

BEFORE THE
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
WASHINGTON, D.C.

Section 512 Study: Notice and
Request for Public Comment

Docket No. 2015–7

**COMMENTS ON BEHALF OF
THE ARTS AND ENTERTAINMENT ADVOCACY CLINIC AT GEORGE MASON
UNIVERSITY SCHOOL OF LAW**

The Arts and Entertainment Advocacy Clinic at George Mason University School of Law submits these comments on behalf of Middle Class Artists in response to the U.S. Copyright Office’s December 31, 2015 Notice of Inquiry (“NOI”) regarding section 512 of the Digital Millennium Copyright Act (“DMCA”). Specifically, these comments address the General Effectiveness of Safe Harbors, the Notice-and-Takedown Process, Counter Notifications, Legal Standards, Repeat Infringers, and Remedies.

I. INTRODUCTION

In 1998, Congress passed the DMCA to address new challenges and opportunities brought about by the Internet. Section 512¹ – the “safe harbor” provision – limits copyright infringement liability for internet service providers (ISPs) that host works posted by other users in order to incentivize ISPs to cooperate with copyright holders in protecting their work online.² ISPs are required to “expeditiously...remove, or disable access to”³ infringing material when they are notified by a copyright owner by the promise of limited liability.

In theory, section 512 presents a viable solution for combating online piracy, but in practice it is ineffective, inefficient, and unfairly burdensome on artists. Perhaps section 512 was effective against piracy on the Internet as it existed in 1998, but in 2016, the statutory provision works to shield ISPs without effectively helping artists protect their copyrighted works.

This comment focuses on the experiences of “Middle Class Artists” – those who pursue their work professionally, rather than as amateurs, have enough of a following to be adversely impacted by online infringement, but lack the resources to effectively address it using the tools provided by the DMCA.

¹ 17 U.S.C. §512 (1998).

² H.R. REP. NO. 105-551, at 49 (1998) (“Title II [of the DMCA] preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”).

³ 17 U.S.C. § 512(c)(1)(C) (1998).

II. MIDDLE CLASS PROFESSIONAL ARTISTS FACE UNIQUE CHALLENGES UNDER THE NOTICE AND TAKEDOWN REGIME

In preparation for submitting this comment, we interviewed five Middle Class Artists and artist advocates whose stories help bring perspective to the ongoing debate over the effectiveness of section 512. The individuals interviewed were: Blake Morgan, Yunghi Kim, Ellen Seidler, David Newhoff, and William Buckley.

Blake Morgan defined the group of individuals most affected by the significant shortcomings of the DMCA as “Middle Class Artists.” Positioned somewhere between emerging artists who hope to make a living from their work, but who are still struggling to find recognition, and the unique and small group of wildly successful artists with substantial resources or corporate backing, Middle Class Artists make a professional career of their music, photography, writing, and other art but live with the same challenges as other middle class Americans. They produce works valued by the market place, enriching society in the process. Middle Class Artists dedicate their professional lives to training in and perfecting their art, investing their time, passion, and money to produce works of beauty and meaning.

Such artists are respected in their field and have important but not globally prominent followings. They are popular enough to be infringed upon. Indeed, they face regular infringement. An infringement that deprives them of a few hundred dollars of licensing or sales revenue makes a significant impact on their ability to pay a mortgage, an orthodontic bill for a child, or address the myriad needs of a family. Multiple infringements costing a few hundred dollars each have a significant impact on their quality of life. Although the financial losses they suffer from unauthorized uses of their work matter to their bottom line, they are far from being able to afford to pay a company to detect and address infringements, nor are they typically afforded the opportunity to use the tools offered to major corporations or trade associations enforcing rights for their members by ISPs. They end up addressing infringement on their own as they can, but suffer productivity losses as a result. When they spend an hour searching for infringement online or sending takedown notices, they lose an hour they would otherwise spend in creative pursuits that enrich their communities and contribute to their family budget.

These Middle Class Artists graciously shared their experiences and frustrations with the Notice and Takedown System with us. Their stories have inspired this comment.

a. Yunghi Kim⁴

Yunghi Kim spent 32 years covering some of the world’s most dangerous conflicts as a photojournalist for outlets including The Boston Globe, Time, Newsweek, LIFE, and many others. In 1992, while she documented civil war and famine in Somalia, she and another reporter were pinned down by heavy fire. In the melee, a Somali warlord captured them. Kim and her companion did not know if they would survive to escape the warlord or would be killed by him. As we know too well from current conflicts, journalists are often casualties of violence in war zones. The warlord held them captive until the UN and CARE could execute a rescue. Kim returned to Somalia and other dangerous zones to continue her work. She has covered war zones from Somalia to Kosovo as well as non-war news all over the globe.

