

NOTE

GO IN GOOD FAITH:
HOW THE NOTICE & TAKEDOWN PROCESS CAN ALIGN
WITH FAIR USE PRINCIPLES

*Estelle Omotayo**

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I. INTRODUCTION

According to Collins Dictionary, the 2024 Word of the Year was “brat” (with a lower-case ‘b’).¹ The definition: “characterized by a confident, independent, and hedonistic attitude.”² Unlike the traditional dictionary meaning of the word “brat,”³ this definition was derived from one of the most successful albums of 2024, ‘brat’ by pop musician Charli XCX.⁴ Released in June of 2024, the pop album became a cultural phenomenon,⁵ generating \$22.5 million dollars in media impact value, due to its “stratospheric” social media impact.⁶ On Spotify, the album has since surpassed a billion streams on Spotify.⁷ Former Vice President Kamala Harris used the Brat social media trend in the online branding of her

¹ Rosa Rahimi, *Collins Dictionary’s Word of the Year is a Confident, Messy Way of Life*, CNN (Nov. 1, 2024) <https://www.cnn.com/2024/11/01/style/brat-word-of-the-year-collins-dictionary-intl-scli> [<https://perma.cc/F6HB-KSNF>].

² *Id.*

³ *Brat*, MERRIAM-WEBSTER (11th ed. 2022) (defining “brat” as “an ill-mannered immature person”).

⁴ See Rosa Rahimi, *supra* note 1; *The 100 Best Albums of 2024*, ROLLING STONE (Dec. 2, 2024), <https://www.rollingstone.com/music/music-lists/best-albums-2024-1235031987/cash-cobain-play-cash-cobain-1235085675/> [<https://perma.cc/2GJF-ZSKH>] (ranking “Brat” as the best album of 2024).

⁵ Chris Richards, *Summer’s Over. What Was the Real Meaning of ‘Brat’?*, WASH. POST (Oct. 3, 2024), <https://www.washingtonpost.com.us1.proxy.openathens.net/entertainment/music/2024/10/03/charli-xcx-brat-impact/> [<https://perma.cc/EN9Y-WK5H>] (“The music has been almost secondary,’ New York Magazine wrote in an August profile, which felt as confusing as saying Beatlemania was almost as important as the Beatles, and yes, I’m citing those guys here because ‘Brat’ is as close to a pop masterpiece as the 21st century will allow.”).

⁶ Lucy Maguire, *The Business of Brat*, VOGUE BUS. (July 9, 2024), <https://www.voguebusiness.com/story/fashion/the-business-of-brat> [<https://perma.cc/8PWD-CMVB>].

⁷ CHARLI XCX, *Brat* (CD, Atlantic Recording Corp. Jun. 7, 2024); *Charli xcx - Spotify Top Albums*, KWORB.NET https://kworb.net/spotify/artist/25uiPmTg16RbhZWAqwLBy5_albums.html. [<https://perma.cc/YC24-MVWW>].

presidential campaign.⁸ The singer's subsequent "Sweat" tour generated \$28 million over the course of two months.⁹

The album reflects the importance of the balance between three different actors: the music industry, social media companies, and Internet users.¹⁰ The music industry's success hinges on public opinion, which is facilitated by social media companies allowing a space for users who then enjoy, disseminate, and market their favored creative works.¹¹ After all, social media is the most popular way that individuals find music to listen to,¹² bolstering the industries that require participation to function.¹³

Before social media, Congress enacted the Digital Millennium Copyright Act (DMCA) in 1998 to promote the potential mutual benefits made possible by the rise of the Internet.¹⁴ The intent was to create a system, called the "safe harbor provisions," that would allow the public to consume creative works, copyright holders could remain assured of their intellectual property protections, and Online

⁸ Lucy Clarke-Billings, *What is Kamala Harris's 'Brat' Rebrand All About?*, BBC NEWS (July 22, 2024), <https://www.bbc.com/news/articles/cqqlgq7k374o> [<https://perma.cc/XPU7-LN2Q>].

⁹ Eric Frankenberg, *Charli xcx & Troye Sivan Sweat Out \$ 28 Million in Grosses With Sold-Out Arena Trek*, BILLBOARD MAG. (Nov. 5, 2024), <https://www.billboard.com/pro/charli-xcx-troye-sivan-sweat-28-million/> [<https://perma.cc/W7QS-JMRW>].

¹⁰ See, e.g., Sophie Caldwell, *What To Know About 'Brat Summer,' the Trend Taking Over Pop Culture and Politics*, TODAY, <https://www.today.com/popculture/music/what-is-brat-summer-charli-xcx-rca163061> [<https://perma.cc/8E5E-FKLA>].

¹¹ Dan Whateley, *How TikTok Emerged as the Music Industry's Greatest Frenemy, as Insiders Describe their 'Complicated' and Codependent Relationship and Potential Path Forward*, BUS. INSIDER (Nov. 21, 2022), <https://www.businessinsider.com/tiktok-record-labels-remain-frenemies-as-they-battle-over-licenses-2022-11?r=tiktok-music-lp> [<https://perma.cc/NYH6-KGB7>] [hereinafter *How TikTok Emerged as the Music Industry's Greatest Frenemy*].

¹² Dan Whateley, *How TikTok Is Changing the Music Industry and the Way We Discover New, Popular Songs*, BUS. INSIDER (Oct. 14, 2024), <https://www.businessinsider.com/how-tiktok-is-changing-music-industry> [<https://perma.cc/SM9M-JHQ5>] [hereinafter *How TikTok Is Changing the Music Industry*].

¹³ *How TikTok Emerged as the Music Industry's Greatest Frenemy*, *supra* note 11.

¹⁴ U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17 at 19 (2020).

Service Providers (OSPs) could invest in a growing online market.¹⁵ However, for OSPs to receive safe harbor protections, there are eligibility requirements, including active participation in the “notice-and-takedown” process.¹⁶

The Internet has expanded exponentially since the passing of the DMCA, and modern logistical demands have burdened copyright holders and OSPs with too much ground to cover in terms of policing online content.¹⁷ As a solution, both parties began to use algorithms called Automated Content Recognition systems (“ACR”).¹⁸ This technology could monitor large areas of the Internet, detect matches between copyrighted material and user content, and send automated notifications in the notice-and-takedown process.¹⁹ With the increased use of this technology, users have been left out of what was once a mutual arrangement.²⁰ The automation presents a variety of problems for individuals, such as the inability of algorithms to evaluate fair use, limited knowledge of copyright law, and financial barriers to recourse against improper takedowns.²¹

This Note argues that the solution to this imbalance is an amendment to the DMCA that imposes a statutory requirement limiting the use of algorithms in notice-and-takedown procedures. This amendment would expand on the holding in *Lenz v. Universal Music Corp.*, wherein the Ninth Circuit held that fair use must be considered prior to the sending of a takedown notice, by creating a standard that reflects the practicalities of the industry.²² Part II will explore the background of the DMCA and the doctrine of fair use. Part III will expand on how automated systems have affected all stakeholders in the notice-and-takedown process. Part IV will propose a statutory amendment that would address the aforementioned problems and encourage human review to accurately consider fair use.

¹⁵ *Id.*

¹⁶ 17 U.S.C. § 512(c).

¹⁷ Diego Arce Santiváñez & Sebastián Carruitero Cárdenas, *Automated Content Recognition: the Big Brother of Creativity*, CHAMBERS AND PARTNERS (Nov. 5, 2025), <https://chambers.com/articles/automated-content-recognition-the-big-brother-of-creativity> [<https://perma.cc/3ZS9-72W2>]; Erin E. Bronner, *Can I Post This?: A Call for Nuanced Interpretation of DMCA Enforcement in the Age of Social Media*, 92 FORDHAM L. REV. 1031, 1045-47 (2023).

¹⁸ Santiváñez & Cárdenas, *supra* note 17; Bronner, *supra* note 17, at 1045-47.

¹⁹ Santiváñez & Cárdenas, *supra* note 17; Bronner, *supra* note 17, at 1045-47.

²⁰ Bronner, *supra* note 17, at 1037.

²¹ *Id.* at 1051-52, 1054.

²² *See generally* *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

II. GUIDELINES AS APPLIED TO SOCIAL MEDIA, COPYRIGHT LAW IMPOSES RESPONSIBILITIES AND LIMITATIONS ON ADDITIONAL PARTIES IN RETURN FOR THE BENEFIT OF ACCESSING PROTECTED MATERIAL

Historically, as technology advanced, copyright law adapted in turn, albeit more slowly.²³ However, with the rapidly evolving nature of the Internet, applications of statutes such as the Digital Millennium Copyright Act and the doctrine of fair use have grown increasingly complex.²⁴ In the days where the Internet was relatively simple to navigate, it was much easier to locate and report copyright infringement in the method contemplated by the DMCA.²⁵ That is no longer the case.²⁶ While Internet usage has grown exponentially, copyright law has stagnated, and the DMCA itself has not been amended since it was passed.²⁷ From copyright holders, to OSPs and Internet users, there is a growing consensus that the current scheme is outdated and insufficient to protect each parties' interests.²⁸

A. THE ORIGINS OF COPYRIGHT LAW

Copyright conveys exclusive rights of use and control to the authors of original, creative works, including but not limited to categories such as literature, music, and film.²⁹ The majority of current copyright principles stem from the

²³ Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 U. PA. L. REV. 1831, 1834–36 (2009).

