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# Don't Tread on Me: The Need for an Alternate Dispute Resolution Process for the Creators and Uploaders of User-Generated Content

Scott A. Tarbell<sup>1</sup>

## I. INTRODUCTION

There is little doubt that this millennium has witnessed the technological advent of new forms of communication that facilitate the exchange and sharing of ideas. Among this trend has been the introduction of what can be termed User Generated Content (UGC) sites created by online service providers (OSPs), where users can upload and display their works for public consumption. Although some websites already existed to allow users to share their works and witness the creations of others, it was not until around 2005 that UGC sharing was adopted for serious mainstream use in any meaningful capacity.<sup>2</sup> An important pioneer in this transformation was YouTube. Founded in 2005,<sup>3</sup> this OSP rapidly grew into a multi-billion dollar industry and was purchased by Google in 2006 for \$1.65 billion.<sup>4</sup> Giving people free access to a place where they could upload and share their

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1. J.D. Candidate 2014, Pepperdine University School of Law.

2. See *YouTube Hits 100m Videos Per Day*, BBC NEWS (Jul. 17, 2006, 10:59 AM), <http://news.bbc.co.uk/2/hi/technology/5186618.stm>; Rob Hof, *YouTube: 100 Million Videos a Day*, BLOOMBERG BUSINESSWEEK (Jul. 14, 2006), [http://www.businessweek.com/the\\_thread/techbeat/archives/2006/07/youtube\\_100\\_mil.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/07/youtube_100_mil.html). While blogs and review sites certainly existed prior to 2005 and were gaining in popularity, they were quickly overshadowed by YouTube's explosive success, which only a year after its inception was already uploading approximately 100 million videos a day. See *YouTube Hits 100m Videos Per Day* Document 1: Hof.

3. *About YouTube*, YOUTUBE, [http://www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited Sept. 21, 2013).

4. See generally Associated Press, *Google buys YouTube for \$1.65 Billion*, MSNBC (Oct. 10, 2006, 10:47 AM), [http://www.msnbc.msn.com/id/15196982/ns/business-us\\_business/t/google-buys-youtube-billion/#.UJQo08XA-Jo](http://www.msnbc.msn.com/id/15196982/ns/business-us_business/t/google-buys-youtube-billion/#.UJQo08XA-Jo); *Google Buys YouTube for \$1.65bn*, BBC NEWS (Oct. 10, 2006, 4:03 AM), <http://news.bbc.co.uk/2/hi/business/6034577.stm>.

thoughts and ideas to anyone with an online connection proved to be one of the most lucrative ventures for an Internet that had just stepped out of its nascency.

However, along with the newfound ability to submit UGC onto YouTube's servers came the inevitable problem of copyright infringement—at some point it became obvious that not all videos uploaded or even all parts of certain videos were going to be free from claims of infringement by copyright holders. Although YouTube alerted users that they must own the rights to the material or have the necessary permission for anything submitted to YouTube's servers<sup>5</sup>, users continued to upload copyrighted material anyway. Initially, YouTube did not provide any real analysis of videos uploaded,<sup>6</sup> instead opting to wait for copyright holders to submit takedown notices pursuant to statutory provisions listed under the Digital Millennium Copyright Act (DMCA). The precarious situation YouTube found itself in could not continue as the status quo forever, and before long groups and individuals began to file lawsuits against YouTube claiming that the OSP was responsible for the copyright infringement of its users.<sup>7</sup>

One such group was Viacom International.<sup>8</sup> A few months after the conglomerate initiated a suit against YouTube in 2007 alleging failure on the OSP's part in maintaining proper vigilance in combating copyright infringement,<sup>9</sup> YouTube in turn introduced its Content ID program<sup>10</sup> in an attempt to ameliorate its ability to detect infringement and mollify excoriating claims that the OSP was profiting off of pirated material.<sup>11</sup> For Content ID to work, copyright holders deliver to YouTube a variety of their content reference files and any necessary metadata (descriptive information about the data itself) and state what they would like YouTube to do should

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5. *Upload Video Files*, YOUTUBE, [http://www.youtube.com/my\\_videos\\_upload](http://www.youtube.com/my_videos_upload) (last visited Sept. 21, 2013). At the upload screen, YouTube warns users that they “must own the copyright or have the necessary rights for any content” they upload. *Id.*

6. *See infra* notes 9-11 and accompanying text. YouTube's Content ID program, which checked the content uploaded by users on its own without requiring a prior copyright holder takedown notice, did not exist until 2007. *See infra* notes 9-11 and accompanying text.

7. *See, e.g.*, *Tur v. YouTube, Inc.*, 562 F.3d 1212 (9th Cir. 2009); *Viacom Int'l, Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010); *see also* Eugene C. Kim, *YouTube: Testing the Safe Harbors of Digital Copyright Law*, 17 S. CAL. INTERDISC. L.J. 139, 143-44 (2007).

8. *See supra* note 7.

9. *See Viacom Int'l, Inc. v. YouTube Inc.*, 676 F.3d 19, 28, 28 n.5 (2d Cir. 2012). The charges by Viacom alleged direct and secondary copyright infringement, the latter of which included “contributory, vicarious, and inducement liability.” *Id.*

10. Kevin J. Delaney, *YouTube to Test Software to Ease Licensing Fights*, WALL ST. J. (Jun. 12, 2007), <http://online.wsj.com/article/SB118161295626932114.html>.

11. *See* Cory Doctorow, *The Pirates of YouTube*, THE GUARDIAN (Dec. 12, 2011, 10:27 AM), [www.guardian.co.uk/technology/2011/dec/12/pirates-of-youtube-cory-doctorow](http://www.guardian.co.uk/technology/2011/dec/12/pirates-of-youtube-cory-doctorow) (“Running Content ID isn't a legal duty, it's an olive branch extended by YouTube to the audiovisual industries.”).

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Content ID locate a match.<sup>12</sup> Options available for copyright holders are: (1) monetize, (2) track, or (3) block.<sup>13</sup> “Monetize” will institute ads around the video playing itself, or ads that play prior to the video requested; “track” has YouTube record the viewing metrics of the video; and, lastly, “block” culminates in an automated takedown of the video.<sup>14</sup>

YouTube has a three-strike policy,<sup>15</sup> with each strike attached to an account whenever infringing material is taken down. Should a user account garner three strikes in which either: (1) YouTube’s own Content ID registered a match between uploaded material and protected content or (2) YouTube removed uploaded material via a copyright holder’s takedown notice, the user account will be taken offline along with any other uploaded materials still attached to the account.<sup>16</sup> A notice is sent to alert the user each time alleged infringing content is taken down.<sup>17</sup>

To fully appreciate the consequences of this policy, it is necessary that the details are addressed more closely. This article analyzes the current position that UGC site users find themselves in relation to their ability to dispute copyright infringement claims. Part II discusses the introduction and purpose of the DMCA along with the statutory provisions and case law relevant to the subject. Part III covers the underlying issues encumbering the current appeals process for the OSPs as dictated under the DMCA, and why changes are required. Part IV advocates for a new dispute process, one in favor of online alternative dispute resolution (ODR), and explains how this new paradigm would produce more equitable results for UGC site users. Finally, Part V lists further changes that would be necessary in order to ensure that ODR exists as (and continues in the future to be) a more viable,

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12. See *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals> (last visited Sept. 21, 2013); *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Sept. 21, 2013).

