

Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, DC

In the Matter of)
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Section 512 Study) Docket No. 2015-7
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COMMENT OF FLOOR64, INC. d/b/a THE COPIA INSTITUTE

I. Preliminary Statement

Floor64, Inc., d/b/a the Copia Institute, is a corporation that regularly advises and educates innovative technology startups on a variety of issues, including intermediary liability and the important free speech aspects of safe harbors. The Copia Institute works directly with innovators and entrepreneurs to better understand innovation and policy issues, while Floor64's online publication, Techdirt.com, has published over 50,000 posts on these topics which have received more than one million third party comments, and is regularly viewed over 3-million times a month. The site depends on the statutory protection for intermediaries to enable the robust public discourse found on its pages.

We file this comment to drive home the point that for the Internet to be the marketplace of ideas Congress anticipated it being in 1998, and, indeed, sought for it to be, it is integral for these businesses to retain durable and reliable protection from liability arising from user-generated content. Furthermore, as long as Congress is taking the opportunity to study how the existing safe harbor has been functioning, we would flag several areas where it could be made to function better in light of these policy goals as well as areas where it should be changed to make it as protective of speech as the Constitution requires.

II. Issues pertinent to all responses to the asked questions (Question #30).

Just as history is written by the victors, records are written by those asking the questions. The hazard is that questions tend to presume answers, even when the answers that they elicit may not necessarily be the answers that are most illuminating.

While there is specific input that can be proffered with respect to various parts of the statute, it would not do the inquiry justice to remain focused on statutory minutiae. The DMCA is ostensibly designed to confront a specific policy problem. It is fair, reasonable, and indeed necessary to ensure that this problem is well-defined and well-understood before determining whether, and to what extent, the DMCA is an appropriate or appropriately calibrated solution to it. The following comments within this section should therefore be incorporated into the record for any individual comment addressed in Section III. They also stand on their own in response to **Question #30**.

A. Congress has recognized the need to protect service providers to allow for the growth of the Internet and realization of the benefits it offers.

Congress in the 1990s may not have been able to predict the growth of the Internet, but it could see the direction it was taking and the value it had the potential to deliver. We see this recognition first baked into the statutory language of 47 U.S.C. Section 230 (“Section 230”), a 1996 statute that provides unequivocal immunity for service providers that intermediate content from other users:

Congress finds the following: [that t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens[;]¹ that t]hese services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops[;]² that t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity[;]³ that t]he Internet and other interactive computer services

¹ 47 U.S.C. § 230(a)(1).

² 47 U.S.C. § 230(a)(2).

³ 47 U.S.C. § 230(a)(3).

have flourished, to the benefit of all Americans, with a minimum of government regulation[;⁴ and that i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.⁵

It was therefore the policy of the United States to, among other things, “promote the continued development of the Internet and other interactive computer services and other interactive media”⁶ and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁷

As the Notice of Inquiry soliciting comment for this study noted,⁸ Congress was still of the same view about the importance of the Internet two years later when it passed the DMCA explicitly to help “foster the continued development of electronic commerce and the growth of the Internet.”⁹ As per an accompanying Senate Report, “The ‘Digital Millennium Copyright Act of 1998’ is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age.”¹⁰ As the Report continued, Congress was going to achieve this end by protecting intermediaries, observing that, “[B]y limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.”¹¹

At no time since then has Congress fundamentally changed its view on the value of the Internet. Nor should it. In these nearly twenty years we have seen countless businesses and jobs be added to the economy, innumerable examples of pioneering technology be innovated, myriad new markets previously unimaginable be created

⁴ 47 U.S.C. § 230(a)(4).

⁵ 47 U.S.C. § 230(a)(5).

⁶ 47 U.S.C. § 230(b)(1).

⁷ 47 U.S.C. § 230(b)(2).

⁸ 80 Fed. Reg. 81862 (Dec. 31, 2015).

⁹ H.R. Rep. No. 105-551, pt. 2, at 21 (1998).

¹⁰ S. Rep. No. 105-190, at 1-2 (1998).

¹¹ *Id.* at 8.

(including many for those in the arts and sciences to economically exploit), and enormous value returned to the economy. By protecting online service providers we have changed the world and brought the democratic promise of information and knowledge sharing to bear. It is therefore absolutely critical that we not create law that interferes with this promise. If anything, we should take this opportunity to reduce the costly friction that the more inapt portions of the existing law have been imposing instead.