²⁴ U.S. COPYRIGHT OFF., *supra* note 14 (“Complex issues are involved: the operation of copyright liability in the online environment has tremendous legal, social, economic, and technological implications. Courts have been issuing decisions on various elements of section 512 for two decades. Changes in technology and business models used to create and disseminate copyrighted materials continues to grow in ways that could not have been imagined in 1998 when the Digital Millennium Copyright Act was passed.”).

²⁵ *See id.*

²⁶ Rebecca Alderfer Rock, *Comment, Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 718 (2014).

²⁷ Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038, 1048 (2017); U.S. COPYRIGHT OFF., *supra* note 14, at 32–33; Bronner, *supra* note 17, at 1069.

²⁸ U.S. COPYRIGHT OFF., *supra* note 14, at 27–34.

²⁹ 17 U.S.C. § 102(a) (affording copyright protection on works of authorship in literature, music, dramatic works, pantomimes and dance, visual art, sound recordings, and architectural works); *What Is Copyright?*, COPYRIGHT.GOV

Copyright Act of 1976,³⁰ with additions from legislation such as the Digital Millennium Copyright Act (enacted in 1998).³¹ The Constitution gave Congress the power to implement copyright legislation in the Intellectual Property Clause, Article I § 8 cl. 8, which states that “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³²

For a work to enjoy copyright protection, it must be both original and “fixed in any tangible medium of expression.”³³ Originality requires independent creation by a human author³⁴ and a minimal degree of creativity in the work.³⁵ For example, a telephone directory is not copyrightable because it is a mere listing of contact information; it does not contain the same level of creativity as the composition of music or a novel.³⁶ Similarly, visual art generated by artificial intelligence is not copyrightable as it is not created by a human author.³⁷ Fixation requires that a work be recorded in a “permanent or stable” copy such that it can be “perceived, reproduced, or otherwise communicated” to others.³⁸ An improvised performance that went unrecorded would not be afforded copyright protection, as the mode of expression is neither permanent nor stable.³⁹

When a work is copyrightable, the author gains a bundle of exclusive rights in the work.⁴⁰ These include the right to sell the work or distribute it for profit, reproduce the work in additional copies, create additional works based on the original (also known as derivative works), perform or display the work publicly, and, in the case of sound recordings, the right to perform the work

(Nov. 19, 2024), <https://www.copyright.gov/what-is-copyright/> [<https://perma.cc/5PMB-W5MH>].

³⁰ See 17 U.S.C. § 102.

³¹ *Id.* § 512.

³² U.S. CONST. art. I, § 8, cl. 8.

³³ 17 U.S.C. § 102(a).

³⁴ *Id.*

³⁵ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

³⁶ *Id.*

³⁷ U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (3d ed. 2017)).

³⁸ 17 U.S.C. § 101.

³⁹ *See id.*

⁴⁰ *Id.* § 106.

through digital audio transmission.⁴¹ Because these rights are exclusive to the copyright owner, others are barred from conducting the previously mentioned actions without permission.⁴² To do so is referred to as copyright infringement.⁴³

B. DIRECT USER INFRINGEMENT

Copyright infringement, or the unauthorized use of a protected work, imposes liability on one who infringes on the exclusive rights of a copyright owner.⁴⁴ For those found guilty of infringement, liability invokes penalties ranging from an injunction against continued use, impounding or disposal of any copies made, or monetary damages, which may include attorney's fees to the prevailing party.⁴⁵ There are two aspects to infringement: the accused must have "factually" copied the protected work, and it must have been an "improper appropriation" of the material.⁴⁶ Factual copying is demonstrated by similarities between the copyrighted material and the allegedly infringing work, combined with evidence that the accused accessed, or encountered, the protected work.⁴⁷ Improper appropriation is a question of whether, as established by the prior element, the accused's copying is legally barred.⁴⁸ For copying to be infringement, it must reflect substantial similarities that come within the scope of copyright protection.⁴⁹ As an example, borrowing the aspects of a work that are already in the public domain is not improper appropriation, but copying its unique portions would be.⁵⁰

C. SECONDARY INFRINGEMENT

Under the doctrines of contributory copyright infringement, vicarious copyright infringement, and inducement of infringement, one can be held

⁴¹ *Id.*

⁴² *Id.* § 501(a).

⁴³ *Id.*

⁴⁴ *See* 17 U.S.C. § 501(a).

⁴⁵ *See id.* §§ 502–05.

⁴⁶ *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13D.02 (2025); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

⁴⁷ *See Arnstein*, 154 F.2d at 468.

⁴⁸ *See Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003).

⁴⁹ *Id.*

⁵⁰ *Id.* at 132.

secondarily liable for the unlawful actions, or direct infringement, of others due to their relationship with the acts of infringement.⁵¹ While these theories can be applied to anyone who assists in the copyright infringement of another, in the online context, this typically involves OSPs.⁵² OSPs are defined as those who facilitate the connections for online communications “without modification to the content of the material as sent or received.”⁵³ Social media companies are an example of this as a platform for digital communication. When there is a sufficient relationship between an OSP and the individuals who are doing the actual copying, courts have found liability for the OSP even though the infringement was committed by a different party.⁵⁴

While the elements of these theories overlap, there are distinct provisions in each one.⁵⁵ Contributory infringement liability requires that the OSP had actual or constructive knowledge of the direct infringement of its users *and* materially contributed to the unauthorized activity.⁵⁶ Either subjective knowledge of specific instances of direct infringement or awareness of “facts that would have made the specific infringement ‘objectively’ obvious to a reasonable person” satisfy the first element.⁵⁷ For the second aspect, to materially contribute to users’ direct infringement, an OSP must have given users the means, technology, or access necessary to copy protected works.⁵⁸ For example, in *Viacom v. YouTube*, YouTube was found liable for contributory infringement because the social media platform gave users the technology and environment to copy protected works.⁵⁹

Vicarious copyright infringement imposes liability on OSPs with a direct financial interest in infringing activities, receiving some monetary benefit from them, while having the right and ability to supervise such acts.⁶⁰ As said, *A&M Records v. Napster, Inc.*, a quintessential (or infamous) modern example of courts holding OSPs secondarily liable for music copyright infringement, “[t]urning a

⁵¹ See *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001).

⁵² See *id.* at 1021.

⁵³ 17 U.S.C. § 512(k)(1)(a).

⁵⁴ U.S. COPYRIGHT OFF., *supra* note 14, at 22.

⁵⁵ *Id.*

⁵⁶ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

⁵⁷ *Id.* at 31.

⁵⁸ See *id.* at 28.

⁵⁹ *Id.* at 41.

⁶⁰ See *A&M Recs.*, 239 F.3d at 1023.

blind eye to detectable acts of infringement for the sake of profit gives rise to liability.”⁶¹ However, vicarious infringement does not contain a knowledge element, so an OSP need not have either actual or constructive knowledge to be found liable.⁶² So long as they incur a benefit from the infringement, vicarious liability may be found.⁶³

Separate from contributory infringement, inducement of infringement can be found where an OSP distributes a product with the intent for it to be used for infringement, as demonstrated by “active steps taken to encourage” such behavior.⁶⁴ This common law principle was recognized by the Supreme Court in *MGM Studios Inc. v. Grokster, Ltd.* for defendants who “not only expected but invoked [infringing use] by advertisement.”⁶⁵ In this case, the defendant Grokster was found liable for inducement because they actively encouraged users to pirate copyrighted material by promoting the infringing capabilities of their technology to the public.⁶⁶

D. SAFE HARBOUR UNDER THE DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act (DMCA) safe harbor provisions, set forth in 17 U.S.C. § 512, mark the balance between the interests of copyright owners, OSPs, and Internet users.⁶⁷ Enacted in 1998, the statute responded to global concerns about the Internet as a new, and readily accessible, technological landscape offering faster, easier ways to reproduce protected works and distribute them amongst the masses.⁶⁸ In order to assuage OSPs’ fear of endless secondary liability litigation and promote the security interests of copyright owners, Congress passed the DMCA, which would allow OSPs to avoid secondary liability for copyright infringement, provided they adhered to conditions intended to assist

⁶¹ *Id.* at 1023.

⁶² *See id.* at 1024.

⁶³ *See id.*

⁶⁴ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 915 (2005).

⁶⁵ *Id.* at 935 (emphasis added).

⁶⁶ *Id.*

⁶⁷ U.S. COPYRIGHT OFF., *supra* note 14, at 19.

