

9 July 2014

Dear ministers and lawmakers of TPP negotiating countries,

The technology sector has become one of the leading drivers of the global economy. The Internet's international network of knowledge-sharing platforms has enabled new innovative, digital services to emerge from all corners of the world, creating hundreds of thousands of new jobs for educated, skilled workers. As our lawmakers and policymakers maintain rules for the use of technology, it remains crucial that these rules respect the very values that gave rise to these new businesses.

As Internet service providers, tech companies, and organizations representing thousands of engineers and users around the world, we write to you today to call your attention to a threat to this thriving technological ecosystem: the Trans-Pacific Partnership (TPP) agreement. This highly secretive, supra-national agreement is reported to include provisions impacting copyright and privacy in ways that significantly constrain legitimate online activity and innovation.

The provisions regarding intermediary liability are particularly concerning. We are worried about language that would force service providers throughout the region to monitor and police their users' actions on the internet, pass on automated takedown notices, block websites and disconnect Internet users. Irresponsible rightsholders can burden intermediaries with many thousands of automated takedown requests every day, using systems that operate with little or no human oversight. These systems rely on a "takedown first and ask questions later" approach to pages and content alleged to breach copyright.

Burdening these service providers with these new liabilities could also add new costs that may be passed onto Internet users. These automated systems have also led to many forms of legitimate speech being taken down, even when they are protected under fair use. (See attached two-page fact-sheet for more info) We oppose any kind of proposal for an enforcement regime that could lead to a "notice and staydown" system, where there is little to no recourse for users to challenge takedowns and restore removed content.

In light of these issues with existing intermediary liability systems, there are two specific models that could better protect the joint interests of tech services and users:

- 1) A notice-and-notice system that does not burden intermediaries with the obligation to remove and block access to content.
- 2) A judicial notice and takedown system that ensures the formal application of due process in determining the lawfulness of allegedly infringing content.

We hope the final language provides proper flexibility for nations to establish these kinds of takedown systems, as they continue to re-evaluate and reform their legal frameworks in response to new technological realities. We sincerely hope you re-examine the proposals that are on the table, and seriously question whether you are pushing for proposals that would truly enable new businesses to flourish in our countries in the decades to come.

Sincerely,



Affinity Bridge



Association for Progressive Communications



Agentic Digital Media



AUSTRALIAN
DIGITAL ALLIANCE

Australian Digital Alliance

- Alexis Ohanian, Co-founder of Reddit -



Australian Privacy Foundation



Amicus



Article 19



BC Freedom of Information and Privacy
Association



Blacknight

- Blindspot -



Briteweb



Catalyst Internet



Cheezburger



Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)



Codename Design



Consumer New Zealand



Consumers International



cStreet Campaigns



Data Foundry



Electronic Frontiers Australia, Inc.



Demand Progress



ello Foods Ltd.



Disconnect



Engine Advocacy



Electronic Frontier Foundation



Fark, Inc.



Fight for the Future



Floop Technologies



Gen Why Media



Floor 64



GHL Consultants Ltd.



Functional Imperative



Giganews



Galiano Coffee Roasting Co.



Golden Frog



GrowthLogic Inc.



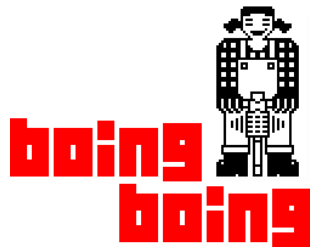
iiNet



Hackers/Founders



Imgur, Inc.



Happy Mutants, LLC (Boingboing.net)



Internet Archive



Hiperderecho



Internet Infrastructure Coalition (i2Coalition)



iFixit



Lionsgate Softworks



Namecheap



Open Media



O'Reilly Media



Public Knowledge



RadioAtlantic.ca



Reddit

- Ron Yokubaitis, Founder of Data Foundry Inc. -



Scoop Media



ServInt



Spake Media House



Stack Exchange



Textuality Services, Inc.

ThoughtWorks®

ThoughtWorks



Tucows



TunnelBear



Wikimedia Foundation



Abuse of Copyright Takedown Processes

A defining feature of notice and takedown regimes, such as those under the Digital Millennium Copyright Act (DMCA) of the United States, is that the Internet intermediary takes down content before even a preliminary assessment of the merits of the claim has been made by a competent judicial or administrative authority.

This makes it exceptionally easy to make takedown requests on spurious grounds unsupported by copyright law—and in order to gain the benefit of safe harbor protection, intermediaries are inclined to accept these spurious claims without question. Due to ignorance of the law or an unfounded fear of legal consequences, uploaders also seldom challenge such wrongful takedown notices.