13. See *supra* note 12.

14. See *supra* note 12.

15. See *A Guide to YouTube Removals*, *supra* note 12 (“The takedown notice will also count as a “strike” on your account – after three strikes, YouTube will cancel all of your YouTube accounts and remove all of your videos.”).

16. *Copyright Strike Basics*, YOUTUBE, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=2814000> (last visited Sept. 21, 2013).

17. See *A Guide to YouTube Removals*, *supra* note 12 (“The reason for the removal of a video is usually mentioned in the email that YouTube sends to the account holder regarding the removal. . . . The message also should appear in your YouTube mailbox, so check there as well.”).

equitable, and less expensive process for resolving YouTube-like OSP copyright infringement disputes than the current system presently allows.

## II. THE CREATION OF THE DMCA AND ITS PROVISIONS

Congress enacted the DMCA in 1998 in order to modernize existing copyright law, assist copyright holders in taking down infringing material, and provide OSPs with statutory safe harbor provisions.<sup>18</sup> The safe harbor provisions were enacted to assist OSPs, which had been long-suffering from years of copyright infringement claims brought by copyright holders, in obtaining legal immunity so long as they complied with the mandates within.<sup>19</sup> Located under section 512 of the Copyright Act, four subsections cover four different categories of OSPs and list the respective requirements that OSPs in each category must meet to obtain and maintain safe harbor immunity from copyright infringement claims.<sup>20</sup>

Under the DMCA, an OSP is defined as “a provider of online services or network access, or the operator of facilities therefor,”<sup>21</sup> which includes entities “offering the transmission, routing, or providing of connections for digital online communications . . . of the user’s choosing, without modification to the content of the material as sent or received.”<sup>22</sup> The safe harbor provision will only apply to an OSP if it:

- (A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the

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18. See H.R. REP. NO. 105-551, pt. 2, at 20, 21 (1998). The DMCA was designed to implement the treaties signed by the United States and other countries at the World Intellectual Property Organization (WIPO), which “would have amended Title 17 of the United States Code to grant copyright owners a new right against ‘circumvention’ of ‘technological protection measures,’ and to establish new provisions dealing with the integrity of ‘copyright management information.’” *Id.* at 20. The House bill to implement the DMCA, H.R. 2281, included two titles to be implemented: “Title I would implement the WIPO treaties; and Title II would provide for limitations on copyright infringement liability for on-line and other service providers.” *Id.* at 21.

19. See Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 15, 29 (2006) (citing Working Group on Intellectual Property Rights, Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure 114-24 (1995)). The DMCA as a whole was drafted based on the recommendations of the Clinton Administration’s Working Group on Intellectual Property Rights (Working Group), which stressed that while OSPs were in the unique situation of best knowing the activities of their subscribers and how to stop illicit activities, there nevertheless was “the need to reduce liability in special circumstances given the diversity of services offered” by OSPs. *Id.*

20. 17 U.S.C. § 512(a)-(d) (2010).

21. *Id.* § 512(k)(1)(B).

22. *Id.* § 512(k)(1)(A).

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service provider's system or network who are repeat infringers; and (B) accommodates and does not interfere with standard technical measures.<sup>23</sup>

Given the importance of qualifying for safe harbor immunity, some of the terms have required further clarification. Where an "adopted and reasonably implemented" policy is concerned, case law has not yet defined the terms to any real degree of certainty.<sup>24</sup> "Standard technical measures"<sup>25</sup> have been defined under the DMCA as those measures used "by copyright owners to identify or protect copyrighted works,"<sup>26</sup> which "have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process."<sup>27</sup>

#### A. Safe Harbor Immunity

After defining what an OSP is, the next question is how one can qualify for safe harbor immunity. An eligible OSP's activities must fall under one of the four respective categories in subsections (a) through (d): (1) transitory digital network communications, (2) system caching, (3) information residing on systems or networks at direction of users, and (4) information location tools.<sup>28</sup> YouTube is most concerned with the third category, under 512(c), as its activities are primarily concerned with UGC that is uploaded and moved upon explicit user direction.<sup>29</sup> Under section 512(c), an OSP providing services similar to that of YouTube is rendered immune from copyright infringement liability if it:

- (A)(i) does not have actual knowledge that the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

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23. *Id.* § 512(i)(1).

24. *See Kim, supra* note 7, at 54 (citing several different methods that courts nevertheless held to qualify as reasonable implementation).

25. 17 U.S.C. § 512(i)(1)(B).

26. *Id.* § 512(i)(2).

27. *Id.* § 512(i)(2)(A).

28. *Id.* § 512(a)-(d).

29. *See About YouTube, supra* note 3.

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access<sup>30</sup> to, the material that is claimed to be infringing or to be the subject of infringing activity.

Certain terms under section 512(c) have required further elaboration. As what constitutes “actual knowledge” can be problematic to define, Congress has recommended a “red flag” test<sup>31</sup> that contains both a subjective and an objective element in determining whether an OSP possessed “actual knowledge.”<sup>32</sup> While an OSP under this test “need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure),”<sup>33</sup> an OSP aware of a red flag must expeditiously remove it lest it loses its safe harbor immunity.<sup>34</sup> However, because each case will obviously differ in facts and circumstances, Congress has stated that “it is not possible to identify a uniform time limit for expeditious action.”<sup>35</sup>

As for case law, courts have opted to apply a narrow definition in determining what would constitute “actual knowledge” and thus trigger an OSP’s obligation to act. In *Viacom*, the district court held that where the actual or constructive knowledge of copyright infringement is concerned, there must be “knowledge of specific and identifiable infringements.”<sup>36</sup> The holding was later substantially affirmed by the Second Circuit<sup>37</sup> because “to require expeditious removal in the absence of specific knowledge or awareness” would culminate into an ill-constructed and formless obligation to take “commercially reasonable steps” in light of only a general awareness

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30. 17 U.S.C. § 512(c)(1)(A)–(C).

31. H.R. REP. NO. 105-551, pt. 2, at 53 (1998).

32. *Id.* The subjective standard determines “the subjective awareness of the service provider of the facts or circumstances in question,” while the objective standard observes “whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances.” *Id.*

33. *Id.*

34. *Id.* Specifically, the report states that:

“[O]nce a service provider obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider’s system or network is apparent, the service provider does not lose the limitation of liability . . . if it acts expeditiously to remove or disable access to the infringing material.”

*Id.*

35. *Id.* at 53–54.

36. *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010), *rev’d*, 676 F.3d 19 (2d Cir. 2012).

37. *Viacom Int’l Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012).

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of infringing activity,<sup>38</sup> and because this requirement would not be reconcilable with section 512(c).<sup>39</sup>

*B. The Takedown Notice*

The takedown notices sent by copyright holders are central to the safe harbor immunity for OSPs such as YouTube in relation to the wording of section 512(c). On one hand, OSPs must have established an agent able to receive these notices;<sup>40</sup> on the other, the DMCA states that claims of alleged infringement by copyright holders must “substantially”<sup>41</sup> include:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- (ii) Identification of the copyright 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;
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material;
- (iv) 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 at which the complaining party may be contacted;
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.<sup>42</sup>

Notices that therefore substantially comply with the aforementioned requirements will prompt OSPs to act “expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of

38. *Id.* at 30–31.

39. *Id.* According to the court’s reasoning, 17 U.S.C. § 512(c)(1)(A)(iii) requires the OSP to act “expeditiously to remove, or disable access to” the specific material in question, which could not simultaneously operate with an order to require expeditious removal where there was no specific knowledge or awareness of any infringing material. *Id.*; *see also* UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022, 1037 (9th Cir. 2011) (“Requiring specific knowledge of particular infringing activity makes good sense in the context of the DMCA.”).

