Georgia Law Review

Volume 58 | Number 1 Article 10

11-17-2023

All the Internet's a Stage: Reform of the Digital Millennium Copyright Act and Broadway's Bootleg Problem

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Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law; B.A., 2021, Texas A&M University. Thank you to Dr. Jonathan Peters for his guidance and feedback on this Note, my professors and mentors at Texas A&M University for encouraging my growth as a student, and my family and friends for their love and support.

ALL THE INTERNET'S A STAGE: REFORM OF THE DIGITAL MILLENNIUM COPYRIGHT ACT AND BROADWAY'S BOOTLEG PROBLEM

Emma K. Wimberly[*]

Broadway is the cultural epicenter of theatre arts. While Broadway performances are internationally known and hugely profitable, they remain inaccessible to a significant number of fans. The inability to bear the increasing costs of travel, lodging, and tickets leads many fans to turn to bootlegs. Bootlegs are illegal recordings of live performances. They are widely viewed and shared online, and uploaders purposefully work to obscure the illegality of these recordings, allowing them to evade tools designed to combat copyright infringement.

The Digital Millennium Copyright Act (DMCA), enacted in 1998, amended U.S. copyright law to attempt to prevent digital copyright infringement. However, with the rapid growth of technology and the internet, the Act has begun to show its age. In 2020, the U.S. Copyright Office published a report that recommended updates to the DMCA. These recommendations call for Congress to fine-tune the statute's current operation by clarifying certain provisions, modifying statutory standards, facilitating voluntary initiatives, and more.

This Note dissects these recommendations and discusses which would be most effective in countering bootlegs and protecting theatre rightsholders. The Copyright Office recommends voluntary efforts by online service providers, but it seems unlikely that these providers would willingly participate in initiatives that expose them to legal liability. Ultimately, this Note concludes that the recommendations that suggest concrete changes to statutory language would be most effective in countering the spread of bootlegs.

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I. INTRODUCTION

"Tonight. 6th row center. Filming. The entire show. Even after you were told not to. You represent the very definition of entitlement. And you're a total distraction to us and all around you. Stay home. Save your money."[1] American musical theatre has a long, storied history. With the opening of *The Black Crook* in New York City on September 12, 1886, a powerful and enduring industry was born.[2] In the 2018–2019 season—the last full Broadway season before the onset of the COVID-19 pandemic caused an industry-wide shutdown in March 2020—Broadway drew 14,768,254 attendees and grossed over $1.8 billion.[3] Despite the plethora of on-demand entertainment options available to us from the comfort of our own homes, these statistics suggest that there is still a high demand for live entertainment. There are only forty-one Broadway theatres operating in New York.[4] They span 1.6 miles from the Nederlander Theatre on West 41st Street in Midtown to the Vivian Beaumont Theatre on West 65th Street on the Upper West Side of Manhattan.[5] With average ticket prices to popular shows now averaging over $200—up significantly from pre-pandemic prices[6]—

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[1] Alex Brightman (@ABrightMonster), TWITTER (Dec. 19, 2019, 9:33 PM). Alex Brightman played Beetlejuice in the Original Broadway Cast of Beetlejuice, which opened on Broadway on April 25, 2019. *Beetlejuice*, PLAYBILL (Mar. 8, 2020) https://playbill.com/production/beetlejuicewinter-garden-theatre-2018-2019 [https://perma.cc/6DRY-S9PT]. He has since deactivated his Twitter account.

[2] *See* GERALD BORDMAN, AMERICAN MUSICAL THEATRE: A CHRONICLE 19 (3d ed. 2001) (explaining that many consider *The Black Crook* to be the first American musical).

[3] *Broadway Season Statistics at a Glance*, BROADWAY LEAGUE, https://www.broadwayleague.com/static/user/admin/media/statistics_broadway_2022-2023_5-season-detail.pdf [https://perma.cc/VT45-PS2L].

[4] *Broadway Theatres in NYC*, BROADWAY LEAGUE, https://www.broadway.org/broadway-theatres [https://perma.cc/5U8Z-AC9N].

[5] For the locations of all Broadway theatres, see *Map of the Broadway Theatre District in NYC*, BROADWAY LEAGUE, https://www.broadway.org/map [https://perma.cc/PXR8-Q2WE]. My search on Google Maps shows that the Nederlander and Vivian Beaumont Theatres are 1.6 miles apart.

[6] *See* Robert Hum, *Broadway Tickets Are More Expensive Now than Before the Pandemic – and Attendance is Strong*, CNBC (Mar. 23, 2022, 1:49 PM), https://www.cnbc.com/2022/03/23/broadway-tickets-more-expensive-as-pandemic-eases.html [https://perma.cc/7KET-XSDJ] (describing average ticket prices of $283 for *The Music Man* and $213 for *Hamilton*).

plus skyrocketing prices for lodging and airfare,[7] seeing a Broadway show is an impracticability for many theatre fans. For those unable to see a performance in person, there are a limited number of professional recordings, commonly referred to as "proshots,"[8] available online through streaming sites like BroadwayHD and Disney+, which of course, require a paid subscription.[9] However, only a small number of Broadway shows have a proshot,[10] and they are often released years after the peak of a show's popularity.[11]

What is a theatre fan starved for content to do? Enter, from stage left, the bootleg. Bootlegs are illegal recordings of Broadway shows.[12] Despite their illegality, they are filmed, uploaded, and widely spread on video-sharing sites like YouTube, social media sites like Tumblr and Reddit, and stored on file hosts like Dropbox and Google Drive.[13] The digital world of bootlegs is comprised of a complex network of trading, gifting, posting, and rules that differ

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[7] *See* Ian Thomas, *Why Marriott, Hilton and Hyatt Say Hotel Prices Are Only Going Up*, CNBC (Jun. 11, 2022, 10:32 AM), https://www.cnbc.com/2022/06/11/why-marriott-hilton-and-hyatt-say-hotel-prices-are-only-going-up.html [https://perma.cc/LX62-ZVEV] ("That hot market has led to rising room prices, something major hotel chain executives say will not subside soon."); Brett Holzhauer, *Airline Ticket Prices Are Up 25%, Outpacing Inflation – Here Are the Ways You Can Still Save*, CNBC (May 25, 2023), https://www.cnbc.com/select/airline-ticket-prices-are-up-25-percent-why-and-how-to-save/ [https://perma.cc/L4ND-9W6J] ("In the last year, the consumer price index for airline tickets has shot up by 25% — the largest jump since the Federal Reserve of St. Louis began tracking the index in 1989.").

[8] Alex Kulak, *The Unexpected Paywall of Proshots*, ONSTAGE BLOG (Aug. 16, 2022), https://www.onstageblog.com/editorials/2022/8/16/the-unexpected-paywall-of-proshots [https://perma.cc/6Z52-S3VW].

