

ACCESS DENIED:

How Journalists and Civil
Society Can Respond to
Content Takedown Notices

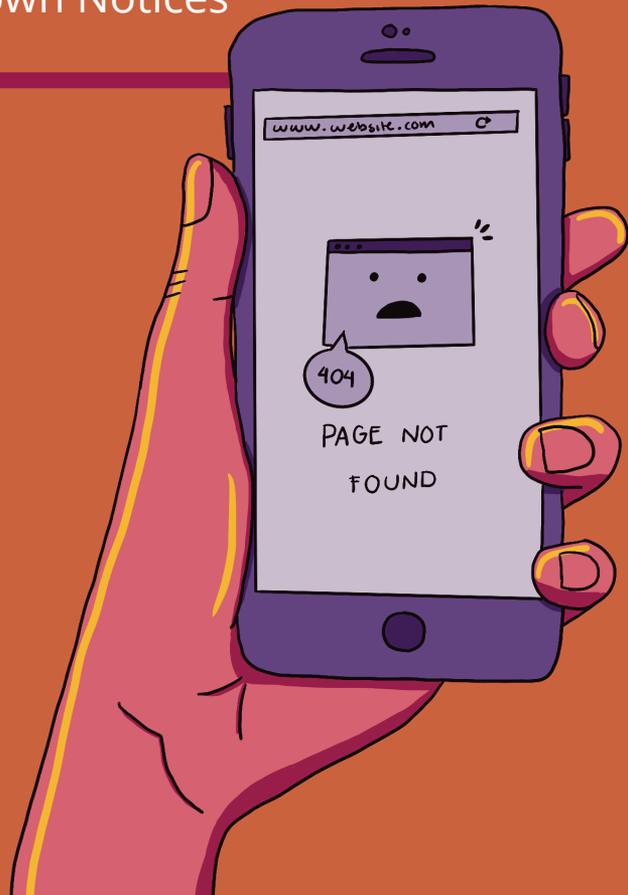


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INTRODUCTION

Over the last several years, ARTICLE 19 Mexico and Central America (Article 19) has heard from more and more journalists, activists, and others in civil society whose important work was removed from the internet through a mechanism known as “notice and takedown”. The takedowns were allegedly due to copyright infringement, but in many cases the content was the original work of the journalist getting the notice. The communications made reference to a US copyright law known as the Digital Millennium Copyright Act (DMCA), although none of the journalists were located there. Such law allowed alleged copyright owners to send a

simple notice to the service provider when their content has been posted without their permission, and have the post taken down right away. The situation was perplexing, but the results were clear: politically significant content was being removed from the internet through a fraudulent abuse of such legislation, and the free expression rights of journalists, activists, and human rights defenders violated, without a readily apparent remedy.

At first, Article 19 worked one-on-one with each case, reaching out for legal support from organizations including Harvard Law School’s Cyberlaw Clinic at the Berkman Klein



Center for Internet & Society (Cyberlaw Clinic). They developed expertise: the “notice and takedown” process used was typically that contained in the DMCA, a law that was intended to update the US’s copyright policy for the internet age. The DMCA takedown process was designed to allow copyright holders to easily notify websites of infringing uses, such as when a fan uploads a copy of a music video rather than linking to the official one from the artist or record label. However, in the cases that were coming to Article 19, people who were seeking to suppress information were submitting fraudulent notices to journalists’

and advocates’ US web hosts, who took down the content more or less automatically, without verifying the allegations.

As the number of cases rose and the team heard from partners throughout the region who were struggling with the same issue, it became apparent that coordinated action was necessary. This white paper is intended to highlight the consequences of the often-fraudulent enforcement of copyright law on free expression and access to information throughout Latin America, and to give journalists, advocates, and others who may be impacted the background information needed to defend their rights.



ABOUT ARTICLE 19

Article 19 is an independent non-governmental organization that promotes and defends the progressive advancement of the rights of freedom of expression and access to information for all people, in accordance with the highest international human rights standards, thus contributing to the strengthening of democracy. In order to fulfil its mission, Article 19 has the following main tasks: to demand the right to disseminate information and opinions in all media, to investigate threats and trends, to document violations of the rights to freedom of expression, to provide support to people whose rights have been violated, and to help design public policies in its area of action. In this sense, Article 19 envisions a region where all people can express themselves in an environment of freedom, security and equality, and exercise their right to access information; facilitating the incorporation of society into informed decision-making about themselves and their environment, for the full realization of other individual rights.