⁶⁸ *See id.* at 18 (demonstrating that Congress included provisions on anti-circumvention technology and protection of rights management information in addition to the safe harbor directives so as to comply with the international standards set out in the World Intellectual Property Organization (WIPO) Internet Treaties).

copyright owners in restraining direct user infringement.⁶⁹ Through cooperation, the legislature sought a solution that would allow OSPs to continue business without worries over being “sued out of existence,”⁷⁰ copyright owners to maintain control of their intellectual property, and “legitimate consumers” to enjoy creative works.⁷¹

The DMCA delineates four safe harbors that each protect a type of activity done by OSPs.⁷² § 512(a) covers “transmitting,” meaning the “[t]ransmission of data by an ISP acting as a mere data conduit, typically by telecommunications companies or firms that merely forwards email or other digital messages or files along their way.”⁷³ One example of this would be a cable company that sends data to its users without modifying it.⁷⁴ § 512(b) refers to “caching,” meaning “[a]utomated copying and storage of data to ensure that access to that data is not impeded by transmission bottlenecks.”⁷⁵ One example of this would be how “a web page originally hosted on a server in New York but frequently requested by computer users in California might be... ‘cached’ in California to avoid transmission across the US every time the page is requested.”⁷⁶

§ 512(c) covers “hosting,” which regards “companies that provide web hosting services, storing content comprising websites that are maintained by independent sponsors of those websites.”⁷⁷ This provision includes social media platforms, such as Facebook or YouTube, that “do not simply store data and respond to requests for that stored data, but provide a very detailed, structural context for the content that is uploaded by users.”⁷⁸ § 512(d) refers to “linking,” wherein “a web page[links] to another web page that has infringing material.”⁷⁹

⁶⁹ See *id.* at 19.

⁷⁰ *Id.* at 16 (quoting NIMMER ON COPYRIGHT, *supra* note 46, § 12B.01[C][1]).

⁷¹ *Id.* at 19.

⁷² See 17 U.S.C. § 512(a)–(d).

⁷³ ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT LAW: A CONTEMPORARY APPROACH 462 (2d ed. 2018); 17 U.S.C. § 512(a).

⁷⁴ See 17 U.S.C. § 512(a).

⁷⁵ BRAUNEIS & SCHECHTER, *supra* note 73, at 462; see 17 U.S.C. § 512(b).

⁷⁶ BRAUNEIS & SCHECHTER, *supra* note 73, at 462–63.

⁷⁷ *Id.* at 463; see 17 U.S.C. § 512(c).

⁷⁸ BRAUNEIS & SCHECHTER, *supra* note 73, at 463.

⁷⁹ *Id.*; 17 U.S.C. § 512(d).

The most common example of this is a search engine site, such as Google.⁸⁰ An OSP can belong to multiple categories, as many perform services that involve combinations of the above activities.⁸¹

To be eligible for safe harbor protection, an OSP must comply with requirements corresponding to the relevant activity.⁸² There is some overlap between the conditions; under all four safe harbors, OSPs must implement a policy to “terminate ‘repeat infringers’” and must not interfere with “standard technical measures” that identify or protect copyrighted works and have been developed according to broad consensus between copyright owners and OSPs.⁸³

Caching, hosting, and linking require additional actions from service providers.⁸⁴ Firstly, these OSPs must “act expeditiously to remove or disable access to material when they have ‘actual knowledge’ of infringement or, in the absence of such actual knowledge, when they have ‘aware[ness] of facts or circumstances from which infringing activity is apparent.”⁸⁵ This requirement does not impose a duty to “monitor[] service or affirmatively seek[] facts indicating infringing activity, except to the extent consistent with a standard technical measure.”⁸⁶ Secondly, hosters and linkers, under § 512(c) and (d) must follow appropriate notice-and-takedown procedures, outlined in more depth in later sections.⁸⁷ Lastly, hosters and linkers cannot “receive a financial benefit directly attributable to the infringing activity, in a case in which the [OSP] has the right and ability to control such activity.”⁸⁸

For OSPs who qualify for safe harbor protection, the benefits of cooperation are clear: a copyright owner is barred from monetary damages and only able to seek injunctive relief for infringement in three ways: “(1) disabling access to infringing material; (2) terminating the infringer’s account(s); and (3) providing such other relief as may be necessary to address infringement at a

⁸⁰ BRAUNEIS & SHECHTER, *supra* note 73, at 463; 17 U.S.C. § 512(d).

⁸¹ U.S. COPYRIGHT OFF., *supra* note 14, at 23; *see Viacom Int’l*, 676 F.3d at 42.

⁸² 17 U.S.C. §§ 512(c)(3)(B)(i)–(ii).

⁸³ *Id.*

⁸⁴ U.S. COPYRIGHT OFF., *supra* note 14, at 24–25.

⁸⁵ *Id.* at 26 (quoting 17 U.S.C. §§ 512(c), (d)).

⁸⁶ *Id.* (quoting 17 U.S.C. § 512(m)(1)).

⁸⁷ 17 U.S.C. § 512.

⁸⁸ *Id.*

particular online location.”⁸⁹ Additionally, the injunction must occur in “the least burdensome [form of relief] to the service provider.”⁹⁰ Transmitters enjoy even greater protection as injunctions are limited to terminating infringing accounts or disabling access to “a ‘specific, identified, online location outside the United States.’”⁹¹

In contrast, the dire consequences of non-compliance with DMCA standards are illustrated by the fall of unauthorized peer-to-peer (P2P) file-sharing programs. This technology was developed at the turn of the millennium with the Internet, allowing users to transmit and store sound recordings.⁹² When users increasingly utilized the programs to distribute and sell copyrighted music and programs, sensing the financial benefits, the file-sharing platforms did nothing to curb this behavior, and the recording industry responded with litigation.⁹³ The first high-profile P2P program to be sued was Napster.⁹⁴ A coalition of recording labels and music publishers claimed that Napster should be held secondarily liable for giving users the software and arena to reproduce and distribute protected music.⁹⁵ The company’s assertion that it could not be held liable as it was entitled to safe harbor protection under § 512(a) and § 512(d) failed as the Court determined that Napster did not meet the proper definition of an OSP in addition to their non-compliance with other eligibility requirements.⁹⁶ Later, Napster settled with the plaintiffs.⁹⁷ It agreed to pay them \$26 million for past unauthorized uses and \$10 million as an advance against future licensing fees.⁹⁸ One year later, the company filed for Chapter 11 bankruptcy and attempted a sale to a media conglomerate that was ultimately denied by a judge, before ultimately selling its

⁸⁹ U.S. COPYRIGHT OFF., *supra* note 14, at 24.

⁹⁰ *Id.* (quoting 17 U.S.C. § 512(j)(1)(A)).

⁹¹ *Id.* (quoting 17 U.S.C. § 512(j)(1)(B)).

⁹² *A&M Recs.*, 239 F.3d at 1011–13.

⁹³ *Arista Recs. LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398, 422 (S.D.N.Y. 2011).

⁹⁴ John M. Moye, *How Sony Survived: Peer-to-Peer Software, Grokster, and Contributory Copyright Liability in the Twenty-First Century*, 84 N.C. L. REV. 646, 662 (2006).

⁹⁵ *A&M Recs.*, 239 F.3d at 1025.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1029; John Borland, *Napster Reaches Settlement with Publishers*, CNET (Sep. 24, 2001), <https://www.cnet.com/tech/services-and-software/napster-reaches-settlement-with-publishers/> [<https://perma.cc/R669-GMUU>].

⁹⁸ Borland, *supra* note 97.

name to a music provider that turned the file-sharing platform into a legitimate subscription service.⁹⁹

Similar P2P file-sharing services have also litigated secondary liability claims and been forced to close down due to large settlement awards to plaintiffs and orders to shut down.¹⁰⁰ In 2005, Grokster settled a case by agreeing to pay \$50 million in damages to music creators and terminating its file-sharing network after the Supreme Court held it secondarily liable for infringement.¹⁰¹ In 2011, LimeWire settled its own case by agreeing to a \$105 million payment and a permanent injunction ordering it to cease operations.¹⁰²

The fear of secondary liability has driven OSPs to adhere to DMCA safe harbor provisions to avoid the aforementioned fates, even when it is a difficult undertaking for them.¹⁰³ The following eligibility requirement, notice-and-takedown, presents one of the more challenging aspects of compliance.

⁹⁹ Benny Evangelista, *Napster Runs Out of Lives -- Judge Rules Against Sale*, SFGATE (Sep. 4, 2002), <https://www.sfgate.com/business/article/napster-runs-out-of-lives-judge-rules-against-2774278.php> [https://perma.cc/5CFL-UGVC]; Stephen Dowling, *Napster Turns 20: How it Changed the Music Industry*, BBC NEWS (May 31, 2019), <https://www.bbc.com/culture/article/20190531-napster-turns-20-how-it-changed-the-music-industry> [https://perma.cc/24TX-LBUR].

¹⁰⁰ See *Metro-Goldwyn-Mayer Studios*, 545 U.S. at 924, 941; *Arista Recs.*, 784 F. Supp. 2d at 427.

¹⁰¹ *Grokster Settles File-Sharing Claim*, THOMSON REUTERS PRACTICAL LAW (Nov. 8, 2005), [https://uk.practicallaw.thomsonreuters.com/8-201-5642?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-201-5642?transitionType=Default&contextData=(sc.Default)&firstPage=true) [https://perma.cc/GQ9H-KRPQ].

¹⁰² Greg Sandoval, *Lime Wire Settles with RIAA for \$105 Million*, CNET (May 12, 2011), <https://www.cnet.com/culture/lime-wire-settles-with-riaa-for-105-million/> [https://perma.cc/79SG-XUN6].

¹⁰³ See Ian Lopez, *Battling Bots in the Age of Automated DMCA Takedown Notices*, LAW.COM (Aug. 30, 2018), <https://www.law.com/legaltechnews/2018/08/30/battling-bots-in-the-age-of-automated-dmca-takedown-notice/?slreturn=20250126183027> [https://perma.cc/C2A3-M45Q].

