

**Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

**In the Matter of
SECTION 512 STUDY**

Docket No. 2015-7

Comments of Automattic Inc.

Automattic Inc. appreciates this opportunity to offer comments in response to the Copyright Office’s Notice of Inquiry regarding the Section 512 Study, 80 Fed. Reg. 81862.

Automattic is a small company that has a big impact on the Internet. We have only 442 employees, of whom six focus on DMCA and copyright issues as part of their jobs. But our impact is large: Automattic hosts more than 80 million websites, attracting approximately 15.8 billion page views each month. Those sites range from small noncommercial blogs hosted on Automattic’s WordPress.com service to websites for Time Magazine, CNN, and NBC Sports.

3. How have section 512’s limitations on liability for online service providers impacted the growth and development of online services?

Safe harbor from allegations of infringement arising out of materials posted by others is foundational to the Internet as we know it. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Internet democratizes access to speech by allowing every user to speak to—and be heard by—every other connected user:

Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Id. at 870 (citation omitted). That democratization would simply be impossible if all content had to be checked for copyright infringement before it was posted—which would be the ultimate result if there were no safe harbors. Indeed, we have seen in the area of trademark that a similar framework has been established by the courts, notably in *Tiffany Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010). The experience in trademark law shows that, to paraphrase Voltaire, if section 512 did not exist, it would be necessary to invent it.

5. Do the section 512 safe harbors strike the correct balance between copyright owners and online service providers?

At a high level, yes. The overall statutory scheme places the burdens in the right places: on the

copyright holder to specifically identify instances of infringing activity, on the service provider to remove the material if it feels it needs safe harbor from that particular copyright claim, and on the poster of the material to identify false or mistaken assertions of infringement.

8. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/ or receiving takedown notices?

Relative to the volume of postings, Automattic receives very few notices of claimed infringement. For example, in one recent month WordPress.com users created more than one million new websites, made 17 million blog posts, and uploaded more than 34 million individual media files. During that same month, we received 541 notices of claimed infringement. That's one notice for every 31,423 new blog posts.

We put a great deal of resources toward processing takedown notices because we take our responsibilities under the DMCA seriously. We aim to respond to all inbound takedown notices within 48 hours, exceeding the law's requirements. But a significant portion of the resources we put towards our DMCA program are aimed at combating the shortcomings of the notice and takedown system. For example, we spend significant effort reviewing and trying to weed out overbroad and abusive DMCA takedown notices, so that our users' speech isn't needlessly censored. This is a real cost to us, and diverts resources from more productive uses, like improving the products and services we offer our customers.

12. Does the notice-and-takedown process sufficiently protect against fraudulent, abusive or unfounded notices? If not, what should be done to address this concern?

The requirements of section 512(c)(3) do a reasonably good job of filtering out many unfounded notices. As discussed below with respect to Subject No. 30, our statistics show that more than 25% of notices fail to meet those requirements, and it is our belief that the failure comes not from overly burdensome requirements, but because in many cases people simply don't have a colorable claim that infringement is taking place. Like many service providers, Automattic provides an online form that guides a claimant in submitting a 512(c)(3)-complaint notification (<https://automattic.com/dmca-notice/>)—and *even so*, a quarter of the notices simply don't include the necessary information.

Thus, the specific requirements of section 512(c)(3) serve as the first filter—and an important, though incomplete, one—against fraudulent, abusive or unfounded notices.

However, even many notices that comply with the statute's requirements are fraudulent, abusive, or otherwise unfounded. One contributor to this problem is the mass and indiscriminate submission of notices by computer programs, apparently without human intervention or review. While we recognize that the use of automated tools may be necessary with respect to some types of infringement on some types of websites, personal blogs are not the proper targets for enforcement robots. Copyright holders have an obligation to consider fair use before sending a takedown notice, and robots simply cannot tell fair use from foul in any but the most obvious circumstances. This problem is compounded by the relative ineffectiveness of the counter notification and 512(f) processes, which serve as only a weak check on copyright robots run amok.

16. How effective is the counter-notification process for addressing false and mistaken assertions of infringement?

17. How efficient or burdensome is the counter-notification process for users and service providers? Is it a workable solution over the long run?

18. In what ways does the process work differently for individuals, small-scale entities, and/or large-scale entities that are sending and/or receiving counter notifications?