Article 19 works to link public policy advocacy and accompaniment to local processes of organizations and the exercise of rights in various states of the country. Article 19 promotes

the recognition and protection of human rights in digital environments, particularly the right to freedom of expression and information to avoid the establishment and practice of censorship mechanisms on the Internet or measures that hinder their exercise either through legislation, public policies, international treaties, judicial or administrative decisions, or private initiatives. Article 19 works to ensure the right conditions for individuals, media and journalists to exercise their rights to freedom of expression and information, privacy, access to the Internet without discrimination and any other right that is relevant in a digital ecosystem.

The activities of Article 19 are articulated in the Right to Information, Central America, Digital Rights and Protection and Defense programs. The Digital Rights Program develops activities related to online freedom of expression, including: (i) participation in advocacy spaces to establish human rights standards on the Internet; (ii) monitoring and evaluation of patterns of digital aggression against journalists; and (iii) promotion of legal remedies to counteract the government's digital surveillance practices.

Nowadays the Digital Rights area emphasizes the monitoring and study of the mechanisms and measures,

both public and private, used to remove information from digital platforms, especially when such measures are taken on behalf of companies and public officials. This implies analyzing the legal frameworks used to censor information on the Internet and foregrounding their incompatibility with the right to freedom of expression and information from the highest standards in the field. The ubiquitous and open nature of the Internet represents an environment that makes the configuration of attacks and aggressions documented by Article 19 are more complex.

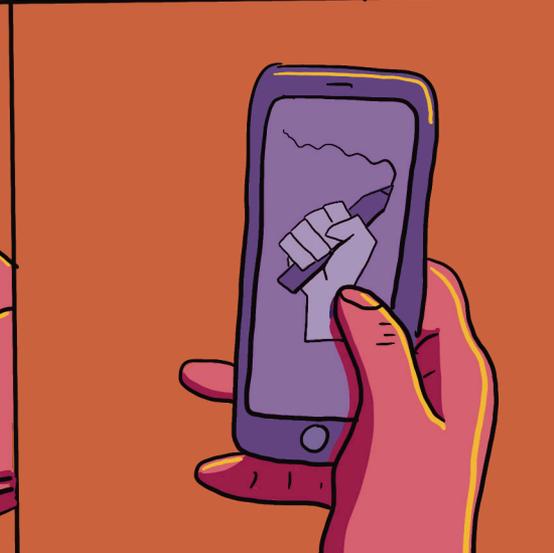
ABOUT THE CYBERLAW CLINIC

Harvard Law School's Cyberlaw Clinic, based at the Berkman Klein Center for Internet & Society, provides pro bono legal services at the intersection of technology and social justice. The Cyberlaw Clinic was founded in 1999, the first clinic of its kind, and today it continues its tradition of innovation with a practice that ranges from human

rights to intellectual property to government use of technology and more.

The Clinic's work is animated by its core values, which include the promotion of a robust and inclusive online ecosystem for free expression; advancement of diversity as a key interest in technology development and tech policy; transparency with respect to public and private technical systems that impact all citizens (and, in particular, members of vulnerable populations); access to knowledge and information; advancement of cultural production through efficient and balanced regulatory and enforcement regimes; and support for broad participation in public discourse.

Each year, dozens of law students participate in the Cyberlaw Clinic, which prepares them for practice by allowing them to work on real-world client counseling, advocacy, litigation, and transactional projects. The Clinic strives to center clients in its legal work, helping them to achieve success as they define it, mindful of (and in response to) existing law.



WHO IS THIS GUIDE FOR?

This is a guide for journalists, activists, and other members of civil society in Central and South America who are interested in protecting their rights to free expression and keeping their online content accessible, in spite of fraudulent DMCA takedown notices they may be targeted with. Although the DMCA is US law, it applies to people around the world who use US-based services like GoDaddy, Google, Twitter, and more.

The information in this guide is intended as educational material, not as legal advice. Using this guide will not form any client-attorney relationship between you and the authors, Article 19, or the Cyberlaw Clinic.

PART I:

WHAT IS THE DMCA,
AND WHAT SHOULD I
KNOW ABOUT IT?



WHAT IS THE DMCA?