E. NOTICE & TAKEDOWN

As stated above, OSPs must comply with DMCA notice-and-takedown procedures to receive safe harbor protection.¹⁰⁴ This process establishes a standard for how OSPs should assist copyright owners in protecting against direct user infringement.¹⁰⁵

The notice-and-takedown process is initiated by copyright owners.¹⁰⁶ Copyright owners who believe that an OSP either hosts or links to a user's uploaded content that infringes on their protected work can notify the OSP and request that the allegedly infringing material be taken down.¹⁰⁷ These notices must comply with DMCA requirements.¹⁰⁸

To start, a notice must contain the copyright owner or their authorized agent's contact information, the identification of the work that has been infringed upon, the identification and/or location of the allegedly infringing content, and the copyright owner or authorized agent's signature.¹⁰⁹ Additionally, the notice must contain a statement of subjective good-faith belief that the allegedly infringing content is unlawful and a statement that the notice is accurate and, if sent by an authorized agent, that the sender is allowed to act on behalf of the copyright owner under penalty of perjury.¹¹⁰

This requirement differs from the traditional way to initiate an action in civil litigation with a complaint.¹¹¹ The Federal Rules of Civil Procedure govern the process of civil litigation in the United States Federal Courts, and many state courts follow these rules as guidelines.¹¹² Under the Federal Rules of Civil Procedure, a plaintiff must include and present enough facts in their complaint that a court can

¹⁰⁴ 17 U.S.C. § 512(c); U.S. COPYRIGHT OFF., *supra* note 14, at 25; *supra* Section II.D.

¹⁰⁵ 17 U.S.C. § 512(c).

¹⁰⁶ *Id.*; U.S. COPYRIGHT OFF., *supra* note 14, at 25.

¹⁰⁷ 17 U.S.C. § 512(c).

¹⁰⁸ *Id.* § 512(c)(3); BRAUNEIS & SHECHTER, *supra* note 73, at 464–65.

¹⁰⁹ 17 U.S.C. § 512(c).

¹¹⁰ *Id.*

¹¹¹ *See* FED. R. CIV. P. 3.

¹¹² *Federal Rules of Civil Procedure*, CORNELL L. SCH.: LEGAL INFO. INST. (Apr. 2021), https://www.law.cornell.edu/wex/federal_rules_of_civil_procedure [<https://perma.cc/Y8XD-5QVK>]; *Civil Procedure*, CORNELL L. SCH.: LEGAL INFO. INST. (July 2025), https://www.law.cornell.edu/wex/civil_procedure [<https://perma.cc/84SQ-3DS7>].

“draw the reasonable inference that the defendant is liable for the misconduct alleged” with “more than a sheer possibility that a defendant has acted unlawfully.”¹¹³ Comparatively, a DMCA notice requires much less information.¹¹⁴

Under § 512(f)(1), sanctions may be imposed against “[a]ny person who knowingly materially misrepresents under this section... that material or activity is infringing.”¹¹⁵ This is a subjective knowledge requirement, requiring “actual knowledge of misrepresentation.”¹¹⁶ In *Lenz v. Universal Music Corp.*, the Ninth Circuit elaborated that for a copyright owner to deliver a proper notice that comports with the good-faith belief statement requirement, it must consider fair use, discussed *infra* Section E, before issuance.¹¹⁷

Upon receiving a proper notice from a copyright owner sent to its statutorily required registered agent, an OSP has a duty to respond swiftly and take down the allegedly infringing content.¹¹⁸ Furthermore, OSPs must notify the user who posted the content in question of the takedown.¹¹⁹ Thereafter, a user whose content is removed has the opportunity to submit a counter-notice under § 512(g), requesting the reinstatement of their content if they believe that the takedown was erroneous.¹²⁰ After submitting a proper counter-notice, an individual must have their content restored within ten to fourteen business days unless the author chooses to proceed with a formal lawsuit.¹²¹ From there, the decision on whether to pursue matters further with an infringement claim against the user or allow the content to stay is left to the discretion of the copyright owner.¹²²

¹¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹¹⁴ *See id.* at 678; 17 U.S.C. § 512(c)(3).

¹¹⁵ 17 U.S.C. § 512(f).

¹¹⁶ *Rossi v. Motion Picture Ass’n of Am., Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004).

¹¹⁷ *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1161 (9th Cir. 2016).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 17 U.S.C. § 512(g); U.S. COPYRIGHT OFF., *supra* note 14, at 27.

¹²¹ 17 U.S.C. §§ 512(g)(2)–(3).

¹²² *Id.* § 512(g)(2)(C).

F. FAIR USE

Fair use is a legal doctrine that, in certain circumstances, allows unauthorized uses of copyrighted works that would otherwise be infringing.¹²³ In alignment with the foundational purpose of copyright,¹²⁴ Fair use is an exception to the exclusive use rights of copyright owners that allows borrowing from protected materials so long as it promotes further creativity and expression.¹²⁵ As repeated by the Supreme Court of the United States in *Campbell v. Acuff-Rose Music, Inc.*,

“in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”¹²⁶

Those accused of infringement may assert fair use as an affirmative defense.¹²⁷

While it arose out of common law principles, fair use is now enshrined in the 1976 Copyright Act, 17 U.S.C. § 107.¹²⁸ Statutorily, the use of a copyrighted work is fair when it is “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹²⁹ Additionally, the statute provides four factors to be considered when analyzing the fair use exception:

“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the

¹²³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

¹²⁴ U.S. CONST. art. I, § 8, cl. 8.

¹²⁵ *Campbell*, 510 U.S. at 577 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

¹²⁶ *Id.* at 575 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)).

¹²⁷ See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 553 (2023).

¹²⁸ See *Campbell* 510 U.S. at 576; 17 U.S.C. § 107.

¹²⁹ 17 U.S.C. § 107.

copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”¹³⁰

1. *Purpose and Character*

To determine whether the copying of protected material qualifies as fair use, courts analyze the purpose and character of the allegedly infringing work.¹³¹ As implied by the examples given in 17 U.S.C. § 107 (criticism, comment, news reporting, etc.),¹³² a fair use is “transformative,”¹³³ adding to the original work “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹³⁴ This is an objective question for the courts as they must investigate “whether the purpose of the use is distinct from the original.”¹³⁵

For example, in *O’Neil v. Ratajowski*, the Court found that a social media post could be a fair use of the image it copied because it could be seen as a commentary on the photograph.¹³⁶ In this case, Robert O’Neil, a photographer, sued Emily Ratajowski, a model and celebrity, for copyright infringement when she posted a paparazzi photo he took of her on the social media platform Instagram.¹³⁷ The image was of the defendant hiding her face from the photographers with a bouquet of flowers, which she captioned with “mood forever.”¹³⁸ When Ratajowski argued that the caption “mood forever” was a commentary and criticism of the paparazzi harassing her, the Court denied the plaintiff summary judgment on the issue of fair use, finding a genuine issue of

¹³⁰ *Id.*

¹³¹ *See generally Andy Warhol Found. for the Visual Arts*, 598 U.S. at 508.

¹³² 17 U.S.C. § 107.

¹³³ *See Campbell*, 510 U.S. at 579 (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”).

¹³⁴ *Id.*

¹³⁵ *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 544–45.

¹³⁶ *O’Neil v. Ratajowski*, 563 F. Supp. 3d 112 at 129 (S.D.N.Y. 2021).

¹³⁷ *Id.* at 122–23.

¹³⁸ *Id.* at 122–23, 129.

material fact on whether the post would convey this new meaning to a reasonable observer, rather than the image's original purpose of documenting celebrity life.¹³⁹

Furthermore, courts look to the financial aspects of the use.¹⁴⁰ An allegedly infringing work that gives "direct or immediate commercial advantage" from the copying" is less likely to be fair use, while non-commercial uses lend themselves to a finding of fair use.¹⁴¹

2. *Nature of Copyrighted Work*

The second fair use factor centers on the copyrighted work itself.¹⁴² This factor looks to the nature of the protected work, first determining whether it is expressive and creative or fact and information-based, then deciding whether it is published or unpublished.¹⁴³ A finding of fair use is more likely when the copyrighted work is factual and less likely when it is creative.¹⁴⁴ Additionally, a use is more likely to be fair when it borrows from a published work rather than an unpublished one.¹⁴⁵

3. *Amount and Substantiality*

Courts also consider the amount and substantiality of what the allegedly infringing work copied from the original.¹⁴⁶ This is both a quantitative and qualitative inquiry that examines the numerical percentage of what was borrowed in light of its significance to the original material.¹⁴⁷ Quantitatively, the more an allegedly infringing work borrows from the original material, the less likely it is to

¹³⁹ *Id.* at 129–30.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* ("The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of copyrighted material without paying the customary price.").

¹⁴² *See Andy Warhol Found. for the Visual Arts*, 598 U.S. at 527.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

¹⁴⁷ *Id.*

be a fair use.¹⁴⁸ Qualitatively, the more significant the portions taken from the original are, the less likely it is that the use will be fair.¹⁴⁹

4. *Potential Market*

The fourth factor in a fair use consideration is a measurement of the allegedly infringing work's effect on the original's market or value.¹⁵⁰ When the work harms the sales of the original or encourages consumers to consider it an alternative choice to purchase instead, it is less likely to be fair.¹⁵¹ As said in *Princeton University Press v. Michigan Document Services, Inc.*, "[t]o negate fair use...one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'"¹⁵² This harm can be illustrated by lost profit or licensing fees.¹⁵³

While the law aims to protect the rights of the author, there are multiple actors with an interest in the availability of copyrighted material. As such, the doctrine of fair use and the DMCA statute seek to find a compromise between individual enjoyment, protection for the copyright owner, and a free market for OSPs.

