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## NOTES

# WHO'S FEELING LUCKY? SKEWED INCENTIVES, LACK OF TRANSPARENCY, AND MANIPULATION OF GOOGLE SEARCH RESULTS UNDER THE DMCA

### I. INTRODUCTION

In March of 2002 Google, the popular search engine,<sup>1</sup> received a letter from the Church of Scientology<sup>2</sup> demanding that Google remove several links to pages within the Web site [www.xenu.net](http://www.xenu.net) (Xenu) from Google search results.<sup>3</sup> The Xenu Web site publishes some harsh criticism of Scientology,<sup>4</sup> but according to the Church of Scientology<sup>5</sup> Xenu also displayed documents to which Scientology claimed exclusive rights<sup>6</sup> under copyright law. The Church of Scientology's argued that posting hyperlinks to infringing Web sites was a violation of the Digital Millennium Copyright Act of 1998<sup>7</sup> (DMCA).<sup>8</sup>

The Church of Scientology acknowledged that Google was protected from liability under the DMCA, but only so long as Google expeditiously removed the material in question.<sup>9</sup> Google removed the pages from its search results, including the Xenu.net home page, even though the home

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1. The term "search engine" is used here in reference to providers of online search technology that index the Internet, such as Google, Yahoo, MSN, AOL or Ask.

2. The Church of Scientology is a religious organization founded in the early 1950's and based on the writings of the author L. Ron Hubbard. See Meet L. Ron Hubbard, [http://www.scientology.org/en\\_US/1-ron-hubbard/meet/index.html](http://www.scientology.org/en_US/1-ron-hubbard/meet/index.html) (last visited Oct. 5, 2006). References to Scientology are solely for the purpose of illustrating the application of the Digital Millennium Copyright Act on the Internet. Any questions regarding Scientology's religious legitimacy are outside the scope of this note.

3. Letter from Moxon & Kobrin, Church of Scientology Legal Counsel, to Google, Inc. (Mar. 8, 2002) (on file with Google, Inc.), available at <http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=232> [hereinafter Xenu Complaint].

4. See Operation Clambake Presents: Frequently Asked Questions, <http://xenu.net/cb-faq.html> (last visited Oct. 9, 2006).

5. See Xenu Complaint, *supra* note 3.

6. Section 106 of the U.S. Copyright Act grants the owner of a valid copyright exclusive right to reproduction, adaptation, distribution, performance, and public display of the underlying work. See 17 U.S.C. § 106 (Supp. II 2002). Someone who violates one of those exclusive rights may be liable for copyright infringement. See *id.* § 501(a) (Supp. II 2002). Where copyrighted material is published on a website such as Xenu.net without authorization, the copyright owner can claim violation of her reproduction and distribution rights.

7. The Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998) (codified in diverse sections of 17 U.S.C. §§101 et seq.).

8. See Xenu Complaint, *supra* note 3 (referencing 17 U.S.C. § 512(d) (2000)).

9. *Id.*

page did not appear to include any infringing material.<sup>10</sup> In a subsequent email to Xenu, Google explained that if it had not removed links to the allegedly infringing pages, Google would have risked being sued for copyright infringement.<sup>11</sup>

Scientology's use of copyright law to secure protection for its materials on the Internet has attracted media attention.<sup>12</sup> The Church of Scientology has adopted a legal strategy of aggressively targeting Web sites that publish anti-Scientology materials.<sup>13</sup> They have sent cease and desist letters not only to the allegedly infringing properties, but also to Internet Service Providers that host the pages and to search engines that link to the alleged infringers in search results.<sup>14</sup> As a result, Web sites that were created to criticize the Church of Scientology have had their content removed by service providers.<sup>15</sup> The Church of Scientology has also targeted online community discussion boards with cease and desists.<sup>16</sup>

The fact that Google could be sued at all for linking to third party Web sites is problematic. It would be unreasonable to hold Google responsible for all the content on the Web. Congress attempted to deal with this problem by including a "safe harbor" provision in the DMCA, granting search engines and other online service providers (OSPs) limited liability for copyright infringement by third parties.<sup>17</sup> Still, to preserve this limited liability OSPs must "take down" infringing material after receiving proper notice.<sup>18</sup> This seems like a fair solution for the clear cases of unadulterated

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10. See John Hiler, *Church v. Google*, MICROCONTENT NEWS, Mar. 21, 2002, <http://microcontentnews.com/articles/googlechurch.htm>.

11. Email from Google, Inc. to Xenu.net (Mar. 3, 2002) (on file with Xenu.net), available at <http://xenu.net/news/20020320-google.txt>.

12. See Matt Hines, *Scientology Loss Keeps Hyperlinks Legal*, CNET NEWS, Sept. 8, 2003, [http://news.com.com/2100-1028\\_3-5072581.html](http://news.com.com/2100-1028_3-5072581.html) ("Scientologists have taken a vigorous approach to squelching critical Web sites, pressuring site operators, ISPs and even Internet heavyweights such as Google into removing links to Web pages.").

13. *Id.*; see also Hiler, *supra* note 10.

14. See Jonathan I. Edelstein, Note, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 294 n.159 (1996) ("On September 5, 1995, the Religious Technology Center and its Dutch attorneys, the law firm of Nauta-Dutilh, prevailed upon the Dutch police to raid the offices of XS4ALL, an anonymous [email] service over which copyright-protected Scientology material was allegedly being sent."); Matt Loney & Evan Hansen, *Google pulls anti-Scientology links*, CNET NEWS, Mar. 21, 2002, <http://news.com.com/2100-1023-865936.html>.

15. See Declan McCullagh, *Google Yanks Anti-Church Sites*, WIRED, Mar. 21, 2002, available at <http://wired.com/news/politics/0,1283,51233,00.html>.

16. Letter from Moxon & Kobrin, Church of Scientology Legal Counsel, to Google, Inc. (Aug. 15, 2002), available at <http://chillingeffects.org/dmca512/notice.cgi?NoticeID=388> (requesting the removal of content from online discussion boards that, according to Scientology, contained copyrighted material).

17. The limitations on liability of service providers for copyright infringement are codified in section 512 of the U.S. Copyright Act, 17 U.S.C. § 512 (2000).

18. *Id.* § 512(c). Section 512(c) contains what are commonly known as the "notice and takedown" provisions of the DMCA. These provisions dictate that in order to maintain limited

infringement such as downloadable versions of well-known pop music or movies. But for the ambiguous cases, the incentive remains for Google to quickly remove the allegedly infringing content in order to preserve the safe harbor protection. There is a clear and present danger that *non-infringing* material will be removed from search results.

The Xenu.net case was typical in that there was no judicial determination of actual copyright infringement. Rather, Google alone carried the responsibility of evaluating the validity of the infringement claim. However, the Act does not provide OSPs with standards for investigating and responding to takedown letters.<sup>19</sup> Google was left to balance the apparent validity or invalidity of the Scientologists' claim against Google's own interest in avoiding a lawsuit. This situation presents the OSPs with a Hobson's choice between:

- a) refusing to remove the information and risking liability for infringement;
- b) conducting costly inquiries into the validity of infringement claims, diverting resources from core business goals; or
- c) removing information from the Internet with minimal investigation.