B. The DMCA functions as a system of extra-judicial censorship.

Despite all the good that Section 230 and the DMCA have done to foster a robust online marketplace of ideas, the DMCA's potential to deliver that good has been tempered by the particular structure of the statute. Whereas Section 230 provides a firm immunity to service providers for potential liability in user-supplied content,¹² the DMCA conditions its protection.¹³ And that condition is censorship. The irony is that while the DMCA makes it possible for service providers to exist to facilitate online speech, it does so at the expense of the very speech they exist to facilitate due to the notice and takedown system.

In a world without the DMCA, if someone wanted to enjoin content they would need to demonstrate to a court that it indeed owned a valid copyright and that the use of content in question infringed this copyright before a court would compel its removal. Thanks to the DMCA, however, they are spared both their procedural burdens and also their pleading burdens. In order to cause content to be disappeared from the Internet all anyone needs to do is send a takedown notice that merely points to content and claims it as theirs.

¹² 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

¹³ Section 230 immunizes service providers for most instances of potential liability that may arise in user-supplied content. However it does not generally provide immunity for liability related to infringement of intellectual property. 47 U.S.C. § 230(e)(2). For situations where the alleged liability is for an infringement of copyright, the DMCA becomes the only statute operating to shield service providers for liability in their users' content.

Although some courts are now requiring takedown notice senders to consider whether the use of the content in question was fair,¹⁴ there is no real penalty for the sender if they get it wrong or don't bother.¹⁵ Instead, service providers are forced to become judge and jury, even though (a) they lack the information needed to properly evaluate copyright infringement claims,¹⁶ (b) the sheer volume of takedowns notices often makes case-by-case evaluation of them impossible, and (c) it can be a bet-the-company decision if the service provider gets it wrong because their "error" may deny them the Safe Harbor and put them on the hook for infringement liability.¹⁷ Although there is both judicial and statutory recognition that service providers are not in the position to police user-supplied content for infringement,¹⁸ there must also be recognition that they are similarly not in the position to police for invalid takedowns. Yet they must, lest there be no effective check on these censorship demands.

Ordinarily the First Amendment and due process would not permit this sort of censorship, the censorship of an Internet user's speech predicated on mere allegation. Mandatory injunctions are disfavored generally,¹⁹ and particularly so when they target

¹⁴ *Lenz v. Universal*, No. 13-16106, 13-16107, slip op. 5-6 (9th Cir. Mar. 17, 2016) (amending 801 F.3d 1126 (9th Cir. 2015)).

¹⁵ See discussion *infra* Section III.B.

¹⁶ Copyright infringement is, after all, often contextual, and a finding may hinge on the existence of license agreements or analysis of how a work was used, which the service provider will be ill-equipped to properly evaluate.

¹⁷ It can also be financially debilitating to even have to litigate the question of infringement liability. Note, for instance, the amount of litigation Google had to face as a result of denying Ms. Garcia's takedown notice to YouTube on the basis of it lacking a valid copyright claim, even just at the preliminary injunction stage. *Google v. Garcia*, 786 F.3d 733, 738-9 (9th Cir. 2015). Also note that Google was ultimately vindicated. *Id.* at 747.

¹⁸ 17 U.S.C. 512(m); see *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1024 (9th Cir. 2013) (rejecting plaintiffs' argument that service provider should have "taken the initiative to use search and indexing tools to locate and remove from its Web site any other content by the artists identified in . . . notices"); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 500, 525 (S.D.N.Y. 2013) ("512(m) and attendant case law make clear that service providers are under no affirmative duty to seek out infringement . . . [and t]his remains the case even when a service provider has developed technology permitting it to do so.').

¹⁹ Mandatory preliminary injunctions are "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor" the request. *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (citing *Anderson v. United States*, 612 F. 2d 1112, 1114-15 (9th Cir. 1979) (collecting cites). See also *Marlyn Neutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009)

speech and may represent impermissible prior restraint on speech that has not yet been determined to be wrongful.²⁰ To the extent that the DMCA causes these critical speech protections to be circumvented it is consequently only questionably constitutional. For the DMCA to be statutorily valid it must retain, in its drafting and interpretation, ample protection to see that these important constitutional speech protections are not ignored.