The result is a chilling of online speech, including political speech, protest, criticism, and parody. A selection of wrongful takedown notices is maintained by the Chilling Effects project at <https://www.chillingeffects.org>, as well as by EFF in its Takedown Hall of Shame at <https://www.eff.org/takedowns>. The examples given below are drawn from those and other sources. They fall into the following categories:

- **To suppress critical reviews or feedback**

The first successful challenge to a DCMA claim was made by EFF in 2003 against Diebold Inc., a manufacturer of electronic voting machines. Diebold knowingly misrepresented that online commentators including IndyMedia and two Swarthmore college students had infringed the company's copyrights by discussing security flaws in its e-voting machines.¹ Since then, taking down negative reviews or criticism through bogus DMCA claims has become commonplace.²

- **To remove lawful parody**

In June 2013, the Church of Scientology issued a DCMA notice for the removal of a parody website, cheerupwillsmith.com. The domain registrar and website host complied with the request without challenge, despite the fact that, as EFF subsequently pointed out, it was entirely without merit: the website had no commercial purpose, and was a clear-cut case of parody as permitted under the fair use doctrine of U.S. copyright law.³

- **Overreaching claims that go beyond the bounds of copyright law**

Falling into a blanket category of claims that are not only legally wrong, but also pointless or even vindictive, are takedown requests that target non-infringing fair uses such as family videos, that happen to incidentally include copyright material in the background. Perhaps the most famous example is the subject of the *Lenz v. Universal* lawsuit, in which EFF acts as counsel—a short clip of a baby dancing to the background sound of Prince's "Let's Go Crazy".⁴

¹ See <https://www.eff.org/cases/online-policy-group-v-diebold/>.

² See <https://www.techdirt.com/articles/20130730/17572624008/rotolight-uses-dmca-to-censor-review-they-didnt-like-admits-to-dmca-abuse-censorship.shtml> and other examples linked from that page.

³ See <https://www.eff.org/deeplinks/2013/06/church-scientology-lands-takedown-hall-shame>. Another example: Victoria's Secret taking down the parody website pinklovesconsent.com created by a womens' rights group: see <https://www.eff.org/deeplinks/2012/12/i-see-london-i-see-france>.

⁴ See also <https://www.eff.org/deeplinks/2013/05/prince-inducted-takedown-hall-shame-new-lifetime-aggravement-award> for other illegitimate takedown claims made by Prince.



- **To delete opinions the complainant disagrees with**

In February 2014, a documentary filmmaker used the DMCA to remove critical scientific commentary that debunked his claims that AIDS and HIV infections were a hoax.⁵ The commentary did indeed use limited portions of the documentary, but as the basis for education and criticism, which once again fall squarely within the fair use doctrine.

- **To whitewash blunders or mistakes**

Reporting on the July 6, 2013 Asiana Airlines crash, a newscaster from San Francisco news station KTVU read out the names of the pilots on air. Unfortunately, the names were later revealed to be entirely fictional and a racist joke that had slipped through the station's editorial processes. As a result, several viewers posted footage of the broadcast online to hold the station accountable for their lapse in journalistic integrity. In response, KTVU resorted to the DMCA takedown process to have the videos removed.⁶

- **To restrict the public domain**

DMCA claims have frequently been applied to materials that are unambiguously in the public domain, beyond the legitimate control of the copyright owner. This included the song "This Land is Your Land" that was used as the soundtrack to a viral animated video during the 2004 presidential election—which, furthermore, also makes it a case of political censorship.⁷

- **Careless automated takedown notices that are simply wrong**

Way back in 1994, the community organization Linux Australia received a takedown notice demanding the removal of two copyrighted movies called "Grind" and "Twisted". Only, the files being hosted by Linux Australia weren't movies at all—they were free and open source software applications that just happened to share the same names.⁸ The ease of taking content down means that notice and takedown regimes lends themselves to careless mistakes such as these.

- **To silence political speech**

Perhaps most concerning of all is when copyright take down processes are misused to silence political speech. A recent example is provided by a spate of DMCA takedown notices issued by a Spanish law firm called Ares Rights, on behalf of several Ecuadorian state officials, targeting documentaries, tweets, and search results that include images of those officials. Although the notices allege copyright infringement, they are clear cases of lawful political commentary.⁹

⁵ See <https://www.techdirt.com/articles/20140210/05172926163/aids-denial-crazies-go-all-dmca-videos-educating-people-their-craziness.shtml>. Another example: Newport Television issuing a takedown notice over a Free Press report on media consolidation: see <https://www.eff.org/takedowns/broadcast-company-tries-manipulate-copyright-avoid-criticism>.

⁶ See <http://www.dmlp.org/blog/2013/after-air-mishaps-embarrassed-newscasters-turn-copyright-law>. Another example: Encana Corp. taking down a recording of a conference call in which a company representative used an expletive: see <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/encana-wants-embarrassing-audio-file-erased-from-the-internet/article8919607>.

⁷ See <https://www.eff.org/takedowns/music-publisher-claims-copyright-public-domains-land-your-land>. Another example: the removal public domain sheet music: <http://boingboing.net/2011/04/21/uk-music-publishers.html>.

⁸ See <http://www.zdnet.com/linux-australia-fights-motion-picture-association-of-america-notice-1139159948/>. Another example: the take down notice received by Cory Doctorow for his novel "Homeland", mistaken for the TV series of the same name: <https://www.eff.org/takedowns/homeland-insecurity-through-bogus-takedowns>.

⁹ See <https://www.eff.org/deeplinks/2014/05/state-censorship-copyright-spanish-firm-abuses-DMCA>. Another example: NBC took down a satirical Obama campaign video in 2008 days before a critical voter registration deadline: <https://www.eff.org/takedowns/nbc-issues-takedown-viral-obama-ad>.