In the interest of efficiency, an OSP in this situation may opt to take down material first and ask questions later. This suggests that Google and other OSPs might comply with even far-fetched infringement notices. Oddly enough, one cannot know for sure whether this is happening with any frequency. Because there is no official public record of how much material has been taken down in response to DMCA notices, by whom, or at whose request.<sup>20</sup>

This note argues that the lack of transparency in the current notice and takedown regime hobbles Internet speech, commerce, and technology by perpetuating a lopsided set of incentives for the removal of non-infringing material from the Internet. Part II of the note outlines the current Internet copyright laws and briefly discusses the shift from ISPs to search engines as prime targets for DMCA takedown requests. Part III raises potential problems with the current regime including a potential for abuse and a chilling effect on speech. Part IV argues that there is no underlying liability for Google regardless of DMCA safe harbor. Part V is an economic analysis of the current system's problems for industry, consumers, and government. Part VI suggests that the skewed incentives of the current notice and takedown scheme could be handled without direct government regulation

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liability a service provider must remove infringing content after receiving notice. For the purposes of this note, such removals are referred to as *takedowns*.

19. See generally Emily Zarins, Note, *Notice Versus Knowledge Under the Digital Millennium Copyright Act's Safe Harbors*, 92 CAL. L. REV. 257 (2004).

20. While no public record of takedown requests exists, the Electronic Frontier Foundation and a consortium of law school clinics have been assembling a database of these requests at <http://www.chillingeffects.org>. In 2002, Google agreed to forward takedown requests to Chillingeffects.org.

by standardizing OSP industry practices and creating a complete public record of DMCA takedown requests.

## II. BACKGROUND

### A. GOOGLE: A NEW TARGET

Search engines have emerged as an ideal target for copyright owners trying to find and stop infringement. Early Internet copyright litigation focused on Internet service providers (ISPs) (those companies that actually hosted the infringing material on their servers).<sup>21</sup> But publishers whose web sites were taken down by ISPs were able to migrate to new servers and reappear online relatively quickly.<sup>22</sup> More recent legal disputes have focused on search engines. Since the mid 1990's, search engines have become an essential and dominant source for Internet content. Internet users are increasingly reliant on search technology for direct and immediate access to particularized information.<sup>23</sup> Google has emerged as the most popular search engine.<sup>24</sup> Google's market hegemony may have helped bring about a new strategy for copyright owners: combating small-time copyright infringers by affecting removal of infringing content from search engines and thus preventing users from finding it.<sup>25</sup> Since 2002, Google has reported approximately 1000 DMCA take down requests.<sup>26</sup>

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21. See *ALS Scan, Inc. v. RemarQ Cmty., Inc.* 239 F.3d 619 (4th Cir. 2001); *Sega Enterprises Ltd. v. Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994) (finding an online bulletin board service (BBS) operator liable for allowing a user to upload copyrighted video games onto the BBS).

22. See *Xenu Complaint*, *supra* note 3. The Church of Scientology complained, "www.xenu.net has been removed five times by well known internet service providers." This indicates, that while the Church of Scientology may have been successful in persuading several ISPs to remove the Xenu.net site from their servers, Xenu could still obtain new hosting services.

23. While search engines were popular in the early days of the Internet economy, their importance has become much greater in recent years. See Brian Morrissey, *Search Guiding More Web Activity*, INTERNET NEWS, Mar. 12, 2003, <http://www.internetnews.com/IAR/article.php/2108921> ("[A]long with going directly to Web sites, people are more likely to go to a search engine. . . . There's less meandering around the Web. The Web's becoming an efficient utility . . . The search engines apparently are becoming the card catalog to the Web. . . .").

24. See *Google voted best brand of 2003*, BBC NEWS, Feb. 3 2004, <http://news.bbc.co.uk/1/hi/business/3456363.stm> ("The company now has more than 70% of the global market, meaning that seven out of 10 people will click onto Google's webpage when they are looking for information on the Internet."). Underscoring Google's synonymy with Internet search, the verb "to google" is established in the lexicon. See Jonathan Duffy, *Google calls in the language police*, BBC NEWS, June 20, 2003, <http://news.bbc.co.uk/1/hi/uk/3006486.stm> ("Singletons will 'google' a new boyfriend or girlfriend—run their name through a search engine—to check them out. People now talk about 'googling' and 'being googled.'"). Ironically, as Duffy points out, Google has made efforts to keep the term out of dictionaries in order to maintain control of its trademarks and brand identity.

25. While the Church of Scientology may have been successful in persuading several ISPs to remove the Xenu.net site from their servers, Xenu could still obtain new hosting services. See *Xenu Complaint*, *supra* note 3 (noting that xenu.net had previously been removed by several ISPs). The Church of Scientology may have concluded that the most effective way to prevent Internet users from viewing the Xenu site was not just to temporarily remove it from the Internet,

## B. DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA's two chief sections, the anti-circumvention<sup>27</sup> and safe harbor provisions,<sup>28</sup> seek a balance between the interests of copyright holders and the risk of overburdening service providers with the task of actively policing networks for infringement.<sup>29</sup> While the anti-circumvention provisions of the Act seek to prevent frustration of copy protection systems, the safe harbor provisions limit liability for certain tools necessary to the operation of the Internet such as "information location tools,"<sup>30</sup> "passive conduits,"<sup>31</sup> and "system caching."<sup>32</sup>

The safe harbor protections, however, come with qualifications and strings attached. A service provider is only immune from liability if it lacks actual knowledge of the infringing behavior,<sup>33</sup> and "does not receive a financial benefit directly attributable to the infringing activity."<sup>34</sup> But most importantly, upon receiving notice of infringement the provider must "act expeditiously to remove, or disable access to, the material[.]"<sup>35</sup> An OSP is not liable to the alleged infringer even if it removes non-infringing material, so long as the removal is part of a good faith response to a takedown letter.<sup>36</sup> Instead, a web site publisher whose content has been removed may file a counter-notification with the provider and request that her content be "put back."<sup>37</sup> Finally, if either the copyright owner or the alleged infringer

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but rather to prevent users from finding it through Google. Also, since § 512(d) of the DMCA, which applies to search engines, does not provide for notice to alleged infringers, Google may be an even more convenient target for takedown requests because the complaining party can potentially obviate the need for any direct communication with the alleged infringer.

26. See Chilling Effects Clearinghouse, <http://www.chillingeffects.org/search.cgi> (last visited Oct. 22, 2006). A search in the Chilling Effects database for cases and desists received by Google produces 1481 results.

27. See 17 U.S.C. § 1201(a)(1)(A) (2000) ("No person shall circumvent a technological measure that effectively controls access to a work protected under this title.").

28. See 17 U.S.C. § 512(a)–(e) (2000).

29. See Jennifer M. Urban and Laura Quilter, *Efficient Process or "Chilling Effects"?* *Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 631–33 (2006).

30. 17 U.S.C. § 512(d).

31. *Id.* Section 512(a) creates safe harbor for "transitory digital network communications," commonly referred to as "passive conduits." These include service providers who, for example, provide technology to facilitate sending email.

32. *Id.* § 512(b).

33. *Id.* § 512(c)(1)(A).

34. *Id.* § 512(c)(1)(B).

35. *Id.* § 512(c)(1)(A)(iii).