40. 17 U.S.C. § 512(c)(2) (2010).

41. *Id.* § 512(c)(3)(A).

42. *Id.*

infringing activity,”<sup>43</sup> lest they run afoul of their obligations under section 512(c) and lose their safe harbor immunity.

### C. The Counter Notice

It is imperative to remember that the entire UGC notification process does not merely revolve around the demands of copyright holders alone; equally important are the requests made by users to have their videos returned to their previously re-uploaded places. Upon content takedown, OSPs are directed to take “reasonable steps” to notify the subscriber of this fact.<sup>44</sup> The DMCA has created a counter-notification process in which users accused of copyright infringement can alert OSPs that they have a “good faith” belief that the material uploaded was not infringing.<sup>45</sup>

To be effective, a counter-notification sent to an OSP must “substantially”<sup>46</sup> include:

- (A) A physical or electronic signature of the subscriber;
- (B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled;
- (C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; and
- (D) The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service providers may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.<sup>47</sup>

Upon receiving a counter-notification, the OSP must promptly provide the copyright holder, who originally sent the takedown notice, a copy of the counter notice,<sup>48</sup> alerting them that the removed material will no longer be disabled and will be put back online in ten business days,<sup>49</sup> unless the copyright holder decides to file a lawsuit before that time and notifies the

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43. *Id.* § 512(c)(1)(C).

44. *Id.* § 512(g)(2)(A).

45. *Id.* § 512(g)(3)(C).

46. *Id.* § 512(g)(3).

47. *Id.* § 512(g)(3)(A)–(D); *see Counter-Notification Basics*, YOUTUBE, [www.youtube.com/t/copyright\\_counter](http://www.youtube.com/t/copyright_counter) (last visited Nov. 18, 2012).

48. *Id.* § 512(g)(2)(B).

49. *Id.*

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OSP to that effect.<sup>50</sup> Should no such notification from the copyright holder arrive after being sent a copy of the user's counter-notification, the OSP is ordered to restore the material no more than fourteen days after receiving the counter notice.<sup>51</sup>

#### *D. Misrepresentation Claims*

Congress anticipated that copyright holders may become overzealous or possibly abusive in claiming copyright infringement; therefore, section 512(f) was implemented as a way to establish "a right of action against any person who knowingly misrepresents"<sup>52</sup> any material or online activity to be infringing, with defendants guilty of such actions liable for "any damages, including costs and attorneys' fees, incurred by any of these parties as a result of the service provider's reliance upon the misrepresentation."<sup>53</sup> It was Congress's intention that this section would deter copyright holders from making "knowingly false allegations . . . in recognition that such misrepresentations are detrimental to rights holders, service providers, and Internet users."<sup>54</sup>

Section 512(f) creates a federal cause of action for misrepresentation and in its entirety states:

(f) Misrepresentations.—Any person who knowingly materially misrepresents under this section—

- (1) that material or activity is infringing, or
- (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and [attorney's] fees incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.<sup>55</sup>

Succinctly stated, a section 512(f) claim can be brought by either a copyright holder or by a user of a UGC site in order to seek damages for

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50. *Id.* § 512(g)(2)(C).

51. *Id.*

52. S. REP. NO. 105–190, at 49 (1998).

53. *Id.*

54. *Id.*

55. 17 U.S.C. § 512(f).

misrepresentation caused either by the copyright holder's takedown notice or the user's counter-notice.

While the black letter text of the statute appears equitable, as applied in case law section 512(f) has made bringing successful misrepresentation claims more challenging. Two cases in particular stand out.

1. *Rossi v. Motion Picture Association of America*<sup>56</sup>

Michael J. Rossi owned and operated a website under the domain name "internetmovies.com" since 1997 and described the website as an "online magazine" that gave users a directory of websites that provided information about movies.<sup>57</sup> Visitors were told that obtaining membership would allow them to "download full length movies . . . every month."<sup>58</sup>

The Motion Picture Association of America (MPAA) is an American trade association that provides ratings and content protection for films.<sup>59</sup> After becoming aware of Rossi's website, the MPAA sent several takedown notices to both Rossi and his internet service provider (ISP).<sup>60</sup> Rossi subsequently found another ISP to host internetmovies.com, and filed suit against the MPAA for a number of state claims; however, none of them included a section 512(f) claim of misrepresentation.<sup>61</sup> Notwithstanding the absence of a section 512(f) claim, the Ninth Circuit decided to review *de novo* the district court's interpretation of the Copyright Act<sup>62</sup> and discussed section 512(f) anyway.<sup>63</sup>

Although Rossi did not dispute that the MPAA complied with the DMCA takedown procedures under section 512(c)(3), he argued "the MPAA did not have sufficient information to form a 'good faith belief' under § 512(c)(3)(A)(v) that [he] was illegally infringing the MPAA copyrights."<sup>64</sup> In the course of considering Rossi's contention, the Ninth Circuit opted for a subjective good faith standard instead of an objective standard.<sup>65</sup> Because Rossi's website contained statements such as "Full

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

57. *Id.* at 1001–02.

58. *Id.* at 1002.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1002–03.

63. *Id.* at 1004–05.

64. *Id.* at 1003.

65. *Id.* at 1004. In deciding which standard to apply, the Ninth Circuit looked to prior case law and the statutory structure of 17 U.S.C. § 512(c) to come to its conclusion that subjective good

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Length Downloadable Movies”; “NOW DOWNLOADABLE”; and “Join to download full length movies online now! new movies every month,” the Court held that the “unequivocal language used by Rossi . . . virtually [compelled]” the conclusion “that motion pictures owned by MPAA members were available for immediate downloading from the website,”<sup>66</sup> a conclusion that Rossi admitted.<sup>67</sup>

In reaching this conclusion, the Ninth Circuit expounded on the required subjective state of mind necessary to bring a valid claim for misrepresentation. According to the Court, a copyright holder under section 512(f) “cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”<sup>68</sup>

## 2. *Lenz v. Universal Music Corp.*<sup>69</sup>

On February 7, 2007, Stephanie Lenz uploaded a twenty-nine second video recording of her children onto YouTube.<sup>70</sup> For twenty-one seconds in the video, the song “Let’s Go Crazy” by Prince could be heard in the background, “albeit with difficulty given the poor sound quality of the video.”<sup>71</sup> Several months later, copyright holder Universal issued a DMCA takedown notice to YouTube and demanded that YouTube remove the video for copyright infringement.<sup>72</sup> Lenz later sent YouTube a counter-notification, asserting that her video constituted fair use<sup>73</sup> of the song and

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faith belief on the part of copyright holders was the proper standard. *Id.* For the full implication of the subjective standard, see *infra* note 81.

66. *Rossi*, 391 F.3d at 1005.

67. *Id.*

68. *Id.* (citation omitted).

69. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

70. *Id.* at 1151–52.

71. *Id.* at 1152.