C. The assumptions of economic harm underpinning the DMCA must be carefully examined.

Veoh was a video hosting service akin to YouTube that was found to be eligible for the DMCA safe harbor.²¹ Unfortunately this finding was reached after years of litigation had already driven the company into bankruptcy and forced it to layoff its staff.²² Meanwhile SeeqPod was a search engine that helped people (including potential consumers) find multimedia content out on the Internet, but it, too, was also driven into bankruptcy by litigation, taking with it an important tool to help people discover creative works.²³

History is littered with examples like the ones above of innovative new businesses being driven out of existence, their innovation and investment chilled, by litigation completely untethered from the principles underpinning copyright law. Copyright law exists solely to “promote the progress of science and the useful arts.” Yet all too frequently it has had the exact opposite effect.

(“[Mandatory preliminary injunctions] are not granted unless extreme or very serious damage will result and are not issued in doubtful cases.”) (internal quotation marks omitted).

²⁰ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints ... [bears] a heavy presumption against its constitutional validity.”). Where liability lies on the line “between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished,” an “[e]rror in marking that line exacts an extraordinary cost.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). See also *Google v. Garcia*, 786 F.3d 727 (9th Cir. 2015) (Reinhart, J. dissenting from the *en banc* decision not to grant rehearing on an emergency basis once the preliminary injunction had been issued, thus causing protected speech to remain censored for 15 months until the *en banc* decision on the merits finally set it aside.).

²¹ *Shelter Capital*, 718 F.3d at 1014-15.

²² Peter Kafka, *Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon*, C|NET (Feb. 11, 2010), <http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/>.

²³ Jacqui Cheng, *SeeqPod bullied into bankruptcy by record industry*, *Ars Technica* (Apr. 1, 2009), <http://arstechnica.com/tech-policy/2009/04/seeqpod-bullied-into-bankruptcy-by-record-industry/>.

The DMCA has the potential to be a crucial equalizer, but it can only do so when the economic value of what these service providers deliver is considered by policymakers with at least as much weight as that given to the incumbent interests who complain that their previous business models may have become unworkable in light of digital technology. Service providers are economic engines employing innumerable people, directly and indirectly, and driving innovation forward while they deliver a world of information to each and every Internet user. We know economic harm is done to them and to anyone, creators and consumers, who would have benefited from their services when they are not protected.

But what needs careful scrutiny and testing are economic arguments predicated on the assumption that every digital copy of every copyrighted work transmitted online without the explicit permission of a copyright holder represents a financial loss. This is a presumption that needs careful scrutiny, with reviewable data and auditable methodology. It is quite a leap to assume that every instance (or even most instances) of people consuming “pirated” copyrighted works is an instance they would otherwise have paid the creator. For example, it tends to presume that people have unlimited amounts of money to spend on unlimited numbers of copyrighted works, and it also ignores the fact that some works may only be consumable at a price point of \$0, which is something that institutions like libraries and over-the-air radio have long enabled, to the betterment of creators and the public beneficiaries of creative works alike. Furthermore, even in instances when people would be willing to pay for access to a work, copyright owners may not be offering it at any price, nor are they necessarily equitably sharing the revenues derived from creative works with the actual creators whose efforts require the remuneration.²⁴

²⁴ As a general matter, economic considerations on the “rights holder” side should be framed from the perspective of creators in general. The economic interest of copyright owners and the economic interest of creators may not necessarily be the same: copyright owners may only profit from a specific work, but creators can benefit from general markets for their works, which many online service providers help them

The DMCA does not adjust to reflect situations like these, nor does it incentivize copyright holders to correct their own self-induced market failures. On the contrary; it allows them to deprive the public of access to their works and to threaten the service providers enabling their access with extinction if they do not assist in disabling this access. None of these outcomes are consistent with the goals and purpose of copyright in general, and care must be taken not to allow the DMCA be a law that ensures them.

III. Comments applicable to specific questions

A. General effectiveness of Safe Harbors (Questions #1, 2, and 5)

Question #1 asks whether Section 512 safe harbors are working as intended, and **Question #5** asks the related question of whether the right balance has been struck between copyright owners and online service providers. To the extent that service providers have been insulated from the costs associated with liability for their users' content, the DMCA, with its safe harbors, has been a good thing. But the protection is all too often too complicated to achieve, too expensive to assert, or otherwise too illusory for service providers to be adequately protected.