⁴ Yunghi Kim’s work is highlighted at www.yunghikim.com.

Kim's work on the Somali famine was a finalist for the Pulitzer Prize in 1992. She has received many other awards, including the World Press Photo Awards and Photographer of the Year awards including Magazine Photographer of the Year.

b. Blake Morgan⁵

Blake Morgan began his career as an alternative rock musician and now, in addition to his personal musical work, heads the ECR Music Group. Mr. Morgan writes, performs, and records his own music, and helps produce and distribute the music of a thriving group of artists. Based in New York City, Morgan's label and publishing company prides itself on caring for artists. All of the artists Morgan works with retain the rights to their master recordings. Mr. Morgan knows the music business from all sides: singing, writing, producing, managing, and protecting the rights of his artists. He also founded "I Respect Music."⁶ an advocacy group dedicated to obtaining fair pay for music creators.

c. Ellen Seidler⁷

Ellen Seidler started her career in broadcast journalism, first at ABC News in New York, then at KRON-TV in San Francisco. She went on to direct and produce films, including the award-winning documentary "Fighting for Our Lives – Facing AIDS in San Francisco," a short called "Et L'Amour," and a lesbian romantic comedy titled "And Then Came Lola." Her films have screened at film festivals around the world. She is a professor and chair of the Fine & Media Arts department at her college.

d. David Newhoff

Like Ms. Seidler, David Newhoff has had a successful commercial career in the audiovisual world. He worked for 20 years for corporate clients, producing in house video works. He currently pursues theatrical film projects and has in recent years become active in advocating on behalf of fellow creators as he continues to learn about and write about intellectual property in the digital age at his blog The Illusion of More.⁸

e. William Buckley

William Buckley worked in the music business for thirteen years, doing promotions, branding, radio, and finally running a label. He defines himself as a music fan and started an organization called Fare Play⁹ to inform young artists about piracy and empower them to fight it. Fare Play recently posted an online petition on its website to convey the views of the artist community about the notice and takedown system to the House Judiciary Committee as the Committee pursues its review of the Copyright Act.¹⁰ The petition has been signed by over a

⁵ Blake Morgan's work is profiled at <http://www.ecrmusicgroup.com/artists/blake-morgan/>.

⁶ See IRespectMusic.org.

⁷ Ellen Seidler writes about issues related to piracy and copyright at www.voxindie.org.

⁸ See www.illusionofmore.com.

⁹ See www.fareplay.org.

¹⁰ The petition is available at www.takedownstaydown.org and is attached as an exhibit to this Comment.

thousand artists asking for a Take Down, Stay Down regime to ensure the safe harbor protections of section 512 work as intended. It is attached as Exhibit A to this filing.

III. THE SAFE HARBOR PROVISIONS OF SECTION 512 ARE NOT EFFECTIVE FOR MIDDLE CLASS ARTISTS¹¹

As the Internet has changed, the effectiveness of section 512 has eroded. What was intended as a provision to balance the interests of artists and ISPs, has devolved into a system of protections for the benefit of ISPs that come at the expense of artists and their ability to pursue and thrive from their creative endeavors. Because case law has eviscerated some of the requirements of section 512, the burden of policing the Internet now rests almost entirely on artists.¹² Moreover the “notice-and-takedown” framework protects the interests of ISPs but has virtually no benefit for artists whose work *may* come down but reappears soon after because ISPs do not have in place mechanisms to prevent the reposting of infringing material (even by the same poster).

a. Section 512’s Limitations on Liability For Online Service Providers Have Negatively Impacted the Protection of and Value of Copyrighted Works, and Have Harmed Licensing Markets For Such Works

Artists like Kim and Seidler believe that ISPs benefit not only from pirated content that drives users to their platforms and generates ad revenue, but also from the safe harbor they receive, which disincentivizes ISPs from investigating or deterring copyright infringement on their sites.