72. *Id.*

73. *Id.* at 1155. 17 U.S.C. § 107 lists the four factors considered in determining fair use: (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 copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.*

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thus did not infringe upon any copyright.<sup>74</sup> The video was reposted six weeks later.<sup>75</sup>

Although Lenz saw the return of her video, she nevertheless filed suit against Universal for misrepresentation under section 512(f) in addition to claims of tortious interference against her contract with YouTube.<sup>76</sup> The court considered whether section 512(c)(3)(A)(v) of the DMCA “requires a copyright owner to consider the fair use doctrine in formulating a good faith belief that ‘use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.’”<sup>77</sup> The *Lenz* court first noted that when issuing a takedown notice, copyright holders must, among other requirements, provide a statement that they possess “a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.”<sup>78</sup> However, the court also stated that while a full investigation by a copyright holder to verify the accuracy of its own claims of infringement was not required, it nevertheless had to consider the fair use doctrine as part of its initial review as to whether the takedown notice should be issued in the first place.<sup>79</sup> Therefore, in order to make a takedown request in good faith, “the owner must evaluate whether the material makes fair use of the copyright.”<sup>80</sup>

Nonetheless, the earlier holding requiring subjective bad faith in *Rossi* is still applicable in *Lenz* given that both cases operate under Ninth Circuit jurisdiction. Thus, although a copyright holder has to consider possible fair use in making a takedown notice, a user nevertheless is still required to provide evidence of subjective bad faith on the copyright holder’s part when it decided to issue the takedown notification.<sup>81</sup>

### III. A CHANGE IS REQUIRED

YouTube’s existing mode of operation can probably be described as troublesome at best from the point of view of its users. Although Congress

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74. *Id.* at 1152.

75. *Id.*

76. *Id.* at 1153.

77. *Id.* at 1154.

78. *Id.* at 1153; 17 U.S.C. § 512(c)(3)(A).

79. *Lenz*, 572 F. Supp. 2d at 1155–56.

80. *Id.* at 1154.

81. *See supra* note 68; *see also* Kathleen O’Donnell, *Lenz v. Universal Music Corp. and the Potential Effect of Fair Use Analysis Under the Takedown Procedures of § 512 of the DMCA*, 2009 DUKE L. & TECH. REV. 10, 19 (2009) (“The subjective bad faith standard imposed by *Rossi* makes it exceedingly difficult for an end-user to succeed in a claim for misrepresentation against a copyright holder.”).

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has attempted to address all possible issues, the DMCA as executed does not equitably balance the needs of all parties involved.

In 2011 the number of takedown notices sent by copyright holders to OSPs for any kind of infringing material whatsoever was at an all-time high, and the number only grows higher with every passing year.<sup>82</sup> In October 2011 alone, 3,904 copyright holders and reporting organizations filed an astonishing combined total of approximately 8,500,000 takedown requests to Google alone, YouTube's purchaser<sup>83</sup> for URLs alone.<sup>84</sup> This number would be even higher were it not for: (1) the infringement report caps implemented by Google;<sup>85</sup> (2) Google's decision to filter out copyright removal requests received for other products aside from just Google Search;<sup>86</sup> and (3) Google's decision to filter out takedown requests sent by means other than Google's online web form.<sup>87</sup>

YouTube itself is no exception even when solely considered; MIT-research project YouTomb tracks videos taken down from YouTube for supposed copyright infringement.<sup>88</sup> In monitoring just the top 450,000 popular videos present on YouTube in 2009, not taking into account the number of videos taken down by YouTube's own Content ID, YouTomb

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82. *Transparency Report*, GOOGLE, [www.google.com/transparencyreport/removals/copyright](http://www.google.com/transparencyreport/removals/copyright) (last visited Nov. 15, 2012). As Google's graph demonstrates, the number of requests in large part only continue to grow. *Id.*

83. *See supra* note 4; *see also* Jonathan Bailey, *Why Are Google DMCA Notices Skyrocketing?*, PLAGIARISMTODAY (Sept. 11, 2012), [www.plagiarismtoday.com/2012/9/11/why-google-dmca-notices-skyrocketing/](http://www.plagiarismtoday.com/2012/9/11/why-google-dmca-notices-skyrocketing/).

84. A large amount of takedown requests sent for copyright infringement in general are automated, created when material scanned through computer filters triggers an alarm. *See, e.g.*, Dave Neal, *Warner Brothers Criticised for 'Robo Takedowns'*, THE INQUIRER (Mar. 7, 2012, 11:22AM), [www.theinquirer.net/inquirer/news/2157660/warner-brothers-criticised-robo-takedowns](http://www.theinquirer.net/inquirer/news/2157660/warner-brothers-criticised-robo-takedowns); Ernesto, *Microsoft DMCA Notice 'Mistakenly' Targets BBC, Techcrunch, Wikipedia, and U.S. Govt*, TORRENTFREAK (Oct. 7, 2012), <http://torrentfreak.com/microsofts-bogus-dmca-notices-censor-bbc-cnn-wikipedia-spotify-and-more-121007/>. For an example of what an automated or "robo" takedown looks like, see *Images DMCA (Copyright) Complaint to Google*, CHILLING EFFECTS, [www.chillingeffects.org/dmca512c/notice.cgi?NoticeID=205681](http://www.chillingeffects.org/dmca512c/notice.cgi?NoticeID=205681) (last visited Nov. 15, 2012).

85. Music Notes Blog, *Some Clear Facts About Google's "Transparency" Report*, RIAA, (May 30, 2012), [http://riaa.com/blog.php?content\\_selector=riaa-news-blog&blog\\_selector=Clear-Facts-&blog\\_type=&news\\_month\\_filter=5&news\\_year\\_filter=2012](http://riaa.com/blog.php?content_selector=riaa-news-blog&blog_selector=Clear-Facts-&blog_type=&news_month_filter=5&news_year_filter=2012).

86. *See supra* note 82 ("Requests for products other than Google Search (e.g., requests directed at YouTube or Blogger) are not included.")

87. *See supra* note 82 ("Requests submitted by means other than our web form, such as fax or written letter are not included.")

88. *About*, YOUTOMB, [youtomb.mit.edu/about](http://youtomb.mit.edu/about) (last visited Nov. 15, 2012).

detected that at least 9,760 were taken down after a takedown notice was sent by a copyright holder.<sup>89</sup>

There would be nothing wrong with any of the aforementioned statistics if it were assumed that each and every takedown notice was for genuinely infringing material. Yet, in 2009, Google published a report noting that more than half of the takedown notices it received under the DMCA (57%) were sent by businesses against their competitors, and over a third of all notices (37%) were invalid copyright claims.<sup>90</sup> The list of material that can and has been subject to takedowns extended to seemingly unfathomable levels in just 2012: the sounds of nature that were overheard when a user recorded and uploaded a video of him harvesting plants to make a salad;<sup>91</sup> a livestream of Michelle Obama's speech at the 2012 Democratic National Convention;<sup>92</sup> NASA's public domain footage of the Curiosity rover landing on Mars;<sup>93</sup> a video of President Obama singing the opening line to Al Green's "Let's Stay Together" assembled by the Mitt Romney presidential campaign staff;<sup>94</sup> and the Hugo Awards' livestream in September of that year.<sup>95</sup>

Even if the media conglomerates responsible apologize, and claim that their copyright detection algorithms detected a false positive, the fact remains that this is not the first time, or even one of the few times, that this

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89. *Video Status*, YOUTOMB, [youtomb.mit.edu/statistics](http://youtomb.mit.edu/statistics) (last visited Nov. 15, 2012). Some of the biggest issuers of takedown notices in 2009 included: Warner Music Group (approximately 935 videos); Viacom International, Inc. (approximately 419 videos); TV TOKYO Corporation (approximately 309 videos); and BBC Worldwide, Ltd., (approximately 206 videos). *Id.*

90. European Digital Rights, *The Digital Millennium Copyright Act (DMCA) as a Model?*, [edri.org/files/0409\\_unintcons.pdf](http://edri.org/files/0409_unintcons.pdf) (last visited Nov. 15, 2012); Mike Masnick, *Google Provides Numbers on Just How Often DMCA Takedown Process is Abused*, TECHDIRT (Mar. 18, 2009, 9:19AM), [www.techdirt.com/articles/20090315/2033134126.shtml](http://www.techdirt.com/articles/20090315/2033134126.shtml); see also Ted Gibbons, *Google Submission Hammers Section 92A*, PCWORLD NEW ZEALAND (Mar. 15, 2009), <http://pcworld.co.nz/pcworld/pcw.nsf/feature/google-submission-hammers-section-92a>.