36. 17 U.S.C. § 512(g). Under this section, the OSP must make a good faith effort to locate and notify the subscriber whose content was taken down. Also, if the subscriber files a counter-notification contesting the takedown, the OSP must provide the original complainant with a copy of the counter-notification and notice that the OSP will replace the material within ten business days. Last, the OSP must replace the material within ten to fourteen days after receipt of the counter-notification, unless the complainant files a lawsuit seeking injunctive relief against the subscriber.

37. *Id.*

makes knowing material misrepresentations about the infringing or non-infringing character of the material, § 512(f) of the Act provides liability for damages including costs and attorney's fees.<sup>38</sup>

### C. COPYRIGHT LITIGATION AND SECONDARY LIABILITY BEFORE AND AFTER THE DMCA.

Before the DMCA, copyright cases involving the liability of ISPs had varying outcomes. In one pre-DMCA case, *Playboy Enterprises v. Frena*,<sup>39</sup> the district court found that the operator of an Internet bulletin board service (BBS) had directly infringed the plaintiff's distribution rights. The problem stemmed from users of the defendant's service posting digitized images of Playboy centerfolds. The court noted that copyright infringement is a strict liability offense and found the defendant liable, reasoning that while the defendant had acted passively, the system itself had contributed to the infringement. This approach, however, was largely abandoned. In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*<sup>40</sup> the court refused to find direct infringement without a showing of "some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party."<sup>41</sup>

Although *Netcom's* "volitional act" test was largely accepted and applied,<sup>42</sup> it would not equip service providers with an impermeable shield from liability.<sup>43</sup> *Netcom's* standard of application remains murky today. After the DMCA became law, one of the first cases to apply it was *ALS-Scan v. RemarQ Communities, Inc.*<sup>44</sup> In that case, an ISP ignored the plaintiff's requests to remove entire Internet newsgroups where users were transmitting pornography despite the plaintiff's claim to exclusive distribution rights.<sup>45</sup> Despite the plaintiff's failure to meet the statutory

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38. *Id.* § 512(f).

39. *Playboy Enters. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

40. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Serv., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

41. *Id.* at 1370.

42. *See, e.g., CoStar Group Inc. v. Loopnet, Inc.*, 373 F.3d 544 (4th Cir. 2004). The court in *CoStar* said:

There are thousands of owners, contractors, servers, and users involved in the Internet whose role involves the storage and transmission of data in the establishment and maintenance of an Internet facility. Yet their conduct is not truly "copying" as understood by the Act; rather, they are conduits from or to would-be copiers and have no interest in the copy itself.

*Id.* at 551.

43. *See Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1173 (C.D. Cal. 2002) (finding Cybernet liable for vicarious infringement where Cybernet failed to implement a policy of terminating users that were repeat infringers).

44. *ALS-Scan v. RemarQ Cmtys., Inc.*, 239 F.3d 619 (4th Cir. 2001).

45. *Id.* at 621.

requirements in providing notice of the infringement,<sup>46</sup> the fourth circuit held that the safe harbor provisions of the DMCA did not exempt RemarQ from secondary liability.<sup>47</sup> The court held that safe harbor did not apply, even in the absence of a “volitional act.”<sup>48</sup>

Given an OSP’s option of preserving limited liability, Congress might have predicted a dearth of litigation over application of the DMCA safe harbor provisions. However, Congress may not have anticipated the neglect of the § 512(g) “putback” provision and the obsolescence of the § 512(f) penalties for misrepresentation. Indeed, both of these provisions are almost never used. Preliminary analyses of takedown letters collected by Chillingeffects.org have indicated that § 512(g)’s counter-notification provisions are rarely used. A survey of the two thousand notifications reported to chilling effects since 2002 reveals only seven instances of counter-notifications.<sup>49</sup> Successful § 512(f) claims for fraudulent misrepresentation are also few and far between. While the plaintiffs were successful in one such claim in *Online Policy Group v. Diebold*,<sup>50</sup> the courts have set a very high standard for showing “knowing misrepresentation,”<sup>51</sup> a critical element of fraud. As a result, except for the clearly sinister case of copyright law manipulation, § 512(f) fails to act as a deterrent against spurious takedown requests.

### III. THE SCOPE OF THE PROBLEM

In the 2003 article, *How Liberty Disappeared From Cyberspace*,<sup>52</sup> the authors conducted a “mystery shopper” test.<sup>53</sup> They posted public domain<sup>54</sup> excerpts from philosopher John Stuart Mill’s *On Liberty* on free web site hosts from both U.K. and U.S. ISPs. Then, posing as the Chairman of the (fictitious) John Stuart Mill Heritage Foundation, they sent cease and desist letters to both ISPs claiming copyright violation and demanding that the

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46. See Raphael A. Gutiérrez, *Save The Slip For The Service Providers: Courts Should Not Give Short Shrift To The Safe Harbors Of The Digital Millennium Copyright Act*, 36 U.S.F. L. REV. 907, 934 (2002) (arguing that ALS Scan court misconstrued the statute by accepting ALS Scan’s website address as substantial compliance with the statutory notice requirements, rather than requiring a representative list of all the allegedly infringed works).

47. *ALS-Scan*, 239 F.3d at 626.

48. *Id.*

49. See Urban, *supra* note 29, at 679.

50. *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

51. See Urban, *supra* note 29, at 630 (“[F]or a complainant to ‘know’ with legal certainty that its complaint targets a non-infringing or fair use is often unrealistic, given the complexity of copyright infringement analysis and the famed unpredictability of the fair use defense.” (citing *Rossi v. Motion Picture Ass’n of America*, 391 F.3d 1000 (9th Cir. 2004); *Dudnikov v. MGM Entm’t, Inc.*, 410 F. Supp. 2d 1010 (D. Colo. 2005))).

52. Christian Ahlert, Chris Marsden and Chester Yung, *How Liberty Disappeared From Cyberspace* (May 2003), available at <http://pcmlp.socleg.ox.ac.uk/text/liberty.pdf>.

53. *Id.* at 17.

54. “On Liberty” was first published in 1859 and has passed into the public domain under U.S. and U.K. law. *Id.* at 3.

pages be taken down.<sup>55</sup> The U.S. ISP responded to the complaint by requesting that notice of infringement be given in a way that satisfied the statutory requirements of the DMCA (including swearing under penalty of perjury to the truth of the complaint).<sup>56</sup> The U.K. ISP, on the other hand, promptly took down the site with minimal investigation.<sup>57</sup>

The “mystery shopper” research highlights concerns about the notice and takedown regime. First, there is a lack of standards for responding to complaints, particularly in the EU.<sup>58</sup> Second, service providers have an economic motivation to take down materials with minimal investigation.<sup>59</sup> Third, the potential for abuse is high.<sup>60</sup>

#### A. STANDARDS FOR RESPONSE

The EU’s legislative analog to the DMCA, the European Directive On Electronic Commerce (EU Directive),<sup>61</sup> states the law in language similar to the DMCA. The EU Directive states, “upon obtaining actual knowledge or awareness of illegal activities [a provider] has to act expeditiously to remove or to disable access to the information concerned.”<sup>62</sup> In the application of both U.S. and U.K. law, a fundamental question is the standard for “actual knowledge or awareness.” Arguably, receipt of a complaint does not constitute actual knowledge of illegal activities, but merely a notice of the complaint.<sup>63</sup> The DMCA sets out specific mechanical criteria for proper notice,<sup>64</sup> but not for actual knowledge. Neither the EU

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55. *Id.*

56. See 17 U.S.C. § 512(c)(3)(A)(vi) (2000) (“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.”). Since the details in the complaint were quite false, Ahlert and his colleagues chose not to pursue this complaint further with the U.S. ISP. See Ahlert, *supra* note 52, at 23.