For example, Seidler’s independent film “And Then Came Lola” – released in 2008 – was hugely successful, appearing in more than 100 film festivals around the world.¹³ She should have easily been able to recoup the quarter of a million dollars she and her co-producer spent personally financing the film, but even today she is fighting her way out of that debt. As an independent filmmaker, she has battled media giants like Google toe-to-toe, sending takedown notice after takedown notice and yet, infringing copies of her work continue to appear online. This has directly impacted her ability to recoup her investment, much less earn a profit on her work. In her words, piracy “cannibalizes” legitimate sales. Meanwhile, infringing sites and services are protected by the safe harbor provisions and continue to earn a profit from increased web traffic and ad revenue. According to Seidler, “piracy is a lucrative business for everyone except artists.” Artists report the biggest impact they have experienced is on their ability to continue to produce and distribute their works. As Seidler explained, if artists cannot be assured that their work is protected online, and must instead devote significant resources to enforcement rather than creative efforts they will produce less, and perhaps not at all, and we all, as a society, will ultimately lose.

¹¹ This section addresses questions 1, 4, and 5 of the U.S. Copyright Office Section 512 Study Notice and Request for Public Comment.

¹² See the Comment to this section 512 study filed on behalf of Intellectual Property professors by the George Mason Law Arts and Entertainment Advocacy Clinic.

¹³ Interview with Ellen Seidler (Feb. 18, 2016).

Photojournalist Yunghi Kim points out that photography is especially vulnerable to piracy.¹⁴ Once a viewer has seen a photograph on an infringing site, they are unlikely to click through to a legitimate site to see the photograph in context. A photographer who earns advertising revenue based on her website traffic will see diminished revenues for every user who views the infringing copy rather than the one monetized by the author.

b Section 512 Safe Harbors Do Not Strike the Correct Balance Between Copyright Owners and Online Service Providers

Rather than creating a balanced approach where ISPs and artists share the responsibility and the benefits of combating piracy, section 512 works to shield ISPs from any real liability while artists are left scrambling to find and seek removal of infringing copies of their work. Rather than placing the entirety of the burden on the artist, the burden should be more evenly spread, especially because ISPs are best positioned to understand the workings of their own sites and services and would incur the least cost in deterring infringement.

Artists like Kim and Seidler describe the takedown process as overly burdensome, -- especially for Middle Class Artists who lack the funds to outsource the task and must spend hours per day addressing piracy link by link, notice by notice. For artists, especially Middle Class Artists whose sole income is based on the work they create, time is a valuable asset. The time Kim spends doing reverse image searches to find infringing uses of her work online and filing takedown notices is time she could be spending working on her photography and earning a living.

Middle Class Artists often make large sacrifices and investments in the process of creating their work. Some, like Kim, risk their lives in warzones and endure captivity to document and memorialize events around the world. Photojournalists like Kim expend significant resources such as salaries for assistants, equipment and training costs, travel expenses, hiring of drivers and interpreters, insurance, and safety provisions – to say nothing of the years of investment spent honing their skills so they may rise to the highest levels of professional (if not financial) achievement. As Kim put it, a single news photograph from a war zone represents many thousands of dollars in resources committed.

Other artists, like Seidler, drain retirement funds, refinance mortgages, use credit lines, and live with years of debt to create art that gives a voice to underrepresented communities on screen. Some, like Morgan, put in long hours in a small business to create music and support those who create it. In addition, musicians, fine artists, photographers, filmmakers and other artists spend decades training, tens of thousands of hours perfecting their technique, and small fortunes on equipment and supplies. Artists already bear the burden of creating work that may or may not be financially successful for the benefit of society as a whole. To be an artist is to work hard, without the promise of financial reward. It is asking too much to expect them to also bear the burden of fending off piracy alone while ISPs benefit, directly and indirectly, from using and monetizing their work without authorization

¹⁴ Interview with Yunghi Kim (Jan. 28, 2016).

IV. MIDDLE CLASS ARTISTS STRUGGLE WITH SECTION 512'S NOTICE-AND-TAKEDOWN PROCESS FOR ADDRESSING ONLINE INFRINGEMENT¹⁵

a. Middle Class Artists Devote Inordinate Amounts of Time and Resources Searching for Infringement Online

An artist's work may be posted on the Internet without authorization a thousand different times over a dozen or more online platforms.¹⁶ For instance, a hit song may be uploaded on YouTube by hundreds of different users and a powerful photograph may be uploaded on Tumblr, Facebook, and Instagram by scores of users. On many of the most popular Internet platforms, each with millions of users uploading content, simply locating infringing content can be a full time job for artists. Yunghi Kim uses Google Image Search to find unauthorized posts of her photographs. To do this, she must search one image at a time, manually entering each photo, waiting for the results, and clicking through the links to confirm they are infringing. Musicians such as Blake Morgan use online search engines to find the titles of their songs or the names of their artists. This, also, must be done by an employee, one search at a time. For an artist with a large body of work, this process alone could take hours a day. At the height of the infringement of "And Then Came Lola," Ellen Seidler spent hours each day aggressively searching Google and other platforms to find infringing copies of her work. Within the first few months of the film's release she sent thousands of DMCA notices in an attempt to preserve a legitimate market for her work¹⁷