Relatedly, **Question #2** asks whether courts have properly construed the entities and activities covered by the safe harbor, and the answer is not always. But the problem here is not just that they have sometimes gotten it wrong but that there is too often the possibility for them to get it wrong. Whereas under Section 230 questions of liability for intermediaries for illegality in user-supplied content are relatively straight forward – was the intermediary the party that produced the content? if not, then it is not liable – when the alleged illegality in others' content relates to potential copyright infringement, the test becomes a labyrinth minefield that the service provider may need to endure costly litigation to navigate. Not only is ultimate liability expensive but even the process of

grow. It is ultimately the latter interest that copyright on the whole is intended to serve in order to keep creators incentivized to create.

ensuring that it won't face that liability can be crippling.²⁵ Service providers, and investors in service providers, need a way to minimize and manage the legal risk and associated costs arising from their provision of online services, but given the current complexity²⁶ outlining the requirements for safe harbors they can rarely be so confidently assured.

B. Notice-and-takedown process (Questions #12 and 13)

Question #12 asks if the notice-and-takedown process sufficiently protects against fraudulent, abusive, or unfounded notices and what should be done to address this concern. Invalid takedown notices are most certainly a problem,²⁷ and the reason is that the system causes them to be a problem. As discussed in Section II.B the notice-and-takedown regime is inherently a censorship regime, and it can be a very successful censorship regime because takedown notice senders can simply point to content they want removed and use the threat of liability as the gun to the service provider's head to force it to remove it, lest the service provider risk its safe harbor protection.

Thanks to courts under-enforcing subsection 512(f) they can do this without fear of judicial oversight.²⁸ But it isn't just the lax subsection 512(f) standard that allows

²⁵ See, e.g., Dmitry Shapiro, *UNCENSORED – A personal experience with DMCA*, The World Wide Water Cooler (Jan. 18, 2012), available at

<https://web.archive.org/web/20120119032819/http://minglewing.com/w/sopa-pipa/4f15f882e2c68903d2000004/uncensored-a-personal-experience-with-dmca-umg> (“UMG scoffed at their responsibilities to notify us of infringement and refused to send us a single DMCA take down notice. They believed that the DMCA didn't apply. They were not interested in making sure their content was taken down, but rather that Veoh was taken down! As you can imagine the lawsuit dramatically impacted our ability to operate the company. The financial drain of millions of dollars going to litigation took away our power to compete, countless hours of executive's time was spent in dealing with various responsibilities of litigation, and employee morale was deeply impacted with a constant threat of shutdown.”)

²⁶ While Section 230 requires only about 800 words to articulate its protection for service providers, with the nearly 200 cited in Section II.A merely setting forth the policy purpose of the providing this protection, the DMCA is nearly five times as long, at over 4100 words.

²⁷ See, e.g., Urban, Jennifer M. and Karaganis, Joe and Schofield, Brianna L., Notice and Takedown in Everyday Practice at 88 (March 29, 2016), <http://ssrn.com/abstract=2755628>; Daniel Seng, ‘Who Watches the Watchmen?’ An Empirical Analysis of Errors in DMCA Takedown Notices (January 23, 2015), <http://ssrn.com/abstract=2563202>. See also Brief for Org. for Transformative Works et al. as Amici Curiae Supporting Appellee and Cross-Appellant's Petition for Rehearing at fn. 3-8, *Lenz*, *supra* note 14, Dkt. No. 93 (collecting other examples of illegitimate takedown notices).