57. Ahlert, *supra* note 52, at 24.

58. *Id.* at 9.

59. *Id.* at 11 (“It does not create an incentive for the ISP to properly investigate whether content is illegal, but rather to remove the content expeditiously.”).

60. *Id.* at 10 (“[T]he current regime may actually promote unfair competition in some situations where companies engage in a form of commercial war on the internet, putting bad faith claims against their competitor’s Web content.”).

61. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. (L 178), available at [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_178/l\\_17820000717en00010016.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf).

62. *Id.*

63. The DMCA’s language raises the same question of the standard for “actual knowledge.” For a discussion of this distinction as applied to the DMCA, see generally Zarins, *supra* note 19.

64. See 17 U.S.C. § 512(c)(3) (2000). The statute requires for notice: i) the signature of someone authorized to act on behalf of the copyright owner; ii) identification of the copyrighted work or works claimed to have been infringed; iii) identification of the materials claimed to be infringing, and information sufficient to locate those materials; iv) contact information for the complaining party; v) a statement that the complaining party has a good faith belief that use of the material is not authorized by the copyright owner, its agent, or the law; and vi) a statement that the

Directive nor the DMCA sets a standard for how much proof a complaining party must present in a request for removal. In practice, under the EU Directive, providers tend to treat the complaint as actual knowledge of infringement.<sup>65</sup> Indeed, although the mystery shopper test was constructed so that even minimal investigation would reveal that the complaint was fictitious, the U.K. provider removed the material anyway. Under the DMCA, once the minimum notice requirements are met, a provider can simply take the complaining party's word without further investigation, no matter how farfetched the claim. Had the "mystery shoppers" been willing to falsely swear under penalty of perjury, the U.S. ISP may have been willing to take their word for it.

### **B. LOW INCENTIVES FOR DUE DILIGENCE**

There are two reasons why a provider might not question takedown requests. First, there is the threat of losing safe harbor protections and being exposed to liability for failure to remove infringing material after receiving notice. Second, thoroughly investigating each of these claims can be terribly arduous and expensive. Even in the EU, where there is a threat of liability for wrongfully removing legal content,<sup>66</sup> the incentive to take down content still outweighs the risks of not taking down. Copyright owners are more likely to take legal action against a deep-pocketed third party provider than against an individual Web site publisher.<sup>67</sup>

Reviewing the validity of takedown requests demands significant work and legal training. Although some disputed Web pages clearly violate copyright laws, most fall in a gray area.<sup>68</sup> Further, many disputes involve large amounts of material. For example, one complaint submitted to Google by Perfect 10, Inc. set forth approximately 200 individual claims of

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information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner.

65. See Ahlert, *supra* note 52, at 9–10.

66. In the United States, the DMCA excludes such liability, providing:

a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claiming to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringed.

17 U.S.C. § 512(g)(1).

67. Individual operators often have no assets, eliminating the deterrent value of large judgments. Moreover, Web site operators are often intimidated into removing content without the need for litigation. See Lisa M. Bowman, *Free Speech Feels Net copyright chill*, CNET NEWS, Oct 24, 2002, [http://news.com.com/2102-1023\\_3-963122.html?tag=st.util.print](http://news.com.com/2102-1023_3-963122.html?tag=st.util.print) (“[L]egitimate sites were being shut down by legal threats. People who don't have legal training or lots of money often back down when they receive threatening letters from lawyers.”).

68. *Id.*

infringement for unauthorized use of adult content.<sup>69</sup> The resources that Google would need to devote to parsing through each of the individual claims would be significant, even without any legal investigation into actual infringement. Verifying the authorship of each work and ascertaining whether rights to each have in fact been infringed would be unworkable. Congress probably did not intend that a provider such as Google should maintain a staff of copyright lawyers and pornography connoisseurs in order to respond to such claims. The alternative, however, is that Congress meant for providers to take each complaint on its face as actual knowledge of infringement. While the investigative measures that Google took in response to Perfect 10's claims are unclear, Google did ultimately remove several of the links.<sup>70</sup>

It is arguably impossible for a service provider like Google to effectively police its search results for infringing content.<sup>71</sup> The Church of Scientology and others have submitted several complaints to Google not only for search results, but also for postings in Google Groups, Google's newsgroup service.<sup>72</sup> Service providers have argued that saddling technology providers with comprehensive policing duties will hamper technology services and dramatically raise costs for consumers.<sup>73</sup>

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69. See Letter from Perfect 10 to Google (Aug. 30, 2005), available at [http://www.chillingeffects.org/dmca512/notice.cgi?action=image\\_2798](http://www.chillingeffects.org/dmca512/notice.cgi?action=image_2798).

70. Perfect 10 complained that a Google search for "Vibe Sorenson" (the model in several of the allegedly infringed photographs) brought up search results containing links to infringing web sites. Google removed the links to the infringing sites. The same search now reveals several messages stating, "In response to a complaint we received under the US Digital Millennium Copyright Act, we have removed 2 result(s) from this page. If you wish, you may read the DMCA complaint that caused the removal(s) at [ChillingEffects.org](http://ChillingEffects.org)."

71. See Susan Kuchinskas, *A Perfect Storm for Infringement*, INTERNETNEWS.COM, Aug. 26, 2005, <http://www.internetnews.com/bus-news/article.php/3530331>.

Google's point of view, as expressed in an e-mail provided to *internetnews.com*, was that he should take his complaint to the offending publishers. "Google is a provider of information, not a mediator. . . . Even if we were able to eliminate the offending page from our index, it would still be on the Web. Every few weeks, our robots sweep the Web for content. If the site is still available on the Web when we crawl, we will likely pick it up and add it to our index again."

*Id.*

72. See Letter from Moxon & Kobrin, Church of Scientology Legal Counsel, to Google, Inc. (Oct. 29, 2005), available at <http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=2355>.

73. See Zarins, *supra* note 19, at 266; see also Cassandra Imfeld and Victoria Smith Ekstrand, *The Music Industry And The Legislative Development Of The Digital Millennium Copyright Act's Online Service Provider Provision*, 10 COMM. L. & POL'Y 291, 305 (2005).

[Service providers] in performing their various system functions, simply cannot review and monitor all the data that is transmitted over and stored in their networks or bulletin boards. Indeed, trillions of bits of data—representing millions of individual messages—travel across the country and around the world each day. . . . Providers of online services do not know what is being uploaded onto, transmitted through, stored upon, and downloaded from their systems.

*Id.*

### C. POTENTIAL FOR ABUSE

It is not surprising that many service providers have chosen to cut off liability by presuming validity and complying with takedown requests rather than struggling to investigate each request.<sup>74</sup> As the mystery shopper test proves, a party could lodge spurious infringement complaints and manage to have content removed. Without a requirement for a judicial determination of infringement, the door is open for abuse of the notice and takedown system for purposes of interfering with competitors,<sup>75</sup> or silencing criticism, or just out of arbitrary vindictiveness.