[9] *See* BROADWAYHD, https://www.broadwayhd.com/ [https://perma.cc/KC8E-PRBC] ("$11.99/month OR $129.99/year"); DISNEY+, https://www.disneyplus.com/ [perma.cc/M433-TCP5] (detailing subscription plans that begin at $7.99/month).

[10] *See* Kulak, *supra* note 8 (describing the barriers to producing proshots, notably the issue of financial viability).

[11] *See, e.g.*, *id.* (noting the release of the Hamilton proshot on July 3rd, 2020, over five years after the musical premiered off-Broadway).

[12] Dafny Flores, *Broadway Bootlegs: The Form of Art that Should Be Accessible*, AFFINITY MAG. (July 6, 2020), http://culture.affinitymagazine.us/broadway-bootlegs-the-form-of-art-that-should-be-accesible/ [https://perma.cc/W8LK-6DC5].

[13] Marc Hershberg, *Copyright Office Urges Congress to Curb Broadway Bootlegs*, FORBES (May 29, 2020, 7:30 AM), https://www.forbes.com/sites/marchershberg/2020/05/29/copyright-office-urges-congress-to-curb-broadway-bootlegs/?sh=23b97f6654a7 [https://perma.cc/35HM-MESP].

from platform to platform and user to user.[14] While the filming of bootlegs is valued by fans who cannot access live performances for a variety of reasons,[15] it presents a challenge to rightsholders, actors, and audience members alike.[16]

In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), which amended U.S. copyright law in several important ways to address the internet's impact on copyright infringement.[17] Twenty-four years later, however, the rapid growth of the internet and other technologies calls into question the DMCA's efficacy in our digital world.[18] In response, the U.S. Copyright Office published a report in order to provide recommendations to Congress to "update the Copyright Act for the 21st century."[19] The purpose of this Note is to identify and discuss which of the Copyright Office's recommendations could be the most effective in preventing the spread of Broadway bootlegs, thus protecting theatre rightsholders from online infringement. Part II gives a background of the DMCA and the creation of the Copyright Office's report and discusses the unique issue of Broadway bootlegs. Part III discusses which Report proposals have the potential to be effective in counteracting the spread. Finally, this Note concludes by reiterating the need for effective change to internet copyright laws and how change could

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[14] *See, e.g.*, u/OtherPeoplesStories, *Rules and Trading Resources*, REDDIT (Oct. 28, 2020, 11:14 AM), https://www.reddit.com/r/MusicalBootlegs/comments/jjplm7/rules_trading_resources/ [https://perma.cc/7M6W-YNT9] (listing seven rules regarding the trading of bootlegs on the subreddit).

[15] *See* Peter C. Kunze, *Bootlegs over Broadway: Musical Theatre (Re)productions, Digital Circulation, and the Informal Media Economy*, 16 CREATIVE INDUS. J. 204, 210–11 (noting Broadway's physical and financial inaccessibility).

[16] Hayley Levitt & Zachary Stewart, *Point-Counterpoint: Broadway Bootlegs — Good or Bad?*, THEATERMANIA (June 27, 2019), https://www.theatermania.com/broadway/news/point-counterpoint-broadway-bootlegs-good-or-bad-_89152.html [https://perma.cc/GP22-JSE3] (stating that actors' main arguments against bootlegs are "1) It's distracting to the performers; 2) It's distracting to the audience; 3) It's theft.").

[17] *See The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF., https://www.copyright.gov/dmca/ [https://perma.cc/4XND-VVCV] (highlighting the changes made by the DMCA).

[18] U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17, at 27–28 (2020) ("Congress enacted the DMCA with a contemporary understanding of internet technology, but the internet ecosystem has grown significantly in the past two decades. These technological changes have altered the effectiveness of the DMCA statutory scheme . . . .").

[19] *Id.* at Acknowledgements.

alleviate the burden currently shouldered by rightsholders in the theatre industry.

II. BACKGROUND

A. THE DMCA AND THE SECTION 512 REPORT

The history of American copyright law leading up to the enactment of the DMCA has been thoroughly detailed in existing legal scholarship.[20] The DMCA was signed into law in 1998 to address a plethora of copyright issues stemming from use of the internet and emerging technology.[21] Some of the issues the Act addresses are "the circumvention of copyright protection systems," civil remedies, and criminal "penalties with respect to copyright protection and management systems."[22] Section 512 of Title 17 of the U.S. Code was enacted as part of the DMCA.[23] This section "established a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet-based services."[24] These limitations on liability are referred to as "safe harbors," and they protect qualifying OSPs[25] from liability for copyright infringement by its users in exchange for cooperating with copyright owners to expeditiously remove infringing content, as well as meeting certain other conditions.[26] This process is referred to as

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[20] *See, e.g.*, Andrew Johnson, Note, *Down with the DMCA*, 15 SMU SCI. & TECH L. REV 525, 526–35 (2012) (detailing the history of U.S. copyright law beginning with its British ancestry).

[21] *See The Digital Millennium Copyright Act*, *supra* note 17 and accompanying text.

[22] Amy P. Bunk, Annotation, *Validity, Construction, and Application of Digital Millennium Copyright Act (Pub. L. No. 105-304, 112 Stat. 2860 (1998))*, 179 A.L.R. Fed. 319 (2002).

[23] *Section 512 Study*, U.S. COPYRIGHT OFF., https://www.copyright.gov/policy/section512 [https://perma.cc/PM9W-BJ36].

[24] *Id.*

[25] Online service providers, also commonly referred to as OSPs or ISPs, are defined in Section 512(k) as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C. § 512(k)(1)(A). Examples of an OSP include internet service providers, social media sites like Instagram or Twitter, entertainment providers like YouTube, e-commerce sites like eBay, and search engines like Google, just to name a few.

[26] *See Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFF., https://www.copyright.gov/512/

the "notice-and-takedown system."[27] The system of the DMCA, premised on a vision of cooperation between rightsholders and service providers, aimed to both foster the growth of the internet and service providers while providing a means to expeditiously address online copyright infringement that harms rightsholders.[28]

This idealistic system envisioned a way to perfectly balance the complex needs of all parties involved in online copyright disputes. Now twenty-five years old, however, it has begun to show its age. This Note is concerned with how the online landscape has evolved since the 1998 Act and the issues it has presented for all the stakeholders involved in this issue. The technological advancements that have taken place since the enactment of the DMCA are staggering. The internet of today would surely be unrecognizable to Congress in 1998. The "walled garden" internet of the 1990s greatly limited user freedom and allowed internet service providers (ISPs) to make it difficult or even impossible to access content outside of specific browsing environments.[29]

After a variety of factors greatly reduced the prominence of walled-garden ISPs in the early twenty-first century,[30] the internet evolved to become as we know it today: a digital world filled with seemingly endless social media sites, retail platforms, e-commerce businesses, music, and audiovisual entertainment.[31] Worldwide access to the internet has grown as well, from about 3.14% of the world in 1998 to over 50% today.[32] While internet services, speed, and access have all grown, so has online copyright infringement.[33] The time required to download content has decreased

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[https://perma.cc/C9ZW-DDWT] (describing the types of OSPs that qualify for safe harbor protection and the basics of the notice-and-takedown system).