²⁸ See *Rossi v. Motion Picture Association of America*, 391 F.3d 1000, 1004 (9th Cir. 2004) (finding that “the ‘good faith belief’ requirement in subsection 512(c)(3)(A)(v) encompasses a subjective, rather than

abusive notices to be sent without fear of accountability. Even though the DMCA includes put-back provisions at subsection 512(g) we see relatively few instances of it being used.²⁹ The DMCA is a complicated statute and the average non-lawyer may not know these provisions exist or be able to know how to use them. Furthermore, trying to use them puts users in the crosshairs of the party gunning for their content (and, potentially, them as people) by forcing them to give up their right to anonymous speech in order to keep that speech from being censored. All of these complications are significant deterrents to users being able to effectively defend their own content, content that would have already been censored (these measures would only allow the content to be restored, after the censorship damage has already been done).³⁰ Ultimately there are no real checks on abusive takedown notices apart from what the service provider is willing and able to risk reviewing and rejecting.³¹ Given the enormity of this risk, however, it cannot remain the sole stopgap measure to keep this illegitimate censorship from happening.

Continuing on, **Question #13** asks whether subsection 512(d), addressing “information location tools,” has been a useful mechanism to address infringement “that occurs as a result of a service provider’s referring or linking to infringing content.” Purely as a matter of logic the answer cannot possibly be yes: simply linking to content has absolutely no bearing on whether content is or is not infringing. The entire notion that there could be liability on a service provider for simply knowing where information resides stretches U.S. copyright law beyond recognition. That sort of knowledge, and the

objective standard.”). With regard to **Question #28**, this standard is a very low bar for a takedown notice sender to hurdle and has made effective redress for people whose speech has been wrongfully removed has become more elusive.

²⁹ *Urban*, note 27 *supra*, at 44-46.

³⁰ The problem of takedown abuse is particularly acute during campaign seasons, when politically-motivated takedown requests can suppress the most effective and cheapest means of communicating political messages for which timeliness is of the essence. See Center for Democracy and Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010), https://www.cdt.org/files/pdfs/copyright_takedowns.pdf.

³¹ The “takedown-and-staydown” regimes contemplated by **Question #10** would only exacerbate the effects of this censorship.

sharing of that knowledge, should never be illegal, particularly in light of the Progress Clause, upon which the copyright law is predicated and authorized, and particularly when the mere act of sharing that knowledge in no way itself directly implicates any exclusive right held by a copyright holder in that content.³² Subsection 512(d) exists entirely as a means and mode of censorship, once again blackmailing service providers into the forced forgetting of information they once knew, and irrespective of whether the content they are being forced to forget is ultimately infringing or not. As discussed above in Section II.B above, there is no way for the service provider to definitively know.

C. Counter-notifications (Questions #16 and 17) and Repeat infringers (Questions #22 and 23)

Questions #16 and #17 more specifically contemplate the effectiveness of the put-back process articulated at subsection 512(g). As explained in Section III.B this mechanism is not effective for restoring wrongfully removed content and is little used. But it is worth taking a moment here to further explore the First Amendment harms wrought to both Internet users and service providers by the DMCA.³³

It is part and parcel of First Amendment doctrine that people are permitted to speak, and to speak anonymously.³⁴ Although that anonymity can be stripped in certain circumstances, there is nothing about the allegation of copyright infringement that should cause it to be stripped automatically. Particularly in light of copyright law incorporating free speech principles³⁵ this anonymity cannot be more fragile than it would in any other circumstance where speech was subject to legal challenge. The temptation to characterize all alleged infringers as malevolent pirates who get what they deserve must

³² In other words, sharing a link to content is not the same thing as making a copy of that content.

³³ See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).

³⁴ See *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 341-42 (1995) (“[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”).

³⁵ See *Golan v. Holder*, 132 S. Ct. 873, 890 (2012).

be resisted; the DMCA targets all speakers and all speech, no matter how fair or necessary to public discourse this speech is.

And yet, with the DMCA, not only is speech itself more vulnerable to censorship via copyright infringement claim than it would be for other types of allegations³⁶ but so are the necessary protections speakers depend on to be able to speak.³⁷ Between the self-identification requirements of subsection 512(g) put-back notices and the ease of demanding user information with subsection 512(h) subpoenas that also do not need to be predicated on actual lawsuits,³⁸ Internet speakers on the whole must fear the loss of their privacy if anyone dares to construe an infringement claim, no matter how illegitimate or untested that claim may be. Given the ease of concocting an invalid infringement claim,³⁹ and the lack of any incentive not to,⁴⁰ the DMCA gives all-too-ready access to the identities of Internet users to the people least deserving of it and at the expense of those who most need it.⁴¹

Furthermore, the DMCA also compromises service providers' own First Amendment interests in developing the forums and communities they would so choose. The very design of the DMCA puts service providers at odds with their users, forcing

³⁶ See discussion *supra* Section II.B.