The absence of a public record of takedown requests raises the potential for abuse. Since the public is not generally made aware of takedown requests, senders of such requests have far less motivation to behave scrupulously than if they were filing a lawsuit, for example. The public will never know who sent a typical takedown request, who received it, what works have allegedly been infringed or who the alleged infringer was.

One response to this problem has been the creation of the Chilling Effects Clearinghouse (Chillingeffects.org).<sup>76</sup> Chillingeffects.org asks its users to forward cease and desist letters. Those letters are compiled into a searchable database and made available to the public. In 2002 Google agreed to forward all the cease and desist letters it received to Chillingeffects.org,<sup>77</sup> and to post notices wherever it removes content from its search results.<sup>78</sup> Since Google adopted this policy, Chillingeffects.org has published almost a thousand cease and desist letters sent to Google.<sup>79</sup>

### D. EFFECTS ON SPEECH AND THE UTILITY OF INTERNET SEARCH

Free speech advocates are concerned that abuse of the notice and takedown regime could unjustly chill speech and reduce public access to information on the Internet.<sup>80</sup> This occurs when non-infringing content is

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74. See Ahlert, *supra* note 52, at 6–7.

75. See Bowman, *supra* note 67 (“Free speech advocates also fear that many companies and organizations are trying to shoehorn their trademark claims into DMCA claims in the hopes of persuading ISPs to quickly take down the sites.”).

76. See Chilling Effects, <http://www.chillingeffects.org> (last visited Nov. 20, 2006).

77. See Chris Sherman, *Google Makes Scientology Infringement Demand Public*, SEARCHENGINEWATCH.COM, Apr. 15, 2002, <http://searchenginewatch.com/searchday/article.php/2159691> (“Google’s policy is now to send copies of all notices of alleged infringement to third parties, such as Chillingeffects.org, that will make them available to the public, confirmed Google spokesperson David Krane.”).

78. *Id.*

79. In addition to the cease and desist letters that Google has received, ThePlanet.com, an Internet hosting provider, has recently agreed to provide Chillingeffects.org with access to the 1600 requests that it has received since 2004. See Urban, *supra* note 29, at 643.

80. See Tricia Beckles and Marjorie Heins, *Commentary: A Preliminary Report on the Chilling Effects of “Cease and Desist” Letters* (The Free Expression Policy Project, Brennan Center for Justice at NYU School of Law, Oct 2004), available at <http://www.fepproject.org/commentaries/ceaseanddesist.html>.

taken down in response to flawed complaints that do not meet the statutory requirements of §512. Removing information from search engines also makes Internet search technology less useful.<sup>81</sup> Google users cannot be sure that search results do not exclude important contrasting views. This undoubtedly contributed to Google's decision to forward the takedown letters to Chillingeffects.org and to publish notices of removal within search results. Google has recognized the value of transparency in the notice and takedown process and of avoiding wrongful takedowns.<sup>82</sup> However, other search engines, like most OSPs, neither forward takedown letters to Chillingeffects.org nor publish notices of takedown.

Wrongful removal of material from Google search results upsets the balance of information more than it affects the volume of available information. The number of previous DMCA takedowns is probably small relative to the billions of pages on the Internet today.<sup>83</sup> But with the potential for wrongful takedowns of controversial information, users of search engines cannot be sure that search results include all available contrasting views—that search results were not manipulated to obscure detractors or competitors from view. Thus, the removal of controversial material strikes a blow to Internet speech, undermining the Internet's capacity to act as a forum for the free exchange of ideas.<sup>84</sup>

#### IV. GOOGLE COULD IGNORE TAKEDOWN REQUESTS

Google could ignore takedown requests for three reasons. First, Google could ignore complaints that do not satisfy the notice requirements of §512(c)(3).<sup>85</sup> Surprisingly, one out of every eleven notices sent to Google exhibited significant statutory flaws.<sup>86</sup> Many of the cease and desist letters sent to Google exhibited one or more common statutory flaws.<sup>87</sup> For example, many complaints were invalid because they involved non-copyrightable materials<sup>88</sup> and fair use.<sup>89</sup> Other flawed complaints do not

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81. Legislative history indicates that Congress not only recognized the usefulness of search engines when it enacted the DMCA, it acted in order to preserve this utility. *See* H.R. REP. NO. 105-551, pt.2, at 58 (1998) (“Information location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need.”).

82. *See* Sherman, *supra* note 77.

83. *See* Hiler, *supra* note 10.

84. *See* Zerán v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (“Congress recognized the Internet and interactive computer services as offering ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’” (quoting Congressional findings in the Communications Decency Act of 1998, 47 U.S.C. § 230(a)(3) (2000))).

85. *See* 17 U.S.C. § 512(c)(3) (2000).

86. *See* Urban, *supra* note 29, at 674. This one-out-of-eleven figure does not include those minor flaws that would not render a complaint invalid such as stating a good faith basis and providing a signature.

87. *Id.* at 667. *See id.* at 666 for a list of these flaws and an analysis of their frequency.

88. Section 102 of the U.S. Copyright Act affords protection for “original works of authorship.” 17 U.S.C. § 102 (2000). Therefore, a complaint could be ignored where it regarded

comply with the technical requirements of § 512(c)(3).<sup>90</sup> Another common flaw involves § 512(a) takedown letters sent to an OSP acting as a passive conduit, such as an upstream provider used for sending email. Unlike BBSs and information location tools such as Google, passive conduits are *not* obligated to takedown content under the provisions of §512(c). In nearly half of the non-Google notices collected by Chillingeffects.org, the OSPs were acting as conduits, and were not obligated to take down content. Moreover, they could have ignored those complaints without any loss of safe harbor.<sup>91</sup>

The second reason Google might ignore takedown notices is that Google would not be liable even if it were sued. The DMCA does not alter the infringement analysis. It only seeks to foster a system that deals efficiently with disputes over Internet property rights. Therefore, a provider may waive its safe harbor protections without necessarily becoming liable. Where safe harbor does not apply, the infringement analysis remains and a court would analyze the facts accordingly.<sup>92</sup> It is not surprising that Google and other providers choose to keep their own liability limited by following notice and takedown procedure. But ignoring certain requests would probably not result in liability. This means little in practice because businesses generally prefer “no-risk” to “low-risk” and so choose to preserve their safe harbor privilege.

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un-authorized use of an idea alone, or something similarly undeserving of protection under copyright law.

89. Some unauthorized uses of copyrighted materials for “purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research” constitute fair use and are therefore non-infringing. *Id.* § 107 (2000).

90. Where a party substantially complies with § 512(c)(3)(A)(ii), (iii) and (iv) (identification of the allegedly infringed and infringing works, and contact information for the complaining party), but fails to satisfy the other notice requirements of § 512(c)(3)(A), the OSP is not free to ignore the request. Instead, the OSP is still obligated to take reasonable steps to assist in receipt of notice that substantially complies. *Id.* § 512(c)(3)(B)(ii). This implies, however, that where the complaining party does not: a) identify the allegedly-infringed work; b) identify the allegedly-infringing work; c) provide a way to locate the allegedly infringing work; and d) provide contact information for the complaining party, the OSP *would* be free to ignore the complaint altogether. *See Urban, supra* note 29, at 674 (defining these subsections as necessary for “substantial compliance,” and arguing that any failure to meet them is a “significant” statutory flaw rendering the notice invalid).