III. NOTICE-&-TAKEDOWN IN THE SOCIAL MEDIA ERA

Currently, the dynamic between OSPs, copyright owners, and social media users is out of balance, due in part to the complications of notice-and-takedown procedures in the modern era. While the Internet has conferred the benefits of quick access between these parties,¹⁵⁴ this expansive environment comes with logistical burdens as well.¹⁵⁵

As explained above, OSPs must follow the DMCA safe harbor provisions to escape secondary liability in the event of users' direct infringement, with one of

¹⁴⁸ *See id.* at 598–601.

¹⁴⁹ *Id.* at 540.

¹⁵⁰ *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1386–87 (6th Cir. 1996).

¹⁵¹ *Id.*

¹⁵² *Id.* (quoting *Harper & Row, Publishers*, 471 U.S. at 568).

¹⁵³ *See id.*

¹⁵⁴ *See How TikTok Is Changing the Music Industry*, *supra* note 12.

¹⁵⁵ Erin E. Bronner, *Can I Post This?: A Call for Nuanced Interpretation of DMCA Enforcement in the Age of Social Media*, 92 *FORDHAM L. REV.* 1031, 1049(2023).

the requirements being the implementation and execution of notice-and-takedown procedures.¹⁵⁶ For practicality's sake, this operation involves the heavy use of algorithms.¹⁵⁷

With the amount of material on the Internet, copyright owners face a challenge in navigating how to effectively monitor and protect their work.¹⁵⁸ For this reason, music companies and copyright holders with the resources to employ automated programs to send notifications to OSPs often outsource the work to third-party companies such as Toppel Track.¹⁵⁹ This technology can search for and detect infringement, allowing copyright owners to reach large portions of the Internet and keep up with the amount of user content with comparative ease as opposed to manual monitoring. Additionally, as a result, they're able to send out many more notices to OSPs, which have a duty to "act expeditiously" to remove the allegedly infringing content.¹⁶⁰ For example, between January and July of 2024, TikTok received 266,392 copyright removal requests, with 173,891 of them resulting in removal.¹⁶¹ In the month of December 2023, Facebook received 342,000 copyright notices and removed 83.19% of them.¹⁶²

Of the thousands of infringement notices that OSPs receive, many are improperly filed.¹⁶³ According to a study by the University of California, Berkeley, and Columbia University, up to 30 percent of takedown notices could be of "questionable validity," due to the use of algorithms with little capacity for

¹⁵⁶ 17 U.S.C. § 512(c).

¹⁵⁷ See Rebecca Alderfer Rock, *Fair Use Analysis in DMCA Takedown Notices: Necessary or Noxious?*, 86 TEMP. L. REV. 691, 718 (2014).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 716; Bronner, *supra* note 155, at 1047.

¹⁶⁰ 17 U.S.C. § 512(c).

¹⁶¹ *TikTok Transparency Report*, TIKTOK, <https://www.tiktok.com/transparency/en/intellectual-property-removal-requests-2024-1> [<https://perma.cc/76TU-W8YR>].

¹⁶² *Meta Intellectual Property Transparency Report*, META, <https://transparency.meta.com/reports/intellectual-property/notice-and-takedown/facebook/> [<https://perma.cc/X5B5-RCJK>] [hereinafter *Meta Transparency Report*].

¹⁶³ See Brent Lang, *Policing the Pirates: 30% of Takedown Requests are Questionable (Study)*, VARIETY, <https://www.yahoo.com/entertainment/policing-pirates-30-takedown-requests-questionable-study-214052507.html> [<https://perma.cc/6KP5-ULA3>].

differentiating between infringement and fair use.¹⁶⁴ In addition to these unsubstantiated claims, there are also fraudulent notices, sent with the intent to stifle conversation and competition or force defendants into settlements.¹⁶⁵

In response to the barrage of notices received, many of the larger social media companies, such as YouTube, Meta, and TikTok, also turned to ACR systems to preemptively police their platforms.¹⁶⁶ YouTube's ACR system, Content ID, was the first of these to be implemented in 2007, and it remains the traditional format for algorithms of its kind.¹⁶⁷ Content ID works to detect matches between protected audio and visual works stored in a database and users' uploaded videos.¹⁶⁸ When similarities are detected, an automatic Content ID claim is initiated.¹⁶⁹ While this system is a separate approach to notice-and-takedown, both kinds of claims can simultaneously apply to the same video.¹⁷⁰ However, they do confer different penalties.¹⁷¹ A Content ID claim's penalty is left to the discretion of the copyright owner, who may choose to block the content, restrict its third-party platform access, or run ads on the video (with or without sharing any revenue with the user).¹⁷² A "copyright strike," as YouTube calls an owner's notification, operates on a three-strike system; once a user has received three, their account is subject to termination, with a bar from creating a new channel, and all their videos are removed.¹⁷³

These tools are convenient in that they allow copyright owners to protect their rights without having to comb through the vast expanses of the Internet

¹⁶⁴ *Id.*

¹⁶⁵ See Matt Binder, *Fraudsters are Abusing Google with Fake Copyright Complaints, and it's Getting Worse*, MASHABLE, <https://mashable.com/article/google-fake-dmca-takedown-requests> [<https://perma.cc/39EK-P69K>].

¹⁶⁶ Bronner, *supra* note 155, at 1046.

¹⁶⁷ *Id.* at 1045–46.

¹⁶⁸ *Learn About Content ID Claims*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/7R48-DFYX>] [hereinafter *Learn About*].

¹⁶⁹ *Id.*

¹⁷⁰ Bronner, *supra* note 155, at 1045.

¹⁷¹ *Learn About, supra* note 168; *Copyright Strike Basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000> [<https://perma.cc/Z4BR-FMPB>].

¹⁷² *Learn About, supra* note 168.

¹⁷³ *Copyright Strike Basics, supra* note 171.

searching for unlawful copies.¹⁷⁴ Additionally, social media companies can effectively comply with DMCA regulations.¹⁷⁵ For users, however, there are more limitations than benefits.

An individual can appeal a takedown by sending a counter-notification to the social media company, which is then required to restore the content in ten to fourteen business days unless the copyright owner notifies them that they have filed a lawsuit against the user.¹⁷⁶ In that case, the content stays offline.¹⁷⁷ However, even if the content is restored within the requisite time frame, that window can have damaging results¹⁷⁸ for the user due to the Internet's increasingly short attention span.¹⁷⁹ Timing is crucial for users to be able to post current, relevant content.¹⁸⁰ Not only does this massively affect some users' livelihoods, but it also implicates certain constitutional rights.¹⁸¹

Furthermore, if the copyright owner chooses to proceed further after receiving a counter-notice, users face an uphill and expensive legal battle against companies that typically have more sophisticated resources, with the burden on them to demonstrate that their use was fair.¹⁸²

¹⁷⁴ See, e.g., Rock, *supra* note 157, at 716.

¹⁷⁵ See 17 U.S.C. § 512(c).

¹⁷⁶ *Id.* § 512(g)(2)(C).

¹⁷⁷ See *id.*

¹⁷⁸ Rock, *supra* note 157, at 700.

¹⁷⁹ See, e.g., Taylor Lorenz, *The Word 'Viral' Has Lost its Meaning*, WASH. POST (Mar. 9, 2024), <https://www.washingtonpost.com/technology/2024/03/09/viral-view-counts-inflation/> [<https://perma.cc/5RMH-7CLJ>] ("The speed at which we cycle through trends and sort of moments of virality on the internet is faster now largely because of TikTok.").

¹⁸⁰ Rock, *supra* note 157, at 700.

¹⁸¹ See generally Chavie Lieber, *How and Why do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX, (Nov. 28, 2018), <https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube/> [<https://perma.cc/3HC4-33CD>]; Amanda Reid, *Considering Fair Use: DMCA's TakeDown & Repeat Infringers Policies*, 24 COMM. L. & POL'Y 101, 104 (2019) (citing *Golan v. Holder*, 565 U.S. 302, 328–29 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) ("Fair use is a bulwark of free speech values.")).

¹⁸² Bronner, *supra* note 155, at 1053–54.