The process is also not particularly effective. It can miss a sizeable percentage of infringing content, sometimes tens of thousands of links.¹⁸

An artist trying to protect her work not only has to find the multiple cases of infringement on any given platform but must also report each individual instance to the platform according to the rules and online forms developed by the platform.¹⁹ In some cases, this means creating a list a hundred links long, each with its own URL information. Creating this document can take hours. With infringement happening across multiple platforms, the list of infringing work must be created for each site. Typically in order to facilitate efficient removal, the artist is required to use proprietary webforms developed by each site, rather than just sending an email with the required DMCA notice information and links. This further complicates the effort for artists, since forms may permit the submission of only a limited number of links, require the entry and acceptance of CAPTCHA codes, force the artist to endure repeated online advertising, and otherwise discourage the submission of notices.

¹⁵ This section addresses questions 6-8, 10, 15-18, and 26-28 of the U.S. Copyright Office Section 512 Study Notice and Request for Public Comment.

¹⁶ Interview with David Newhoff (Feb. 23, 2016); Additionally, Blake Morgan said that he has experienced a single song infringed in a thousand or more places online. Interview with Blake Morgan (Jan. 28, 2016).

¹⁷ Interview with Ellen Seidler (Feb. 18, 2016).

¹⁸ *Id.*

¹⁹ The notice provisions of 17 U.S.C. § 512(c)(3)(A)(ii) require "Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site." While the words "representative list" are ambiguous in the statute, the practice has developed that a Takedown notice must contain the URL of each infringement.

b. Middle Class Artists Encounter Roadblocks Locating the Proper Method of Reporting Infringement

Each platform has its own process for reporting infringing content. For an artist with infringement across multiple platforms, this means locating the proper method of reporting infringement for each platform, following the process, and submitting a notice.

Some platforms make it difficult to report infringing content. For instance, it is extremely hard to find the email contact for the DMCA agent for Google.²⁰ Furthermore, Google requires a login with a Google account in order to access the form to submit a takedown notice, creating a roadblock for copyright owners without a Google account.²¹ Once a user finds the correct form and creates a Google account to send the notice, she then must find the correct URL where the infringing content is located to report to Google. This information is itself not as straightforward to discern as one might think. Google's file system places video files within a folder but requires the non-folder URL for the takedown notice.²² The copyright owner may think she has the right URL but Google will not accept it and the copyright owner must then spend time figuring out why. This creates another roadblock. A determined Middle Class Artist trying to send a DMCA notice to Google for the first time may spend several hours simply trying to find the proper method of reporting.²³ Others may not be so determined and give up after a few roadblocks.²⁴

Google is just one site. YouTube, Facebook, Twitter, and other sites all have their own systems that the copyright owner must figure out.

Even for an artist who has sent a takedown notice to a particular ISP before, and therefore is familiar with that particular ISP's system, simply navigating the website to the correct form, filling out the form, and submitting it requires a significant time investment. For artists who have multiple works to protect by reporting, this burden is magnified.

c. Middle Class Artists Must Also Spend Time and Resources Monitoring to Ensure that Infringing Content Has Been Removed

Once a takedown notice has been sent, the platform is under no obligation to inform the owner that the content has been removed. The artist must spend time returning to the site to monitor the infringing content. Checking the infringing URL would be complicated enough as it is, but often the user reuploads the content into a different URL on the same site, which the artist must then find and report.

²⁰ See Ellen Seidler, *Why Does Google Make it So Damn Difficult to Send a DMCA Notice?*, VOX INDIE (Feb. 24, 2016), <http://voxindie.org/why-does-google-make-it-so-damn-difficult-to-send-dmca-notice/>.

²¹ *Id.*

²² *Id.*

²³ For a humorous yet accurate account of the challenges artists face when submitting a DMCA notice to Google see Stephen Carlisle, *How to Send a Takedown Notice to Google in 46 (or more) Easy Steps!*, NOVA SOUTHEASTERN (Mar. 31, 2016), <http://copyright.nova.edu/takedown-notice-google/>.

