such non-infringing activity would also not violate §1201.

It is important to recognize that there are multiple types of noninfringing uses that are harmed by §1201. Device unlocking and repair-type activities, for example, have simply been dragged into the copyright system by §1201; although they might technically require “access” to a computer program on a device, they generally don’t involve behavior that would implicate copyright rights. (As a reminder, there is no copyright right of “access” to a work; only §1201 creates a right to control access, not §106.)

However, §1201 also harms other noninfringing uses, such as security research; library, archive, and preservation activities; access for the blind and print disabled; and fair uses for criticism and comment. These generally involve some kind of copying. Solutions for unlocking and repair are sorely needed, but we should not forget that noninfringing uses are also economically, culturally, and politically significant. These activities too should be enabled with
third-party assistance when the entities seeking to take advantage of an exemption own a lawfully made copy and are entitled to an exemption. Again, amending §1201 to cover only circumvention that facilitates infringement, and associated trafficking, would cover all these situations.

In addition, Congress should, as the European Union has done, prohibit contractual overrides that purport to prevent users from exercising their rights over the copies they own, whether in embedded devices or otherwise. This could build on the successful Consumer Review Fairness Act, which similarly prohibited the enforcement of contract provisions allowing companies to control consumer reviews.

VIII. The Discussion Draft’s Proposed Revisions to Section 1202 Make it Worse, Not Better

The OTW does not support changes to Section 1202. Section 1202 has not proved significant in deterring or detecting copyright infringement, and instead has mostly merely multiplied causes of action in standard infringement cases. In some cases, it has threatened extension of liability to non-copyright concerns such as trademark. The double intent standard is an important protection against unwarranted expansion of liability—or, more importantly, threats of liability—against ordinary competition.

Similarly, the OTW does not support changing §1202 to provide a right of action “when someone removes or alters rights management information with the intent to conceal an author’s attribution information.” Simply put, this would make a federal case out of every allegation of plagiarism by a high school student (or by a politician, for that matter).

One way to deal with the current ambiguities in §1202 would be to add language of the type:

For purposes of this section, to “remove” means to delete copyright management information associated with an infringing exact or substantially exact copy of a work protected under this title.

This change would address the problem that courts have been deeply confused about what “removal” means in the digital context. Section 1202, to the extent that it is merited at all, makes sense only to target exact or near-exact copying of a work with missing CMI, not, for example, derivative works. Because of how digital files are created, deletion from a copy is therefore what §1202 should clearly target. Although this definition would exclude ripping the cover page off of a lawfully produced book, there is no evidence that such activities are a problem for authors or copyright owners that needs to be addressed by civil and potentially criminal liability. This definition would not, however, entirely exclude non-digital copying (to

the extent it still exists)—if someone used a film camera to take a picture of a photograph and cropped out the CMI, that would constitute “removal” under this definition. This definition would also clarify that ordinary plagiarism or infringing derivative works aren’t the target of this provision.

Respectfully submitted,
Betsy Rosenblatt
On behalf of Organization for Transformative Works
March 5, 2021