

Copywrong: From Takedown to Staydown – A Copyright Reform in the Digital Age

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INTRODUCTION

Let's set the stage. It's 1998 – Titanic is setting records as the highest grossing film, Britney Spears is crashing onto the scene with her hit single “Baby One More Time,” Matt Damon and Ben Affleck are making waves in Hollywood winning an Oscar for “Good Will Hunting,” and Congress is hard at work creating the Digital Millennium Copyright Act (DMCA). This Act brought U.S. copyright law into the digital age, setting up the notice-and-takedown system and providing an avenue for limited liability for Online Service Providers (OSPs), arguably allowing the internet to blossom into the goliath it is today. However, since its inception neither the notice-and-takedown system nor the limited liability provisions, known as “safe harbor” provisions, have been amended, an issue which has current rightsholders advocating for change. In analyzing a U.S. District Court case out of Florida, *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, which raises questions as to what the modern approach should be when taking into account advances in technology and considering where the burden should be placed when it comes to monitoring copyright infringement, this paper calls for amendment to the Act by reforming the notice-and-takedown system into a “staydown” system, hinging safe harbor on implementation of reasonable efforts to prevent the reupload of infringing content.

The primary issue set forth in *Athos* is whether YouTube is liable under direct and secondary infringement theories for its failure to prevent the systematic reposting of the plaintiff's copyrighted movies to its platform.¹ Athos, the plaintiff argues that YouTube's advanced video detection software, in conjunction with the thousands of takedown notices the Athos tendered upon YouTube, gives rise to genuine issues of fact as to whether YouTube forfeited the DMCA's safe harbor protections.² In its decision, the Court found that Athos missed

¹ *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *3 (S.D. Fla., May 16, 2023).

² *Id.* at *3.

the mark in its claim and commented that the role of the court is not to dictate what Congress should do, but rather rule on what YouTube is statutorily required to do under the DMCA.³

Despite the court's finding, however, *Athos*'s construction of the DMCA begs the question of whether the Act should be amended to better respond to the issues that face copyright holders in today's digital age. When the DMCA was passed in 1998, YouTube and similar user-generated, content-sharing websites did not exist at the scale available today. However, in the nearly 30 years that have passed since the Act's passing, these websites have become a mainstay of the internet, with YouTube alone consisting of 2.1 billion worldwide users.⁴

In this paper I will focus on two main policy considerations for amending the DMCA and reforming the notice-and-takedown and safe harbor provisions. First, where does equity dictate that the burden of copyright infringement monitoring should reside? In *Athos*, the rightsholder had to play a game of whack-a-mole and issue DMCA takedown notices for each and every instance of infringement, despite the fact that many of the same clips were repeatedly infringed.⁵ This paper's aim is to weigh whether incidents such as those in *Athos* call for a need to shift the burden from rightsholders onto OSPs, such as Google and Meta, who have greater technological tools and resources to monitor copyright infringement. Second, under a reasonableness standard and given the latest advances in technology, is it equitable to shift the burden onto YouTube and similarly situated sites and require them to abide by a notice-and-staydown system to keep safe harbor? Later sections of this paper will discuss how several OSPs already implement automatic filtering systems to monitor copyright infringement and will posit that the use of these tools has made it such that the burden shift is not as great as critics make it out to be.

³ *Id.* at *27–28.

⁴ *YouTube - Statistics & Facts*, STATISTA, <https://www.statista.com/topics/2019/youtube/> (last visited May 9, 2025).

⁵ *See Athos*, 2023 U.S. Dist. LEXIS 85462, at *8.

In Part I of this paper, I will discuss the history behind the DMCA and the context in which the Act came to exist, as well as the concerns of the stakeholders involved at the time of its inception. From there I will discuss in further detail Section 512, which sets forth the notice-and-takedown system and the criteria OSPs must meet to gain safe harbor. In Part II of this paper I will discuss in greater detail the events that played out in *Athos* and discuss how the facts of this case bring up considerations for amendment of the DMCA. In this section I will also draw comparisons between the DMCA and the European Union's counterpart, the European Copyright Directive's Digital Single Market (DSM). Specifically, I will delve into the EU's passing of Article 17 of the DSM and explain what this provision means for online service providers. Additionally, I will draw parallels between the American approach and European approach and explain the climate which led EU leaders to amend its copyright system from one of "takedown" to "staydown." In Part III I will discuss how Section 512 of the DMCA has never been amended since its passing in 1998, and I will make a proposal that this section of the Act be amended to implement a staydown system and recalibrate the judicial interpretations of red-flag knowledge to better effectuate Congress original goals of the DMCA. I will explain how adopting a notice-and-staydown regime will help to balance the scale in favor of copyright holders, who under the current system are responsible for taking on the onerous task of monitoring their copyrights and issuing takedown notices for each case of infringement. Further, I will address the counterarguments to a notice-and-staydown system and the considerations that must be accounted for when adopting a staydown regime.

PART I: THE INTERNET’S INFANCY AND A LONG-STANDING MARRIAGE TO SAFE HARBOR AND NOTICE-AND-TAKEDOWN

Before delving into how the DMCA came to be, I first want to briefly discuss the different theories behind why works are protected by copyright. The full details of what a copyright is and is not are outside the scope of this paper; however, as a baseline, a copyright is a type of intellectual property that protects original works of authorship that are “in a sufficiently permanent medium such that the work can be perceived, reproduced, and communicated for more than a short period of time.”⁶ The protection of these works serves to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁷ The goal behind granting this right of exclusivity to copyright holders is to incentivize the creation of new works and make those works available to consumers in the marketplace.⁸

The copyright system in the United States was established over 200 years ago and since then the development of new technologies, such as personal cameras, computers, and user-generate, content-sharing platforms has made creating and distributing new works substantially easier. However, this advance in technology has also made it easier than ever to copy and reproduce copyrighted works without the rightsholder’s permission, thereby infringing on these creative works;⁹ an issue that caught Congress’ attention in the late 1990s.

⁶ *What Is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> (last visited May 9, 2025).

⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸ *Copyright Basics*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/copyright-policy/copyright-basics> (last visited May 9, 2025); *see also* *Twentieth Century Music Group v. Aiken*, 422 U.S. 151, 156 (1976) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good”).

⁹ *Definitions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-definitions.html> (last visited May 9, 2025) (defining copyright infringement as when a copyrighted work is “reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner.”).

a) How the DMCA came to be

With the rise of the digital age a growing concern over how to address copyright law arose. Online service providers were concerned with regard to liability and rightsholders were worried about the growing proliferation of piracy across the internet.¹⁰ Out of this concern the DMCA was born, amending U.S. copyright law to address the inherent relationship between copyrights and the internet.¹¹ A primary update the DMCA brought about was the establishment of the notice-and-takedown system, which allows copyright holders to report instances of infringement to an OSP to be taken down.¹² The Act also created safe harbor provisions for OSPs, which shield them from liability for infringement so long as they meet certain requirements.¹³ These provisions were born out of a desire to solve the question of what happens when a user uploads infringing content on an OSPs network or website without the OSP's knowledge that the material is infringement.¹⁴

Prior to the DMCA, in the early- to mid-1990s, several courts concluded that OSPs could be liable for infringing activity uploaded by their users.¹⁵ For example, in *Playboy Enterprises, Inc. v. Frena*, the court held that a lack of knowledge of infringement did not matter as “[i]ntent to infringe is not needed to find copyright infringement.”¹⁶ Further, the initial proposals for copyright reform in the digital age called for less protections provided to OSPs.¹⁷ In 1993 the Clinton Administration established the Information Infrastructure Task Force (“IITF”), which

¹⁰ See U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 1, 13–15 (May 2020), available at <https://www.copyright.gov/policy/section512/section-512-full-report.pdf> [hereinafter SECTION 512 REPORT].

¹¹ *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/dmca/> (last visited May 9, 2025).

¹² *Id.*

¹³ *Id.*

¹⁴ Stephen Wolfson, *The Digital Millennium Copyright Act Enters a New Era*, U. PA. LIBRARIES (Dec. 9, 2024), <https://www.library.upenn.edu/news/dmca-update>.