The Digital Millennium Copyright Act, better known as the DMCA, is a US law that was passed in 1998, a moment in history where the internet was growing fast, and there were expectations it would continue to do so. For this reason, there was a concern about copyright protection for creative works that appeared online, such as music, movies, and articles. Through the DMCA, the US intended to balance the interests of copyright owners, internet users, and online service providers.

The DMCA extended the reach of US copyright protection to the internet and limited the liability of online service providers for copyright infringements committed by their users. The DMCA is a collection of provisions that are loosely related, but we are here focusing on Section 512, which provides for content take-downs, and especially how this provision can be fraudulently abused to remove important content, such as journalism, from the internet.

WHAT DOES DMCA SECTION 512 PROVIDE, AND HOW IS IT IMPACTING JOURNALISTS?

The purpose of Section 512 was to help online service providers (web

hosts, social media sites, and others) and users (content authors and readers or viewers) address copyright infringement. Online service providers, or OSPs, play a big role in copyright today because they provide a platform for all types of content online. Unlike the print publishers who preceded them, many OSPs do not exercise discretion over what is being posted to sites in their control.

In the 1990's, when internet use was exploding, foundational legal questions remained unanswered. Content owners were complaining about their material being "pirated," OSPs were finding it challenging to deal with the sheer volume of content, and it was often unclear who could or should be held liable for copyright infringement. Some in Congress worried that "without clarification of their liability, service providers [would] hesitate to make the necessary investment in the expansion of the speed and capacity of the internet."¹ For their part, business leaders insisted that "protracted litigation to determine who is liable for online infringement by users was not a sustainable business practice, and should be resolved by legislation." But how would such legislation² be structured?

By the end of the decade, when Congress passed section 512 of the

DMCA, they had settled on a safe harbor framework to balance the interests of the various parties. The legislation allows OSPs to limit their liability for infringement occurring on their systems by satisfying some conditions, generally consisting of implementing measures to quickly address infringing activity³. The law was intended to also account for creators' interests, and encourage them to share their content, by providing them a straightforward way to enforce their intellectual property rights⁴. Section 512 allows copyright owners to send a simple notice to the service provider when their content has been posted without their permission, and have the post taken down right away. This process took the place of expensive, long, and unpredictable litigation.

Maybe, it turns out, the process is too easy: recent cases in Latin America as well as the US and elsewhere reveal

that the Section 512 takedown process can be used fraudulently, not to target actual copyright infringement, but to silence the press. This has consequences: basically, recipients of takedown notices are presumed to be guilty, and the content is removed before any kind of neutral arbiter has the opportunity to rule for or against. This means that **if someone does not like something they see online and can produce a takedown notice, they're in a strong position to have the content removed, even if aspects of that notice are fraudulent – especially if the user who posted the content isn't aware of their right to file a counter notification.**

With abuse of the DMCA process on the rise, it is important that journalists in Central and South America understand their rights within the context of the DMCA, including how to ensure their important voices are not silenced.

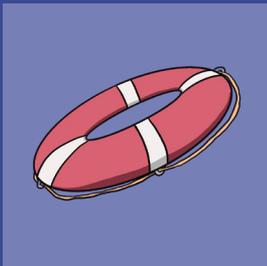
◀¹ 83 S. R.E.P. NO. 105-190, at 8 (1998).

◀² 73 See Senate Copyright Infringement Liability Hearing, 105th Cong. 98 (responses of George Vradenburg III to questions for the record from Sen. Leahy); House W.C.T. Implementation Act Hearing, 105th Cong. 87 (written statement of Roy Neel, U.S. Telephone Association).

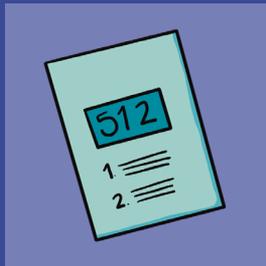
³ 77 Pub. L. No. 105-304, 112 Stat. 2877–86 (1998).

⁴ 78 H.R. R.E.P. NO. 105-551, pt. 2 at 23 (1998).

WHY DO ONLINE SERVICE PROVIDERS COMPLY WITH DMCA SECTION 512 TAKEDOWN NOTICES (OR, WHAT'S IN IT FOR THEM)?



The DMCA includes a “safe harbor” provision that protects online service providers from being held liable for copyright infringement committed by their users.



However, service providers can only take advantage of the safe harbor if they comply with the notice and takedown steps laid out in DMCA Section 512.