²⁴ In contrast, Vimeo has a DMCA notice system that is easier to use and more responsive. See Ellen Seidler, *Google Lives on Tech's Cutting Edge—But in DMCA Takedown Luddite-Land*, VOX INDIE (Jul. 9, 2015), <http://voxindie.org/google-tech-cutting-edge-dmca-takedown-luddite-land/>.

d. Middle Class Artists Find Infringing Content Frequently Reappears Quickly

In addition to the process itself being burdensome, for some Middle Class Artists, the process is ineffective because even when they are successful at having their work taken down, the effort is in vain because it reappears shortly thereafter. Ellen Seidler expressed disappointment with the struggle to protect her work, saying that if she had to do it all again, she wouldn't. The difficulty in combating piracy under such an unbalanced system is so burdensome that some artists would rather not share their work at all. After all of the hassle of searching for infringing links, locating DMCA forms, submitting the forms, and then waiting days, sometimes even weeks or months for the link to come down – the same work reappears the next day.

Seidler suggests that the larger ISPs be required to use digital fingerprinting technology like YouTube's Content ID system²⁵ to prevent users from repeatedly uploading infringing content. While it's a costly investment, as Seidler explained, it's a cost associated with employing a business model that relies on user-generated content.

e. Middle Class Artists Believe the Notice and Takedown System Leaves them with No Real Remedy to Address Infringement.

Once the infringing content is taken down, the person who posted it has the right to send a counternotice to the ISP contending that they do indeed have the legal right to post the content. The ISP is then obligated to repost the content unless the copyright owner brings a lawsuit in federal court within ten days. The Middle Class Artists with whom we spoke reported that this was not a viable option. Ellen Seidler pointed out that she doesn't have the financial resources pay for an attorney and associated court costs. The other artists agreed. Artist advocate David Newhoff has cataloged numerous artist experiences consistent with this report on his blog.²⁶ This is not surprising. The costs of hiring a lawyer and bringing a federal lawsuit are impossibly high. The copyright office itself has reported that costs to enforce against copyright infringement in court run into the multiple hundreds of thousands of dollars, and that many lawyers will not take on cases unless at least 30K in damages is expected.²⁷ The provision in section 512(g)(2)(C) which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing material offline is especially burdensome to independent artists. Unlike large corporations, independent artists have neither the resources nor the experience to bring a lawsuit so quickly. This provision presumes a sophisticated actor and not a professional artist lacking a ready legal team.

²⁵ See <https://support.google.com/youtube/answer/2797370?hl=en>.

²⁶ See, e.g., David Newhoff, *Understanding DMCA With Help From Michelle Shocked*, THE ILLUSION OF MORE (Jan. 29, 2016); see also David Newhoff, *Is Adele an Anomaly?*, THE ILLUSION OF MORE (Dec. 1, 2015).

²⁷ See Register of the United States Copyright Office, *Small Claims Report* (2013) (documenting the challenges of resolving small copyright claims in the current legal system); Visual Artists Groups, *Summary Recommendations of Key Components of a Copyright Small Claims Tribunal Bill* (2016).

V. THE NOTICE AND TAKEDOWN PROCEDURE IMPOSES BURDENSOME FINANCIAL COSTS ON MIDDLE CLASS ARTISTS

Monitoring infringement and sending takedown notices takes an inordinate amount of time for a Middle Class Artist. Yunghi Kim spent hours every week searching for her photos online, figuring out how to send takedown notices, and sending them. None of these hours results in additional income, nor do they allow her to take photographs which would enrich society. They are wasted hours.

Blake Morgan's experience is similar. He decided to try an experiment at his ECR Music Group. He assigned a staff member to find infringement of the label's music and to send takedown notices, full time. He was curious if having a staff person focus on infringement would yield enough benefit to the music group to justify hiring permanent staff for the job. For a small music group with just a handful of employees, assigning someone to monitor infringement full time is a significant dedication of resources. The employee spent three days on the project and found he had barely scratched the surface in terms of limiting infringements. A hacking attack on the employee's computer (which Morgan believes was a result of the concentrated enforcement campaign) ended the experiment for good.

Ellen Seidler recorded more than 50,000 infringing links within the first four months after her film was available online. By using an email template, she has learned how to streamline the process, but the hundreds of hours spent monitoring online piracy meant hundreds of hours she could not dedicate to creating a new film.

The cost in time, however, pales in comparison to the cost when measured in dollars lost to infringement. Seidler estimates that if only 5% of the hundreds of thousands of people who had viewed her film online through an illegal site had instead bought a ticket or watched via a legal site, she and her partner could have easily paid off production debts. Yunghi Kim makes an average of \$300 per photograph each time she licenses her work for editorial use. If just a small percentage of the thousands of cases of infringement she finds online had bought a license, she would be significantly better off.

