

excerpt: Free Speech Unmoored in Copyright's Safe Harbor: Abuses of the DMCA and the First Amendment,

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The Chill in Practice

The Digital Millennium Copyright Act's "notice and takedown" provision has spawned many notices of claimed copyright infringement and many takedowns of allegedly infringing material. Along with expeditious removals of infringing material have come speedy takedowns of non-infringing speech, as well as many scenarios that simply fall outside the core of copyright's policy justifications, and others too close to the edge between infringement and fair use to be decided accurately by the summary procedures of an ISP reviewing a 512(c) notice.

Sometimes, we see flat-out errors. The Recording Industry Association of America (RIAA) sent a DMCA notice to Penn State's Department of Astronomy and Astrophysics in May 2003, accusing the university of unlawfully distributing songs by the musician Usher, and nearly forcing the department's servers offline during exam period. As it turned out, RIAA had mistakenly identified the combination of the word "Usher" (identifying faculty member Peter Usher) in conjunction with an a cappella song performed by astronomers about gamma rays as an instance of infringement. In apologizing, RIAA noted that its "temporary employee" had made an error. RIAA admitted that it does not routinely require its "Internet copyright enforcers" to listen to the song that is allegedly infringing.¹ In the same period, RIAA admitted to several dozen additional errors in sending accusatory DMCA notices - all made in a single week. But RIAA has refused to provide additional details about these errors, professing concern that to do so would compromise the "privacy" of its employees and of the victims of its false accusations.²

Likewise, the Internet Archive's historic Prelinger collection of public domain films earned a takedown from Universal Studios over its films' numerical file names. Universal sent a DMCA notice to the Internet Archive in connection with films 19571.mpg and 20571a.mpg, its bot apparently mistaking public domain films on home economics for the copyrighted submarine movie "U-571."³ Because Internet Archive is a large enough collection to act as its own ISP, it was saved the trouble of explaining this to an upstream service provider who might not have grasped the distinction quickly enough to avoid a shutoff. Warner Brothers threatened a child whose Harry Potter book report wound up in a "shared" folder and was mistaken for the movie.⁴

The RIAA members' sound recordings and Universal and Warner's movies are creative works entitled to the full protection of copyright. But the copyright sword against piracy isn't supposed to be a blunderbuss against innocents who happen to be in

¹ See McCullagh, [RIAA Apologizes for Threatening Letter](#), *CNET News.com*, May 12, 2003.

² See McCullagh, *RIAA Admits It Sent Erroneous Letters*, *CNET News.com*, May 13, 2003.

³ See "Universal Studios Stumbles on Internet Archive's Public Domain Films," <http://www.chillingeffects.org/notice.cgi?NoticeID=595>.

⁴ See *Verizon Seeks Stay of RIAA Ruling*, *Internet News.com*, January 30, 2003, <http://www.internetnews.com/bus-news/article.php/1577111>.

the vicinity. On the face of a DMCA 512(c) notification, there may be little to distinguish innocent from infringing speech, and the legal structure (and market pressure) gives the ISP little incentive to investigate beyond the face of the notice.

Not all the takedowns are commercial or entertainment related. For those whose view of the First Amendment is shaped by Meikeljohn's emphasis on political discourse, numerous politically oriented takedowns raise concern. The tool, once available, quickly attracts censors of all stripes.

The New York State College Republicans, amid a contested battle for control of the College Republicans organization, sent a takedown notice against the weblog "Musings of a New York College Republican," alleging that it copied several photographs and "engaged in 'remote loading'" of several press releases. The senders of the demand requested identification of the anonymous blogger and threatened legal action if they did not receive it.⁵ The anonymous blogger had been critical of organizational infighting. Stated less pejoratively, "remote loading," is just hyperlinking to a page on a different server – something that web pages do every day with sites with which they agree or disagree – and highly unlikely to be found a copyright infringement. Indeed, it is an alternative to copying the content to which you want to make reference.

A graphic designer sent a DMCA complaint when an Arkansas Democrat's campaign logo was used by the conservative "Arkansas Family Coalition- ArkFam.com" weblog to illustrate a post discussing ethics complaints regarding campaign contributions accepted by the candidate.⁶ Although a political logo can be copyrighted like any other graphic design, commentary about the candidate who uses it for her identification makes a good argument for fair use.