If a service provider doesn't comply, it can lose access to the safe harbor and become liable for expensive copyright damages in US courts.

The DMCA's definition of an “online service provider” is broad. Any entity that offers hosts or transmits user-generated content or communications between users' online counts, unless the entity is actively involved in editing or otherwise modifying users' content. OSPs include telecommunications, website hosting, email, and social media companies, among many others.

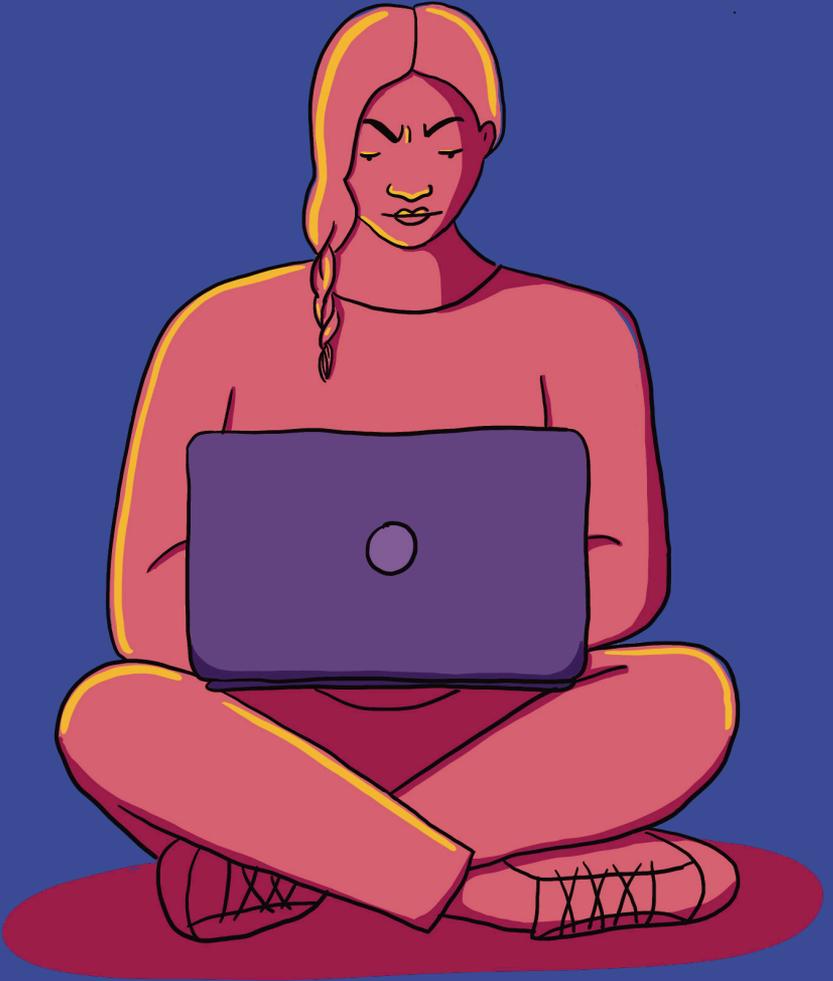
I'M NOT IN THE US—WHY SHOULD A US LAW APPLY TO ME?

Technically, the DMCA is not applied to you directly, but rather to US-based sites where you might choose to host your content. Some of the biggest online service providers are from the United States: Facebook, Google, Twitter, Godaddy.com, WordPress, and more, are all located in the US. The way Section 512 is designed, it's the online service provider who receives the takedown notice, and US law applies to them because that's where they are organized, regardless of where their individual users might be located. Online service providers not located in the US do not have to comply with the DMCA.

However, Mexico is in the process of adopting a policy similar to DMCA Section 512. The United States, Mexico, and Canada Agreement (USMCA) entered into force on July 1, 2020. As a part of Mexico's fulfillment of the USMCA, it committed to certain policy changes, including in the area of copyright. Mexico's legislature passed a new copyright law in June 2020 that will change how Mexicans browse the internet. There are three main changes: a takedown notice mechanism, access control technologies (DRM), and changes to the federal criminal code related primarily to DRM. The takedown process described in the June bill essentially replicates the takedown process in the DMCA.