[27] *Id.*

[28] US. COPYRIGHT OFF., *supra* note 23, at 19.

[29] *See* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIA. L. REV. 137, 166 (2008) ("In the specific context of Internet service providers, a walled garden is present when the provider 'direct[s] users to paid content that the ISP supports.'").

[30] *Id.* at 169.

[31] U.S. COPYRIGHT OFF., *supra* note 18, at 28–29.

[32] *Id.* at 31.

[33] *See id.* ("Internet piracy has evolved alongside these substantial gains in internet services, speed, and access.").

dramatically,[34] making it easier for users to share and consume potentially infringing content within a fraction of the time and effort that it used to take. With the spread of online copyright infringement, the question that has been repeatedly asked is this: has Congress achieved its goal of providing legal certainty for OSPs and protecting the legitimate interests of rightsholders against the threat of rampant, low-barrier online infringement?[35] This is the question that led the Copyright Office to conduct the study that led to the Section 512 Report.[36]

The report was published in May 2020 following a multi-year study by the Copyright Office, which resulted in "two notices of inquiry, tens of thousands of written responses, nine empirical studies, and [three] public roundtables."[37] As a result of this study, the Copyright Office made recommendations in twelve areas of Section 512.[38] These recommendations do not propose any "wholesale changes"[39] to Section 512, but instead call for Congress to fine-tune its current operation by clarifying certain provisions, shifting or modifying statutory standards, considering alternative models, facilitating voluntary initiatives, and more.[40] This Note does not address all twelve recommendations, as some are less relevant to the specific issue of Broadway bootlegs.

B. BROADWAY BOOTLEGS AND THEIR UNIQUE QUALITIES

Online copyright infringement poses a threat to a vast array of creative industries: film, music, and video gaming—just to name a few.[41] Theatre, and Broadway specifically, is no exception. There are

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[34] *See id.* at 29 (noting that a four-minute song would have needed eighty minutes to download in 1998, but today only needs around one second).

[35] *See id.* at 1 ("In the twenty-plus years since section 512 went into effect, the question has often been asked whether the balance that Congress sought has been achieved, particularly in light of the enormous changes the internet has undergone.").

[36] *Id.*

[37] *Id.*

[38] *Id.* at 2.

[39] *Id.* at 7.

[40] *See id.* at 2–7 (outlining the Copyright Office's twelve recommendations).

[41] *See* Jan André BlackBurn-Cabrera, *Streaming Movies Online: The E! True Hollywood Story*, 5 U. P.R. BUS. L.J. 60, 62 (2014) ("According to a study commissioned by the Motion Picture Association of America . . . in 2005, movie studios in the United States are losing

several reasons that Broadway bootlegs are an issue that need to be dealt with; some apply to all creative content, and some are unique to live theatre. The first, and perhaps most obvious reason is that the capture and sharing of bootlegs is a violation of federal law. Federal law forbids making, sharing, and distributing or selling unauthorized copies of a live musical performance.[42] Aside from the illegality of bootlegs, there are other arguments against them that touch on issues of profit, privacy, and consent.

The primary grievance of many theatre professionals who speak out against bootlegs is the claim that the distribution of bootlegs takes away profits from rightsholders.[43] The logic behind this sentiment is that if someone can watch a recording of a show online, they will choose to watch it instead of purchasing a ticket to a live performance. This line of thinking seems to hinge on many assumptions: namely, that everyone who watches bootlegs has access to live performances in the first place, and that people will always choose to watch a bootleg instead of a live performance if they have access to both. It also ignores the possibility that people watch bootlegs of shows that are no longer being performed live and do not have a proshot available for purchase or streaming, in which case: what potential profits are being lost? Nonetheless, this concern over the possibility of bootlegs detracting from the revenue of the parties involved in producing a live musical is one of the driving forces of the fight against them.

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around six billion dollars a year to online piracy. This loss is mostly due to the unlimited amount of sources of illegal streams available online for watching movies and television shows, as well as illegal downloads through peer-to-peer networks."); Amanda M. Witt, *Burned in the USA: Should the Music Industry Utilize Its American Strategy of Suing Users to Combat Online Piracy in Europe?*, 11 COLUM. J. EUR. L. 375, 376 (2005) ("The music industry in particular blames free downloading and file-swapping for its four-year slump in the $32 billion industry. Between 2002 and the start of 2003, one billion files were illegally available on the Internet." (footnote omitted)); Andrew V. Moshirnia, *Typhoid Mario: Video Game Piracy as Viral Vector and National Security Threat*, 93 IND. L.J. 975, 987 (2018) ("Piracy numbers are notoriously difficult to glean, an unsurprising fact in light of the clandestine and anonymous nature of the activity. Estimates of piracy rates range from 15% of all users to up to 90% for individual title downloads. Piracy numbers for individual PC titles may be in the millions.").

[42] 17 U.S.C. § 1101.

[43] *See, e.g.*, Hershberg, *supra* note 13 (quoting the head of a theatre industry advocacy group as saying that bootlegs are "part of the debilitating problem of the devaluation of music").

Bootlegs also have a unique effect on actors. Compared to film actors or studio musicians who might not even be aware of the pirating of their movies and songs, the nature of Broadway bootlegs necessitates that the person filming be in the same performance space as the actors. Over the years, Broadway stars have taken to social media to express their frustration with individuals in the audience who film performances with their phone.[44] Pointing to the distraction of the actors and audience,[45] distortion of quality,[46] and the obvious illegality,[47] it is clear that at least a portion of performers feel strongly enough to take matters into their own hands and admonish those who attempt to illegally record their live performances.

A recent incident is illustrative of another unique aspect of live theater that is impacted by illicit filming: privacy and consent. In May 2022, video footage taken of the Broadway revival of Richard Greenberg's play *Take Me Out*, showing several cast members fully nude, was leaked online.[48] Second Stage Theater, the company who produced the play, tweeted a response noting that "[t]aking naked pictures of anyone without their consent is highly objectionable and

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[44] *See* Kunze, *supra* note 15, at 9 ("Broadway performers have carried out much of the (uncompensated) labor of resisting bootlegs, often through social media posts, based on the unproven assumption that it threatens their livelihood."); *supra* note 1 and accompanying text.