¹⁵ SECTION 512 REPORT, *supra* note 10, at 15.

¹⁶ *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993).

¹⁷ See SECTION 512 REPORT, *supra* note 10, at 16–17.

issued a report in 1995 examining existing copyright law and recommending a number of changes.¹⁸ In this report, commonly referred to as the “White Paper,” the IITF concluded that the best approach was to hold service providers liable for infringing activity facilitated by its services.¹⁹ The idea was that the market could regulate the behavior by creating incentives for OSPs to make their users aware of copyright law and implement preventative measures against potential infringement.²⁰ Though this approach was never implemented by Congress, in large part due to the inability of the stakeholders involved to reach an agreement over the scope of the liability,²¹ it demonstrates that the current “safe harbor” regime was not the only approach suggested or advocated for when contemplating copyright reform in the digital millennium.

Ultimately the stakeholders involved agreed that leaving the question of liability to the courts could result in uncertainty and protracted litigation and agreed that the liability issue was best left to the legislature.²² An agreement that led Congress to the decision that the notice-and-takedown system was the best solution for the digital age at the turn of the millennium.

b) Safe Harbors and Notice-and-Takedown

The development of the notice-and-takedown system was designed to give rightsholders an “expeditious mechanism to address online infringement.”²³ Congress’s goal in creating this regime was to incentivize OSPs and copyright owners to “address online infringement cooperatively and efficiently” in a manner that avoided litigation and encouraged “further

¹⁸ *Id.* at 16.

¹⁹ INFO. INFRASTRUCTURE TASK FORCE, *Intellectual Property And The National Information Infrastructure: The Report Of The Working Group On Intellectual Property Rights* (1995), at 117 <https://files.eric.ed.gov/fulltext/ED387135.pdf> [hereinafter *White Paper*].

²⁰ *Id.* at 124.

²¹ SECTION 512 REPORT, *supra* note 10, at 17.

²² *Id.* at 18.

²³ Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 503 (2018).

development of the internet.”²⁴ In conjunction with this notice-and-takedown system, Congress contemplated the issue of liability as well, setting up certain criteria that OSPs had to meet in order to gain safe harbor and be shielded from liability and the risk of drawn out litigation.

Under Section 512(c) a “service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright by reason of the storage . . . of material that resides on a system or network controlled or operated by or for the service provider” so long as they meet certain criteria.²⁵ In order to qualify for safe harbor, and thus not be liable for infringement, the Act requires that the OSP: (1) does not have “actual knowledge” of the infringing material; (2) is not aware of circumstances which would make it apparent the material is infringing, which is commonly referred to as “red-flag knowledge,” and; (3) upon obtaining knowledge the OSP acts “expeditiously to remove, or disable access to, the material.”²⁶ It’s important to note that these safe harbor provisions do not require that OSPs actively monitor their systems for copyright infringement, rather only to remove material once reported and deemed infringement.²⁷ However, the systems do require that the OSP must adopt and implement a “repeat infringer” policy, which allows for the termination of accounts on the OSP’s network that are reported for multiple instances of infringement.²⁸

In creating these provisions, Congress hoped to balance “the interest of content owners, on-line and other service providers, and information users in a way that [fostered] the continued development of electronic commerce and the growth of the Internet.”²⁹ The safe harbor

²⁴ SECTION 512 REPORT, *supra* note 10, at 9; *see also* S. REP. NO. 105–190, at 20 (1998); H.R. REP. NO. 105–551, pt. 2 at 49–50 (1998).

²⁵ *See* 17 U.S.C. § 512(c).

²⁶ *Id.* § 512(c)(A)(i)–(iii).

²⁷ Kevin J. Hickey, *Digital Millennium Copyright Act (DMCA) Safe Harbor Provisions for Online Service Providers: A Legal Overview*, CONGRESS.GOV (Mar. 30, 2020), <https://www.congress.gov/crs-product/IF11478>.

²⁸ *Viacom Int’l Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012) (quoting 17 U.S.C. § 512(i)(1)(A)).

²⁹ H.R. REP. NO. 105–551, pt. 2 at 21 (1998).

provisions were created with two goals in mind: “(1) to enable copyright owners to effectively address the infringement of their works online and (2) to facilitate the development of internet-based platforms by clarifying the obligations and limiting the liability of OSPs.”³⁰ However, there is recognition by the U.S. Copyright Office that the current system is unbalanced and does not work consistently for all stakeholders.³¹ Rightsholders report that the rise in online piracy has contributed a significant decrease in revenue, and that does not include the added expense of financial resources when it comes to adequately monitoring these sites for infringing content.³² This monitoring expense is something that large rightsholders such as Universal Music Group are able to devote adequate finances to; however, smaller rightsholders, are often without the resources to fully address infringing content.³³ Moreover, some scholars argue that due to the DMCA safe harbors OSPs have no incentive to consider whether material posted by their users is infringement or not.³⁴ This lack of incentive creates a system where infringers can merely reupload already removed content, knowing that a rightsholder has to file a separate takedown notice for that reupload. Without an adequate incentive or statutory scheme hinging an OSPs safe harbor on implementing a notice-and-staydown system, rightsholders remain on the back foot.

Though the DMCA was born out of an effort to adapt copyright law to the internet era, this goal has not been continuously implemented as the Act has failed to be amended to meet the

³⁰ SECTION 512 REPORT, *supra* note 10, at 8; *see also* S. REP. NO. 105–190, at 40 (1998); H.R. REP. NO.105–551, pt. 2, at 49–50 (1998).

³¹ *See* SECTION 512 REPORT, *supra* note 10, at 73 (noting that despite Congress’ intentions there is a “stark division of opinion between rightsholders and OSPs over how effectively Section 512 balances their respective rights in practice”).

³² *See Id.* at 78–79 (noting that rightsholders such as Universal Music Group have to devote significant resources to protecting existing content, resources that could be contributed to investment of new content creation); *see also* Athos Overseas Ltd. Corp. v. YouTube, Inc., 2023 U.S. Dist. LEXIS 85462, at *8 (S.D. Fla., May 16, 2023).

³³ *See* Association of American Publishers, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 7 (Apr. 1, 2016) (discussing how many rightsholders in the U.S. are small businesses or non-profits for whom the costs of infringement monitoring services are too expensive); *see also* Athos, 2023 U.S. Dist. LEXIS 85462, at *8; SECTION 512 REPORT, *supra* note 10, at 79–80.

³⁴ *See* Sag, *supra* note 23, at 503.

new needs of digital technology. The U.S. Copyright Office recognized this very issue in its 2020 Report on Section 512 of Title 17, stating that “changes in technology and business models... continue[] to grow in ways that could not have been imagined in 1998 when the [DMCA] was passed.”³⁵ In order to keep apprised of the advances of technology the Act must be flexible and willing to adapt with the ever changing digital world, a goal this report strived to achieve, with its sole purpose being to “assist Congress [in] evaluating ways to update the Copyright Act for the 21st century.”³⁶

PART II: ATHOS, YOUTUBE, AND THE LIMITS OF THE DMCA

Not only has the DMCA failed to keep up with technology, but it has failed to adequately address the needs of various rightsholders, leaving many small rightsholders without sufficient recourse to protect their intellectual property and rather forcing them to expend their resources and time to play whack-a-mole, smacking down each instance of infringement as it pops up.³⁷ This reality has caused some rightsholders to turn to the courts in hopes of finding a favorable judgment and a rebalancing of the system to put rightsholders and OSPs on more equal footing. One such example of this is *Athos Overseas Ltd. Corp v. YouTube, Inc.*, a case exemplifying the imbalance of the system as it stands and one which illustrates how small- and medium-sized rightsholders are harmed unproportionately when compared to large rightsholders,

³⁵ Maria Strong, ACKNOWLEDGEMENTS OF SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFF., (May 21, 2020).