26. Is section 512(g)(2)(C), which requires a copyright owner to bring a federal lawsuit within ten business days to keep allegedly infringing content offline--and a counter-notifying party to defend any such lawsuit--a reasonable and effective provision? If not, how might it be improved?

The counter notification process is, in practice, not particularly effective in addressing false and mistaken assertions of infringement. As the Office has recognized in studying the issue copyright small claims, most infringements of copyright cause relatively small economic harm, to which full-scale federal-court litigation is not an economically rational response. The same is true of most fair uses and other lawful uses of copyrighted material to which copyright holders may object, especially on noncommercial blogs: regardless of the strength of the party's legal position, the use is not of a sufficient dollar value to make litigation rational.

Our statistics bear this out. As discussed below with respect to Subject No. 30, our statistics show that about 10% of the notices of claimed infringement we receive are otherwise valid but are clearly false or mistaken. But we receive many fewer counter notifications than that—only about one-half of one percent of the total number of notices we receive. We think this ratio shows that the low number of counter notifications is not the result of a correspondingly low number of false and mistaken assertions of infringement, but instead results from the concern that sending a counter notification is likely to result in costly litigation, even if that litigation would ultimately turn out to hold that no infringement had occurred.

28. Are the remedies for misrepresentation set forth in section 512(f) sufficient to deter and address fraudulent or abusive notices and counter notifications?

No. Automattic has direct experience dealing with fraudulent and abusive notices, and the remedies all too often prove illusory. Indeed, during 2015, Automattic found that approximately 1 in 10 notifications of claimed infringement it received contained material misrepresentations.

A. *Automattic Inc. et al. v. Chatwal*

Ivan Oransky and Adam Marcus are experienced science journalists who operate Retraction Watch (retractionwatch.com), a WordPress.com site that highlights and tracks situations where published scientific papers may not be everything they seem. One reader apparently disagreed with a critique published on Retraction Watch, so he copied portions of the Retraction Watch site, claimed the work as his own (by backdating his site to make it appear to be the original publisher) and sent a DMCA takedown notice against the true authors. Relying on the representations of copyright ownership in the DMCA notice, we processed the notice and disabled Retraction Watch's original content. Retraction Watch promptly provided a counter

notification, but their content stayed down for a period of 10 days: the time period mandated by the DMCA, even after the legitimate publisher submits a valid counter notification.

Automatic, along with Mr. Oransky and Mr. Marcus, brought suit under Section 512(f) against the party that submitted the notice, who claimed in his DMCA notice to be a person named “Narendra Chatwal” at the address “Plot No 15 & 16, Express Trade Tower, Archana Complex, Noida, Uttar Pradesh, India 201302.” We brought suit in the United States District Court for the Northern District of California, and attempted to serve “Narendra Chatwal” in accordance with the Hague Convention at the address provided on the notice. The Indian judiciary attempted to serve the papers at the address provided on the notice, but was unable to locate any such address. The telephone number provided on the notice was disconnected, and emails to the address provided on the notice bounced.

It appears to us that the contact information provided on the notice of claimed infringement was simply false. Automatic, Mr. Oransky, and Mr. Marcus were deprived of the opportunity to litigate our Section 512(f) claim as a result. “Narendra Chatwal”—or whoever sent the fraudulent notification of claimed infringement—will never have to answer for the harm he caused.

B. *Automatic et al. v. Steiner*

Oliver Hotham is a student journalist living in the UK. He publishes investigative articles on his WordPress.com blog (oliverhotham.wordpress.com), and, as part of his work on that blog, conducted an email interview with Nick Steiner, the press officer of a group calling itself “Straight Pride UK.” Straight Pride UK describes itself as “a small group of heterosexual individuals who joined together after seeing the rights of people who have opposing views to homosexuality trampled over and, quite frankly, oppressed.” Hotham posed a number of questions to Steiner, and Steiner responded with a document titled “Press Statement.” Hotham published a blog post containing the questions he had posed to Straight Pride UK, along with the portions of the Press Statement responsive to the questions he posed.

Steiner submitted a notice of claimed infringement to Automatic, requesting removal of the blog post and claiming, falsely, that the use was unauthorized and infringing. Automatic processed the notice and removed the blog post, as it had to in order to keep its safe harbor with respect to that post. Mr. Hotham, who at that time was a student unrepresented by counsel, was not comfortable consenting to be sued in the United States, and thus did not submit a counter notification. His blog post remains disabled today.