[45] *See* Will Roland (@will_roland), TWITTER (Jan. 13, 2018, 2:52 PM), https://twitter.com/will_roland/status/952267010200793088 [https://perma.cc/9VH3-9HEK] ("Please stop filming us during our show. It's disrespectful, and it's distracting. Watch the play.").

[46] *See* Lin-Manuel Miranda (@Lin_Manuel), TWITTER (Feb. 27, 2014, 6:06 PM), https://twitter.com/Lin_Manuel/status/439174779908935680 [https://perma.cc/Y8Z7-QK8B] ("[A] bootleg, w[ith] terrible audio and shaky visuals doesn't preserve my work, it MISrepresents it.").

[47] *See* Lindsay Champion, *Film a Bootleg, Get an Ear Flick: The Official Guide to Broadway Etiquette by Ramin Karimloo & the Cast of* Les Miz*,* BROADWAY BUZZ (Apr. 15, 2014), https://www.broadway.com/buzz/175495/film-a-bootleg-get-an-ear-flick-the-official-guide-to-broadway-etiquette-by-ramin-karimloo-the-cast-of-les-miz/ [https://perma.cc/4YUC-LJMH] ("Andy Mientus, who plays Marius in the new revival, recently tweeted, 'Hey folks snapping pics during this matinee—I'm excited that you're excited but it's not allowed and we can see you. Sit back and enjoy!'").

[48] *See* Logan Culwell-Block, *Second Stage Pledges to Add Staff After Footage of* Take Me Out *Leaks Online*, PLAYBILL (May 11, 2022), https://playbill.com/article/second-stage-pledges-to-add-staff-after-footage-of-take-me-out-leaks-online [https://perma.cc/DHV3-TQ5R] (describing the leaked video footage and discussing Second Stage Theater's response).

can have severe legal consequences. Posting it on the internet is a gross and unacceptable violation of trust between the actor and audience forged in the theatre community."[49] The Hayes Theater, where *Take Me Out* was performed, seats less than 600 people—the smallest capacity of any Broadway theatre.[50] This scene, which was performed to and intended to be seen by only a few hundred people, was illegally filmed and shared online to potentially millions of viewers. This issue of breach of consent rightfully deserves a place in the conversation around Broadway bootlegs.[51]

Additionally, there are two technical elements that make Broadway bootlegs unique forms of online copyright infringement. In order to evade rightsholders filing takedown notices, users will often upload bootlegs with humorous titles that conceal their true content.[52] Some examples currently available on YouTube include: the musical *Waitress* (in a video titled "pie flavored slime tutorial (feat. jeremy jordan and shoshana bean)");[53] the musical *The Cher Show* (in a video titled "Cher Fight a Small Mustached Man for 30 Years but in Chicago,");[54] and the musical Hedwig and the Angry Inch (in a video titled "genderqueer rock n roll n centimetre long phallic organ"),[55] just to name a few.[56] While this tactic may not be

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[49] Second Stage Theater (@2STNYC), TWITTER (May 10, 2022, 6:15 PM), https://twitter.com/2STNYC/status/1524151193035063297 [https://perma.cc/4S8C-EA8W].

[50] *See Hayes Theater*, N.Y. THEATRE GUIDE, https://www.newyorktheatreguide.com/theatres/hayes-theater [https://perma.cc/9JXL-2K2H] ("The Hayes Theater is the smallest Broadway theatre, now with 597 seats.").

[51] I am aware that the illegal filming and sharing of certain live performances, such as *Take Me Out*, could implicate legal claims such as publication of private facts or nonconsensual pornography. This Note is not intended to focus on or debate the merits of these potential claims. Rather, the issue of consent is raised to further illustrate the unique impact of bootlegs on theatre performers.

[52] Kunze, *supra* note 15, at 5.

[53] short insomniacs, *Pie Flavored Slime Tutorial (Feat. Jeremy Jordan and Shoshana Bean)*, YOUTUBE (June 12, 2020), https://youtu.be/70zuDujVeuU [https://perma.cc/7J6E-3XEF].

[54] Cher.Archived, *Cher Fight a Small Mustached Man for 30 Years but in Chicago*, YOUTUBE (Jan. 1, 2020), https://youtu.be/hFnJ0753GXg [https://perma.cc/5JCB-EZR4].

[55] medicrio, *Genderqueer Rock n Roll n Centimetre Long Phallic Organ*, YOUTUBE (Nov. 26, 2017), https://youtu.be/hkJXZP-HnzM [https://perma.cc/P45V-GSTH].

[56] All three of these videos are still live on YouTube as this Note goes to publication. *See supra* notes 53–55.

a foolproof way to prevent removal of the recording, it adds an additional layer of difficulty for individuals tasked with finding bootlegs and filing takedown notices with the respective online service provider.[57]

Another method by which illegal uploads of copyrighted materials can be identified online are through automated content identification systems, like Content ID on YouTube.[58] Content ID works by checking videos uploaded onto YouTube "against a database of audio and visual content that's been submitted to YouTube by copyright owners."[59] These pieces of data are often referred to as "fingerprints," emphasizing their unique nature and ability to be used for identification purposes.[60] This system works by identifying a snippet of a copyrighted song used in an uploaded video, and then alerting the rightsholder, who then can elect to block, track, or monetize the video.[61] This system is illustrative of the cooperative efforts required to curb online copyright infringement. As the Copyright Office notes in its report, this kind of technology relies on the willingness and ability of rightsholders to provide reference files and data to OSPs.[62] The potential issue with relying on these systems to identify bootlegs is that, unlike file-based content like music and movies which can be perfectly reproduced in digital form,[63] live theatre, by its nature, cannot be. Theatre bootleggers are often using a smartphone, filming discretely to evade being spotted by ushers in charge of catching

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[57] *See* Hershberg, *supra* note 13 ("Jeffrey Seller, the lead producer of *Hamilton*, had to hire someone full-time to search for bootleg recordings of the show . . . .").

[58] *See How Content ID Works*, GOOGLE, https://support.google.com/youtube/answer/2797370?hl=en [https://perma.cc/96W9-3XAQ] (explaining YouTube's automated content-checking system).

[59] *Id.*

[60] *See A Guide to YouTube Removals*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals [https://perma.cc/KTR6-3DE9] ("[Content ID] works by checking every video uploaded against a database of audio and video 'fingerprints' submitted by rightsholders.").

[61] *Id.*

[62] *See* U.S. COPYRIGHT OFF., s*upra* note 18, at 178 (noting the need for cooperation from rightsholders to identify infringed materials).