Photographer Leif Skoogfors sent numerous DMCA complaints when the photograph he had taken at a 1970 Vietnam peace rally, showing Jane Fonda in the foreground and John Kerry behind, showed up on anti-Kerry sites around the web.⁷ There was plenty of room for debate whether the image showed anything at odds with what then-candidate Sen. Kerry was now saying about his Vietnam-era opposition to the war, or whether it was being misrepresented and blown out of proportion, but even photographer Skoogfors acknowledged, "Now the picture was the news."⁸ People on

⁵ See *NY College Republicans complain about critics*, <<http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=2174>>

⁶ See *Graphic designer complains of use of political logo*, <<http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=2455>>. The blog post at <<http://arkansasfamilycoalition.blogspot.com/2005/10/jimmie-lou-fisher-facing-ethics.html>> originally included the logo as a graphic.

⁷ See letters collected at <<http://www.chillingeffects.org/search.cgi?search=skoogfors>>; It appears that the Skoogfors photograph was generally presented in its original form, with occasional labels marking the figures. Another photograph, circulated at the same time, was doctored to place Kerry and Fonda on the same podium, Ken Light, Fonda, Kerry and Photo Fakery, Washington Post, Saturday, February 28, 2004; Page A21 <<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A13810-2004Feb27¬Found=true>>. At the same time, it does not appear that Skoogfors was trying to get his photograph withdrawn from debate entirely – it apparently continued to be available for licensing from Corbis [check; price?].

both sides of the political discussion “quoted” the photograph to support their arguments. Yet when they received DMCA takedowns, most ISPs removed the pictures.

Activists The Yes Men saw how far copyright can reach when they criticized Dow Chemical Co. by taking a copy of Dow’s website and creating one that apologized for chemical accidents at Bhopal. As designed, Dow then had to disavow the apology, which The Yes Men took as a renewed opportunity for criticism.

Dow responded as well with a DMCA takedown complaint to Verio, the owner of the netblock in which the dow-chemical.com site was hosted: “The Website displays numerous trademarks, images, texts and designs taken directly from Dow’s website located at dow.com. This material is protected by copyright law and may not be reproduced, in whole or in part, without the express written authorization of Dow.” The Yes Men’s hosting provider, New York ISP Thing.net, indicated it would not take down the material, but the target of Dow’s letter was one level up the chain. Verio, provider of connectivity and network space to The Thing, was unswayed by Thing.net’s determination to stand by its customers. In the ensuing scuffle, Verio cut connectivity to all of Thing.net’s customers for a day-long period.⁹

The Yes Men’s parody might or might not have crossed the line from parody to copyright infringement (as well as trademark infringement and false advertising), but nothing was alleged against the other digital artists who hosted sites with Thing.net. \

Further, if we don't presume that everyone in a political debate will act civilly – and one of the reasons for constitutional government and its procedures is precisely to restrain us when we act uncivilly – we should be wary of mechanisms that give one party a lever to shut down debate rather than participate in it. Especially in political debate, one often wants to quote from one's opponent.¹⁰ We can't say it's just the non-political action of copyright that stops this kind of conversation. Rather, if every such quotation brings threat of a facially plausible copyright takedown, the scope of political debate is narrowed. When some of those threatened claims materialize, it is narrowed further.

Other claims misinterpret the scope of copyright exclusivity. A DMCA claim was made against an individual who posted public court records that contained copyrighted material. The material was removed from the web until he filed a counter-notification.¹¹ The Church of Scientology was a pioneer in using the DMCA to ask

⁸ See Leif Skoogfors, *The Digital Journalist*, March 2004, <http://www.digitaljournalist.org/issue0403/dis_skoogfors.html>;

⁹ <<http://www.theyesmen.org/hijinks/dow/bhopal2002.shtml>>, Ed Foster, *Draconian DMCA*, InfoWorld, <<http://www.infoworld.com/articles/op/xml/02/06/03/020603opgripe.html>>. The site has been revived at <<http://dowethics.com/>>.

¹⁰ For an extensive example of political quotation see FreeRepublic.com, whose members asserted they needed to quote entire articles from the “liberal media” to make arguments about its bias. Newspapers including the Washington Post claimed copyright infringement and a mere intent to deprive the Post of advertising revenue. Probably, the motives were somewhere in between.