91. *See Urban, supra* note 29, at 674–76.

92. *Id.* at 674. The legislative history for § 512 states:

The Committee emphasizes that new Section 512 does not specifically mandate use of a notice and take-down procedure...[T]he service provider is free to refuse to “take down” the material or site-even after receiving a notification of claimed infringement from the copyright owner. In such a situation, the service provider’s liability, if any, will be decided without reference to new Section 512(c).

H.R. REP. NO. 105-551, pt. 2, at \*58 (1998); *See also* *Ellison v. Robertson*, 357 F.3d 1072, 1077 (9th Cir. 2004) (“Congress provided that OCILLA’s ‘limitations of liability apply if the provider is found to be liable under existing principles of law.’”).

Very few cases in the United States have found liability for creating hyperlinks to infringing content. Two cases that did were *Universal City Studios v. Reimerdes*,<sup>93</sup> and *Intellectual Reserve v. Utah Lighthouse Ministry*.<sup>94</sup> In both of these cases, the court found that the defendant had acted with the purpose of disseminating infringing material.<sup>95</sup> In a case about hyperlinks in search results, a court would probably not see Google's purpose as the dissemination of infringing material. Since Google's technology automatically sifts vast amounts of Internet content (ostensibly the entire Internet) for the purpose of creating a searchable index of that content, a court may be unwilling to define Google's purpose as "disseminating" material at all.<sup>96</sup> Indeed, Google's stated mission is "to organize the world's information and make it universally accessible and useful."<sup>97</sup> If a court accepted this as Google's purpose, the court could distinguish cases like *Reimerdes* or *Utah Lighthouse Ministry* where the defendants' purposes were clear and illicit in comparison.<sup>98</sup>

A third reason why Google could decline to take down involves complaints under foreign law. Several cease and desist letters in the ChillingEffects.org database pertain to European defamation law.<sup>99</sup> In the

93. *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000). In *Reimerdes*, eight major motion picture studios sued the publisher of *2600: The Hacker Quarterly*, an online magazine, after the defendant published code which allowed users to 'rip' and copy encoded DVDs. *Id.* at 308.

94. *Intellectual Reserve v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290 (D. Utah 1999). In *Utah Lighthouse*, defendants were held liable for linking to three websites where users could download plaintiff's copyrighted material. Finding contributory liability, the court found that the defendants contributed not to the infringing behavior of the websites offering the material for download, but rather for the actual downloading by the users. *Id.* at 1295.

95. In *Reimerdes*, the defendant was found contributorily liable under the DMCA's anticircumvention provisions. After being enjoined from posting the code on his own website, defendant urged other sites who had not been enjoined to post the material and then linked to those sites for the purpose of facilitating downloads. *Reimerdes*, 111 F. Supp. 2d at 324. Similarly, in *Utah Lighthouse Ministry*, the court emphasized: "After being ordered to remove the Handbook from their website, defendants posted on their website: 'Church Handbook of Instructions is back online!' and listed the three website addresses." *Utah Lighthouse Ministry*, 75 F. Supp. 2d at 1295.

96. See Kuchinskas, *supra* note 71 (quoting an e-mail from Google).

"Even if we were able to eliminate the offending page from our index, it would still be on the Web. Every few weeks, our robots sweep the Web for content. If the site is still available on the Web when we crawl, we will likely pick it up and add it to our index again."

*Id.*

97. Google Corporate Information: Company Overview, <http://www.google.com/corporate/> (last visited Nov. 13, 2006).

98. In both *Reimerdes* and *Utah Lighthouse* the defendants were facilitating the illegal copying or downloading of copyrighted material. Google, on the other hand, operates a search engine.

99. See, e.g., Notice from Google to Chillingeffects.org, German Complaint of Illegal Material in Google Search (Sept. 24, 2006), <http://chillingeffects.org/international/notice.cgi?NoticeID=2382> ("On September 24, 2005, Google received a complaint via email regarding a site that is allegedly illegal according to German law. In response to this complaint, we have removed the site from the www.google.de domain."). Among the cease and desist letters that Google has reported

United States, ISPs are shielded from defamation claims by the § 230 of Communications Decency Act.<sup>100</sup> Therefore, DMCA Safe harbor protection is irrelevant to foreign defamation claims.<sup>101</sup> This is not to say that Google could not be sued in a European court under European defamation law. However, foreign parties can masquerade foreign law claims as DMCA complaints to obtain the quick results that are common in the DMCA notice and takedown regime.

Finally, international takedown requests involving foreign law could lead to actions in non-U.S. courts under non-U.S. defamation law. However, in such cases a foreign court might lack personal jurisdiction over Google. Even if a non-U.S. court exercised jurisdiction, the First Amendment might render a foreign judgment unenforceable in the United States.<sup>102</sup> Google may be subject to jurisdiction in several countries because of its international business contacts. Nevertheless, if Google had no assets in the foreign jurisdiction, the judgment might be unenforceable in the U.S. and Google could choose to ignore the complaint.

## V. AN ECONOMIC APPROACH TO THE CHILLING EFFECT

### A. MARKET FAILURE

Although elements of the law of secondary liability on the Internet remain unsettled, the safe harbor provisions of the DMCA and of the EU Directive on Electronic Commerce seem to have helped create a stable system of self-regulation in the day-to-day operation of Internet business. In the absence of a corpus of case law, an economic analysis of the current system of incentives may provide insight into the problems with the notice and takedown system, and into the usefulness of available alternatives. These problems are externalities (costs or benefits to people other than the individuals making decisions) produced by the DMCA's system of self-regulation. They can be seen as a form of market failure.

Failure in the market's self-regulatory mechanisms include: "[m]onopoly, pollution, fraud, mistake, mismanagement, and other unhappy

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to Chillingeffects, there are several other examples of international requests that are specific to foreign law. See Chilling Effects Clearinghouse, Int'l Cease and Desist Notices, <http://chillingeffects.org/international/search.cgi> (last visited Nov. 13, 2006).

100. 47 U.S.C. § 230(c) (2000); see, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (declining to hold ISP liable for failure to remove defamatory material from BBSs).

101. See Symposium, *Metamorphosis of Artists' Rights in the Digital Age*, 28 COLUM. J.L. & ARTS 397, 412 (2005) ("Where no copyright subsists, the protections in the DMCA do not apply.").

102. See *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1184 (N.D. Cal. 2001). After plaintiffs obtained an order from a French court requiring Yahoo! to block French citizens' access to any Nazi material displayed or offered for sale on Yahoo's United States auction site, Yahoo! filed suit in U.S. district court arguing that enforcement of the order would constitute a deprivation of its First Amendment rights. See *id.*

byproducts of the market.”<sup>103</sup> In the conventional view, any of these failures would justify public regulation.<sup>104</sup> While the current system of self-regulation appears to protect copyrights reasonably well, those protections have a social cost in the potential for wrongful removal of information from the Internet. Market incentives exacerbate the problem. Offering insulation from liability encourages removal of content. The incentive for unjustified takedowns, combined with a lack of transparency in the takedown process results in a chilling effect on Internet speech. This reduces public access to information on the Internet and limits free discourse on the Web.