[63] *See* Patrick Turner, *Digital Video Copyright Protection with File-Based Content*, 16 MEDIA L. & POL'Y 165, 172 (2007) ("Current technology, available to consumers, allows for perfect digital reproduction of digital content . . . .").

audience members recording.[64] This leads to recordings that have poor audio and video quality, far from a perfect copy of the live performance. Therefore, automated content identification systems are likely much less effective on uploads of live Broadway performances. Both of these unique technical elements were likely not contemplated in 1998 when the DMCA was enacted and illustrate the urgent need to update the Copyright Act for the twenty-first century.

III. THE US COPYRIGHT OFFICE RECOMMENDATIONS

In Part VI of the May 2020 report, the Copyright Office made numerous recommendations for legislative action regarding Section 512 based on the study's guiding principles.[65] This Note will not address every recommendation, as some recommendations are more promising than others. Even the Copyright Office itself states that "some [recommendations] offer[] greater potential improvements for the functioning of the section 512 system than others."[66] This subsection will address four recommendations that are particularly salient to the issue of Broadway bootlegs and will discuss the potential of each to be effective in combatting their online spread.

A. REPEAT INFRINGER POLICIES

For OSPs to be eligible for safe harbor under Section 512, the provider must have "adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service

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[64] *See* Kunze, *supra* note 15, at 2 ("[T]heatre bootlegs [are] . . . often filmed secretly on commercial-grade digital technologies (smartphones, digital camcorders, etc.) for personal use, trading, or sale."); Steph Panecasio, *Hamilton on Disney Plus is Bringing Musical Theatre to a Whole New Audience*, CNET (July 5, 2020, 6:34 PM) https://www.cnet.com/culture/entertainment/hamilton-on-disney-plus-is-bringing-musical-theater-to-a-whole-new-audience/ ("If by some miracle [unlucky or priced-out fans] *do* find a viable bootleg, chances are it's 10% Hamilton and 90% a shaky iPhone recording of the back of someone's head in 144p.").

[65] *See* U.S. COPYRIGHT OFF., *supra* note 18, at 84 ("With the Study's guiding principles in mind, the Office has formulated several recommendations for legislative action . . . .").

[66] *Id.*

provider's system or network who are repeat infringers."[67] While the requirement of this policy is an important element of Section 512, its language is vague and lacks definition. An important question arises from this ambiguity: who is a repeat infringer? As displayed in a number of copyright infringement cases, the definition of this term has largely been left to the discretion of individual OSPs.[68] This has, in turn, "resulted in a malleable definition of repeat infringer" which creates extreme flexibility for OSPs and uncertainty for users and copyright holders alike.[69]

In addition to the adoption requirement, Section 512(i) also requires reasonable implementation of the repeat infringer policy.[70] While the adoption of a policy is simply a question of fact, the question of reasonable implementation looks at the content of the policy itself, namely, "does it require termination of users' accounts, and does it do so under appropriate circumstances?"[71] This issue of reasonable implementation, like the issue of defining a repeat infringer, has largely been interpreted by courts to allow OSPs to adopt a lax approach to informing users of a repeat infringer policy.[72] As a result, some OSPs have implemented policies that have "very little deterrent effect,"[73] for instance, by having an unwritten policy and not communicating the terms of the repeat infringer policy to the user.[74] The Copyright Office, therefore, is of the opinion that the current interpretation of the repeat infringer requirement fails to serve as a deterrent for infringing activity by producing unwritten policies that are administered in an "unsystematic and casual" manner, ultimately placing a high

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[67] 17 U.S.C. § 512(i)(1)(A).

[68] *See* U.S. COPYRIGHT OFF., *supra* note 18, at 100–01 (noting multiple decisions in which courts have failed to clarify a uniform standard for the boundaries of an acceptable repeat infringer policy that satisfies the Section 512 repeat infringer policy requirement).

[69] *Id.* at 101–02.

[70] 17 U.S.C. § 512(i)(1)(A).

[71] U.S. COPYRIGHT OFF., *supra* note 18, at 103–04.

[72] *See id.* at 105 ("The courts have interpreted section 512(i)(1)(A) as allowing OSPs to adopt a somewhat casual approach to 'inform[ing] subscribers and account holders . . . of[] a [repeat infringer policy]'" (alterations in original) (quoting 17 U.S.C. § 512(i)(1)(A))).

[73] *Id.*

[74] *See id.* at 106 (questioning outcomes that allow an OSP to adopt an unwritten policy but only requiring that the OSP communicate the existence of the policy itself, not the actual terms of the repeat infringer policy).

burden on rightsholders.[75] The Copyright Office thus recommends that Congress closely monitor judicial interpretation of the repeat infringer policy requirement and potentially consider legislation if "case law continues to place a high burden on rightsholders."[76]

As evidenced by the lengths that individuals who upload and share Broadway bootlegs go in order to avoid detection and take-down, [77] it is likely that a vast majority understand that the act of filming and posting bootlegs is illegal. However, individuals seem to be willing to reupload their bootlegs that get removed for copyright infringement. An illustrative example of this is a bootleg of *Heathers: The Musical* on YouTube titled "mean girls but its 1989 (the musical)" in order to evade detection.[78] The video description reads: "omg i know it's heathers jesus christ stop sayin it in the comments. it's to keep it up. if anything happens and the video gets taken down i'll repost it."[79] This bootleg has been on YouTube since July 2019 and has just over one million views.[80] While this is just one example, it demonstrates that individuals who post bootlegs seem undeterred by the removal of infringing material and are willing to reupload the material that does get removed.

Thus, the actions of the bootleg community substantiate the finding of the Copyright Office that the current interpretation of the repeat infringer requirement fails to serve as a deterrent to infringing activity. The recommendation of the Copyright Office that OSPs inform users of repeat infringer policies, as well as disable accounts of repeat infringers, could be effective in reducing the spread of bootlegs. While some individuals post bootlegs freely without expecting reciprocation, others trade bootlegs for money or other bootlegs.[81] If OSPs enforced the termination of repeat infringer's accounts, this could effectively take users out of the trading system, even if only temporarily. Owners of terminated

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[75] *Id.* at 109.

[76] *Id.*

[77] *See* Kunze, *supra* note 15, at 5–6 (describing various strategies for undetected circulation of bootlegs on the internet).

[78] Christi T, *mean girls but it's 1989 (the musical)*, YOUTUBE (July 17, 2019), https://youtu.be/tUNqQsp7qls [https://perma.cc/4Z8J-GFAT].

[79] *Id.*

[80] *Id.*

[81] *See* Kunze, *supra* note 15, at 5–6 (describing the "gift economy approach" taken by some bootleggers).

accounts might create new accounts, but if the repeat infringer policy is enforced as the Copyright Office recommends, subsequent new accounts participating in infringing behavior would be similarly terminated. This process of continuously creating new accounts and potentially losing their data on the site might be too much of a hurdle for bootleg traders to overcome.[82] Being clearly informed of the possibility of their account being disabled, and the belief that an OSP will actually follow through with these actions if the user reuploads infringing material, could be an effective deterrent for a bootleg sharer whose online accounts are their ticket to the Broadway bootleg community.