VI. THE NOTICE AND TAKEDOWN PROCESS IMPOSES COSTS BEYOND THE FINANCIAL

There is also a cost to artists in particular that goes deeper than time spent or money lost. Because their art is such a fundamental part of who they are, infringement hits more than the wallet.

Ms. Kim is a photographer first, a businesswoman second. She takes pride in her photographs and considers it a matter of professional credibility that the journalistic photographs not be factually misrepresented. For instance, when a photograph she took in mid 1990s Kosovo popped up mislabeled as a recent picture of a Palestinian refugee in an effort to raise funds for a particular NGO, as a journalist, she felt that the record was distorted. She also feels a sense of personal responsibility to the people in the photographs she takes to ensure that their images and the (often horrific) experiences not be misused. When she photographed Korean women who had been held as sexual servants by Japanese troops during World War II, they allowed her to intimately photograph their lives and pain. She does not want to see their experiences and stories violated by having their photographs disrespected and misrepresented when other organizations use them without authorization on the Internet.

In addition, Kim feels an economic responsibility to preserve the marketplace for news photographs, some of which cost thousands of dollars to create, considering costs of travel, insurance, translators, and training required for war photography. If the market for such news photographs dries up due to piracy, news organizations will no longer invest the resources in covering such difficult stories.

Finally, the photographs are intensely personal to her. She risked her life to document some of the most dangerous conflicts of the last 30 years, and was held hostage by a Somali warlord. She feels a sense of injustice that others would steal her life's work and profit from it.

Blake Morgan feels the same sense of injustice when his music is stolen and used for profit by someone else. When his music is used without his permission in unsavory videos such as pornography or violent videos, he feels frustration and anger at being associated with such things against his will. He is frustrated that he has no control over the songs into which he poured so much of himself.

These artists would like to earn a reasonable profit from their work, but they would also like to choose how and where their work is presented to the world. Under the current regime, they can do neither.

VII. MIDDLE CLASS ARTISTS ENCOUNTER INTIMIDATION AND PERSONAL DANGER WHEN REPORTING INFRINGEMENT

When an artist files a takedown notice the statute requires that she provide information “reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address.”²⁸ ISPs require that the person sending a notice include her full legal name, address, email address, and phone number.²⁹ After the notice is submitted, platforms, including YouTube, send an email to the user who posted the work stating that the material has been taken down upon the request of the artist. The email includes the artist's name and address. The artist, however, is not informed about the real identity of the user who posted her copyrighted work, and such users also often hide behind made up usernames. Middle Class Artists, expressed discomfort and fear for their safety when they are required to reveal their personal information, including phone numbers and a home address. Middle Class Artists are placed in an unequal position with infringers who know the artist's name, address, phone number and email while the artist only knows a username. This imbalance of information means a bad actor has the power to harass the artist with impunity, knowing the artist has no idea who he is. Ellen Seidler reported that this occurs regularly.

Moreover, YouTube and other platforms personally identify the artist to the public as the individual responsible for removing the work from the platform. When they remove infringing content, they leave in its place a notice illustrated with a frowning face informing the public that the work has been removed because of a copyright claim made by the artist. This notice does not contain the artist's address or other contact information, but it does contain her name. Many artists perceive this as an attempt to anger individuals looking for their work.

Every takedown notice filed with major online platforms is also copied into a database maintained by Lumen, an activist website formerly known as Chilling Effects.³⁰ This online, searchable database can be used to track the notices any individual sends over time. Many

²⁸ 17 U.S.C. § 512 (c)(3)(A)(iv).

²⁹ *E.g.*, Copyright Infringement Notification, YOUTUBE, https://www.youtube.com/copyright_complaint_form.

³⁰ *See* LUMEN, www.lumendatabase.org.

Middle Class Artists object to the suggestion that by enforcing their legal rights they are “chilling” the free speech of those who would steal and disseminate their works. Artists like Yunghi Kim who risked her life to tell the truth about conflicts worldwide and Ellen Seidler who spent her own money to tell stories that resonate with audiences marginalized by the mainstream media are the very definition of free speech. To spend one’s life speaking truth to power only to be labeled as opponents of free speech by corporate interests and user groups who seek to exploit artists’ works for personal profit is galling to these Middle Class Artists.