³⁶ *Id.*

³⁷ Devlin Hartline, *Endless Whack-A-Mole: Why Notice-and-Staydown Just Makes Sense*, GEO. MASON CENTER FOR INTELLECTUAL PROPERTY X INNOVATION POLICY BLOG, (Jan. 14, 2016) <https://cip2.gmu.edu/2016/01/14/endless-whack-a-mole-why-notice-and-staydown-just-makes-sense/>; see also Maria Schneider, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 5 (Apr. 1, 2016) (commenting that the takedown regime is just an endless game of whack-a-mole).

who are able to contract with large OSPs to protect their interests through advanced content monitoring and filtering technology.³⁸

a) Examining Athos: A Snapshot of Current Challenges Under the DMCA

(1) What's going on in Athos?

The plaintiff, Athos, is a Panamanian company owned by Carlos Vasallo, a media executive and producer who owns rights to hundreds of classic Mexican films.³⁹ Athos alleged that thousands of clips containing unauthorized segments of these films were uploaded to YouTube by third-party users.⁴⁰ This repeated infringement resulted in the company tendering thousands of takedown notices to YouTube between 2014 and 2020.⁴¹ At the center of the dispute was YouTube's Content ID system, an advanced video fingerprinting and rights management tool available only to rights holders who agree to YouTube's Content Hosting Services Agreement (CHSA).⁴² Athos was offered use of this tool in January 2015, but ultimately declined to use it as Vasallo felt the release of claims provision was unfair, finding the terms to be "those of a monopoly, and abusive."⁴³ As a result, Athos was limited to using the standard DMCA takedown procedures, which requires rightsholders to identify each infringing clip and report those clips one-by-one to YouTube as they pop up.⁴⁴

In its argument, Athos asserted that YouTube's failure to proactively prevent future uploads of these same works, particularly through the use of its proprietary content detection

³⁸ See *YouTube Copyright Transparency Report: Everyone Has Access (Jul. 2023–Dec. 2023)*, GOOGLE, <https://transparencyreport.google.com/youtube-copyright/everyone-has-access?hl=en> (last visited May 9, 2025) (explaining that content ID is offered only to users operating at "an entirely different scale and sophistication," making up only 7,791 users between July 2023 to December 2023).

³⁹ *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *1 (S.D. Fla., May 16, 2023).

⁴⁰ *Id.* at *8 (noting that on many instances the clips uploaded were the same works that had been previously uploaded).

⁴¹ *Id.* at *7–8.

⁴² *Id.*

⁴³ *Id.* at *8 n.5.

⁴⁴ *Id.* at *8–9.

technologies, constituted a forfeiture of DMCA safe harbor protections and amounted to direct and secondary copyright infringement.⁴⁵ The crux of this argument was that through these copyright monitoring systems, and in conjunction with the DMCA takedown notices tendered by Athos, knowledge had been imputed on YouTube of each and every single clip that infringed on a noticed film.⁴⁶ Further, Athos argued that YouTube had breached its DMCA removal duties by only removing the specific identified infringing clip, rather than removing those clips and future reuploads.⁴⁷ The court found these arguments unavailing, noting that they conflicted with the plain language of the DMCA.⁴⁸ The court reaffirmed that under 17 U.S.C. § 512(c), online service providers like YouTube are only required to act expeditiously to remove content upon receiving a proper takedown notice that identifies specific infringing material. The court emphasized that the DMCA’s safe harbor provisions do not impose an obligation to monitor user content or to affirmatively seek out infringements beyond those specifically identified in a notice.

There is certainly no doubt that under the current construction of the DMCA Athos’s arguments do clash with the plain language; however, its arguments bring to light the issues that rightsholders face under the current regime and raise questions over whether it need be amended. This case highlights many of the longstanding policy frustrations that copyright holders have with the current DMCA notice-and-takedown framework. Chief among these concerns is “whack-a-mole” problem that Athos faced, where infringing content, once removed, quickly reappears in slightly altered or reposted forms, forcing rights holders into a perpetual cycle of

⁴⁵ *Id.* at *15–16.

⁴⁶ *Id.*

⁴⁷ *Id.* at *16.

⁴⁸ *Id.* at *16–17 (noting that a conception of knowledge that imputes specific awareness on an OSP based on its copyright monitoring tools clashes head-on with the DMCA’s non-monitoring provisions).

enforcement. In this case, Athos submitted thousands of takedown notices over multiple years, only to see new infringing clips continuously uploaded.⁴⁹ Yet the court reaffirmed that platforms like YouTube are not legally obligated to prevent future uploads of the same infringing material, so long as they respond to individual takedown requests. This reactive approach, combined with the volume of user-generated content and the speed at which it spreads online, places an enormous burden on rightsholders, particularly smaller entities that lack the resources to monitor infringement at scale. As a result, critics argue that the system disproportionately favors large tech platforms and undermines the practical enforceability of copyright online. While the court in *Athos* emphasized its duty to apply the law as written, the case has amplified calls for legislative reform, including proposals to replace “notice-and-takedown” with a more robust “notice-and-staydown” regime that would better reflect modern technological capabilities and reduce the burden on creators.

(2) Analyzing the Policy Implications in Athos

The Court’s decision raises questions for debate over whether the existing DMCA framework remains the best fit. The court noted that, “[c]harging YouTube with the affirmative obligation of going beyond the specific URLs identified in Plaintiff’s DMCA takedown requests would in effect shift from the copyright owner to the ISP the burdens of policing and identifying infringement on its systems.”⁵⁰ This is a concept which Congress explicitly avoided in its establishment of the notice-and-takedown system, but it’s not a new concept; the initial discussions over copyright law in the digital age advocated for placing the burden on OSPs instead of rightsholders.⁵¹ Even without a statutory requirement in place, some OSPs have taken

⁴⁹ See *Id.* at 7–8.

⁵⁰ *Id.* at *27; see also *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (noting that the DMCA notification procedures intentionally placed the burden of notice on the owners of the copyright).

⁵¹ See *White Paper*, *supra* note 19, at 117.

up the charge themselves to monitor infringement. For example, YouTube already has in place measures to police and identify infringement on its systems; this can be seen clearly in their Content ID System.⁵² This system works on an “opt-in” basis and is only accessible to a particular group of copyright holders.⁵³ In short, the system is set up “for enterprise partners (such as movie studios, record labels, and collecting societies) and service providers who operate at an entirely different scale.”⁵⁴ From July 2023 to December 2023, only 7,791 users were eligible to access the Content ID system as compared to the billions of users who are eligible to report infringement through its most basic copyright tool, Webform.⁵⁵ Even where users are given access to Content ID, they must still sign a release of claims provision, the very provision Athos was unwilling to sign. This creates a system where many rightsholders are left to fend for themselves and rely on less robust copyright management tools while still facing the risk of rampant infringement, as seen in *Athos*.

Outside of the Content ID system, YouTube offers users the ability to monitor copyrights through Webform and the Copyright Match Tool, both free tools to its users. Webform is the basic system that is available to all users with a YouTube account; in this system users can submit a takedown request but have no other tools at their disposal.⁵⁶ Under the Copyright Match Tool, however, users get access to the main feature of the Content ID system, a tool that “detects and surfaces potential matches of videos removed by the rightsholder.”⁵⁷ The goal of this tool is to find “full or nearly-full matches,” thus if a user uploads only a small portion of a clip then this

⁵² See *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited May 9, 2025).

⁵³ See *Qualify for Content ID*, YOUTUBE HELP, <https://support.google.com/youtube/answer/1311402> (last visited May 9, 2025).

⁵⁴ GOOGLE, *YouTube Transparency Report*, *supra* note 38.

⁵⁵ *Id.*

⁵⁶ *YouTube Copyright Transparency Report: Introduction (Jul. 2023–Dec. 2023)*, GOOGLE, <https://transparencyreport.google.com/youtube-copyright/intro?hl=en> (last visited May 9, 2025).

⁵⁷ GOOGLE, *YouTube Transparency Report*, *supra* note 38.

tool might not locate that reupload.⁵⁸ Further, like the Content ID System, the Copyright Match Tool is not available to everyone, only those who are part of the YouTube Partnership Program or those who have made successful takedown requests through the Webform tool.⁵⁹ While these tools are certainly better than none, they still require that an individual have a YouTube account. This again leaves rightsholders who don't have an account, such as Athos, vulnerable and unable to protect their rights most effectively.