91. Andy Baio, *Copyright Kings are Judge, Jury and Executioner on YouTube*, WIRED (Feb. 29, 2012), [www.wired.com/business/2012/02/opinion-baiodmcayoutube/](http://www.wired.com/business/2012/02/opinion-baiodmcayoutube/). The company that claimed copyright was Rumblefish, a music licensing company. *Id.*

92. Ryan Singel, *YouTube Flags Democrats' Convention Video on Copyright Grounds*, WIRED (Sept. 5, 2012, 12:10 AM), [www.wired.com/threatlevel/2012/09/youtube-flags-democrats-convention-video-on-copyright-grounds/](http://www.wired.com/threatlevel/2012/09/youtube-flags-democrats-convention-video-on-copyright-grounds/).

93. Alex Pasternack, *NASA's Mars Rover Crashed Into a DMCA Takedown*, MOTHERBOARD, <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown> (last visited Dec. 14, 2012).

94. Timothy B. Lee, *Music Publisher Uses DMCA to Take Down Romney Ad of Obama Crooning*, ARSTECHNICA (Jul. 16 2012, 4:59 PM), [www.arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/](http://www.arstechnica.com/tech-policy/2012/07/major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/).

95. Annalee Newitz, *How Copyright Enforcement Robots Killed the Hugo Awards*, IO9 (Sep. 3, 2012, 10:25 AM), <http://io9.com/5940036/how-copyright-enforcement-robots-killed-the-hugo-awards>.

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has happened. For example, Scripps News Service, the private corporation responsible for the takedown of the Curiosity Mars rover livestream, was also responsible for the temporary takedown of a video of one of NASA's space shuttles being ferried by a 747 in April of the same year.<sup>96</sup> According to NASA, NASA either suffers inaccurate takedowns of their videos approximately once a month or is forcibly inundated with ads from the fraudulent copyright infringement claimant, with claims covering almost everything from "imagery to music."<sup>97</sup>

Even worse than false positives is when copyright holders are unapologetically abusive concerning the scope of their takedown abilities. In 2011, Universal Music Group (UMG) issued a takedown notice against Megaupload's "Mega Song," hosted on YouTube, even though it did not own the rights to anything in the video.<sup>98</sup> By means of a rebuttal, UMG responded that it had the "right to block or remove user-posted videos through YouTube's [copyright management system] based on a number of contractually specified criteria" through a supposedly private contractual agreement with YouTube which lay outside of the DMCA's provisions.<sup>99</sup> Although YouTube later refuted UMG's statement to the contrary, troubling questions are nevertheless raised concerning UMG's attempt to circumvent the DMCA takedown rules. The uploading user cannot even utilize the provisions the DMCA has allotted against the infringement claimant even though it was a supposed "non-DMCA takedown" because of UMG's goal that even if it takes down a video that it does not own the copyright to, the uploading user cannot even utilize the provisions the DMCA has allotted against the infringement claimant because it was a supposed "non-DMCA takedown."<sup>100</sup>

Despite all these aforementioned statistics and examples, YouTube has nevertheless said that it will "not manually review copyright-infringement claims before its system automatically blocks disputed footage," but instead

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96. Alex Pasternack, *NASA's Mars Rover Crashed into a DMCA Takedown*, MOTHERBOARD, <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown> (last visited Dec. 14, 2012).

97. *Id.*

98. Timothy B. Lee, *UMG Claims "Right to Block or Remove" YouTube Videos it Doesn't Own*, ARSTECHNICA (Dec. 15, 2011, 11:05 PM), <http://arstechnica.com/tech-policy/2011/12/umg-we-have-the-right-to-block-or-remove-youtube-videos/>.

99. *Id.*

100. *Id.* YouTube later stated that "Our partners do not have the right to take down videos from YouTube unless they own the rights to them or they are live performances controlled through exclusive agreements with their artists," and reinstated the "Mega Song." *Id.*

opts to send some of the flagged material to the copyright holders itself to decide if there has been an infringement violation.<sup>101</sup> This is somewhat unfortunate since copyright holders cannot be considered a neutral party and have been shown to make fraudulent claims a high percentage of the time; yet at the same time, users who wish to sue copyright holders must first obtain proof of subjective bad faith before a valid claim for misrepresentation can be brought.<sup>102</sup>

In short, a change is required. Comparing the millions of takedown requests generated every single day to the comparatively small number of counter-notice claims sent by users<sup>103</sup> suggests that the DMCA in actual practice has created a system with high disparity in regards to each party's ability to be heard. While one reason why the number of counter-notifications created is not higher can likely be attributed to some users' ignorance that there is a dispute process to begin with, let alone how it even works; another reason can stem from users' reluctance to send a counter-notification at all. This reluctance is known as the chilling effect.

#### A. Payment

Currently, any resolution process for infringement claims on YouTube is litigation-based. As stated earlier, a user who files a counter-notification exposes himself or herself, among other things, to a possible lawsuit in a federal district court should the copyright holder decide to file suit.<sup>104</sup> Litigation can be prohibitively expensive, especially if a party appeals a judgment it consider unfavorable. As the average person who has witnessed a takedown of his material most likely is not financially prepared (if ever) to pay legal fees, the costs of litigation alone can stand as a considerable counterweight in the litigation process.

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101. David Kravets, *Google Says It Won't 'Manually' Review YouTube Vids for Infringement*, WIRED (Oct. 4, 2012, 7:49 PM), <http://www.wired.com/threatlevel/2012/10/youtube-infringement/>.

102. See *supra* notes 65, 68 and accompanying text.

103. As of this writing, there does not seem to be any available list that tracks the total amount of counter-notifications filed by YouTube users against claims of alleged infringement by copyright holders. However, given the stringent requirements to file just a single counter-notification, see *supra* notes 46-47, and the fact that copyright holders can and have sent as an aggregate whole millions of takedown requests many of which are automated via copyright "bots" which require no human time or review before they are sent, see *supra* note 83, it is incredibly unlikely that the total amount of counter-notifications created can even come close in comparison let alone match or surpass.