Worse still, Lumen/Chilling Effects functions as a de facto piracy link database because it includes full, unredacted links to the URL (identified in the DMCA notice by the copyright owner) where the infringing work resides. Someone searching for links to infringing content need go no further than Lumen to find the link filed with every DMCA takedown request. Takedown notices are searchable by the name of the artist and the title of the copyrighted work. Links to the database are included in the public notice Google, YouTube and others posts when a link is disabled in their service.³¹

As noted earlier, publicly revealing personal information about a notice sender may endanger the artist’s property and safety. Blake Morgan's ECR Music Group directed an employee to spend his work time sending takedown notices. Three days into the project, the computer the employee used was hit with a hacking attack. The hard drive was destroyed and the computer had to be replaced. Mr. Morgan strongly suspects the hack attack was in retaliation for the new and concerted effort in sending takedown notices.

The risks go beyond property damage. War photographer Yunghi Kim has taken powerful photos of conflict zones. Sometimes those images are misappropriated by political or revolutionary groups. In one case, a revolutionary group copied and misrepresented one of Ms. Kim’s images as one of their own. From its website the group appeared to endorse violent methods of achieving its goals. Ms. Kim had to choose between sending her personal information to a potentially violent group who might take offense at her assertion of her copyright and walking away from a case of clear infringement. She chose not to enforce her rights.

VIII. THE BURDENSOME NATURE OF THE NOTICE AND TAKEDOWN SYSTEM HAS LED MANY MIDDLE CLASS ARTISTS TO ABANDON USING IT ALTOGETHER

The Middle Class Artists with whom we spoke each decided the time and trouble required to police infringing content via section 512 provisions is too burdensome and gave up trying to enforce their copyright online at all. In Ellen Seidler’s words, for many artists, the DMCA’s notice and takedown regime “is like standing under Niagara Falls with an umbrella.”³² Even though she describes the DMCA notice and takedown procedures as an artist’s only real enforcement tool, she realizes that it is weighted against Middle Class Artists like herself.

Like Ms. Seidler, Ms. Kim is an extremely motivated copyright owner. She has meticulously pursued damaging infringements, and has even used funds received in settlement of infringement

³¹ Ellen Seidler, *Does Chilling Effects Make a Mockery of the DMCA?*, VOX INDIE (Oct. 31, 2014), <http://voxindie.org/chilling-effects-make-mockery-dmca/>.

³² Ellen Seidler, *Everyone Hates the DMCA*, VOX INDIE (Mar. 17, 2016), <http://voxindie.org/everyone-hates-the-dmca/>.

claims to make direct grants to artists to support their work and copyright education.³³ Even so, Ms. Kim concedes that it is futile to spend large amounts of time enforcing her copyrights. She needs to continue to create new photography, not chase lost dollars from licensing of older work. She believes using the notice-and-takedown system as it exists today is largely futile, and echoed Ms. Seidler's sentiment that the system works against independent artists.

Likewise, Blake Morgan gave up on the notice-and-takedown system after his employee's computer was destroyed by a hacking attack. Prior to the attack, he speculated that the money he would recover by keeping the work of his musicians from unpaid and unauthorized distribution would not justify the cost of the salary of the employee focused on sending takedown notices. After the hack attack, with the added cost of replacing a computer and the further cost of the work product lost on the computer that had nothing to do with copyright enforcement, Mr. Morgan stopped dedicating resources to sending takedown notices. It simply was not worth it.

Ms. Kim, Mr. Morgan, and Ms. Seidler are all highly motivated copyright owners who spent the time to learn and use the notice and takedown system. However, they have found that the time they dedicated to it did not return satisfactory results. Countless more artists give up more quickly, finding it too difficult to figure out the system in the first place or too costly to spend the time on enforcement. The notice and takedown system does not work for Middle Class Artists.

David Newhoff reports that a great number of artists with whom he has worked see the notice and takedown system as too confusing, burdensome, and troublesome to engage.³⁴ Artists less motivated than Kim, Morgan, and Seidler, or artists primarily focused on building their careers who lack the time to pursue infringement, do not even use the system.

Middle class artists do not expect to be free of the burden of protecting their work. On the contrary, they are proud of their work and would be glad to spend reasonable amounts of time protecting it from infringement if the tools available to them were effective. However, they struggle with a system that threatens to consume all their time and return little to no result.