The primary difference between managing infringement through the webform and the more advanced tools is that the Content ID and Copyright Match Tool automatically scan and flag potential infringement whereas Webform requires users to monitor content on their own and issue a takedown request. The difference in efficiency is clear; the Content ID System made up 99.3% of the unique claims and copyright removal requests made between July 2023 and December 2023, and the Copyright Match Tool accounted for 700,000 more removal requests than that of Webform.⁶⁰ This highlights just how crucial automated tools have become in handling large-scale copyright enforcement efforts.

Some critics of imposing stricter liability on OSPs point out that it might be redundant or unnecessary to statutorily require content management systems for safe harbor since many OSPs already implement monitoring systems anyway. To this point, however, not all OSPs are as proactive as YouTube in implementing these systems, but by raising the bar for safe harbor, Congress would create greater incentives for smaller or less proactive OSPs who, under the current regime, do not feel a need to implement these systems.⁶¹ With that said, some scholars

⁵⁸ *Learn About the Copyright Match Tool*, YOUTUBE HELP, <https://support.google.com/youtube/answer/15269184> (last visited May 9, 2025).

⁵⁹ *See Id.*

⁶⁰ GOOGLE, *YouTube Transparency Report*, *supra* note 38.

⁶¹ *See* Donald P. Harris, *Time to Reboot?: DMCA 2.0*, 47 ARIZ. ST. L. J. 801, 853 (2015).

argue that under a notice-and-staydown system incentives might actually shrink, since under a takedown system both OSPs and rightsholders are in the market for these systems, whereas under a staydown regime the market would only be for OSPs as rightsholders would no longer need to monitor as much.⁶² However, this theory fails to consider the fact that under a staydown system rightsholders would still need to monitor for initial infringement and issue a takedown notice to the OSP. Additionally, this “market theory” under a notice-and-takedown regime fundamentally places the burden on rightsholders, creating market incentives for third-parties, who are not hosting user-uploaded content, and thus not at risk of liability, to develop content monitoring systems to then sell access to rightsholders to protect their rights, further increasing the monetary burden on them. By creating a staydown regime, less proactive OSPs who host user-generated content would be forced to kick into gear and protect against the reupload of users’ copyrights to gain safe harbor. Not only that, but a staydown regime would help rightsholders such as Athos recover when an OSP fails to implement systems reasonably able to prevent reuploads of infringed material and monitor for future infringement. This is an issue that has not gone unnoticed in all corners of the world, however. Recently the European Union analyzed its digital copyright system and took note of the imbalance of the takedown system, passing new legislation that requires OSPs make “best efforts” to prevent the reupload of infringing content.⁶³

b) The European Approach

For many years the U.S. led the charge in setting the global standard for online copyright law with the DMCA. In the years following the Act’s passing many countries followed suit in

⁶² See Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which is Superior? And Why?*, 42 COLUM. J. L. & ARTS 53, 76 (2018).

⁶³ See Robert Bateman, *Complying with Article 17 of the EU Copyright Directive*, TERMSFEED, [HTTPS://WWW.TERMSFEED.COM/BLOG/EU-COPYRIGHT-DIRECTIVE-ARTICLE-17/](https://www.termsfeed.com/blog/eu-copyright-directive-article-17/) (Feb. 16, 2025).

establishing similar legislation and adopting notice-and-takedown systems into their own countries' statutes. However, in the years since the United States and EU have differed in their approaches to regulating the internet. In recent years, the EU approach has been much more focused on "strict digital oversight, strong privacy protections, and policies designed to ensure fair competition," whereas the U.S. has taken a more pro-business approach.⁶⁴ These variances in approaches have been reflected in their respective digital copyright directives as well.

(1) What is EU Article 17?

In 2019 the European Union passed Directive 2019/790, which reformed the Directive on Copyright in the Digital Single Market. The most notable change stemming from this directive was the passing of Article 17, which prohibits content-sharing platforms from displaying unlicensed copyright content on behalf of their users.⁶⁵ Under Article 17, in order for an OSP to gain safe harbor it must demonstrate that it has satisfied the "best efforts" framework.⁶⁶ Under this framework an OSP must: (1) make best efforts to obtain a license; (2) make best efforts to prevent the display of copyrighted content that has been registered by a rightsholder with the platform; (3) act expeditiously to remove copyrighted content upon receipt of a valid notice from the rightsholder; and (4) make best efforts to prevent the reupload of removed content.⁶⁷ While the Directive preserves a formal prohibition on imposing a "general monitoring obligation,"⁶⁸ the requirement to prevent reuploads of notified works represents a material departure from the purely reactive model of the takedown system.

⁶⁴ Ilias Dimou, *The Future of Digital Regulation Between the EU and the US*, DIGWATCH, (Mar 12, 2025) <https://dig.watch/updates/the-future-of-digital-regulation-between-the-eu-and-the-us>.

⁶⁵ Bateman, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ *Id.*; Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, 2019 O.J. (L 130) 92, 120.

⁶⁸ Directive 2019/790 of 17 April 2019, 2019 O.J. (L 130) 92, 120.

(2) Why was Article 17 Needed?

The adoption of Article 17 was significantly influenced by advocacy from rightsholders across various creative sectors in Europe. These stakeholders highlighted the inadequacies of the existing notice-and-takedown system and lobbied for a more robust framework to protect their works online, much like is happening in the United States. The primary purpose of Article 17 was to reduce the “value gap,” the idea that OSPs providing access to user generated content receive significant economic benefit from unauthorized sharing of copyrighted material, while the actual rightsholders receive very little economic benefit.⁶⁹ This is something that Athos faced as well, arguing that YouTube did not qualify for safe harbor because it is in breach of § 512(c)(1)(B) as YouTube financially benefited from infringing activity in a case where it had the right and ability to control said activity.⁷⁰ In *Athos* the court found that YouTube was not financially benefiting as the evidence showed that of the 7,000 clips-in-suit 91% generated no advertisement revenue.⁷¹ However, that means that 630 of the 7,000 clips were generating advertising revenue of which YouTube was keeping at least 45%, if not more, of the revenue.⁷² Extrapolating this number out to the billions of infringed material uploaded every year,⁷³ that profit margin suddenly grows exponentially, leading to the very value gap rightsholders were concerned about in Europe. A 2016 study by the European Commission (“EC”) confirmed this issue, highlighting that OSPs derive significant economic benefit from the upload of creative

⁶⁹ OSBORNE CLARKE, *CJEU Rejects Poland’s Challenge to the Copyright in the Digital Single Market Directive Article 17*, (May 10, 2022), <https://www.osborneclarke.com/insights/cjeu-rejects-polands-challenge-copyright-digital-single-market-directive-article-17>.

⁷⁰ *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *35 (S.D. Fla., May 16, 2023) (citing *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 36 (2d Cir. 2012); 17 U.S.C. § 512(c)(1)(B)).

⁷¹ *Athos*, 2023 U.S. Dist. LEXIS 85462, at *38.

⁷² See Maddie Martin, *How Much Money Do You Get Per View on YouTube? (2025 Stats)*, THINKIFIC, (Aug. 14, 2024), <https://www.thinkific.com/blog/youtube-money-per-view/> (noting that YouTube keeps 45% of the ad revenue and gives 55% to creators, so long as they are part of the YouTube Partnership Program)

⁷³ See GOOGLE, *YouTube Transparency Report*, *supra* note 38.

works while taking limited responsibility for ensuring compliance with copyright law.⁷⁴ The study further noted that the current copyright system placed rightsholders on the backfoot, requiring that rightsholders monitor each individual case of infringement, leading to significant costs and inefficiencies in effectively protecting their rights.⁷⁵

Not only was the value gap a concern, but many rightsholders in Europe faced similar concerns to their American counterparts. European rightsholders also experienced the same frustrations with OSPs when it came to the reupload of previously infringed content. For example, in a reply to the public consultation on online platforms, the International Federation of the Phonographic Industry (“IFPI”) stated that “around 90% of infringements that IFPI locates and addresses with a takedown request could have been avoided if the relevant services had taken measures to avoid that infringing content reappears after the first notification.”⁷⁶ One such example of this is One Direction’s “Drag Me Down” which reappeared over 2,700 times on YouTube after the initial takedown notice.⁷⁷ Outside of reupload concerns, rightsholders also faced issues with monitoring and managing the sheer amount of infringement uploaded on content-sharing platforms. In its 2016 study, the European Commission echoed concerns being voiced in the U.S. market, citing Sony Music Entertainment’s infringement battle with Soundcloud.⁷⁸ In this battle, Sony spent hundreds of thousands of dollars manually reviewing metadata matches on Soundcloud for infringement and sending roughly 218,000 takedown notices to remove these infringing copies, which only made up approximately 15% of its catalog

⁷⁴ See European Commission, Impact Assessment on the Modernisation of EU Copyright Rules, SWD(2016) 301 final, at 132–135, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0301>.