Service providers based in the US also usually notice in their terms & conditions that they are complying with the DMCA, and ask users to represent that they will not post content that infringes copyright. When you use the website, you accept their terms and conditions and commit yourself to comply with everything that is said there. Thus, if a service provider receives a takedown notice saying that content on its site is infringing, it may consider that content to violate its terms and conditions as well.

The troubling thing about this situation is that it upsets a careful balance between protections for free expression and protections for the rights of content creators. Generally, in the US and in other countries around the world, people's right to freedom of expression is protected by domestic law. Those protections have certain limits, including copyright provisions that allow content creators to limit other people's ability to use their work. However, when the copyright law of one jurisdiction, like the US, is used illegitimately to block free expression from a person in another jurisdiction, such as Mexico or Brazil, the Mexican or Brazilian will find it difficult, legally and logistically, to challenge that decision on free expression grounds.



THIS MEANS THAT IF SOMEONE DOES NOT LIKE SOMETHING THEY SEE ONLINE AND CAN PRODUCE A TAKEDOWN NOTICE, THEY'RE IN A STRONG POSITION TO HAVE THE CONTENT REMOVED, EVEN IF ASPECTS OF THAT NOTICE ARE FRAUDULENT – ESPECIALLY IF THE USER WHO POSTED THE CONTENT ISN'T AWARE OF THEIR RIGHT TO FILE A COUNTER NOTIFICATION.



PART 2:

HOW HAS THE DMCA BEEN
IMPACTING JOURNALISTS
IN THE REGION?



MEXICO

The practice of journalism in Mexico has become an imminent risk to life, integrity, security and has resulted in a differentiated psycho-emotional impact. In 2019, 609 aggressions against the press were registered and 10 journalists were murdered. Between 49% and 53% of the aggressions against journalists come from state agents.

Two years ago, the government headed by Andrés Manuel López Obrador had promised an agenda of transition and structural changes known as the 4T (the Fourth Transformation).

However, the promises have changed and instead of promoting an agenda of transformation, there has

been a concerning setback related to the right to freedom of expression and access to information. The intensification of legislative actions to censor the Internet seen in 2019 - for example - imposed on digital platforms a new Federal Copyright Law that introduces the notion of a DMCA-style "Notification and Takedown." Just as in the US, this new Mexican policy requires websites to control the content generated by their users, to identify copyright violations, and may allow the entirety of a website to be affected even if only a small proportion of its content is considered illegal, thus creating an extrajudicial procedure.



CASE: NOTIGODINEZ

On 2018, NotiGodinez –a news portal that publishes official data from institutions, analysis, and opinion pieces alongside news stories⁵ – received a total of two intimidating e-mails from a person identified as “Nancy Mayorga”, who claimed to be the “legal representative” of the company “Planea tú Bien” and demanded that the note be removed or there would be legal consequences. Notigodinez decided to stand firm and did not remove such journalistic piece.

Later, on September 27, 2019, NotiGodinez again received an email

from its web host, the American company known as GoDaddy⁶. The email notified them that a person identified as “Andrea Noel” had activated the “notice and take down” mechanism. Andrea Noel’s complaint concerned a 2015 article that was originally written by the Reforma⁷ newspaper and which NotiGodinez had quoted on its website. The article described fraudulent acts by the company “Plan your good” (Planea tu Bien)⁸, which since 2016 had been harassing NotiGodinez with legal threats demanding the removal of the article.

The takedown notice issued by GoDaddy gave NOTIGODINEZ two options; either to remove the article or to fill out a form known as a “counter-notification” or “counter-notice” within 24 hours. Acting quickly, NotiGodinez chose to make the counter-notification with the assistance of Article 19. In their response, they pointed out that the notice contained several inconsistencies. Most significantly, they flagged the possibility that

⁵ Available in the following link: <https://notigodinez.com/acerca-de/>

⁶ Information available in the following link: <https://mx.godaddy.com/>

⁷ Removal of the note available in the following league: <http://web.archive.org/web/20150422213811/http://notigodinez.com/ahora-la-empresa-planea-tu-bien-engancha-y-estafa-a-sus-clientes-con-mentiras>

⁸ Company dedicated to the service of real estate financing. Information available in the following link: <https://www.planeatubien.com/>

the claim was fraudulent, an impersonation of the actual owner of the work in question. NotiGodinez carried out an investigation to get in touch with "Andrea Noel", which revealed that the contact details provided to GoDaddy, which had been passed on to them, were falsified. No one by that name worked at the Reforma newspaper, on whose behalf the complaint had purportedly been made. NotiGodinez and Article 19 made several other points as well, even quoting the previous Federal Copyright Act of 2019, but to no avail. GoDaddy never gave an answer about the information that was shared with it. Its only response was a form letter that ignored the substance of the response:

IMPORTANT: The necessary and legally required wording for items C and D is very specific and we have to return your counter notice to you if you do not provide us with a correctly written statement including all of the verbiage indicated above.