B. KNOWLEDGE REQUIREMENTS

Another requirement for OSPs to be eligible for the safe harbor provision under Section 512(c) and 512(d) is that the host both lack "actual knowledge" of infringing material on their service, and "not [be] aware of facts or circumstances from which infringing activity is apparent."[83] This is commonly referred to as "red flag knowledge."[84] If an OSP does obtain actual knowledge or red flag knowledge, it must expeditiously remove or disable access to infringing content in order to avoid liability.[85] However, the OSP has no duty to "monitor[] its service or affirmatively seek[] facts indicating infringing activity."[86] In the Section 512 Report, the Copyright Office addresses "three different issues within the knowledge requirements: the difference between actual knowledge and red flag knowledge; the willful blindness standard; and the extent to which two standards specific to section 512(c)-types of OSPs track the common law vicarious liability standard."[87] Most relevant to the issue of bootlegs is the narrow interpretation of red flag knowledge.

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[82] *See id.* at 109 (describing the potential deterrent effect of termination of repeat infringers' accounts).

[83] 17 U.S.C. § 512(c)(1)(A)(i)–(ii), (d)(1)(A)–(B).

[84] U.S. COPYRIGHT OFF., *supra* note 18, at 111 n.588.

[85] *Id.* at 111.

[86] 17 U.S.C. § 512(m)(1).

[87] U.S. COPYRIGHT OFF., *supra* note 18, at 112.

While actual knowledge is not defined in Section 512, it is well understood to mean actual knowledge of infringing activity, which OSPs can discover through personally uncovering infringing material, identifying material through content identification systems, or receiving communications that alert the OSP of infringement on its platform.[88] Red flag knowledge is similarly undefined in the statute, but Congress intended this standard to obligate OSPs to act when they have "learned *enough* information to indicate a likelihood of infringement—but short of obtaining actual knowledge."[89] The report notes that, when the DMCA was passed in the 1990s, Congress used internet directories as an example to demonstrate red flag knowledge, explaining that directory providers would lose their safe harbor if they were to refer users to other sites where obviously apparent infringing material could be downloaded or transmitted.[90] The Copyright Office, considering the technological advancements since the Act was passed, concludes that Congress logically intended similar indicia to be red flag knowledge for Section 512(c) OSP sites, such as an upload like "FULL [movie title] part 3."[91] Currently, courts have interpreted red flag knowledge in a way that essentially removes the standard, "almost requir[ing] a user to 'fess up'" before an OSP has a duty to act.[92] Therefore, the Copyright Office recommends that "[i]f Congress intends for the actual knowledge and red flag knowledge standards to be distinct, then Congress may wish [to] add statutory language to that effect."[93]

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[88] *See id.* at 113 (outlining the ways in which an OSP can obtain actual knowledge of infringed material on its platform).

[89] *Id.*

[90] *See id.* at 114 ("The Senate and House Reports, in the parlance of late–'90s technology, talked specifically about internet directories, saying that a directory provider would obtain red flag knowledge from viewing a 'pirate' site and would then lose its safe harbor if the directory still linked to that site.").

[91] *Id.*

[92] *Id.* at 123. *See also* UMG Recordings, Inc. v. Shelter Cap. Partners, 718 F.3d 1006, 1023 (9th Cir. 2013) ("[W]e hold that Veoh's general knowledge that it hosted copyrightable material and that its services could be used for infringement is insufficient to constitute a red flag."); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 32 (2d Cir. 2012) ("[W]e note that no court has embraced the . . . proposition—urged by the plaintiffs—that the red flag provision 'requires less specificity' than the actual knowledge provision.").

[93] U.S. COPYRIGHT OFF., *supra* note 18, at 123.

Prominent OSPs are aware that their sites can be used to share infringing material; this, of course, is not enough to impute liability under the knowledge requirements.[94] Furthermore, they have little incentive to prevent infringing conduct, as it "brings users and users' information (and therefore, advertising revenue) to their sites."[95] When doing a cursory search of YouTube, it seems highly unlikely that the platform is unaware that there are Broadway bootlegs on its site. For example, when you search "Broadway bootleg," the first result that appears is a playlist containing 780 videos, many of which are several hours long and are cleverly named, indicating that they are bootlegs.[96] The fact that these extensive playlists exist, with videos that have stayed up for years, seems to indicate that there should at least be red flag knowledge under the DMCA—if Congress did indeed intend for this kind of indicia to be sufficient knowledge under the statute.[97] Adding statutory language to clarify the red flag knowledge standard could be effective in addressing bootlegs by preventing courts from interpreting the standard out of existence. Statutory language that lowers the threshold knowledge requirement for red flag knowledge could give OSPs more incentive to address this infringing material, thus helping to restore the balance between rightsholders and OSPs in this regard.

C. NOTICE-AND-TAKEDOWN PROCESS

The notice-and-takedown process, as described in Section 512(c)(3), epitomizes the cooperative process that Congress envisioned in passing the DMCA.[98] In short, the takedown process

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[94] *See id.* at 119 ("[C]ourts have said it is not enough, for example, for an OSP to have a 'general knowledge that one's services could be used to share unauthorized copies of copyrighted material.'" (quoting *UMG Recordings*, 718 F.3d at 1021)).

[95] Kunze, *supra* note 15, at 6.

[96] Martina Castro Vallejo, *Playlist: Are These Broadway Musical Bootlegs? No This Is Patrick.*, YOUTUBE, https://youtube.com/playlist?list=PLPQNosPFj3zdCBfEh0EcC5D-GpaHybl03 [https://perma.cc/Q7TU-ZSNG].

[97] *See* US. COPYRIGHT OFF., *supra* note 18, at 114 ("If viewing a linked site and finding that it is dedicated to piracy would be red flag knowledge for a directory provider, it is logical that Congress intended similar indicia to be red flag knowledge for section 512(c) OSPs regarding their own sites as well.").