³⁷ See *McIntyre*, 514 U.S. at 341-42 (1995) (“The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”).

³⁸ Compare Fed. R. Civ. P. 45(a)(1)(A)(ii) (“Every subpoena must . . . state the title of the action and its civil-action number.”), with 17 U.S.C. § 512(h) (lacking any similar requirement or other mention that the subpoena be predicated on a commenced civil action). Note that many jurisdictions explicitly forbid pre-litigation discovery. See, e.g., Cal. Code of Civ. Proc. 2035.010(b) (“One shall not employ the procedures of this chapter for the purpose . . . of identifying those who might be made parties to an action not yet filed.”). Many jurisdictions further require careful testing of a plaintiff's claims before stripping Internet speakers of their anonymity. See, e.g., *Krinsky v. Doe*, 72 Cal.Rptr.3d 231, 241-246 (discussing standards for determining whether a plaintiff can be allowed to unmask an anonymous speaker).

³⁹ See discussion *supra* Section II.B.

⁴⁰ See discussion *supra* Section III.B.

⁴¹ The abusive practices of many extortionate copyright plaintiffs illustrate why judicial oversight is required before Internet users are forced to be stripped of their privacy protection. See, e.g., *AF Holdings, LLC v. Does 1-1058*, 752 F. 3d 990, 992 (D.C. Cir. 2014) (describing the affairs of copyright plaintiffs who built a business on demanding money from people they discovered via subpoenas to pay settlements to avoid litigation, despite the putative plaintiffs not having a valid copyright to sue upon).

them to be antagonistic their own customers and their own business interests as a condition for protecting those interests. Attempts to protect their forums or their users can expose them to tremendous costs and potentially incalculable risk, and all of this harm flows from mere allegation that never need be tested in a court of law. The DMCA forces service providers to enforce censorship compelled by a mere takedown notice, compromise user privacy in response to subsection 512(h) subpoenas (or devote significant resources to trying to quash them), and, vis a vis **Questions #22 and 23**, disconnect users according to termination policies whose sufficiency cannot be known until a court decides they are not.⁴²

The repeat infringer policy requirement of subsection 512(i)(A) exemplifies the statutory problem with many of the DMCA's safe harbor requirements. A repeat infringer policy might only barely begin to be legitimate if it applied to the disconnection of a user after a certain number of judicial findings of liability for acts of infringement that users had used the service provider to commit. But as at least one service provider lost its safe harbor for not permanently disconnecting users after only a certain number of allegations, even though they were allegations that had never been tested in a court consistent with the principles of due process or prohibition on prior restraint.⁴³

In no other context would we find these sorts of government incursions against the rights of speakers constitutional, robbing them of their speech, anonymity, and the opportunity to further speak, without adequate due process. These incursions do not suddenly become constitutionally sound just because the DMCA coerces service providers to be the agent committing these acts instead.

⁴² See, e.g., *BMG Rights Management (US) LLC v. Cox Communications*, Civil No. 1:14-cv-1611, slip op (E.D. Va. Dec. 1, 2015).

⁴³ *Id.* The court in this case also required the service provider to terminate users regardless of the impact on the user if they were forced to exist in the modern world without broadband internet connectivity. To the extent that this holding was drawn from a fair reading of the statute, while perhaps in the 20th Century the consequences of losing Internet access were negligible, in the 21st Century we know they are not. There may not be many other options for broadband access available to terminated users, and the cumbersome nature of the DMCA combined with expansive theories of secondary liability do little to encourage investment by new market entrants.

IV. Conclusion

Ultimately it is not possible to have a valid copyright law that in any part is inconsistent with the Progress Clause or First Amendment. To the extent that the DMCA protects intermediaries and with them the speech they foster it is consistent with both of these constitutional precepts and limitations. To the extent, however, that that DMCA suborns due process or otherwise compromises the First Amendment rights of either Internet users or service providers themselves to use and develop forums for information exchange on the Internet it is not. The statutory infirmities that have been leading to the latter outcome should therefore be corrected to make the DMCA's protections on intermediaries and the speech they foster as durable as this important policy interest requires.

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Respectfully submitted,

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