⁷⁵ See *Id.* at 140.

⁷⁶ *Id.* at 140, Note. 417 (quoting the IFPI reply to the public consultation on online platforms).

⁷⁷ *Id.*

⁷⁸ *Id.*

on Soundcloud.⁷⁹ Further, prior to these infringing copies being taken down the copies had amassed “over two billion unremunerated plays, representing millions of dollars in lost revenue.”⁸⁰

Recognizing the issues at play the 2016 EC study proposed various options for how to proceed, one of which outlined a system that would require content-sharing platforms to implement appropriate technologies to monitor for repeat infringement while still allowing for an appeals process.⁸¹ This was largely out of a recognition of the advancement in technologies and the fact that many OSPs already had tools in place to monitor for instances of infringement.⁸² However, the study recognized that a more robust system would require the cooperation of rightsholders in supplying certain metadata to assist the “fingerprinting technologies” implemented by many of these systems.⁸³

Ultimately, due to these concerns voiced by rightsholders in the EU and U.S. and a recognition of the advancement in technologies, the European Union passed Article 17 to ensure fair compliance across the member states and rebalance the scales so rightsholders were not overshadowed by OSPs. The adoption of Article 17 marks a shift in global copyright law, rejecting the reactive logic of the notice-and-takedown model in favor of a regime that places meaningful enforcement obligations on digital platforms. Driven by rightsholders’ concerns over repeated infringement, technological advancements, and the economic inequities of the modern content economy, the DSM Directive illustrates how legal systems can evolve to meet the needs of the modern technological world.

⁷⁹ Sony Music Entertainment, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31 2015, Notice of Inquiry at 7 (Apr. 1, 2016).

⁸⁰ *Id.*

⁸¹ See Impact Assessment (EC), *supra* note 74, at 146–47.

⁸² *Id.* at 140.

⁸³ See *Id.*

PART III: TOWARD BALANCED ENFORCEMENT, REFORMING SAFE HARBOR THROUGH NOTICE-AND-STAYDOWN

As examined in *Athos*, the current notice-and-takedown regime under the DMCA forces rightsholders, particularly small and medium-sized ones, into a never-ending enforcement cycle issuing takedown requests over and over. In *Athos*, the plaintiff submitted thousands of takedown notices over several years, only to see the same or slightly altered infringing clips repeatedly reuploaded to YouTube.⁸⁴ Despite YouTube’s technical capacity to detect and prevent these reuploads using tools like Content ID, the platform faced no obligation to act beyond removing the specific clips listed in the takedown requests.⁸⁵ This case exemplifies the structural imbalance of the DMCA; while large platforms benefit from expansive safe harbor protections, individual creators and smaller rightsholders are left to bear the burden of monitoring infringement at scale, often without access to the advanced enforcement tools that major studios and labels can negotiate for. In contrast, the European Union’s Article 17 introduces a more balanced model that requires platforms to make “best efforts” to license content, remove infringing material, and prevent its reappearance—without imposing a blanket monitoring requirement.⁸⁶ Looking to the EU’s shift from a takedown to a staydown model, the United States should adopt a notice-and-staydown framework tailored to its own legal and technological ecosystem. A system that preserves the innovation-enabling functions of the DMCA but recalibrates the obligations of OSPs to more equitably protect creators' rights.

⁸⁴ *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *8 (S.D. Fla., May 16, 2023).

⁸⁵ *Id.* at 27–28.

⁸⁶ *See Bateman*, *supra* note 63.

a) Proposing a Notice-and-Staydown Standard

The purpose behind the DMCA was for the law to adapt with the digital age and make the internet a safe place to disseminate copyrighted works.⁸⁷ It was meant to usher in a new era of copyright law, one which protected rightsholders, but allowed tech companies to grow without fear of liability. However, the act was drafted when a majority of American households were not even connected to the internet.⁸⁸ Moreover, the DMCA safe harbor provisions have not been amended since their passing in 1998 but technology has come a long way since then and the internet is a much different place than it was at the turn of the century.⁸⁹ This has caused many stakeholders, especially large media companies who are major rightsholders in the space, to advocate for stricter liability for OSPs. One such proposal is to transfer from a notice-and-takedown system to a notice-and-staydown system.

(1) What Would Staydown Look Like?

A functional notice-and-staydown system in the U.S. would preserve some elements of the DMCA while reforming others. Under the proposed staydown regime, a rightsholder still must issue an initial takedown notice to an OSP that must then act “expeditiously to remove or disable access to the infringing material.”⁹⁰ Requiring this initial takedown would help to avoid a general monitoring obligation that could trigger free speech concerns through over-blocking. From there, the OSP must notify the uploader of the alleged copyright infringement, who may challenge the notice if they believe the material was erroneously removed.⁹¹ Where the proposed

⁸⁷ H.R. REP. NO. 105–551, pt. 1, at 9 (1998).

⁸⁸ See Sag, *supra* note 23, at 506.

⁸⁹ See Kristian Stout & Geoffrey A. Manne, *A Roadmap to Reform Section 512 of the Copyright Act*, INT’L CTR. L. & ECON. § 1 (Oct. 13, 2022) <http://laweconcenter.org/resources/a-roadmap-to-reform-section-512-of-the-copyright-act/>

⁹⁰ COPYRIGHT.GOV, *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, <https://www.copyright.gov/512/> (last visited May 9, 2025).

⁹¹ *Id.*

system differs from the current DMCA regime is that under a staydown regime an OSP notified of infringing material would have a duty to “proactively identify and remove all instances of the infringing content and prevent future uploads.”⁹²

To make the system fair and adaptable, the U.S. should implement a “reasonableness” test. This standard would assess whether a service provider’s actions to prevent repeat infringement are reasonable based on its size, technological capacity, and available resources. For example, large OSPs with advanced infrastructure, such as Google, Meta, or Amazon, would be expected to maintain automated filtering and content management systems. This is because these major tech companies have the resources necessary to develop and implement these tools to monitor infringement and as such “legislators should put in place laws that don’t push the burden of getting content removed on the victims.”⁹³ In contrast, small startups, nonprofits, and platforms hosting primarily open-source content should be subject to a lighter burden.⁹⁴ The reasonableness calculus should provide exceptions for smaller platforms and a transitory period to allow these companies to come into compliance with a notice-and-staydown system as well as allowing small- and medium-sized platforms to use third-party copyright management software to bring them into compliance. Alternatively, the U.S. Copyright Office has suggested that small sites, such as craft sales sites, might just need to assign content review to an existing or new employee, charged with ensuring the listed products aren’t infringing.⁹⁵ These sites with lower amounts of content would not have to implement as robust of management tools so long as they could show the efforts made are reasonable to address the needs of their users.

⁹² SECTION 512 REPORT, *supra* note 10, at 54.

⁹³ Matt Burgess, *Google Is Getting Thousands of Deepfake Porn Complaints*, WIRED, (Mar. 11, 2024) <https://www.wired.com/story/google-deepfake-porn-dmca-takedowns/>.

⁹⁴ See Bateman, *supra* note 63.

⁹⁵ See SECTION 512 REPORT, *supra* note 10 at 124.