104. See *supra* note 47.

*B. Balance of Power*

Given the aforementioned DMCA provisions and case law listed prior in Part II, it would not be incongruous to state that copyright holders possess an impetus to achieve their objectives that supersedes what a typical user might normally have. Succinctly restated: (1) a copyright holder only has to “substantially” include the requirements listed under the DMCA in issuing a takedown notice;<sup>105</sup> (2) an OSP must act expeditiously to remove or disable access to the allegedly infringing material once served with the takedown notice;<sup>106</sup> (3) infringing material can be taken down, monetized with ads, or tracked (all possible before any notification is sent by the OSP to the user);<sup>107</sup> (4) an OSP must only take “reasonable steps” to notify users of a counter-notification process;<sup>108</sup> (5) a counter notice submitted by a user provides his or her personal information and exposes him or her to federal court jurisdiction;<sup>109</sup> (6) a copyright holder is only liable in a suit for misrepresentation if the user provides evidence that the misrepresentation was done with subjective bad faith;<sup>110</sup> and (7) while a copyright holder must take into account possible fair use in deciding to issue a takedown notice, the standard is nevertheless still based upon a subjective good faith belief on the part of the copyright holder.<sup>111</sup>

With all these conditions arranged in such a manner that clearly benefits the copyright holder over the user, it is not surprising that many users decide to forego the counter-notification process altogether, creating the previously mentioned chilling effect. The resulting situation is justifiably worrisome, as the lack of an opposing side willing to dispute claims can only lead to abuse and exploitation of the takedown process. If no real incentive exists on the part of users to dispute infringement claims, then there is nothing preventing an unscrupulous copyright holder from taking advantage through fraudulent means and misrepresentation to censor and control whatever UGC they wish with impunity.

It is clear that the current DMCA process urgently requires renovation.

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105. 17 U.S.C. § 512(c)(3)(A) (2010).

106. *See supra* note 30.

107. *See supra* note 12.

108. *See supra* note 44.

109. *See supra* note 47.

110. *See supra* note 65.

111. *See supra* notes 77–80.

#### IV. ONLINE ALTERNATIVE DISPUTE RESOLUTION AS THE NEW DISPUTE PARADIGM

While the issues previously listed in this article have been discussed before in varying lengths, a clarion call has yet to be made for the application of alternative dispute resolution (ADR) in regard to UGC disputes, let alone an online ADR process (ODR). In contrast to the existing litigation-friendly paradigm, this article posits that ODR is much more likely to achieve an equitable result than both traditional litigation and ADR, while ensuring that all parties have a chance to make their voices heard.

As stated in Part II, the DMCA was enacted in 1998 with the goal of modernizing copyright law in light of the new technological age brought on by the Internet.<sup>112</sup> However, since the DMCA's initial inception, both technology and the American legal system have evolved, thus adding on new techniques that Congress could not have completely foreseen. The concept of ODR is a byproduct of that technological evolution.

##### A. Location-Based Jurisdiction and its Problems

Traditionally, having both parties arrive at a specific physical location to litigate has worked well enough in administering justice. In these disputes, two issues (personal and subject matter jurisdiction) have been important, especially if the two opposing parties hailed from different states.

Parties could avoid the uncertainty of the personal jurisdiction determinations by agreeing to a forum selection clause from the outset, like how YouTube users currently agree to federal court jurisdiction if they submit a counter-notification in response to a video takedown.<sup>113</sup> Forum selection clauses can be convenient because they preclude personal jurisdiction issues since the parties have already agreed upon where to litigate.<sup>114</sup> However, although forum selection clauses can provide predictability and contribute to the efficiency of the judicial system, they can be held inequitable in practice, as it is a possibility that the party drafting the forum selection clause will choose a jurisdiction that is beneficial for its

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112. See *supra* note 18 and accompanying text.

113. Marjorie A. Shields, Annotation, *Permissive or Mandatory Nature of Forum Selection Clauses Under State Law*, 32 A.L.R. 6th 419 § 2 (2008); see *supra* notes 44-47.

114. See J. Zak Ritchie, *A Tie that Binds: Forum Selection Clause Enforceability in West Virginia*, 113 W. VA. L. REV. 95, 96 (2010) (“[F]orum selection clauses . . . may reduce uncertainty as to where a potential plaintiff will file suit.”).

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purposes,<sup>115</sup> whether it be in terms of the distance needed to travel or, a more favorable jury pool. Forum selection clauses also exist under their own analogous sword of Damocles—an ever-present risk that the clause itself might become the subject of litigation and possibly held by a court to be unconscionable and thus void for any number of reasons.<sup>116</sup> Lastly, even a perfectly equitable forum selection clause can still cost litigants a high fee amount in both court costs and travel expenses. As long as the current paradigm revolves around an assumption of litigation through physical presence in a courtroom, the previously mentioned issues will never be fully assuaged.

### *B. Introducing Online Dispute Resolution and its Benefits*

The general advantages of ADR mechanisms and processes when compared to traditional litigation have not gone unnoticed by legal analysts and scholars.<sup>117</sup> In contrast to physical litigation and ADR, ODR resolves all physical issues of personal jurisdiction, as the forum in which grievances would be aired is an online interactive medium that is closest to the nearest accessible (and hopefully secure) computer with an Internet

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115. See, e.g., Fred Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. ILL. J.L. TECH. & POL'Y 1, 32–33 (2009).

116. For example, two possible reasons include if the forum selection clause's enforcement "would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision," or if the forum clause would be "seriously inconvenient for the trial of the action." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–16 (1972). Other reasons can include fraud or overreaching or if a forum selection clause would cost an out-of-state plaintiff more via litigation than the actual cost of the damages as a way to deter any litigation. *Id.*; see Galves, *supra* note 115, at 31.

117. See Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, 18–24 (2004) (stating that traditional litigation is "inconvenient, impractical, time-consuming, and prohibitive," and that ADR is non-confrontational, efficacious, neutral, and less costly among other benefits); Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 675–76 (2000) (noting that "ADR mechanisms offer lower costs, reassure participants, and solve the jurisdictional problem because use of them manifests consent" as well as containing a "readily available fund" to satisfy a decision for either party); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) ("Mediation offers some clear advantages over adversary processing: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants."); John Hartje, *Chapter 48. Alternative Dispute Resolution*, 4 N.Y. PRAC., COM. LITIG. IN NEW YORK STATE COURTS § 48:2 (3d ed.) (asserting that whereas traditional litigation can be costly and that the "vast majority of cases settle or are otherwise resolved before trial," it is better to use ADR to expedite early settlement before legal fees mount).

connection. Even ADR, the benefits of which will be discussed in the following paragraphs, still necessitates that the parties meet somewhere physically. Requiring only a computer would mitigate any travel expenses or inconveniences, and any attempt by one party to have a “home turf” advantage by being more familiar with the jurisdiction’s judges or jury pool than the other party is either lessened or eliminated.<sup>118</sup> In this sense, ODR would act as the great equalizer, ensuring that any disparity the dispute may commence with is reduced as much as possible.

As noted by other authors, ADR has generally been construed as more cooperative than courtroom litigation since ADR removes “many of the cold formalities . . . that often result in bitterness between parties,”<sup>119</sup> such as motions or other tactics that can be abused in order to obfuscate the issues, delay litigation, and pile up legal fees. In contrast, ADR would minimize the chances of pointless protraction occurring in the first place because such methods are not normally available in an ADR setting.<sup>120</sup>

The comparative efficacy and haste with which ADR cases are resolved when compared to their litigious brethren is also something that should be taken into account. Trials can take months to resolve—not accounting for the wait before a case is even heard in the first place<sup>121</sup>—whereas ADR can resolve a case in weeks.<sup>122</sup>

Another advantage of ODR is that unlike ADR and traditional litigation, parties would not have to look at each other while negotiating. This can be beneficial for parties that are completely unaccustomed to any sort of legal proceeding (although an ideal ODR system would have a video counterpart available if needed). While for some this might be considered detracting because it would “dehumanize” the parties, for others that exact reason might be considered a boon. When a party is staring at a computer screen instead of an actual live audience, fears that might stem from public speaking anxieties or difficulties are diminished, and the parties have an opportunity to carefully think over their entries prior to written submission

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118. Galves, *supra* note 115, at 32.