A takedown notice requires a “good faith belief” statement from the copyright holder that the allegedly infringing material is unauthorized by law.¹⁸³ While § 512(f) allows an accused user to sue a copyright holder who “knowingly materially misrepresent[ed]” that their content was infringed upon, violating this good faith belief requirement, the courts have a high bar for what meets this standard.¹⁸⁴ To demonstrate the subjective knowledge necessary to succeed, a plaintiff would need to prove that the defendant actually knew that they were making a misrepresentation, a showing of negligence, or that “the defendants should have known” is insufficient.¹⁸⁵

In 2016, the Ninth Circuit interpreted § 512(c)(3)(A)(v) and § 512(f) to mean that a copyright holder is unable to dismiss a claim of knowing misrepresentation if they did not analyze whether a user’s content is fair use before sending a takedown notice to a social media company.¹⁸⁶ However, in reality, this consideration is practically impossible due to the widespread use of automated systems, which are unable to do a nuanced fair use analysis as humans do.¹⁸⁷ In *Lenz v. Universal Music Corp.*, the Ninth Circuit held that fair use was not a traditional affirmative defense to be asserted after the plaintiff’s case, but a right that warranted consideration as a prerequisite.¹⁸⁸ However, due to an algorithm’s inability to fulfill that prerequisite, fair use is still effectively an affirmative defense to be claimed after multiple steps of the notice-and-takedown process.¹⁸⁹ Furthermore, due to the expenses of litigation and the low chance of receiving more than minimal damages, it is often not worth it for users to pursue judicial action, and, therefore, their fair use right is essentially waived as a practical matter.¹⁹⁰

¹⁸³ 17 U.S.C. § 512(c)(3)(A)(v).

¹⁸⁴ Bronner, *supra* note 155, at 1039, 1072.

¹⁸⁵ *White v. UMG Recordings, Inc.*, No. 20 Civ. 9971 (AT), 2021 WL 6052106, at *2 (S.D.N.Y. Dec. 21, 2021); *Lenz*, 815 F.3d at 1153.

¹⁸⁶ 17 U.S.C. § 512(f); *see Lenz*, 815 F.3d at 1157 (holding that § 512(c)(3)(A)(v) required a copyright owner to consider fair use in order to make a good faith belief statement that the content in question was infringing).

¹⁸⁷ Bronner, *supra* note 155, at 1072.

¹⁸⁸ *See Lenz*, 815 F.3d at 1152–53.

¹⁸⁹ *See Bronner*, *supra* note 155, at 1054 (articulating the burden on the user’s end, or the plaintiff, to prove that their identified post was fair use).

¹⁹⁰ *See id.* at 1051 (noting the prevalence of disputes regarding “DMCA takedowns on social media”).

The notice-and-takedown process leans toward takedowns.¹⁹¹ Generally, counter-notices are rarely filed as users have “little or no knowledge of copyright law’ and little capacity to make informed estimates of the risks attendant on filing a counter notice.”¹⁹² With social media companies risking secondary liability under safe-harbor provisions, their interest lies in caution and the liberal removal of any allegedly infringing content.¹⁹³ For users who attempt to utilize the limited protections of § 512(f), the subjective good-faith belief standard is a high bar to success in proving that a copyright holder “knowingly [] misrepresented” their allegations.¹⁹⁴ As copyright owners subsequently gained increased control over their work, the system incentivized takedowns without distinguishing between valid claims of infringement and unsubstantiated notices.¹⁹⁵ While Congress intended to create a harmonious relationship between the public, copyright holders, and OSPs with the DMCA,¹⁹⁶ the statute was enacted prior to the technological advancements that led to the imbalance between these actors.¹⁹⁷ For a decade, critics of the current system have advocated for a restructuring of notice-

¹⁹¹ Lopez, *supra* note 103; see Andre Menko Bleech, *What's the Use? Good Faith Evaluations of 'Fair Use' and Digital Millennium Copyright Act 'Takedown' Notices*, 18 COMMLAW CONSPECTUS 241, 263 (2009) (examining how the standards for a takedown notice allows copyright holders to abuse this system which presents an imbalance of power to the detriment of individual users).

¹⁹² Jennifer Urban et al., *Notice and Takedown in Everyday Practice*, U.C. Berkeley Samuelson Law, Technology & Public Policy Clinic Pub. L. Rsch. Paper No. 2755628, at 44 (2017), <https://dx.doi.org/10.2139/ssrn.2755628> [<https://perma.cc/4MB3-2NB6>].

¹⁹³ *Id.*

¹⁹⁴ Bleech, *supra* note 191, at 258, 263–66 (discussing the implications of *Lenz* and *Rossi* to only allow a misrepresentation claim issuing a takedown notice when the owner has “knowingly and materially misrepresented” the copyrighted material).

¹⁹⁵ Jennifer M. Urban & Laura Quilter, *Efficient Process or Chilling Effects - Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA HIGH TECH. L.J. 621, 687 (2005).

¹⁹⁶ See U.S. COPYRIGHT OFF., *supra* note 14, at 19 (describing the background in which the DMCA was enacted by Congress and the belief that Congress could have balanced the interests of each respective party).

¹⁹⁷ See *id.* at 27–28 (acknowledging that while Congress wrote the statute with a “contemporary understanding of internet technology,” the current speed in which technology has grown has far surpassed the effectiveness of the DMCA).

and-takedown procedures that allows users to benefit from the protections offered by the fair use doctrine.¹⁹⁸

IV. ANALYSIS

This Part proposes a statutory reform to notice-and-takedown so that copyright holders must include more than a mere good-faith belief statement that an allegedly infringing social media post is unauthorized by law. Instead, the DMCA should be amended so that owners must provide a complaint of substance that illustrates why fair use is inapplicable. This would effectively create a presumption of fair use, reflecting its proper status as a right, not an affirmative defense within the context of the DMCA.¹⁹⁹

Currently, a takedown notification's good-faith standard requires a single statement that the copyright holder subjectively believes that the allegedly infringing material is unauthorized, in addition to providing the holder's contact information and a certification that the underlying material is owned by them.²⁰⁰ The sample notice provided by the Copyright Office gives this sentence as an example: "I have a good faith belief that the use of the work(s) described above in the material(s) listed here is not authorized by the copyright owner, an agent of the copyright owner, or the law."²⁰¹ The factual basis for this belief is saved for litigation under a § 512(f) claim.²⁰²

However, that statement should be replaced by a complaint similar to pleadings favored in civil litigation under the Federal Rules of Civil Procedure.²⁰³ F.R.C.P. 8(a)(2) requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief" accompanied by "more than

¹⁹⁸ Leron Solomon, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 238–39 (2015).

¹⁹⁹ See *Lenz*, 815 F.3d at 1152–53 (explaining the interpretations of fair use and whether precedent has addressed whether it is an affirmative defense).

²⁰⁰ See 17 U.S.C. § 512(c)(3) (stating the elements of a takedown notification).

²⁰¹ *Notice of Copyright Infringement: Request for Removal of Infringing Material*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/512/sample-notice.pdf> [<https://perma.cc/VW9E-V57P>] [hereinafter *Notice of Copyright Infringement*].

²⁰² See *White*, 2021 WL 6052106, at *2; see also 17 U.S.C. § 512(f).

²⁰³ See FED. R. CIV. P. 3; FED. R. CIV. P. 8(a)(2).

an unadorned, the-defendant-unlawfully-harmed-me accusation.”²⁰⁴ As the Supreme Court said in *Ashcroft v. Iqbal*, “a pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’”²⁰⁵ The good-faith statement in current takedown notices is exactly “a formulaic recitation” of copyright infringement elements.²⁰⁶ Instead of the parties maneuvering back and forth through notice-and-takedown procedures with little discussion of its basis, it would be more efficient to begin with a discussion of fair use as a preliminary matter.

Despite how unrecognizable the current technological landscape is in comparison to 1998, Congress has not amended the DMCA since its passage.²⁰⁷ For decades, stakeholders have called for reform to the notice-and-takedown process.²⁰⁸ A statutory solution would allow this issue to be resolved at its source, by those best equipped to craft an addition to the DMCA based on input from all parties, as initially intended by the legislative branch.²⁰⁹ As artificial intelligence and algorithmic technology become more widely used, Congress has turned its attention to potential regulation of the field, although not yet in this context.²¹⁰ As part of the larger conversation surrounding the impact of these new tools, the legislature could naturally include an amendment to 17 U.S.C. § 512(c)(3), raising the standard from “a statement that the complaining party has a good faith belief

²⁰⁴ FED. R. CIV. P. 8(a)(2); *Ashcroft*, 556 U.S. at 678 (overviewing the pleading requirements necessary to entitle a plaintiff to relief).

²⁰⁵ *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

²⁰⁶ *Id.* at 678; *Notice of Copyright Infringement*, *supra* note 201.

²⁰⁷ *See* Bronner, *supra* note 155, at 1069 (articulating how Congress has not amended the DMCA and that all amendment proposals since 1998 have been unsuccessful).

²⁰⁸ *Id.* at 1059 (providing context to the “notice and stay down” filters that were made in light of Article 13).

²⁰⁹ *See, e.g.*, S. REP. NO. 105-190 at 2–3 (reporting on the Senate Committee on the Judiciary’s hearing to introduce the DMCA with testimony from 30 witnesses, more than 70 public comments, and written statements from over 150 individuals and organizations); H.R. REP. NO. 105-551, pt. 1, at 11–12 (reporting on the House Committee on the Judiciary’s introduction of the DMCA with testimony from 25 stakeholders).

²¹⁰ *See Artificial Intelligence Legislation Tracker*, BRENNAN CTR. FOR JUST. (Sept. 26, 2025), <https://www.brennancenter.org/our-work/research-reports/artificial-intelligence-legislation-tracker> [<https://perma.cc/QT7Q-MKL5>] (tracking proposed legislation in Congress that indicates Artificial Intelligence).

that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law” to a complaint of substance with similar pleading requirements to the Federal Rules.²¹¹

If Congress does not act on this issue, the judiciary can and should take the opportunity to step in through a common law interpretation of what constitutes good faith. To a certain extent, the Ninth Circuit has already done this in *Lenz v. Universal Music Corp.*, where the court ruled that fair use must be considered by the copyright holder before a takedown notice is sent.²¹² However, more work needs to be done in clarifying what that requirement means in light of the technological landscape.