¹¹ See “Defendant Uses Section 512 Against Copyright Claimant,” <<http://www.chillingeffects.org/notice.cgi?NoticeID=348>>.

Google to stop including in its index websites critical of the Church, on the grounds that their criticism quoted from Scientology texts.¹²

Wal-Mart sent a Section 512(h) subpoena, along with a 512(c) notice, to a comparison-shopping website that allows customers to post prices of items sold in stores, claiming incorrectly that its prices were copyrighted. Wal-Mart sought the identity of the user who had anonymously posted information about an upcoming sale. Other retailers, including Kmart, Jo-Ann Stores, OfficeMax, Best Buy, and Staples, also served 512(c) notices on the website based on the same theory of copyrightable facts.¹³ While they might have had trade secret misappropriation claims against those who leaked circulars before holiday sales (and less plausibly, a claim that the websites should have known the information was misappropriated), asking a judge for a temporary restraining order would have required more time, money, and effort than simply sending DMCA notices to the ISPs.

Finally, there are some claims that use the DMCA as battering ram, seemingly assuming that where there's text, there's copyright infringement if you look hard enough.

Mir Internet Marketing is a "search engine optimization and placement" firm, soliciting potential clients to "get your website the top ranking and increased traffic it deserves." Their service, in short, is to get clients' websites to appear in response to searches on favored keywords, aiming to maximize the number of searchers who click through to the clients' sites. The tactics of search engine optimizers run through various shades from white to black-hat: optimizing the site structure for search engine crawlers, including common search terms frequently in text and links; linking to the site from other high-traffic pages (pages with real relevance or fake sites designed solely to generate "link rank"); "farming" links out through spam or on typo-sited; burying keywords in hidden text or "gateway pages." Mir and other optimizers have added another trick to their bags – DMCA takedowns against competitors. After all, removing competitors from search engine results boosts the visibility of your sites.

Mir has sent at least 48 separate takedown notices against hundreds of websites it claims infringe its copyrights, often based on a few duplicate phrases. Among pages on its website describing the DMCA takedown process, Mir says "We consider removing violators to be part of our job in helping our clients to improve their search engine ranking." Elsewhere, it points to its set of notices to Google as evidence of the strength of this tactic, "To see examples of our DMCA filings with Google, visit ChillingEffects.org, where Google posts copies of all notices it receives."¹⁴

¹² See the series beginning with "Google Asked to Delist Scientology Critics (#1)," <<http://www.chillingeffects.org/notice.cgi?NoticeID=232>>, and more of their takedown demands, which often mix copyright and trademark: <<http://www.chillingeffects.org/dmca512/keyword.cgi?KeywordID=10>> see also Loney and Hansen, [Google pulls Anti-Scientology Links](#), *CNET News.com*, March 21, 2002.

¹³ See <<http://www.fatwallet.com/forums/messageview.cfm?catid=18&threadid=129657>>; McCullagh, Wal-mart Backs Away from DMCA Claim, *CNET News.com*, Dec. 5, 2002.

¹⁴ See "Search Engine Marketing FAQ: What can I do about Internet copyright infringement or trademark infringement by another Webmaster? Can plagiarism by another website hurt my rankings?" <<http://www.seologic.com/faq/copyright.php>>, and "Search Engine Marketing FAQ: How do you send

A wide range of conduct may be targeted by these takedowns. When competitors choose to “borrow” substantial text someone else has written rather than writing their own, they infringe copyright. Yet in many other cases, similarities reflect not direct copying but the relatively limited number of ways to describe a generic product or service. That searches on a phrase turn up other uses does not mean that the matches have copied anything copyrightable, or anything outside the permissions of fair use. Much of the text on many advertising sites is minimally creative recitation of fact. Among the takedowns between competitors in the Chilling Effects archives are dozens targeting insubstantial similarities.¹⁵

Search engine optimizers’ chief concern is not to get the infringement remedied, but to have competitors penalized. Mir therefore recommends that copyright holders contact search engines and the site’s ISP before contacting the allegedly infringing site’s webmaster:

Do not contact the owner or Webmaster of the site that is illegally using your content. If you do that, you will just be tipping them off, and they are likely to quickly edit the copied material just enough so that the copyright violation becomes very hard to prove. It is best if you make your claims while the blatant copy is still online. If you want to punish the Webmaster for copying your content, and have their site removed from the search engines, or even from the Internet entirely, then you should take the following steps ...