Moreover, “reasonableness” in this context should not mean that sites need to have a 100% accuracy rate in keeping repeat infringement from occurring. Rather the focus would be on the efforts and actions made by OSPs to implement copyright monitoring tools built to help sift and catch instances of repeat infringement. A good example of this is YouTube’s Content ID and Copyright Match Tools, as these systems were built with the very goal of monitoring infringement. While YouTube implemented these systems to maintain a competitive edge, a statutory requirement to reasonably implement these systems would mean that all OSPs hosting user-generated content would have to create or use copyright monitoring tools. Implementation of this reasonableness test would likely look different for large and small platforms. Looking at large platforms like Meta or YouTube an OSP of this caliber would only be able to satisfy for safe harbor where it reasonably took efforts to develop and implement a system that could effectively monitor for repeat infringement, such as through fingerprinting technology. This is something most large OSPs would already meet as they already implement these systems out of their own volition. With this said, just as in the EU’s Article 17 there should be no “general monitoring obligation” imposed.⁹⁶ Additionally, the reformed DMCA should prohibit requiring content-sharing platforms to scan all uploaded content; rather, the focus should only be on the specific content that has been infringed once before, e.g. the clips that were reuploaded multiple times in *Athos*.⁹⁷

Outside of the “reasonableness” test, another benefit of a staydown system is its potential to expand the scope of “red-flag knowledge.” Under the current safe harbors of the DMCA, an OSP is protected unless it has “actual knowledge” of infringement or awareness of facts that

⁹⁶ Bateman, *supra* note 63.

⁹⁷ See *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *8 (S.D. Fla., May 16, 2023); SECTION 512 REPORT, *supra* note 10 at 54 n. 282 (noting that some frameworks require a duty to prevent the reupload of an identical work while others provide duties to prevent reupload of similar infringements).

make the infringement apparent, i.e. “red-flag knowledge.”⁹⁸ As it stands the red-flag threshold is a hard one to meet as judicial interpretations have practically collapsed the red-flag standard into that of the actual-knowledge standard.⁹⁹ A statutory amendment to § 512 would help to lower this knowledge threshold so that rightsholders could actually meet the requirement and not have claims dismissed purely on the caveat that a content-sharing platform wasn’t aware of the reupload of a previously infringed material, even if facts existed that made the inference obvious. Thus, under an amended DMCA, red-flag knowledge would be based on an objective test and would be found where information exists such that a reasonable person or entity in the online content-sharing business would infer that infringement was taking place. This would make cases like *Athos* easier to prove for plaintiffs as evidence of thousands of takedown notices coupled with complaints of the same films being constantly reuploaded would satisfy the objective standard, inferring red-flag knowledge on to YouTube. Expanding red-flag knowledge, coupled with a reasonableness test to prevent reuploads would help to rebalance the scales in the digital copyright world.

(2) Why Should the U.S. Shift?

The DMCA currently places the power in the hands of the OSPs as they face very little to no liability for infringing content on their sites. All that is required of them is to “expeditiously remove” content that a valid takedown notice has been issued on and to ban “repeat infringers.”¹⁰⁰ This has led to a world where rightsholders bear all the burden of monitoring their content, lose revenue because of infringement, and expend thousands if not millions of dollars issuing takedown notices all while the OSPs generate advertising revenue off of infringing

⁹⁸ Stout & Manne, *supra* note 89, at § Executive Summary.

⁹⁹ *Id.* at § IV(A).

¹⁰⁰ 17 U.S.C. § 512.

material. Under the notice-and-takedown regime rightsholders are forced to expend their own resources, which are often far less vast than that of OSPs, to whack-a-mole each instance of infringement. Imposing a statutory amendment to the DMCA would rebalance this system and allow rightsholders and OSPs to work together to prevent piracy and infringement, achieving the original goals of the DMCA.¹⁰¹

Notice-and-staydown systems aren't a new concept. Germany has been implementing a notice-and-staydown system since 2017 and bases its rationale on an intermediary theory of secondary liability.¹⁰² Under this theory an intermediary “who knowingly and causally facilitates a third party’s conduct that directly infringes copyright may incur liability, but only for injunctive relief.”¹⁰³ Further, the intermediary is only liable where it violates certain duties, such as the duty to investigate; the scope of which depends on whether the party can reasonably carry out an investigation.¹⁰⁴ In Germany’s system OSPs must take some action such as using filtering technology in order to ensure that infringing content is taken down and stays down, and to ensure that similar infringements of the same kind are not repeated.¹⁰⁵ Additionally, while this system was criticized for much the same reasons any staydown system is criticized, it has not lead to mass takedowns of online content in Germany and has not systematically changed the behavior of online platforms.¹⁰⁶ Rather it has merely made it easier to report illegal content online.¹⁰⁷ Looking at this system and concepts of secondary liability generally, employing a staydown system is not an outlandish idea. After all, OSPs supply the primary means of distribution for

¹⁰¹ See SECTION 512 REPORT, *supra* note 10 at 9; see also Jasmine Ogaki, *German Content Moderation and Platform Liability Policies*, U. WASH. HENRY M. JACKSON SCH. INT’L STUD. BLOG, (July 17, 2024) <https://jsis.washington.edu/news/german-content-moderation-and-platform-liability-policies/>.

¹⁰² SECTION 512 REPORT, *supra* note 10 at 54-55.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 55.

¹⁰⁵ *Id.*

¹⁰⁶ Ogaki, *supra* note 101.

¹⁰⁷ *Id.*

content and thus should have a responsibility to ensure that the material they distribute is not blatantly infringing.

If an OSP fails to reasonably provide these tools to users, i.e. by restricting them only to limited users, then the OSP should be liable for resulting repeat infringement. Under the current DMCA regime a copyright holder like Athos, who does not agree to the Content ID contract, must use their resources, time, and effort to comb YouTube for each and every instance of copyright infringement even when it's shown that much of the same content is reuploaded and infringed multiple times.¹⁰⁸ This is not cheap as the resources required for content creators to monitor the internet for infringement have proven to be prohibitively expensive.¹⁰⁹ Additionally, OSPs like YouTube should have an affirmative duty to keep repeat infringement off its site as the widespread piracy on YouTube reduces the revenue to copyrights “by at least hundreds of millions and by perhaps more than one billion dollars each year.”¹¹⁰ One study based on 2015 data found that if YouTube paid rates closer to market level then it would create additional revenue for content creators between \$650 million to \$1 billion.¹¹¹ Not only does the infringement reduce revenue to the creator but it acts as a source of revenue for YouTube. YouTube's business model is focused on advertisement-revenue, generally splitting the revenue with creators in the YouTube Partner Program (“YPP”).¹¹² However, in 2020 YouTube updated its ad policies, placing ads on channels outside of the YPP.¹¹³ On these channels YouTube does not share revenue with the creators, thus where infringement goes unnoticed YouTube is the sole

¹⁰⁸ See *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *8 (S.D. Fla., May 16, 2023).

¹⁰⁹ Hickey, *supra* note 27.

¹¹⁰ T. Randolph Beard, George S. Ford & Michael L. Stern, *Safe Harbors and the Evolution of Music Retailing*, PHX. CTR. POL'Y BULL. NO. 41 1, 3 (2017).

¹¹¹ *Id.* at 20.

¹¹² See Martin, *supra* note 72.

¹¹³ *Updates to YouTube's Terms of Service*, YOUTUBE OFF. BLOG (Nov. 18, 2020) <https://blog.youtube/news-and-events/updates-to-youtubes-terms-of-service/>.

beneficiary of revenue on those videos, leaving the rightsholder with nothing. Due to this value gap the OSPs who benefit from this infringement should have some liability in ensuring the content they make money on is legitimate speech and not piracy. By implementing a notice-and-staydown regime centered on reasonableness and expanding the scope for red-flag knowledge Congress can help to effectuate this change and ensure equity.

b) Addressing Counterarguments

While a notice-and-staydown system offers a more balanced framework to address rampant online copyright infringement, it is not without its challenges. Any reform calling for heightened duties on OSPs is going to raise questions and concerns about the costs, fairness, and unintended consequences of implementation. Critics of a staydown system often cite several grievances, chief among them being concerns of over-blocking legitimate speech and the chilling effects this may have on users. Outside of this though critics cite concerns with the financial burden implementation of automated systems will have on OSPs, leading to a stifling of innovation and stagnation of the internet. As well as concerns over the impact on the courts and whether raising the burden on OSPs will cause a flood of litigation. Each of these critiques underscores the importance of calibrating the reasonableness standard carefully to ensure that the system works efficiently and fairly without creating a new imbalance in the digital copyright space.