Upon receipt and recognition of a complete counter notification the hosting account will be suspended or remain suspended for 10-14 days per the Counter Notification Policy.

You may wish to review our Trademark &

Copyright policy which includes information about Counter Notifications: http://www.godaddy.com/agreements/showdoc.aspx?pageid=TRADMARK_COPY

Please understand that as a web hosting provider, we are not able to make legal determinations as to who is right or wrong in an infringement claim.

Let us know if you have any other questions at this time and how you would like to proceed.

Kindest Regards,

Copyright Department

Go Daddy Operating Company, LLC

CopyrightClaims@GoDaddy.com

After ensuring that its counter notice carefully followed the formatting requirements, NotiGodinez got no further. GoDaddy issued no analysis on the arguments that had been presented, merely reiterating the statement that they were going to suspend the NotiGodinez page for ten to fourteen days. In the face of this bureaucratic stonewalling, NotiGodinez decided to comply with the original notice, taking down the article entirely, out of fear that if it did not, GoDaddy might pursue reprisals against the portal as a whole.



CASE: PEDRO CANCHÉ

Pedro Canché is an independent Mayan journalist whose main means of communication is the portal Pedro Canché Noticias⁹. He is a reference point in the State of Quintana Roo for his journalism on regional political and human rights issues, as well as events of national impact. Article 19 has worked with Canché in several prior instances when he suffered aggression because of the work he does, and Canché reached out to the organization again when his journalism was targeted with a takedown notice.

During 2014 and 2015, Pedro Canché was a victim of arbitrary detention, fabrication of crimes, torture and ill treatment, smear campaigns, and discrimination, after documenting the level of repression against Mayan demonstrators in the facilities of the

Water and Sewerage Commission of the state of Quintana Roo, the municipality of Felipe Carrillo Puerto, and publicizing his findings to national attention. He spent nine months in the Felipe Carrillo Puerto Municipal Prison, only released once an amparo trial sentence confirmed that the process had been mounted as a reprisal against the exercise of freedom of expression. The Federal Collegiate Court found that Pedro Canché was only covering the demonstration that took place in the facilities of the Water and Sewerage Commission.

During his time in prison, Canché was the victim of threats and physical aggressions, repeatedly beaten by other inmates who referred to him as “the journalist” –an unsubtle hint at the cause of the violence he suffered.

The facts of Canché’s case have been made known to the United Nations Working Group against Arbitrary Detention and to the National Human Rights Commission. Seeking justice, Canché has initiated criminal proceedings before the Special Prosecutor’s Office for Crimes against Freedom of Expression (FEADLE) against the officials who participated in the fabrication of the criminal proceedings against him, as well as against

⁹ <https://noticiaspedrocanche.com>

the people who tortured him inside the prison. To date, he has only received a public apology, and those responsible for the events that affected Canché remain unpunished¹⁰.

Beginning in early 2019, Canché started receiving death threats and other intimidation, intended to force him to stop publishing information or to change what he published related to the activities of organized crime. Journalists in Quintana Roo face an adverse context due to the omissions of the authorities¹¹. In spite of reports to various Mexican agencies, such as FEADLE and the Protection Mechanism for human rights defenders and journalists, circumstances have not changed and Canché and his fellow Quintana Roo journalists continue to lack any meaningful access to justice.

On March 11, 2020, Canché noticed that his news website, entitled NOTICIASCANCUN.MX, was down. He sent an email to GoDaddy, his

web host, inquiring about the outage and complaining that his news portals had been blocked for no reason, without providing him with any resources or information to be able to recover them. The type of content removal towards Pedro Canché is one more precedent that links him to his journalistic work in Quintana Roo.