Automatic, along with Hotham, sued Steiner in the United States District Court for the Northern District of California for violating Section 512(f). Steiner was validly served pursuant to the Hague Convention, but did not appear and did not respond to the complaint. In a lengthy and carefully-reasoned opinion, the court held that the court had personal jurisdiction over Steiner; that Steiner had violated Section 512(f); and that Automatic and Hotham were entitled to damages for the time and resources they incurred in dealing with the improper notices, as well as attorneys’ fees incurred in bringing the action. Judgment was entered in the amount of \$25,084.

But by the time judgment was entered, Steiner had moved on. The address he had provided turned out to be that of a mailbox rental outfit—and after the lawsuit was served, he ceased

renting the mailbox, leaving no forwarding address. Private investigators were unable to locate Mr. Steiner, and the judgment cannot be collected. Steiner, like Chatwal, was able to evade the consequences of his actions by avoiding service of process, leaving Automattic and Hotham with no way to collect the damages awarded by the court.

C. Other Questionable Notices of Claimed Infringement

We have experienced many other instances of apparent misrepresentations in notices of claimed infringement. A small sampling:

- A medical transcription training service that used forged customer testimonials on their website submitted a takedown for screenshots of the fake testimonials in a blog post exposing the scam.
- A physician demanded removal of newspaper excerpts posted to a blog critical of the physician, by submitting a DMCA notice in which he falsely claimed to be a representative of the newspaper.
- A model involved in a contract dispute with a photographer submitted a series of DMCA notices seeking removal of images of the model for which the photographer was the rights holder.
- An international corporation submitted DMCA notices seeking removal of images of company documents posted by a whistleblower.
- A frequent submitter of DMCA notices submitted a DMCA notice seeking removal of a screenshot of an online discussion criticizing him for submitting overreaching DMCA notices.

Each of these cases caused harm to Automattic for which Automattic could sue under Section 512(f). But because the remedies available under that section are often illusory even in cases of clear misrepresentations, as in *Chatwal* and *Steiner*, they will go unremedied.

D. Possible Solutions

Abusive notices of claimed infringement are all too common, and there need to be real consequences for those who cause damage through material misrepresentations in their notices. Some potential policy solutions:

- Damages from abusive notices of claimed infringement can sometimes be difficult to quantify. Thus, in order to further the goals of compensation and deterrence, statutory damages for abusive notices of claimed infringement and abusive counter notifications could be added either to section 504 or to section 1203.
- Elsewhere in the legal system, parties requesting that action be taken on a claim are often required to post a bond before action is taken in reliance on their claims. Such a bond may be the only way to ensure that those who cause damage via misrepresentations are called to account for their misdeeds.

- Section 512 could be modified to preserve the safe harbor in cases where the service provider has an objectively reasonable good faith belief that the notice of claimed infringement contains misrepresentations, even if the material is later found by a court to be infringing. Alternately, 17 U.S.C. § 504(c)(2) could be modified to add the words “service provider (as defined in section 512(k))” after the word “library” in each instance in which it appears. Either of these changes would provide service providers with greater incentives to reject abusive notices of claimed infringement.

29. Please provide any statistical or economic reports or studies that demonstrate the effectiveness, ineffectiveness, and/or impact of section 512’s safe harbors.

Automattic publishes transparency reports documenting, among other things, the notices of claimed infringement (and purported notices of claimed infringement) that it receives. The transparency reports are available at <https://transparency.automattic.com/>, and the transparency reports related specifically to section 512 are available at <https://transparency.automattic.com/intellectual-property/>. In all, during 2014 and 2015:

- Automattic received 16,794 notices of claimed infringement.
- Content was removed in response to about 61% of those notices.
- About 29% of the purported notices of claimed infringement we received did not contain the elements of notification required by section 512(c)(3).
- About 10% of the notices of claimed infringement we received contained the elements of notification required by section 512(c)(3), but were directed at clear fair uses, clearly uncopyrightable content, or contained clear misrepresentations regarding copyright ownership. Because the contained clear material misrepresentations, Automattic declined to remove the content in response to these notices.
- We received 113 counter notifications in situations in which content was removed.

We would be happy to provide any further information the Office would find helpful in its work on the Study.

/s/ Paul Sieminski

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