(1) Over-blocking and Chilling Effects

A major criticism of imposing a notice-and-staydown system is that doing so would result in vast over-blocking of legitimate and legal speech, thus chilling legal creativity and fair use. However, the great fears of over-blocking under a notice-and-staydown regime are

overstated.¹¹⁴ For example, in YouTube's content ID system, the total number of instances of unjustified automated blocking is likely to be around 50,000 out of 1 billion, amounting to an error rate of just 0.005%.¹¹⁵ Moreover, the rate at which the automated claims were challenged as unjustified was just 0.42% as compared to the 0.97% of manual claims that were challenged in the Content ID system, demonstrating that at least YouTube's automated systems are more efficient and less erroneous.¹¹⁶ Additionally, opponents of the staydown system in Germany, especially human rights groups, argued that a staydown system could lead to "a hampering of freedom of speech and expression and could lead to censorship"¹¹⁷ However, this concern can be overcome by calibrating the reasonableness test appropriately. Under the reformed DMCA content-sharing platforms would still be able to qualify for safe harbor and thus avoid liability, it would just mean they have a higher responsibility to ensure speech is truly legal. This could be satisfied through implementation of filtering technologies as well as providing for an appeals process, allowing the user to protest a takedown request from the OSP. Additionally, since "reasonableness" wouldn't be centered on 100% accuracy of these filtering technologies and rather on reasonable efforts to filter and prevent reuploads the OSPs would be less concerned with blocking every minimal chance of infringement, still allowing fair use and parody to live on.

¹¹⁴ See Stout & Manne, *supra* note 89, at § V(C)(1); see also *The Role of Private Agreements and Existing Technology in Curbing Online Piracy: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 116th Cong. (2020) (written testimony of Katherine Oyama, at 9), available at <https://www.judiciary.senate.gov/imo/media/doc/Oyama%20Testimony.pdf> (noting less than 1% of claims made by Content ID were disputed from January to June of 2020).

¹¹⁵ See Paul Keller, *Article 17 – Five Years Later*, KLUWER COPYRIGHT BLOG (June 7, 2024), <https://copyrightblog.kluweriplaw.com/2024/06/07/article-17-five-years-later/>.

¹¹⁶ *YouTube Copyright Transparency Report: Our Tools Are Cutting Edge (Jul. 2023–Dec. 2023)*, GOOGLE, <https://transparencyreport.google.com/youtube-copyright/cutting-edge?hl=en> (last visited May 9, 2025).

¹¹⁷ Ogaki, *supra* note 101.

Further, implementing these automated filtering systems may prove a more efficient manner to catch copyright infringement.¹¹⁸ For example, in 2021, YouTube introduced a new technology available to users filing a takedown request through YouTube’s webform.¹¹⁹ This tool was developed to specifically target the reupload of near-identical copies of videos removed due to copyright infringement.¹²⁰ In implementing this tool YouTube prevented 4 million copies from being reuploaded in the latter half of 2023.¹²¹ Tools such as this one, specifically focused on the reupload of previously taken down content, would clearly satisfy the requirements for safe-harbor in a notice-and-staydown regime and further prevent concerns of over-blocking as the tools are narrowly tailored for near-identical copies.

(2) *Burden on OSPs*

Some scholars argue that “[t]he safe harbor provisions let Internet companies focus their efforts on creating great services rather than spend their time snooping their users’ uploads.”¹²² Arguing that a notice-and-staydown regime “would effectively shift the burden of policing copyright infringement to the platforms themselves, undermining the purpose of the safe harbor in the first place.”¹²³ However, the plethora of copyright infringement has made it such that Section 512 does not sufficiently address the proliferation of online infringement.¹²⁴ Content creators and rightsholders of all sizes believe the system to be inefficient and unable to

¹¹⁸ See Daria Degacheva & Christian Katzenbach, *Copyright Moderation on YouTube Following the Implementation of Article 17 CDSMD*, (Aug. 14, 2024) <https://copyrightblog.kluweriplaw.com/2024/08/14/copyright-moderation-on-youtube-following-the-implementation-of-article-17-cdsmd/> (noting that since implementing Article 17 in Germany nearly two-thirds of video takedowns were copyright related, as compared to only a bit over a third in France).

¹¹⁹ See *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *12 n.9 (S.D. Fla., May 16, 2023).

¹²⁰ See *Id.*

¹²¹ *YouTube Copyright Transparency Report: Our Tools Are Cutting Edge (Jul. 2023–Dec. 2023)*, GOOGLE, <https://transparencyreport.google.com/youtube-copyright/cutting-edge?hl=en> (last visited May 9, 2025).

¹²² Elliot Harmon, “Notice-and-Stay-Down” is Really “Filter-Everything,” ELEC. FRONTIER FOUND., (Jan. 21, 2016) <https://www.eff.org/deeplinks/2016/01/notice-and-stay-down-really-filter-everything>.

¹²³ *Id.*

¹²⁴ See Hickey, *supra* note 27.

sufficiently address the proliferation of online infringement.¹²⁵ Further, rightsholders express concern that the judicial developments and interpretations of the actual and red-flag knowledge have tipped the application of the section 512 safe harbors in favor of OSPs, granting them near total exemption from liability.¹²⁶ Due to the scale of copyright infringement on the internet today many platforms, such as Facebook, YouTube, SoundCloud, Twitch, and Vimeo have adopted automatic copyright filtering systems to monitor copyright infringement.¹²⁷ Many of these systems work similarly to YouTube’s content ID system in that a rightsholder submits to the OSP the files, metadata, audio visual samples, and rights ownership information to scan and match this data to potentially infringing clips.¹²⁸ Others work in a similar manner to YouTube’s Copyright Match Tool, merely using fingerprinting technology to detect videos that match a copyrighted work.¹²⁹ Yet, even with these systems in place the proliferation of piracy and copyright infringement makes it such that the notice-and-takedown regime “barely staunches illegal content” as removed media is just reuploaded immediately after being taken down, further placing a huge burden on creators and rightsholders.¹³⁰ By requiring all OSPs seeking safe harbor to implement reasonable systems to help monitor reuploads this would create a system where OSPs actually had an incentive to ensure reupload didn’t occur, reducing the burden on rightsholders to be the only ones monitoring daily for this kind of infringement. Additionally, the burden to implement these systems would be much lower as in many instances they are already in place.

¹²⁵ See SECTION 512 REPORT, *supra* note 10, at 10-12.

¹²⁶ See *Id.*; see also Stout & Manne, *supra* note 89, at § IV(A).

¹²⁷ Sag, *supra* note 23, at 538–39.

¹²⁸ See Athos Overseas Ltd. Corp. v. YouTube, Inc., 2023 U.S. Dist. LEXIS 85462, at *13 (S.D. Fla., May 16, 2023).

¹²⁹ See *Id.* at *12.

¹³⁰ See Content Creators Coalition, Comments Submitted in Response to U.S. Copyright Office’s Dec. 31, 2015, Notice of Inquiry at 4 (Apr. 1, 2016).

A key aspect of this burden shifting argument is that it would cause a deterrence of technological innovation. The idea being that OSPs would have to divert resources to legal fees and development of systems to comply with heightened standards for safe harbor rather than focusing their efforts on new technology. However, the internet today is much different than it was in 1998, it is no longer the toddler it was then and it is unlikely that OSPs will collapse due to increased potential liability.¹³¹ Many critics of Article 17 levied this fear and warned of the collapse of the internet when the EU proposed this legislation in 2019, but six years after its passing the internet still functions as well now as it did then in the EU.¹³² Additionally, Congress originally envisioned that OSPs and rightsholders would “collaborate on evolving technologies and make those measures available to all on reasonable and nondiscriminatory terms.”¹³³ This is something that hasn’t happened in the years since and rather OSPs have used their position as leverage, requiring that rightsholders sign release of claims provisions before gaining access to their strongest protection tools.¹³⁴ Through creating a statutory requirement, however, OSPs would be forced into playing ball and rightsholders would be able to fall back on the courts if an OSP failed to reasonably provide a copyright management tool to users. This would help to accomplish the original goal of the DMCA and truly create a system where rightsholders and OSPs could collaborate meaningfully to limit online piracy as both would have an incentive for preventing this infringement.