File notices of alleged infringement that comply with the Digital Millennium Copyright Act (DMCA) with each search engine or directory where the infringing site is listed. The Digital Millennium Copyright Act empowers you to send a notice to any directory or search engine that lists the offending site and demand that they remove any links to the offending site. Yes, you can make Google, Yahoo!, and all the others take the site out of their search results.¹⁶

This practice appears to have sprung up in direct response to the DMCA, specifically driven by 512(d)’s instructions to providers of “information location tools.” In the rush for page-views, some of those looking for advantage will skirt the law. What they want is precisely what the DMCA-induced search engines offer – rapid unquestioning takedown, for at least a short period of time.

Digital Millennium Copyright Act (DMCA) notifications to the major search engines and directories asking that they remove copyright violators from their sites?”, <<http://www.seologic.com/faq/dmca-notifications.php>> both visited February 22, 2006.

¹⁵ See many of the takedowns between competitors listed at <<http://www.chillingeffects.org/dmca512/keyword.cgi?KeywordID=36>>. Because the letters themselves do not include the full text of the original or the alleged infringer, and the sites’ content may have changed since the letters were sent, after-the-fact comparison will not be foolproof. The same factors make it difficult for an ISP or search engine to evaluate the DMCA infringement claims.

¹⁶“Search Engine Marketing FAQ: What can I do about Internet copyright infringement or trademark infringement by another Webmaster? Can plagiarism by another website hurt my rankings?” <<http://www.seologic.com/faq/copyright.php>>

The availability of a new, relatively cheap way to knock out competitors attracts some on the edges, while the minimal penalties for misuse give them little pause. There is a mismatch between this activity and the principles of copyright.

Now it's true, there are mismatches all around. One maker of chef's jackets quotes one of its competitors prominently on its website: ¹⁷

Is Egyptian Cotton really better because it was grown in Egypt?
CrookedBrook, a company known for making exceptional chef jackets, states the following about Egyptian Cotton on their website:
“For years chefs have been led to believe that Egyptian cotton is the premium fiber for chef's jackets; nothing could be further from the truth...”

This sounds like comparative advertising and fair use quotation, yet if CrookedBrook has carefully optimized its text, then quoting that text will help Bragard's search ranking as well. Crooked Brook sent a DMCA notice to Google complaining of precisely that quotation. (On the other hand, copyright arguably wouldn't protect the “functional” aspect of text serving as a source of keyword optimization in the first place.)

Many of the cases ISPs are called in to adjudicate pursuant to DMCA notices are fact-specific disputes even courts would be unable to decide on summary judgment. For it is not just cases where the ownership of the original and its copying are both clear, major motion picture studios ferreting out the posting of first-run movies, for example, but also disputes where the mere similarity of the content is not enough to establish who has rights to it.

Google has been asked to remove links to web pages pursuant to DMCA in disputes between former partners over ownership of jointly created content,¹⁸ disputes between an independent contractor and its client over the ownership of a website the contractor designed but alleged he was not paid for.¹⁹ In some of these situations, one party has filed the DMCA complaint even while litigation was pending regarding the underlying rights.

I don't mean to claim that all of these represent clear-cut cases of non-infringement. The uses are not necessarily fair and non-infringing; the senders of takedown notices are not necessarily motivated by invidious purposes. My claim is rather that they are not clear-cut cases of infringement liability either. In equivocal cases, of which copyright has many, the summary process of takedown upon DMCA notice to a third party, deprives parties, and the public and the law, of an important opportunity to clarify.

¹⁷ See <http://www.bragardusa.com/learn_about_egyptian_cotton_chef_jackets.asp>; <<http://www.chillingeffects.org/notice.cgi?sID=1359>>

¹⁸ See, e.g., “Golden Gate Expeditions Complaint to Web Host,” <<http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=572>>, Feb. 20, 2003,

¹⁹ See, e.g., “Azalea Web Design Company Asks Google to Delist Client,” May 2, 2004, <<http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=1256>>

Limited Warming?