[98] U.S. COPYRIGHT OFF., *supra* note 18, at 136.

begins with the rightsholder sending a takedown notice to a service provider, the contents of which must meet several requirements under the statute.[99] After receiving a compliant notice, the OSP "must act expeditiously to remove or disable access to the infringing material" and "promptly notify" the uploader of the removal.[100] That uploading user may submit a counter-notice requesting reinstatement of the material if they believe it was mistakenly removed.[101] Throughout the course of the study, rightsholders noted that "large-scale infringement has rendered the notice-and-takedown process as 'burdensome and ineffective,'" pointing out the time, effort, and financial resources that are intrinsic to the process of claiming infringement to the designated agent of a service provider.[102] In particular, there was significant disagreement as to the definitions of "representative list" and "identifiable location"[103] as included in the statute.[104] While many OSPs argue that rightsholders should be required to provide specific URLS for each instance of infringing material to satisfy the identifiable location requirement,[105] rightsholders reject this assertion. Instead, rightsholders suggest that upon receiving a representative list of works they claim to be infringing, the OSP should review its site for

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[99] *See id.* at 138 ("A compliant notice must include 'substantially the following' elements: (i) the signature of the copyright owner or authorized agent; (ii) identification of the copyright-protected work allegedly infringed or, for multiple works, 'a representative list'; (iii) identification of the infringing material or activity sufficient for the OSP to locate the material; (iv) contact information for the copyright owner or authorized agent; (v) a statement of 'a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law'; and (vi) a statement that the information is accurate and, under penalty of perjury, that the complaining party is authorized to act." (citing 17 U.S.C. § 512(c)(3)(A)(i)-(vi))).

[100] *Section 512 of Title 17, supra* note 26.

[101] *Id.*

[102] U.S. COPYRIGHT OFF., *supra* note 18, at 137.

[103] *Id.* at 139.

[104] *See* 17 U.S.C. § 512(c)(3)(A)(ii) (requiring "[i]dentification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site"); *see also* 17 U.S.C. § 512(c)(3)(A)(iii) (requiring "[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material").

[105] *See* U.S. COPYRIGHT OFF., *supra* note 18, at 140–41 (explaining OSP arguments "in favor of requiring rightsholders to provide specific URLs on practical or policy grounds").

such infringing materials and not require the rightsholder to provide specific notice for each infringing work.[106]

In essence, the general view of OSPs that takedown requests must provide specific, individual URLs has the effect of collapsing the two standards and, in the eyes of rightsholders, renders the representative list provision meaningless.[107] The Copyright Office posits that the result of collapsing the two provisions "does not appear to be in keeping with Congress's original intent."[108] Therefore, the Copyright Office suggests that Congress provide statutory clarification, including whether a URL is a necessary identifier or simply one sufficient means of providing information to OSPs.[109] In addition to clarification regarding the two standards, the Copyright Office also makes the suggestion that Congress consider a way to "future-proof" the notice requirements "by shifting enumeration of notification methods from a statutory mandate towards a regulatory process."[110]

One way the Copyright Office suggests that Congress could achieve this goal is to modify the language of Section 512(c)(2) to require that the OSP's designated agent information be "prominently displayed," as well as allow the Copyright Office to regulate placement and content standards.[111] As of now, the statute only requires the information to be "on its website in a location accessible to the public."[112] This could help prevent the issue of rightsholders having to comb through OSP sites to find the submission form or designated agent's information.[113] Second, the Copyright Office suggests that Congress may wish to provide the Copyright Office with authority to adopt new notice methods, including adding user-friendly webforms, which would streamline the process for the rightsholder while allowing OSPs to utilize new

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[106] *See id.* at 141 (noting rightsholders' arguments that interpreting the identifiable location provision to require notices to contain the specific URL of each instance is "incompatible with the representative list provision").

[107] *Id.*

[108] *Id.* at 145.

[109] *Id.*

[110] *Id.* at 158.

[111] *Id.* at 159.

[112] 17 U.S.C. § 512(c)(2).

[113] *See* U.S. COPYRIGHT OFF., supra note 18, at 158 (explaining how current OSP websites burden the takedown process).

technology on their end.[114] The Copyright Office noted that to alleviate the burden on users in dealing with nonstandard takedown notices, it would make available standard notice and counter-notice forms.[115]

The assertion that the notice-and-process takedown discourages creators from enforcing their rights by requiring an unreasonable amount of time, money, and resources is likely applicable to Broadway rightsholders attempting to get bootlegs of their work removed. While Broadway does make significant revenue, it pales in comparison to the financial prowess of other industries. For example, while Broadway as a whole grossed $1.8 billion during the 2018–2019 season,[116] Disney alone grossed $11.12 billion at the box office in 2019.[117] Therefore, it is likely that theatre rightsholders, as part of a relatively small industry, do not have the same financial and technological resources as other rightsholders like major movie and music production companies.[118] Other artistic rightsholders, in comments submitted during the study, detailed the roadblocks faced in navigating the takedown process. A comment submitted by the Author's Guild notes that rightsholders "are frustrated by the fact that different ISPs utilize different DMCA takedown forms, some of which oblige rightsholders to provide information beyond that required by the statute."[119] A standardized takedown form provided by the Copyright Office which complies with the elements set out in Section 512(c)(3)[120] could reduce the time and effort it would take to submit requests to different OSPs while still fulfilling the statutory requirements.

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[114] *Id.* at 159.

[115] *Id.* at 158.

[116] *Broadway Season Statistics at a Glance*, *supra* note 3.

[117] Nancy Tartaglione, *2019 Worldwide Box Office Hits $42.5B Record*, DEADLINE (Jan. 10, 2020, 1:34 PM), https://deadline.com/2020/01/highest-grossing-movie-studios-2019-record-international-global-box-office-market-share-chart-analysis-2020-forecast-1202823471/ [https://perma.cc/9JJ2-98DE].

[118] *See* Kunze, *supra* note 15, at 6 (explaining how Broadway, being a relatively small industry lacking in financial and technological resources as compared to mass media conglomerates, would struggle to curtail bootleg content without significant federal law enforcement aid).

[119] The Authors Guild, Inc., Comment Letter on In the Matter of Section 512 Study: Request for Additional Comments, at 5 (Feb. 21, 2017), https://www.regulations.gov/comment/COLC-2015-0013-92463.

[120] U.S. COPYRIGHT OFF., *supra* note 18, at 158.

Additionally, rightsholders note that some platforms make it difficult to report infringing content by making it hard to find the correct contact, form, submission method, and other important resources.[121] This could be intentionally done by OSPs as a "hide-the-ball" tactic[122] to reduce the number of takedown requests while still complying with the Section 512 requirement to provide information "on its website in a location accessible to the public."[123] The proposed amendment to § 512(c)(2) that requires information to be conspicuously placed on websites could thwart this OSP tactic. Overall, statutory clarification and standardization of the notice-and-takedown process could streamline the process for theatre rightsholders, removing roadblocks that would discourage them from addressing bootlegs of their copyrighted work. It would be important, however, to ensure that OSPs are amenable to the streamlining process, specifically by being willing to accept the standardized takedown form created by the Copyright Office. If platforms required additional information or did not allow standardized forms to be submitted, it would defeat the purpose of creating this option for rightsholders. Requiring OSPs to accept this form or a similar standardized form could be a useful addition to the proposed amendments to Section 512.