While the judiciary may not be equipped to facilitate a full conversation in the way that Congress is able to hear testimony from an array of parties, they are still able to receive and solicit opinions from the public in amicus briefs at their discretion.²¹³ Before Congress is able to address this issue, the courts may do so through the common law.

A. THE BENEFITS OF FAIR USE AS A PRELIMINARY MATTER TO ACHIEVE COMPROMISE

Fair use is typically considered a defense, albeit a nontraditional one, with the ultimate burden placed on the supposed defendant. However, the initial responsibility should instead be placed on the copyright holder to elaborate on why allegedly infringing material is not fair use and should be taken down.²¹⁴ This analysis can be conducted at the outset of the notice-and-takedown process since the foremost requirement is a “side-by-side comparison of the two works,” a component that does not always need expensive or complicated investigation.²¹⁵

²¹¹ 17 U.S.C. § 512(c)(3)(a)(v); see FED. R. CIV. P. 3, 8(a)(2).

²¹² See *Lenz*, 815 F.3d at 1157.

²¹³ *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991) (holding that an invitation to participate in a case as an amicus is at the discretion of the court to allow or provide); see also *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990) (“an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court.”).

²¹⁴ See *Lenz*, 815 F.3d at 1152–53.

²¹⁵ Robert T. Sherwin, *Clones, Thugs, ‘N (Eventual?) Harmony: Using the Federal Rules of Civil Procedure to Simulate a Statutory Defamation Defense and Make the World Safe from Copyright Bullies*, 64 DEPAUL L. REV. 823, 856, 858 (2015) (explaining how some comparisons may require context or an evaluation of

To increase efficiency in an already overloaded system, fair use should be a preliminary matter; if a copyright holder has already evaluated it and made a thoughtful determination that the content is still infringing, there's little need to continue the back and forth of a takedown appeal, litigation, or § 512(f) claim.

In *Brownmark Films, LLC v. Comedy Partners*, the Seventh Circuit dismissed a copyright infringement claim for failure to state a claim upon which relief could be granted at the outset of litigation based on the defendant's assertion of fair use, despite this being an affirmative defense.²¹⁶ Although affirmative defenses do not usually dispense a claim for relief, the Seventh Circuit granted the motion to dismiss pre-discovery when it could be demonstrated that the allegedly infringing work was a fair use based on the visual comparison.²¹⁷ As social media content is typically a snapshot of information or commentary, tangential to the context of the original material, a side-by-side look at the materials would be appropriate without necessitating the costs of litigation.

There has been extensive scholarship proposing various solutions to the imbalance of power exacerbated by algorithmic copyright enforcement.²¹⁸ Other proposals include replicating anti-SLAPP-esque provisions to provide a mechanism for early dismissal of abusive copyright infringement claims²¹⁹ or replacing the subjective knowledge necessary for a user to succeed on a § 512(f) claim of misrepresentation with an objective standard that would include copyright holders who should have known that it was a misrepresentation.²²⁰ Further, authors have suggested a presumption of fair use for all non-commercial music covers and mashups, or that the allegations of infringement in a takedown

market harm to determine if it is a fair use, but many can be done by looking at the works side-by-side).

²¹⁶ See *id.* at 856–58; *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012) [hereinafter *Brownmark Films II*]; *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 999 (E.D. Wis. 2011) [hereinafter *Brownmark Films I*].

²¹⁷ See *Brownmark Films II*, 682 F.3d at 691–92; *Brownmark Films I*, 800 F. Supp. 2d at 999.

²¹⁸ See generally Bleech, *supra* note 191, at 241; Reid, *supra* note 181, at 101; Shreya M. Santhanam, *Going Beyond the Music Modernization Act: Creation in the Digital Era*, 35 BERKLEY TECH. L.J. 1093, 1093–94; Sherwin, *supra* note 215, at 823.

²¹⁹ See Sherwin, *supra* note 215, at 865 (explaining how state legislatures passed anti-SLAPP laws to prevent the abuse of defamation or tortious interference claims against individuals speaking on public issues).

²²⁰ See Bleech, *supra* note 191, at 267–68 (providing examples of amendments that could restore “the balance of [the] copyright holder and user interests”).

notice be made under penalty of perjury (as the statement of non-infringement in a counter-notice is).²²¹ Each of these proposals would likely lead to more detailed takedowns by virtue of the logistical realities. However, imposing a good-faith belief statement standard that aligns with the Federal Rules of Civil Procedure guarantees that the matter will be evaluated on the front end instead of waiting until costly litigation. When a user's rights must be asserted during litigation, these considerations go unheard if one is unable to afford the practical costs. In turn, this solution seeks to prevent a trial from becoming necessary in the first place.²²²

Prior to the final ruling in *Lenz v. Universal Music Corp.*, the Ninth Circuit issued a different opinion that was later substituted for the current holding.²²³ In the initial opinion, the Court contemplated the practical difficulties of human review and proposed screening algorithms as a solution that would ensure fair use was considered while allowing for the logistical realities of the Internet.²²⁴ This portion of the ruling was removed when the opinion was reissued.²²⁵ While the Court did not explain why they made this change, the practical implications of a requirement to analyze fair use without addressing the complications of algorithms incapable of nuance are clear. Still, the reasoning behind a compromise between all parties presents a plausible solution to the problems with notice-and-takedown procedures.

A compromise can be found between the use of ACR systems and human participation. With how much material is posted to social media platforms, it would be a massive undertaking of human labor to monitor the Internet without technology.²²⁶ ACR technology works by detecting matches between copyrighted

²²¹ See Reid, *supra* note 181, at 129 (arguing to protect First Amendment principles by “robust protections” that can be enacted by amendments and further reforms).

²²² See Sherwin, *supra* note 215, at 864 (citing Lawrence Lessig, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 9–10 (2004) (“But the fair use doctrine has arguably become little more than ‘the right to hire a lawyer to defend your actions in court.’”)).

²²³ See generally *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015), amended and superseded by *Lenz*, 815 F.3d.

²²⁴ *Id.* at 1135–36.

²²⁵ *Id.*; see generally *Lenz*, 815 F.3d.

²²⁶ Lauren Levinson, *Adapting Fair Use to Reflect Social Media Norms: A Joint Proposal*, 64 UCLA L. REV. 1038 (2017).

work and user content.²²⁷ A statutory requirement that allows for the use of automated takedown notices when the allegedly infringing work matches the vast majority of the copyrighted material would also produce the same benefits as a total shift to human review, with fewer of the potential logistical problems. Eighty-five% is a large enough quantity that a post that borrows so much is highly unlikely to be a fair use.²²⁸ In contrast, a post that borrows half of the copyrighted work is much more likely to be using the material for the purposes of comment, parody, or criticism, so it would warrant a fair use analysis from a human.²²⁹

This could be a similar scheme to how online platforms already conduct content moderation.²³⁰ Although human workforces struggle with it, the general mechanisms translate well to copyright monitoring. Algorithms work to identify matches and flag content while humans review “the less obvious or more controversial identifications.”²³¹ The human decisions can then be used to train the algorithms to make more accurate decisions aligned with what a person would do.²³² Further, many of the problems that arise with moderation, such as moderators suffering from encounters with disturbing imagery, violence, and hate speech, would not apply to copyright enforcement.²³³

Raising the § 512(c)(3) standard rebalances the scales in favor of individuals who have been previously at a disadvantage.²³⁴ In addition to the challenges users face in a system that leans toward takedowns,²³⁵ users are comparatively ill-equipped to navigate the legalities of the DMCA.²³⁶ The current

²²⁷ Bronner, *supra* note 155, at 1045.

²²⁸ See generally *Harper & Row, Publishers*, 471 U.S. at 539.

²²⁹ See *id.*

²³⁰ Thomas Stackpole, *Content Moderation is Terrible by Design*, HARV. BUS. REV. (Nov. 9, 2022), <https://hbr.org/2022/11/content-moderation-is-terrible-by-design> [<https://perma.cc/CAJ3-RRA5>].

²³¹ Tarleton Gillespie, *Content Moderation, AI, and the Question of Scale*, BIG DATA & SOC'Y (2020) <https://journals.sagepub.com/doi/epub/10.1177/2053951720943234>, [<https://perma.cc/Z5QN-JGA5>].

²³² Stackpole, *supra* note 230; Gillespie, *supra* note 231.

²³³ Stackpole, *supra* note 230.

²³⁴ Bronner, *supra* note 155, at 1053–55.

²³⁵ Lopez, *supra* note 103; Solomon, *supra* note 198, at 256–57.

²³⁶ Bronner, *supra* note 155, at 1038–39 (quoting *Hawkins v. Knobbe*, No. 05-20-00224-CV, 2020 WL 7693111, at *5 (Tex. App. Dec. 28, 2020) (“[T]he general public, or more accurately the reasonable reader, likely is not aware of what

counter-notification system presents a risk to the average user who attempts to reinstate their content, as they are unlikely to fully understand the nuances of a legal doctrine such as fair use²³⁷ while opening themselves up to liability in the event that a copyright owner chooses to pursue a court order against them.²³⁸ Similarly, many of these users who proceed with misrepresentation claims under § 512(f) are pro se litigants, unlikely to gain substantial damages²³⁹ while navigating a complex legal battle against well-resourced companies.²⁴⁰ As the employees of OSPs are similarly less likely to be knowledgeable about copyright,²⁴¹ the responsibility of explanation should be on the copyright holders who assert the laws in question.