Two common methods of regulation used to remedy market failure are the common law method and direct (or administrative) regulation.<sup>105</sup> The common law method relies chiefly on private parties as opposed to public officials.<sup>106</sup> Private parties can sue those causing the harm and receive compensation for the injuries suffered. In addition, the threat of a costly lawsuit may deter further harm. In contrast, direct regulation relies more on public officials and seeks to prevent injuries before they occur rather than to compensate injured parties.<sup>107</sup>

A classic illustration of market failure is air pollution.<sup>108</sup> The common law method will probably not solve problems such as pollution from cars because each individual injury is small and the sum of the injuries is spread thinly across many parties (both injured and injuring).<sup>109</sup> As a result, the victims are unlikely to bring lawsuits because their recoverable damages will be small in each instance. This problem is analogous to the notice and takedown regime’s chilling effect. Single incidents of wrongful removal go unreported<sup>110</sup> and are not noticed by the public.<sup>111</sup> In both contexts, while the individual harm is small, the total number of occurrences can multiply to yield a very high aggregate social cost.

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103. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 383 (6th ed. 2003).

104. *Id.* Posner goes on to qualify this statement, noting that these indications of market failure do not necessarily warrant public regulation, and that direct regulation can be costly financially and politically. *See id.* at 385.

105. *Id.* at 383.

106. *Id.*

107. *Id.*

108. *See* Douglass Kendall & Eric Sorkin, *Nothing For Free: How Private Judicial Seminars Are Undermining Environmental Protections And Breaking The Public’s Trust*, 25 HARV. ENVTL. L. REV. 405, 425 (2001).

109. *See id.* at 429 (“Environmentalists also argue that common law liability rules, such as nuisance law, are incapable of enforcing the polluter pays principle.”).

110. *See* BERKMAN CTR. FOR INTERNET AND SOCIETY & GARTNERG2, *COPYRIGHT AND DIGITAL MEDIA IN A POST-NAPSTER WORLD* 28 (2003), <http://cyber.law.harvard.edu/home/uploads/254/2003-05.pdf>.

111. Just as one is unlikely to immediately perceive the polluting effect of a single car driving by, the public may not notice the removal of a single web site from Google search results. However, just as the aggregate effect of millions of cars is apparent, the effects of many takedowns would have a noticeable effect on the availability of information.

There are three administrative approaches to regulating pollution: input control, output control, and tax control.<sup>112</sup> With input control, the legislature sets mandatory remedial steps that polluters must take to avoid penalties.<sup>113</sup> Output control focuses on ends rather than means, leaving the choice of means up to the regulated party while setting a maximum amount of pollution that will be allowed without punishment.<sup>114</sup> The third approach is to tax pollution—setting a “price” for pollution equal to the social cost of the pollution.<sup>115</sup> These three approaches represent different philosophies for correcting market failure, with varying levels of emphasis on self-regulation, market incentives and economic efficiency.

Output control and tax control approaches to the notice and takedown problem are impracticable. Unlike pollution, the notice and takedown externalities are inherently unquantifiable. No public record documents DMCA complaints. As a result, no government agency can measure the problem to cap or tax it. For air pollution both output control and the tax control treat some underlying harm as a “necessary evil.” Even if some air pollution is necessary to even the most environmentally friendly manufacturing process, wrongful takedowns are not needed for efficient operation of the Internet. The “necessary evil” view embodied in the tax approach does not translate to the problem at hand.

### B. HAS SELF-REGULATION FAILED OUTRIGHT?

Discussing this problem in terms of market failure requires working around the subjectivity of the notion of “failure.” Common signals of market failure (e.g., monopoly, pollution, and fraud) are not necessarily litmus tests for a failure of public regulation. Instead, they may indicate merely that the market is “failing” only in the sense that “it is failing to be perfect.”<sup>116</sup> Indeed, the presence of negative externalities may be

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112. POSNER, *supra* note 103, at 390–91.

113. For example, a polluter might be required to install special sewage treatment plants, emission control devices or taller smokestacks. *Id.* at 390.

114. A municipality might set a maximum number of pounds per square inch of pollution, leaving the polluter to decide whether it will install new equipment, alter its method of production or cease a particularly costly behavior. Posner points out that output control might appear more flexible and efficient than input control, but it also creates an incentive to reduce the costs of compliance as much as possible, which could allow too much pollution. *Id.* at 391.

115. *Id.* The tax approach represents a departure in the comparison of pollution and Internet self-regulation. The tax approach assumes that a certain level of pollution is not only inevitable but necessary and desirable for efficient operation. The tax acts not as a punishment, but as a cost of doing business, and an incentive to minimize pollution. Unjustified removal of Internet content on the other hand, is not integral to the successful operation of an OSP, but rather is a by product of a statutory scheme that creates too great of an incentive for complying with takedown complaints. Nevertheless, the pollution analogy helps illustrate the parallel between the topic at hand and more traditional examples of market failure.

116. NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 103–04 (1994) (“Since all alternatives are also imperfect, the existence of market ‘failures’ cannot determine policy outcomes.”).

unfortunate, but the alternatives may well present bigger, more harmful externalities.<sup>117</sup>

The alternatives for regulation of OSPs with regard to copyright infringement may not have proven any better for any of the parties concerned. One such alternative was embodied by the proposed measures in the *White Paper*, circulated by the Working Group on Intellectual Property Rights September of 1995.<sup>118</sup> The *White Paper* which had been heavily influenced by the music and film industries,<sup>119</sup> recommended that service providers be held strictly liable for user copyright infringement. The effect of these changes would have greatly exaggerated the current problems with notice and takedown.<sup>120</sup>

On the other hand, limiting incentive for service providers to respond to the takedown requests presents a different set of problems. The production of copyrighted media like music, TV, and film, plays a huge role in the U.S. economy.<sup>121</sup> Failure to protect the exclusive rights of copyright owners would undermine the basic incentives for creation of works under copyright law and would place the country's economic interest at risk.

From Google's perspective, continuing to self-regulate under the current DMCA regime presents some annoyances, but also offers a degree of security. Fielding complaints such as Perfect 10's<sup>122</sup> (i.e. comparing hundreds of allegedly infringing pornographic photographs to the originals) may be an inefficient use of any technology company's resources. Moreover, removing anything from search results arguably runs counter to

117. For example, both Posner and Komesar point out that regulation involves serious information problems. POSNER, *supra* note 103, at 385 ("If accident victims have nothing to gain from bringing an unsafe condition to the government's attention, the regulators may have difficulty finding out what exactly the problem is."). Komesar also suggests that high costs of information (cost of acquiring basic data, as well as the costs of understanding that data) as a potential root cause of market failure. See KOMESAR, *supra* note 116, at 102-03 ("Where low per capita transaction benefits combine with high information costs, we get ignorance that can be manifested in a failure to act or in a mistaken choice that would not be made given better information.").

118. Information Infrastructure Task Force Working Group on Intellectual Property Rights, Intellectual Property Rights and the National Information Infrastructure (Sept. 1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf> [hereinafter *White Paper*].

119. See LAWRENCE LESSIG, *FREE CULTURE* 126 (2004) (referring to "copyright warriors").

120. See Zarins, *supra* note 19, at 266.

The effect of the White Paper's proposed changes would be not only to further the interests of powerful copyright holders, but also to call upon service providers to play the role of digital copyright cops. That is, faced with liability for direct infringement regardless of knowledge, a service provider could either close up shop or feverishly try to monitor all content flowing through its infrastructure . . . .