119. *Id.* at 40.

120. *Id.* at 41. (“Because these motions do not exist in an ADR forum, it improves the chances that the bitterness inherent in the beginning stages of traditional litigation will be avoided by the use of ADR.”).

121. David A. Hoffman, et al., *Alternatives to Litigation*, CIVP MA-CLE § 10.1, § 10.4.1(b) (2008). A case can sometimes wait three to five years before it is available for trial in both Superior and Federal District Courts. *Id.*

122. See, e.g., Mark Albright, *The Advantages and Disadvantages of ADR*, ALBRIGHT STODDARD BLOG (Sep. 21, 2012, 12:11 AM), [www.albrightstoddard.com/blog/bid/223519/The-Advantages-And-Disadvantages-of-ADR](http://www.albrightstoddard.com/blog/bid/223519/The-Advantages-And-Disadvantages-of-ADR); *Alternative Dispute Resolution*, SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO, [www.fresno.courts.ca.gov/alternative\\_dispute\\_resolution/](http://www.fresno.courts.ca.gov/alternative_dispute_resolution/) (last visited Dec. 14, 2012).

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in order to ensure that only the most developed arguments are submitted. The absence of immediate human interaction in front of an opposing party also means that the other party cannot use physical, intimidation, or pressure, through body language, nor can any actual bias (classism, personality, sexism, racism, bodily tics, etc.) come into play, as both parties would be reduced to nothing more than their respective arguments on a screen, something traditional litigation and ADR cannot provide given their physical nature. The absence of these factors helps to ensure that the parties are focused solely on the issue at hand without any distracting nuances.

Additionally, each party would be able to post at its own convenience since the two parties are not stuck in a singular physical location during the proceedings (although it could certainly be argued that this has its own advantages by making the parties more invested in coming to an equitable agreement), or the parties could agree to a specific online session in order to work through things as quickly as possible. To ensure efficiency and haste, the parties could also agree under ODR to make their arguments at their convenience as long as all submissions are within a certain time frame. Not only would this ensure that each party to make the best arguments for its positions, but this method would also guarantee flexibility in submissions.

Furthermore, ADR and ODR are more advantageous than traditional litigation in that they permit private resolution rather than a public resolution.<sup>123</sup> This can be beneficial to the parties if they wish to assert their claims, however tenuous they may be, but possess a desire to avoid public embarrassment or humiliation by a loss in the judicial system. In arbitration, for example, the final resolution is made public “only if one of the parties seeks intervention by the court to enforce, modify, or vacate the decision” of the arbitrator.<sup>124</sup>

Lastly, because all arguments and files uploaded in ODR would be recorded and accessible by the parties, it would provide an easily accessible method for either party should any later disagreements arise during enforcement of the ODR resolution.<sup>125</sup>

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123. *See supra* note 121, at § 10.4.1(a).

124. *See id.*

125. Although it is not unlikely that lawyers would be available for certain parties, the point of ODR is to provide for an alternative dispute resolution forum where the common layperson would be able to air their grievances and requests. This latter point is of particular import here, as it is unlikely that the average UGC-site user would hire a lawyer (whose legal fees can be prohibitively expensive) to dispute something so small as a YouTube video (unless they had stronger ties to it, such as if it were their own original product, for example).

### C. Enforcement and Appeals

Should a dispute come to a unsatisfying final resolution for all the parties involved, the ideal ODR system<sup>126</sup> would have an appeal process that would permit each party to submit its respective appellate briefs, which would allow for a different ODR judge<sup>127</sup> who would either affirm or deny the previous resolution. This would ensure that there is an enacted appeals process available for those who feel that justice has not been served, yet still remain comparatively less expensive and time-consuming than traditional litigation or ADR.

Enforcement would not be an issue here as the resolution, as far as UGC is concerned, is binary in nature. The material considered is either online or offline and control over the material is not in the hands of either party but under YouTube (or any other analogous OSP) itself. All that would be required would be a notice sent to YouTube to alert it of the final resolution between the two disputing parties and for it to comply with the instructions contained therein.

## V. ADDITIONAL IMPLEMENTATION

Although implementing ODR as a replacement for the current litigation-friendly paradigm would make the YouTube dispute process much more equitable for both parties as a whole, additional steps must be taken in order to ensure that ODR is a worthwhile process for those involved. These steps require that: (1) ODR must be offered prior to takedown in at least some capacity; (2) larger fines should be levied against copyright infringement claimants in cases of misrepresentation; (3) trust funds for representation should be implemented in order to assist users in paying their ODR fees during the process; and (4) the respective holdings in *Rossi* and *Lenz* should be overruled.

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126. In so far as the ODR system is concerned, while private companies such as Google could adopt it, it might be better if there were a national system implemented in place by act of Congress; the danger inherent with private corporations implementing their own ODR programs is the ever-present risk that they would try to influence the ODR system as much as they could in favor of copyright holders so as to avoid lawsuits against the private companies themselves.

127. These ODR judges would be a neutral third party in the dispute, either hailing from a hypothetical company that could be hired to provide qualified arbitrators who were familiar with online technologies, or through a national governmental group which would assign said arbitrators as needed. It is important that OSPs are not in charge of choosing the arbitrator, as there would be the risk that they would choose arbitrators biased in favor towards copyright holders in order to avoid any lawsuits against the OSP. *See supra* note 125 and accompanying text.

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*A. ODR Must be Offered Prior to Takedown in at Least Some Capacity*

As mentioned before, the current dispute process takes down allegedly infringing material, and sends a contemporaneous notice to the user alerting the user regardless if the action is based on a Content ID match or a copyright holder takedown notice.<sup>128</sup> It is only after the user submits a dispute counter-notification and the copyright holder fails to respond, backs down, or loses the lawsuit, that the user can have his or her material reposted onto the site for public viewing.<sup>129</sup> Copyright holders might argue that their “take down first, ask questions later” ability is crucial in preventing copyright infringement where new material has just been released. To some degree, it is not difficult to see the validity of this line of thought. For example, if a singer had just released his or her new album, and soon thereafter, a user on YouTube started to provide free copies of it through one of his or her videos in violation of a copyright, it would obviously be imperative to take down the infringing material as soon as possible to prevent illicit downloads. However, the problem is that it is too easy for copyright holders to simply claim that all supposed matches found by their detection algorithms are as immediately dire of a situation as the one presented above when that might not be the case at all (leaving aside the aforementioned topic of whether the claimed materials infringed upon is even theirs in the first place).

A grace period, even if it is a day or two, should be offered by OSPs so that the user can be notified and be given a chance to dispute the takedown notice/Content ID match through ODR before the material is taken offline, even if the time period is as short as a day or two. Any time frame would conceptually be superior to the current system, where the user is already placed at a disadvantage. This concession may seem to be too much for copyright holders, but it is not impossible to conceive that the user, who is an independent artist, for example, desperately needs the material to be available for public consumption and sharing in order to advertise. A takedown of any sort (erroneous or otherwise) would take time away from dispute/litigation that would otherwise have been used for the advertising effort or for other needs. It is certainly possible that by the time the user is able to get the material reposted online, it is too late and the damage is done. This “critical point in time” argument is, at best, inequitable. Once ODR

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128. See *supra* note 17 and accompanying text.