IX. THE BURDEN IMPOSED BY THE NOTICE AND TAKEDOWN SYSTEM CHILLS CREATIVITY OF MIDDLE CLASS ARTISTS

The Constitution states that the purpose of copyright is “to promote the Progress of Science and useful Arts.”³⁵ The reasoning is that creative people will be encouraged to produce and distribute their art for the betterment of society if they have a property interest in their work and can support themselves and their families by making it available to the public. However, because the notice and takedown system is so burdensome to Middle Class Artists, the system threatens to chill new creative efforts. Middle Class Artists repeatedly told us that they must choose whether to spend their time creating new work or enforcing against infringement of their copyrighted works. Yunghi Kim cannot capture powerful images if she is behind a computer searching out infringement. Blake Morgan cannot create music if he is spending his day sending takedown notices. Ellen Seidler cannot produce new films if she remains in debt from the last

³³ Kelly McEvers, *Photojournalist Pays it Forward After Earning Thousands in Copyright Fees*, NPR (Dec. 2, 2015); <http://www.npr.org/2015/12/02/458206397/photojournalist-pays-it-forward-after-earning-thousands-in-copyright-fees>; Yungki Kim, “*Value Your Work*” *YUNGHI KIM Grant 2015*, <http://www.yunghikim.com/yunghi-grant/> (last visited Mar. 31, 2016).

³⁴ Interview with David Newhoff (Feb. 23, 2016)

³⁵ U.S. CONST. art. I, § 8, cl. 8.

movie because widespread infringement undermined legitimate distribution by licensed platforms like iTunes and Netflix.

Will Buckley reports that the next generation of creators is being increasingly discouraged from pursuing careers in the arts. Many of the performing arts students with whom he has spoken do not hold out much hope for pursuing careers in the arts. They do not see it as a viable way to provide for their needs. While their passions may be as creators, their sense of security is pointing them toward more mainstream professions.

A decade ago, Buckley says, many of these same students might have seen the Internet as the great equalizer that provided everyone a shot at discovery. The feeling today is that because of the effects of widespread infringement there is no money in pursuing a career in the arts.

Likewise, Ms. Kim notes that, in contrast to the recent past, most professional photographers can no longer legitimately be classified as Middle Class Artists. Professional employment in photojournalism and other disciplines is hard to find. Most news photographers are freelancers and do not earn enough income from photography to be considered middle class.

When the notice and takedown system was created in 1998, the intent was to encourage the development of the Internet while protecting the creators of books, music, film, photography and other works of authorship from rampant online infringement. However, the result now is the opposite. Many authors now believe that instead of encouraging authorship, the provisions of section 512 have the effect of chilling it.

X. CONCLUSION

Due to the time and difficulty in sending takedown notices, the ineffectiveness of such notices, and the lack of reliable remedies for infringement, the Middle Class Artists interviewed for this comment believe the process established by section 512 does not work. They respectfully ask Congress to give them viable ways to protect their copyrighted works.

Respectfully submitted,

Rebecca Cusey
Terrica Carrington
Student Advocates,
George Mason University School of Law
Arts and Entertainment Advocacy Clinic

EXHIBIT A

Take Down Stay Down Petition at www.takedownstaydown.org

TAKE DOWN
STAY DOWN

SUPPORT THE PETITION

Take Down and Stay Down:

Dear Member of the House Judiciary Subcommittee on Courts, Intellectual Property, and Internet:

For over 15 years artists have had their constitutional rights trampled, in many cases by laws that were supposed to protect them.

The Digital Millennium Copyright Act was designed to protect websites from infringement claims due to material posted by third parties, as well as give artists an effective tool to remove infringing content.

It is not working. Active infringing sites still get their safe harbor, but artist rights get destroyed. Google alone received 345 million take down notices last year. This means every day of the year there are 900,000 notices sent to Google about infringing material. This infringing material is taken down, only to be reposted on the same sites, sometimes within a matter of hours.

On March 13, 2014 in testimony before the Congressional Subcommittee on Courts, Intellectual Property and the Internet, a major book publisher testified to sending take down notices 571 times for the same book on the same website.

The result is that since 1999 copyright holders have lost over 100 billion dollars to Internet piracy. The worldwide music industry has shrunk by 62%. There are 45% fewer working musicians in the United States than in 2002.

Small independent film makers spend their time not making movies, but sending out 50,000 take down notices in a vain attempt to sweep aside the tide of recurrent copyright infringement. We need to change the laws to make sure that artists spend their time making art, not sending take down notices.

It is time that a take down notice be sent once, and only once. Thereafter it should be the duty of the website to prevent the reposting of the same material. The technology to do this is available. What is lacking is the legal directive to use this technology to prevent the wholesale theft of artistic creations.

Close the loophole in the Digital Millennium Copyright Act that provides safe harbor for online piracy. Place the responsibility where it belongs, with those websites that profit from it. Protect artist's rights. Stop protecting those that profit from internet piracy. "Take down" needs to become "take down and stay down".

We are asking congress to add a "stay down" provision to Section 512 and restrict safe harbor protection for infringing sites. Protect creators, not those who profit from internet piracy.