¹³¹ See Harris, *supra* note 61, at 854.

¹³² Keller, *supra* note 115.

¹³³ *Strengthening Measures to Advance Rights Technologies*, <https://www.tillis.senate.gov/services/files/BBDBFA87-17CA-4D15-AA0F-9B54BFEEA31D> (last visited May 9, 2025).

¹³⁴ See *e.g.*, Athos Overseas Ltd. Corp. v. YouTube, Inc., 2023 U.S. Dist. LEXIS 85462, at *8 (S.D. Fla., May 16, 2023).

(3) Systemic Uncertainty

Others worry that imposing a staydown system would create uncertainty in the courts and cause an increase in litigation, allowing rightsholders to sue in any instance where infringement is not caught by an OSP. However, this would not be the case, since OSPs would still have safe harbor under the DMCA so long as they abided by the reasonableness requirements.

Additionally, OSPs could avoid unnecessary litigation if they make clear to users the availability of their copyright management tools and make these tools reasonably accessible to all users. This would help mitigate overly litigious plaintiffs' lawyers as implementation of copyright management tools would be sufficient to satisfy the reasonableness test and could dismiss the claim on a motion to dismiss. Further, they would still need to satisfy *Iqbal* and *Twombly* standards for pleading, thus helping to eliminate unmeritorious claims that don't reference specific facts. If claims should advance past this stage, courts interpreting the reasonableness factors would simply have to apply an objective test. For red-flag knowledge the question would be focused on whether a reasonable person in the user-generated content business would have inferred such infringement is taking place.¹³⁵ Once knowledge is determined, the question would then turn on whether the OSP took reasonable efforts to obtain and implement a content monitoring system and make that system available to users.

Moreover, under the current DMCA system the courts play little to no role in holding OSPs accountable. Under the knowledge standards of the DMCA the courts "have set too high a bar for red flag knowledge, leaving an exceptionally narrow space for facts or circumstances that do not qualify as actual knowledge but will still spur an OSP to act expeditiously to remove infringing content."¹³⁶ Further, at a public roundtable in 2019, participants were asked to provide

¹³⁵ See Stout & Manne, *supra* note 89, at § IV(A).

¹³⁶ SECTION 512 REPORT, *supra* note 10 at 123.

an example of something less than actual knowledge that would trigger red-flag knowledge under the current judicial interpretations, and no stakeholders were able to identify a single activity.¹³⁷ Consistently courts have found that service providers “who do not locate and remove infringing materials they do not specifically know of should not suffer the loss of safe harbor protections.”¹³⁸ Further, under red-flag knowledge, courts have found that the provider must have actual knowledge of significant facts that would lead an ordinary, reasonable person to an inference of infringement.¹³⁹ As such the concerns for systemic uncertainty are equal, if not greater, under the notice-and-takedown system as the judicial interpretations have made it such that OSPs are held only to the high bar of actual knowledge of infringement.

(4) Unintended Consequences

A major consideration in adopting a staydown system is the recognition that small rightsholders often exist on both sides of the copyright coin. They are often both rightsholders and remixers of copyrighted content, whether that be through reaction videos or the creation of memes. As such concerns of aggressive filtering and over-blocking exist for these dual rightsholders as well. However, much like the general over-blocking concerns for staydown systems these concerns too are likely overstated.¹⁴⁰ These fears can also be allayed through tailored filtering technology such as YouTube’s technology developed for near-identical copies.¹⁴¹ With OSPs implementing technology such as this the chances of over-blocking are even lower. Additionally, creating an appeals process for users to challenge takedown notices

¹³⁷ *Id.*

¹³⁸ *Universal Music Group Recordings, Inc. v. Shelter Capital Partners, LLC*, 718 F.3d 1006, 1023 (9th Cir. 2013).

¹³⁹ *Capital Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir 2016).

¹⁴⁰ See Stout & Manne, *supra* note 89 at § V(C)(1).

¹⁴¹ See *Athos Overseas Ltd. Corp. v. YouTube, Inc.*, 2023 U.S. Dist. LEXIS 85462, at *12 n.9 (S.D. Fla., May 16, 2023).

allows users and OSPs to work together to ensure that only truly infringing material is being removed.

Another potential unintended consequence is that implementing a staydown regime could result in the creation of a monopoly of major OSPs who have the resources to develop content monitoring systems internally and keep them from competitors.¹⁴² This concern can be mitigated however through the careful construction of the reasonableness standard, so that it can adapt and be flexibly applied to OSPs of varying sizes. For example, a small OSP without the resources to create and develop their own software would be able to satisfy the reasonableness test by showing they made efforts to obtain a copyright monitoring system through an approved third-party that satisfies the requirements. Additionally, providing exceptions to certain OSPs, such as online encyclopedias, who have a lower threshold to meet safe harbor will help to mitigate the cause for concern over a monopoly as these OSPs will not be in direct competition with the larger OSPs such as Facebook and YouTube. This lack of direct competition will give room for smaller OSPs to still develop and maintain safe harbor, while large, established OSPs will act to protect rightsholders interests and carry some of the burden of monitoring for infringement.

CONCLUSION

Ultimately, a well-structured notice-and-staydown system grounded in reasonableness would reflect the technological advancements and platform capabilities of 2025, not 1998. It would lift the disproportionate burden currently borne by rightsholders, incentivize OSPs to adopt protective tools already within reach, and strengthen the integrity of online copyright law without overreaching into the realms of speech and innovation. However, it's unlikely that Congress will adopt a notice-and-staydown system anytime soon. In its 2020 study, the U.S.

¹⁴² See Husovec, *supra* note 62, at 76.

Copyright Office advised that prior to implementing a notice-and-staydown system it would be beneficial to study the real world impacts of such a requirement, such as by looking at the impact of Article 17 in European Union States.¹⁴³ This is a goal which will hopefully be realized soon as Article 30 of the EU Directive stated that “No sooner than 7 June 2026, the Commission shall carry out a review of this Directive and present a report on the main findings to the European Parliament.”¹⁴⁴ However, this June 7th deadline is merely a minimum and a report detailing the impact of Article 17 is more likely to come in a few years rather than months.

There is hope on the horizon, however. With studies such as the U.S. Copyright Office’s 2020 report on Section 512, as well as bill proposals such as the SMART Copyright Act, there is clearly a shift happening in the political economy.¹⁴⁵ The Section 512 Report to Congress offers clear evidence that the Copyright Office recognizes the shortcomings of the DMCA as it stands. Further, bill proposals such as the SMART Copyright Act are advocating for more focus on copyright in the digital space, advocating for modernizing copyright law for the current technological world.¹⁴⁶

As it stands the largest voices, and lobbying groups still seem to be prevailing, placing this battle on the fields of Big Content versus Big Tech. However, the focus shouldn’t be lost on who the DMCA is truly for, the everyday user. As such, Congress should continue to hear from stakeholders big and small and “remember that this [discussion] is not ‘Big Content v Big Tech’” but rather a discussion of users and content creators alike.¹⁴⁷ By focusing on inclusive

¹⁴³ SECTION 512 REPORT, *supra* note 10, at 193.

¹⁴⁴ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market, 2019 O.J. (L 130) 92, 125.

¹⁴⁵ See e.g., SMART Copyright Act, H.R. 9541, 117th Cong. (2022).

¹⁴⁶ See *Strengthening Measures to Advance Rights Technologies*, <https://www.tillis.senate.gov/services/files/BBDBFA87-17CA-4D15-AA0F-9B54BFEEA31D> (last visited May 9, 2025).

¹⁴⁷ Katharine Trendacosta, *Reevaluating the DMCA 22 Years Later: Let’s Think of the Users*, ELEC. FRONTIER FOUND. (Feb. 12, 2020) <https://www.eff.org/deeplinks/2020/02/reevaluating-dmca-22-years-later-lets-think-users>.

policymaking that values all voices we can move toward a more equitable and effective digital copyright system that isn't as imbalanced as the current model.