D. NON-STATUTORY APPROACH: EDUCATION

The Copyright Office also posits that there could be potential in non-statutory approaches to mitigate the limitations of Section 512.[124] The first approach discussed in this section of the report is education initiatives to "alleviate certain imbalances in the section 512 framework."[125] Educational resources would pertain to the

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[121] *See* The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, Comment Letter on Section 512 Study: Notice and Request for Public Comment, at 7 (Apr. 7, 2016), https://www.regulations.gov/comment/COLC-2015-0013-90145 (arguing that platforms like Google, YouTube, Facebook, Twitter, and others frustrate the reporting of infringing content by making correct forms and submission protocols difficult to find).

[122] *See* The Authors Guild, *supra* note 119, at 5 (detailing how hide-the-ball tactics are enabled by the lone requirement of service providers having takedown information on websites accessible by the public).

[123] 17 U.S.C. § 512(c)(2).

[124] U.S. COPYRIGHT OFF., *supra* note 18, at 171.

[125] *Id.*

various aspects of copyright protection, including the scope of these rights, takedown notices, counternotices, and more.[126] These educational materials would, ideally, "serve all participants in the digital creative economy, including users, rightsholders, OSPs, and other members of the public."[127]

Considering the unique elements of bootlegs that have been discussed thus far, education initiatives have the potential to be successful in some areas, but perhaps not as much as other practical measures suggested by the Copyright Office. It is evident that the vast majority of users who record and post bootlegs know it is illegal.[128] Therefore, education geared toward users, like information on counterclaims, would be futile, as users who upload infringing content cannot submit counterclaims in good faith.[129] Educational measures might have some potential to inform theatre rightsholders on ways to improve the quality and accuracy of their takedown notices under the current Section 512 requirements. However, rightsholders may argue that it would be more helpful to improve the system itself, rather than place even more of a burden on them to use a system that already is difficult to navigate.[130] One commenter noted that educational programs have the potential to expand awareness of potential shared solutions between the different stakeholder groups in the digital creative economy.[131] Regarding the theatre industry, this kind of cooperation could allow rightsholders to share industry-specific knowledge[132] that could help OSPs better recognize infringing material.

However, OSPs have little incentive to participate in these cooperative methods. For one, these OSPs do benefit from infringing material on their sites, as it brings users, and therefore advertising revenue, to their sites.[133] Additionally, OSPs might be resistant to

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[126] *Id.* at 171–72.

[127] *Id.* at 172.

[128] *See supra* notes 77–80.

[129] *See* 17 U.S.C. § 512(g)(3)(C) (providing that one element of a counter notification is "[a] statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled").

[130] *See* discussion *supra* section III.B.*3*.

[131] U.S. COPYRIGHT OFF., *supra* note 18, at 173.

[132] *See* discussion *supra* section III.A.

[133] Kunze, *supra* note 15, at 6.

receiving information that could alert them to infringing material or cause them to recognize it, as it could rise to the level of the red flag or actual knowledge, thus putting them in jeopardy of losing their safe harbor.[134] The Copyright Office itself has noted that "[c]ooperation cannot be the only answer,"[135] and that "internet policy created without the input and buy-in of important stakeholders is unlikely to be successful."[136] Education initiatives are unlikely to effectively address the bootleg issue considering the knowing engagement in illegality by users, the goal of reducing the burden on rightsholders, and the potential reticence by OSPs to avoid information that would make them susceptible to losing their safe harbor. A better solution would be to implement concrete steps that change the operation of Section 512 to create a more effective path for creatives to assert their rights.

IV. CONCLUSION

The Digital Millennium Copyright Act ambitiously envisioned an internet that both ardently protected the rights of creatives and allowed OSPs to flourish.[137] Twenty-four years later, it is apparent that this ideal is not currently being achieved.[138] Broadway rightsholders, actors, and other creatives have a vested interest in maintaining the integrity of copyrighted material by preventing the spread of illegal recordings online.[139] The unique elements of Broadway bootlegs necessitate a change to the online copyright landscape to combat the negative effects posed to those involved in the production of live performances.[140]

The Copyright Office proposed a number of recommendations to Section 512 based on a thorough study, considering the needs and opinions of all parties involved in the online copyright dispute.[141] Some of the recommendations are more applicable than others to

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[134] *See* discussion *supra* section III.B.*2*.

[135] U.S. COPYRIGHT OFF., *supra* note 18, at 66.

[136] *Id.* at 67.

[137] *See supra* notes 23–24 and accompanying text.

[138] *See* Part II.

[139] *See* section III.A.

[140] *Id.*

[141] *See* Part II.

the issue of Broadway bootlegs.[142] Ultimately, the recommendations that suggest concrete changes to statutory language in order to alleviate the burdens on Broadway rightsholders would be most effective in countering the spread of bootlegs. Trying to coerce OSPs to participate in collaborative solutions and make the processes easier for rightsholders is likely to prove difficult, as these changes might make them more susceptible to losing safe harbor protections.[143] Instead, statutory revisions that mandate change to Section 512 would ultimately put more power in the hands of small rightsholders and balance the scales against large, powerful OSPs.

Undoubtedly, there are creative rightsholders calling for more drastic measures to the DMCA to prevent online infringement.[144] These recommendations should not be the end of the conversation about the shortcomings of the DMCA. After all, recommendations are just that—it is ultimately up to Congress to pass legislation that would work to achieve the goals that the Copyright Office lays out in the report. One example of proposed legislation regarding Section 512 is the SMART Copyright Act of 2022, introduced by Senator Thomas Tillis on March 17, 2022.[145] The bill acts to "amend title 17, United States Code, to define and provide for accommodation and designation of technical measures to identify, protect, or manage copyrighted works, and for other purposes."[146] The report and this bill are just the beginning, and ongoing developments regarding the Section 512 amendment should be closely monitored by all stakeholders in the online copyright landscape.

Before change is enacted, or in the event definitive change to the DMCA never occurs, agencies and organizations should provide concrete support to creatives asserting their rights. Educational resources on the notice-and-takedown process and standardized forms are examples of ways that rightsholders can better navigate the requirements of the DMCA.[147] While statutory amendments to the Act would be the most effective means of alleviating

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[142] *See* section III.B.

[143] *See* section III.B.

[144] *See supra* notes 44–49 and accompanying text.

[145] S. 3880, 117th Cong. (2022). A version of the bill was introduced in the House in December 2022 as the SMART Copyright Act of 2023. H.R. 9541, 117th Cong. (2022).

[146] S. 3880 at 1.

[147] *See* section III.B.

rightsholder burdens, additional resources and support could help to correct the drastic imbalance between rightsholders and OSPs in the current online copyright landscape.