In July 2003, an archive of email messages leaked from Diebold, Inc., manufacturer of electronic voting machine systems. These archives, communications among Diebold employees and contractors, included messages describing flaws, sham test messages, and use of uncertified code in electronic voting machines deployed around the country. In October, wanting to share the evidence with others – and to get help reviewing the thousands of messages in the archives for more examples – journalists and activists posted the archives on websites and invited others to search and mirror the collection. Just as quickly as mirror sites and search tools were built, Diebold responded with takedown notices by the dozens, alleging that the postings, and even sites linking to the postings, violated Diebold copyrights. ISPs including colleges and universities pulled the web pages. Thus shortly before 2003 elections, most sites were silencing discussions of voting security.

The creativity in these emails was more in their ways of fudging demonstrations and obtaining certifications than in their expression.²⁰ If anything, the technical details of machine function and malfunction might be a subject for trade secret, rather than copyright. But because “the DMCA provides the rapid response, the rapid remedies that Congress had in mind,” and a route through ISPs and not individuals, Diebold chose to assert copyright protection rather than trade secret.²¹

Two Swarthmore College students had their website disrupted just as they were planning a symposium on electronic voting and its security. Their college, hosting the student group’s site, chose to follow the DMCA’s takedown procedure when it received notice from Diebold, notwithstanding letters from the students’ counsel outlining their fair use defenses.²² Online Policy Group, a non-profit ISP resisted the takedown demand aimed at a co-located IndyMedia website that linked to the Diebold archive – only to find its upstream hosting provider threatened with litigation for hosting the intransigent OPG.²³

At this point, OPG and the Swarthmore students and their pro bono counsel filed suit for DMCA misuse, saying Diebold’s takedown notices “knowingly materially

²⁰ See Email archives quoted at “WhyWar? Targeting Diebold with Electronic Civil Disobedience,” <<http://why-war.com/features/2003/10/diebold.html>>:

For a demonstration I suggest you fake it. Program them both so they look the same, and then just do the upload fro the AV. That is what we did in the last AT/AV demo.

...

I have become increasingly concerned about the apparent lack of concern over the practice of writing contracts to provide products and services which do not exist and then attempting to build these items on an unreasonable timetable with no written plan, little to no time for testing, and minimal resources. It also seems to be an accepted practice to exaggerate our progress and functionality to our customers and ourselves then make excuses at delivery time when these products and services do not meet expectations.

²¹ *Id.* at 1204n.12, citing Law & Motion Hearing, November 17, 2003, p. 30:6-8.

²² See *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195, 1198 (N.D. Cal. 2004); Carissimi Declaration, Nov. 14, 2003, available at <http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/reply_decl_carissimi.pdf>

²³ See *Online Policy Group v. Diebold*, 337 F. Supp. 2d at 1198.

misrepresented” copyright infringement in violation of § 512(f).²⁴ After suit was filed, Diebold attempted to moot the lawsuit by withdrawing its threats, perhaps because it recognized its error and that litigation would bring more attention to the archives and their contents.

The district court gave summary judgment to the plaintiffs, finding that “[t]he email archive was posted or hyperlinked to for the purpose of informing the public about the problems associated with Diebold’s electronic voting machines,” making at least a portion of the posting fair use, not infringement as alleged.

No reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold’s voting machines were protected by copyright, and there is no genuine issue of fact that Diebold knew—and indeed that it specifically intended—that its letters to OPG and Swarthmore would result in prevention of publication of that content. The misrepresentations were material in that they resulted in removal of the content from websites and the initiation of the present lawsuit. The fact that Diebold never actually brought suit against any alleged infringer suggests strongly that Diebold sought to use the DMCA’s safe harbor provisions—which were designed to protect ISPs, not copyright holders—as a sword to suppress publication of embarrassing content rather than as a shield to protect its intellectual property.²⁵

In the wake of this ruling, Diebold settled with plaintiffs for \$125,000.

In the meantime, however, the DMCA had made a copyright claim too weak to withstand summary judgment into an instrument of widespread takedown. Diebold’s claims and ISPs’ prompt resort to the safe harbor removed this noninfringing contribution to political debate from most places on the Net. Even those who filed counter-notifications had their speech downed during critical pre-election days. For those without counsel, this first step, takedown, would likely also be the last.

²⁴ See Complaint, <http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/complaint.php>. The author was a member of the Electronic Frontier Foundation legal team representing OPG. Stanford’s Center for Internet & Society represented the Swarthmore students.

²⁵ *Id.* at 1204-05.