*Id.*

121. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY, THE 2004 REPORT*, [http://www.iipa.com/pdf/2004\\_SIWEK\\_FULL.pdf](http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf). In 2002 the value added by the copyright industry to the U.S. economy was \$626 billion or six percent of the U.S. economy. *Id.*

122. See Letter from Perfect 10 to Google, *supra* note 69.

a search engine's function of providing search technology that indexes all available information. On the other hand, a constant need to actively police content for copyright violations by users would have a crippling effect on OSPs and the technology that they create.<sup>123</sup> Additionally, direct regulation by an administrative agency would present a whole new set of transaction costs from Google's perspective. Google would probably prefer to continue to self-regulate. Most importantly, the limitation on liability that Google enjoys under the safe harbor provisions allows it to properly allocate resources for responding to takedown requests without too much concern over being sued for infringement.<sup>124</sup>

Copyright owners are possibly the most content under the current system. Though a strict liability system like that proposed in the *White Paper* would have provided for aggressive protection of copyrights,<sup>125</sup> the notice and takedown regime also provides for very strong protection. It is possible that the copyright industry is really in a comparable position to what might have occurred under a *White Paper* system, given evidence of over-enforcement in responses to takedown requests.

From the government perspective too, self-regulation is less costly than a more direct method of administrative regulation. The status quo appears to function properly in terms of the DMCA's principal concern—regulating copyright infringement. The government would probably not be eager to adopt a more invasive system of regulation, particularly since the associated transaction costs could hinder OSPs in their development of technology. In light of the alternatives, it is possible that the notice and takedown problem does not constitute the level of market failure that would require a new system of public regulation. However, this is not to say that Internet users, publishers or OSPs should be content with the notice and takedown regime as it exists today.

## VI. CONCLUSION AND PROPOSED REMEDIAL MEASURES

Despite its lack of clear standards in terms of the proper response to a § 512 complaint, the DMCA has achieved some success in balancing its two principal goals: protection of the rights of copyright owners and limiting liability of online service providers. However, an examination of the application of the DMCA's notice and takedown process reveals negative externalities. Byproducts of the notice and takedown regime include an incentive for OSPs to remove content without careful scrutiny. This

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123. See Zarins, *supra* note 19, at 266 (“[An OSP’s] ability to monitor the ‘trillions of bits of data—representing millions of individual messages’ that travel through their systems every day is virtually impossible without considerably slowing down the hailed ‘Internet speed’ or burdening consumers with dramatically increased costs.”).

124. Of course, Google is not *immune* from being sued. See *Perfect 10 v. Google*, 416 F. Supp. 2d 828 (C.D. Cal. 2006).

125. See *White Paper*, *supra* note 118, at 114–24.

incentive increases the potential that flawed or disingenuous complaints will still result in the removal of content from the Internet.<sup>126</sup> Indeed, flawed complaints are common.<sup>127</sup> The potential for abuse of the notice and takedown system may not rise to the level of market failure requiring the introduction of direct government regulation. However, consumers, providers and the government need not and should not be content with the current system's externalities. Steps should still be taken to balance the incentives and minimize the potential for wrongful takedowns.

#### **A. INTERNATIONAL STANDARDIZATION OF INDUSTRY BEST PRACTICES**

One measure for minimizing the problems of notice and takedown without the need for administrative regulation is the development of international standards of industry best practices for online service providers. Since judicial determination of infringement is not part of the notice and takedown process, OSPs act as de facto judges and juries, ultimately deciding the validity of complaints. Since the DMCA does not provide guidelines for OSPs, creating a workable standard for evaluation of complaints would contribute to uniform results and reduce the appearance of arbitrariness. Such standards would also act as self-imposed measures against unwarranted takedowns. This could include following Google's lead by forwarding DMCA complaints to the Chillingeffects.org database, as well as a heightened level of scrutiny for the types of complaints that are likely to be questionable, such as complaints about content that is published for the purpose of criticism of the complaining party, or by business competitors.<sup>128</sup>

#### **B. DEVELOPMENT OF A PUBLIC RECORD**

In light of the potential for fraud, abuse and mistakes, the need for greater transparency in the notice and takedown process is evident. Despite the public interest in making (and keeping) information available on the Internet, there is no effective way for the public to monitor the takedown process. Complaining parties have had little reason to expect that their complaints would be subject to significant scrutiny. Indeed, the service providers that receive complaints are not adversaries to the complaining copyright owners, but merely intermediaries with an interest in preserving their limited liability.

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126. See Ahlert, *supra* note 52.

127. See Urban, *supra* note 29, at 674.

128. This is not to say that all complaints in these categories are ill-founded. On the contrary, most DMCA complaints about copyright infringement are genuine and may indeed warrant a takedown. However, the categories of complaints that are most likely to include false complaints deserve closer scrutiny.

Chillingeffects.org has taken the first steps toward the creation of a searchable database of § 512 takedown requests. However, since this database only contains complaints that have been voluntarily submitted, the scope of the data is limited. To give the public a greater opportunity to monitor removal of information from the Internet it is necessary to expand the pool of available data. One solution would be for the Copyright Act to provide a central mechanism for simultaneously sending and recording § 512 complaints. This would not require the government to act as an intermediary in the resolution of the complaints. It could merely require complaining parties to enter the pertinent information into an online form and submit it via the Internet to the intended recipient. In the process, all complaints could automatically be recorded in a public database.

This mechanism would allow for a complete public record of all § 512 takedown requests. Second, requiring submission of DMCA complaints through a public channel would add formality to the process. This could deter unfounded or fraudulent complaints by adding additional gravity to the § 512(c) requirement of swearing under penalty of perjury to the veracity of a complaint. Making these complaints available to the public would also check service providers' incentive to remove content too quickly by encouraging greater care in evaluating DMCA complaints. In addition, a complete public record could enhance copyright owners' ability to observe patterns of infringement on the Internet and adopt informed policies for the protection of their rights. Finally, a public record of takedown complaints could also act as a deterrent for infringers.

The Xenu story underscores the need for increased transparency in the takedown process to curb abuse. In a recent article about Google, a Norwegian newspaper retold the story of Xenu.net and its operator, Andreas Heldal-Lund:

“[T]he removal of Heldal-Lund’s site from Google did not pass unnoticed... American newspapers started writing about Scientology’s and Google’s censorship of the Norwegian website... ‘Google reopened almost all of my pages, says Heldal-Lund. At the same time the company also published all complaints from the Church of Scientology. My case was solved, but only because the world media helped. A small organization who gets no public attention will get run over. Google might have censored more web sites without us knowing. We need a watchdog to defend freedom of speech on the Internet,’ says Andreas Heldal-Lund.”<sup>129</sup>

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129. OC News 2005, Xenu.net, <http://www.xenu.net/news/oc-news2005.html> (Heldal-Lund’s English translation of excerpts from an article in the Norwegian paper, DAGENS NAERINGSLIV, Sept. 24, 2005). The original Norwegian text is available at <http://www.xenu.net/news/20050924-dn.jpg>.

Heldal-Lund's experience demonstrates the benefit of holding parties who seek swift justice under the DMCA accountable. Accountability is facilitated by moving the notice and takedown process out from behind the closed doors, and into public view with defined standards.

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