B. THE NECESSITY OF HUMAN REVIEW OF COPYRIGHT NOTICES

Requiring a complaint of substance forces the issue of human review as opposed to algorithms. In *Lenz*, the Ninth Circuit did not go as far as to make a fair use prerequisite a reality by exploring how companies would be able to fulfill this requirement while utilizing systems that are fundamentally incapable of it.²⁴² Algorithmic technology is useful for detecting matches between content and copyrighted material, but it is not capable of balancing the nuanced considerations required of a fair use analysis.²⁴³ A more detailed complaint would require human participation to begin the notice-and-takedown process, decreasing the use of algorithms that send such a significant number of automated takedown

a 'DMCA claim' or what the acronym DMCA even means.")); Solomon, *supra* note 198, at 256.

²³⁷ Bronner, *supra* note 155, at 1038–39; Solomon, *supra* note 198, at 256.

²³⁸ 17 U.S.C. § 512(g)(2)(C).

²³⁹ Levinson, *supra* note 226, at 1056.

²⁴⁰ Bronner, *supra* note 155, at 1054.

²⁴¹ See, e.g., *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 96–97 (2d Cir. 2016).

²⁴² *Lenz*, 815 F.3d; Bronner, *supra* note 155, at 1049 (“For over a decade, scholars have criticized social media platforms for using ACR technology as the first line of copyright infringement detection, on account of the technology’s inability to evaluate for fair use in the same capacity as a human.”).

²⁴³ Bronner, *supra* note 155, at 1051; see also Caroline E. Kim, *Insta-Fringement: What is a Fair Use on Social Media?*, 18 J. MARSHALL REV. INTELL. PROP. L. 102, 116 (2018) (“The substantial uncertainty surrounding the appropriate threshold for what rises to the level of a fair use in these contexts continues to frustrate both lawyers and content creators alike.”).

notifications that social media companies must employ their own algorithms to keep up.²⁴⁴ With less to wade through, social media companies would then be able to utilize human review as well, further increasing the opportunities for fair use to be evaluated.

Beyond fair use, this proposal would remedy another problem that arises out of the near-constant use of algorithms to police copyright infringement.²⁴⁵ Not only are OSPs receiving too many notices to adequately consider, but many of those notices are also improperly filed, intentionally or otherwise, containing such unsupported claims of infringement that raise questions about whether the notices had a more abusive motive than simply enforcement.²⁴⁶ While a user can allege knowing misrepresentation under § 512(f), the success of that argument is unlikely against an automated notice because, legally, algorithms do not have intentions, so they cannot be said to knowingly act.²⁴⁷ Therefore, a misrepresentation claim must proceed against a human party, the copyright owner. However, if an algorithm sends an incorrect notice automatically without any human oversight, how would an individual possibly prove that the owner was subjectively aware of any flaws?

Additionally, there is no stipulation for misrepresentations that result from willful blindness, or the premise that a copyright owner *should* have known that its notices were false or unsupported.²⁴⁸ Even if the copyright owner failed to verify the truth of their notices, a misrepresentation claim could not succeed. Thus, copyright owners may escape liability²⁴⁹ due to an outdated requirement that doesn't account for modern technology. In contrast, human review of a notice

²⁴⁴ See Rock, *supra* 157, at 717–18 (noting that human review of copyrighted material online could not occur at the same speed or with the same volume as an algorithm).

²⁴⁵ *Id.* at 701.

²⁴⁶ Jon M. Garon, *Tidying Up the Internet: Take Down of Unauthorized Content Under Copyright, Trademark, and Defamation Law*, 41 CAPITAL U. L. REV. 513, 524 (2013); Rock, *supra* note 157, at 701 (noting that the notice-and-takedown process can be abused by filing unsubstantiated claims to stifle fair use, freedom of speech, and business competition).

²⁴⁷ Ian Ayres & Jack M. Balkin, *The Law of AI is the Law of Risky Agents Without Intentions*, U. CHI. L. REV. ONLINE (Nov. 27, 2024), <https://lawreview.uchicago.edu/online-archive/law-ai-law-risky-agents-without-intentions#heading-5> [<https://perma.cc/SY8X-BG2E>].

²⁴⁸ *Rossi*, 391 F.3d at 1004.

²⁴⁹ Ayres & Balkin, *supra* note 247.

would ensure proper attribution of blame when necessary. So long as the ambiguities within the use of algorithmic technology remain, limitations of its effects are necessary.

This proposal clearly lessens the burden on OSPs, who would inherently receive fewer takedown notices if they required more effort, and users, but the logistical benefits for copyright holders must be elucidated. By requiring a complaint of substance composed by a human, copyright holders would need to furnish a workforce that could effectively monitor how their work is being used. With how vast the expanses of the Internet are, even the portion of cases where the content is an eighty-five% match to the copyrighted material could still present a huge amount of material to wade through. For copyright holders of all budgets, the expense can be daunting.²⁵⁰

However, in terms of cost, the assumption that human review would automatically present a loss to copyright holders in the aggregate is faulty.²⁵¹ While the initial costs of hiring humans to monitor copyrighted material may be substantial, the process of weighing whether or not to send a takedown notice instead of sending them automatically when a bot detects a match benefits copyright holders. With how the Internet has changed the pursuit of creative success, it's worth it to allow a larger number of users to borrow from copyrighted material and prolong the conversation about a work.²⁵² Instead of imposing new burdens on copyright holders in addition to the protective enforcement they must already handle, this proposal redirects the energy, frontloading the process, to alleviate later concerns for all parties.

For the protection offered by § 512(f) to remain adequate, clarification from Congress on the role that algorithms are allowed to play in these processes is vital. This would return the landscape to a technological level that allows it to

²⁵⁰ See Gillespie, *supra* note 231 (discussing how online platforms view algorithms as a necessity to enforcement due to the amount of information to review and the prohibitively expensive costs of utilizing humans in the context of content moderation).

²⁵¹ *Id.* (explaining how the assumption that algorithms are the only tool required is dismissive of both other methods and “any deeper interrogations of the capitalist, ‘growth at all costs’ imperative”).

²⁵² Tasbeeh Herwees, *How TikTok is Rewriting the Rules for Emerging Artists*, ROLLING STONE (Apr. 24, 2025), <https://www.rollingstone.com/music/music-news/tiktok-rewriting-rules-emerging-artists-1235319787/> [<https://perma.cc/P36Z-2M48>] (“Emerging talents are building careers in real time, where a hit doesn’t come from major label push alone but from authentic engagement and community-driven content.”).

better embody the legislative intent behind the DMCA, wherein users, OSPs, and copyright owners can each “promote the Progress of Science and useful Arts.”²⁵³

V. CONCLUSION

Two years before the DMCA was enacted, the founder of the Electronic Frontier Foundation, John Perry Barlow, wrote “*A Declaration of the Independence of Cyberspace*” in response to the Telecommunications Act of 1996, one of the decade’s many Congressional attempts to regulate the online world.²⁵⁴ There, he stated, “[Cyberspace] is an act of nature and it grows itself through our collective actions.”²⁵⁵ Almost thirty years later, social media is becoming the dominant venue for the propulsion and sharing of creativity, making it imperative that the logistical constraints of its size not overtake legitimate concerns about the status of fair use in the notice-and-takedown system.²⁵⁶ The doctrine of fair use is increasingly important in the online context as the Internet continues to drive much of the social and cultural conversation.²⁵⁷ For the continued enjoyment of creative work, it is essential to allow a certain amount of borrowing from protected materials for purposes such as comment, criticism, parody, or education.²⁵⁸

This Note proposes a solution that re-centers the symbiotic relationship between users, social media platforms, and copyright holders through a compromise between the protection of each party’s interests and the shared benefits that come from encouraging fair usage of copyrighted material. For that reason, this Note proposes an amendment to the DMCA so that, as the initiator of the notice-and-takedown process, a copyright owner should be required to

²⁵³ U.S. COPYRIGHT OFF., *supra* note 14, at 18; U.S. CONST. art. I, § 8, cl. 8; *see Reid, supra* note 181, at 103–04 (“The fair use doctrine is an important check on the copyright holder’s authority because it makes permissible socially valuable uses, including uses that a copyright holder might not authorize.”).

²⁵⁴ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/cyberspace-independence> [<https://perma.cc/HX58-UJLB>].

²⁵⁵ *Id.*

²⁵⁶ *How TikTok Emerged as the Music Industry’s Greatest Frenemy*, *supra* note 11; Levinson, *supra* note 226.

²⁵⁷ Levinson, *supra* note 226.

²⁵⁸ *See generally Campbell*, 510 U.S.; U.S. CONST. art. I, § 8, cl. 8.

provide a complaint of substance, similar to that required in civil litigation, which evaluates potential fair use in an allegedly infringing work.²⁵⁹

²⁵⁹ See *Ashcroft*, 556 U.S. at 678.