129. See *supra* notes 49–51.

starts, if the user fails to demonstrate that he or she owns the rights to the material at issue or can raise a defense, such as fair use, then the usual section 512(f) misrepresentation penalties would apply<sup>130</sup> along with any other punitive measure that the OSP deems necessary. This would force users to be more hesitant prior to introducing fraudulent claims in the hopes of exploiting the new ODR dispute system and would encourage copyright holders to participate more willingly.

Should YouTube and similar OSPs offer this new dispute process, it is likely that copyright holders would attempt to bring lawsuit alleging that the implementation of this new dispute plan is in violation of DMCA safe harbor provisions. However, given the somewhat ambiguous language of section 512(c) of the DMCA<sup>131</sup> and since “actual knowledge” is contingent upon “knowledge of specific and identifiable infringements” by the OSP as held by the court in *Viacom*,<sup>132</sup> the OSPs could argue that providing the user with a mandatory grace period to initiate ODR prior to automatic takedown would not violate their duties to act expeditiously in removing or disabling access to the allegedly infringing material<sup>133</sup> that was found with imperfect (and often automated) detection algorithms.<sup>134</sup> After all, there is no uniform time limit as to what would constitute an expeditious removal.<sup>135</sup>

The manual review of every single claim of copyright infringement on YouTube is not being asked, since that would require astronomical costs<sup>136</sup> and would be impracticable, if not impossible, to execute. However, YouTube needs to engage in proactive behavior that would provide the user with a chance to at least initiate ODR and offer his or her voice in the matter before his or her material is taken down.

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130. See *supra* notes 52–55.

131. See *supra* notes 31–32 and accompanying text.

132. See *supra* note 36.

133. See *supra* note 30.

134. See *supra* notes 91–95 and accompanying text.

135. See *supra* note 35.

136. Engineer Craig Mansfield calculated via a mathematical formula available on his website that manually reviewing every single video for possible copyright infringement would require almost 200,000 judges working 120 work weeks every single week with no holidays in order to cover all the new material coming in every second. Craig Mansfield, *An Engineer's Cost Analysis of Video Screening on YouTube*, CRAIG'S THAWTS (May 23, 2012, 5:32 PM), [blog.cdmansfield.com/2012/05/23/an-engineers-cost-analysis-of-video-screening-on-youtube/](http://blog.cdmansfield.com/2012/05/23/an-engineers-cost-analysis-of-video-screening-on-youtube/). It would cost Google \$37 billion a year. See Chase Hoffberger, *Pre-screening Videos Would Cost YouTube \$37 Billion a Year*, THE DAILY DOT (May 30, 2012), [www.dailydot.com/news/youtube-prescreen-copyright-37-billion/](http://www.dailydot.com/news/youtube-prescreen-copyright-37-billion/);

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*B. Larger Fines for Cases of Misrepresentation*

On average, copyright holders send thousands of DMCA takedown notices every year, and the number will only increase as time goes on.<sup>137</sup> Unfortunately, as earlier examples have shown, the automated takedown system is not perfect. Copyright holders are responsible for targeting and taking down material that is unlikely to be subject to takedown in the first place (the sounds of nature),<sup>138</sup> content that is clearly for the public domain yet is still subject to takedown monthly (videos posted by NASA taken down by Scripp News Service),<sup>139</sup> and even material they owned no rights to (the Megaupload “Mega Song” and UMG’s subsequent remarks).<sup>140</sup> Although these examples show a spectrum of copyright issues, with genuine mistakes caused by inaccurate or deliberate actions taken, none of it matters if copyright holders are not given serious incentives to remedy their actions. Larger fines automatically placed on false claimants would guarantee that copyright holders would not be nearly as eager to send out takedown notices en masse if they were required to pay them for every single instance of misrepresentation.

*C. Representation Trust Fund*

In addition to larger fines for instances of misrepresentation, users would be much more likely to file a counter-notice and use the ODR dispute process if their fees could be reduced to some degree. A nationwide trust fund for legal representation for ODR users could be created by placing the fines successfully levied against copyright holders. These fines would encourage copyright holders to act more carefully in their takedown notices and, allow future plaintiffs to use their comparatively newfound fiscal freedom to initiate more disputes. A trust fund of this nature would also provide peace of mind to users who wish to voice their complaints but are reluctant to do so primarily due to their lack of funds.

To prevent less scrupulous users from selfishly emptying the entire trust fund, the trust should be limited to a certain number of hours or a total monetary amount, whichever comes first, and the rest of which would have

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137. See *supra* notes 82–87 and accompanying text.

138. See *supra* note 91 and accompanying text.

139. See *supra* notes 93, 96–97.

140. See *supra* notes 98–100 and accompanying text.

to be paid by the user himself or herself. Although it does not wholly account for all possible legal fees that may be incurred, some financial assistance is better than none.

*D. Overruling the Holdings in Rossi and Lenz*

More than the other recommendations, overruling the joint holdings in *Rossi* and *Lenz* is quite possibly the most important goal to achieve if users are ever to make successful cases for misrepresentation should the parties fail to come to a resolution via ODR and therefore, must pursue litigation. As mentioned above:

*Rossi* held that a copyright holder could only have a subjective, not an objective, good faith belief in determining whether to issue a takedown notice.<sup>141</sup> As the court stated in its opinion, a “copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. . . . Rather, there must be a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner.”<sup>142</sup>

*Lenz* held that copyright owners must make a good faith consideration of whether the alleged infringing content constitutes fair use prior to sending out a takedown notice and that this consideration was consistent with the DMCA’s section 512(f) misrepresentation clause.<sup>143</sup> However, this consideration is somewhat limited in scope, as *Rossi* still holds, and thus section 512(f) still only requires subjective bad faith.<sup>144</sup> Taken to its logical end, a user that uploaded UGC to an OSP, such as YouTube, would therefore only successfully bring a cause of action for misrepresentation, let alone win, if he or she can somehow procure and provide evidence of actual subjective bad faith on the copyright holder’s part. This subjective standard imposes an incredibly difficult obstacle to surpass on the part of the user, making it very unlikely misrepresentation actions will be brought.

Although *Rossi* and *Lenz* are mandatory authority only in the Ninth Circuit, they nevertheless stand out as persuasive authority to the rest of the federal circuit courts should they eventually address the issue. More jurisdictions adopting the Ninth Circuit’s holdings would be nothing short of disastrous for users’ abilities to claim misrepresentation, especially when nothing shows that copyright holders will cease making fraudulent infringement claims anytime soon.

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141. See *supra* note 65.

142. See *supra* note 68.

143. See *supra* note 65; 17 U.S.C. § 512(c)(3)(A) (2010).

144. See *supra* note 66; O’Donnell, *supra* note 81, at 19.

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## VI. CONCLUSION

Under the existing DMCA, the current dispute process for OSPs like YouTube is solely focused on adversarial litigation: a process which in practice unfortunately comes across as largely one-sided and inequitable to the detriment of the users of said OSPs. This process is created in no small part by a chilling effect in which users are reluctant to voice their grievances due to a lack of monetary resources and legal experience. Adopting an ODR-based approach would be more equitable in practice as it would allow users a chance to voice to their opinions under a process that is less expensive, more efficacious on average, and in a more cooperative manner. To support ODR, a small grace period should be implemented allowing users to enter into ODR with copyright holders prior to takedown, larger fines should be placed against copyright holders for misrepresentation, a nationwide trust fund should be formed to assist users in paying their legal dues, and the subjective standard established and reinforced in *Rossi* and *Lenz* should be replaced with an objective standard of misrepresentation.