The following day, GoDaddy replied to Canché, stating that it had received a report of alleged copyright infringement from an unidentified third party. Rather than afford Canché even the limited process available under the DMCA Section 512, such as the opportunity to review the substance of the notice and the option to respond with a counter-notification, GoDaddy immediately removed the content. In a disturbing parallel to the challenges he experiences in seeking access to justice in his home state, in this instance the policy of an American web host also denied Canché the

¹⁰ For more information, see the report published by ARTICLE 19 “Protocol of Impunity”, chapter “Justice: Complete”, which outlines the legal and personal consequences of the criminal proceedings that Pedro Canché faced for having exposed the disproportionate use of force against demonstrators. Available at: https://articulo19.org/wp-content/uploads/2019/02/A19-2019-InfomImpunidad_final_v3.pdf

¹¹ For more information, see the report published by ARTICLE 19 “A Quiet Paradise: Violence against the Press in Quintana Roo”. This material contains an account of the threats that Pedro Canché has received from organized crime, as well as the context of the state. Available at: <https://articulo19.org/paraisoquecalla/>

opportunity to challenge and invalidate the claims made against him. Finally, Canché was silenced and forced to search and move all his content to a new web host.



CASE: PÁGINA 66

PÁGINA 66 published an article by Daniel Sanchez Barrientos titled “Malos antecedentes de empresa que contrató ‘Alito’ para videovigilancia” (Company hired by ‘Alito’ for video-surveillance has prior bad record’) in January 2018¹².

The article revealed that Interconecta, subsidiary of Grupo Altavista, had signed a contract for almost 2 million pesos per month to provide

video-surveillance services in four cities in the Mexican state of Campeche. Mr. Sanchez’s research had also unearthed, based on data by the Auditoría Superior de la Federación (Federal Audit Office), Interconecta’s prior corruption and tax fraud allegations on similar contracts under its CEO, Ricardo Orrantia.

In August 2018, some eight months after the article was posted, Mr. Sanchez received several messages threatening legal action if he did not take it down. Some of the messages argued that since Grupo Altavista is a registered international trademark, using its name without their consent was “improper use”.

In October, Digital Ocean (which was paid to host PÁGINA 66’s site) received a notice under the DMCA “notice and take down procedure.” Digital Ocean notified PÁGINA 66 that they had 3 days to take down the article or risk their entire site being taken down. PÁGINA 66 contacted Article19 published a public alert on the matter¹³.

Additionally, the Digital Rights team at Article19 sent a written report to Digital Ocean. With this response,

¹² The original URL of the posting (now empty due to the current case) is <https://www.pagina66.mx/malos-antecedentes-de-empresa-que-contrato-alito-para-videovigilancia/>

¹³ Disponible en la siguiente liga: <https://articulo19.org/amenazas-contra-medio-pagina-66-para-eliminar-informacion-sobre-corrupcion-en-internet/>

Digital Ocean stepped back and PÁGINA 66 site remained accessible.

On December 13, 2019, PAGINA 66 received an email from “Compliance legal” at the email address compliance@legal-abuse.eu. The email was “in representation of” Humberto Herrera Rincón Gallardo. The notification was described as “off the record” and asked Mr. Sanchez, author of the article about Interconecta, to remove it from PÁGINA 66’s site and to install the code “robots.txt” or “instrucciones noindex” on the site so the name “Ricardo Orrantia” and “Grupo Altavista” could not be indexed or found there. The email argued that the publication was damaging Grupo Altavista and Ricardo Orrantia’s “right to honor” under article 17 of the European Union’s General Data Protection Regulation (GDPR) as well as jurisprudence of the Court of the European Union (C-131/12), invoking a right to eliminate the “private information”.

PAGINA 66 again reached out to Article19, which recommended Mr. Sanchez to take no action due to the following factors:

Given the PAGINA 66 site is hosted in the United States, and the US did not sign Convention 108 of the European Union, EU regulations do not apply.

The email was purportedly in representation of Humberto Herrera Rincón Gallardo, and not Ricardo Orrantia. EU law requires that a petition of this kind be made directly by the subject of such personal data.

Ricardo Orrantia is a Mexican citizen in Mexico, and his name is not private information, but already in the public eye and easily found by any research.

Article19 researched the email address, and it did not trace to the EU, but was linked to a company in Aguascalientes, México.

The matter was left as such, and no other email or official communications have been received from “Compliance legal”.

Unfortunately, Grupo Altavista and Ricardo Orrantia continued their efforts to suppress the article. On January 29, 2020, Mr. Sanchez received a notification from Digital Ocean that his website was infringing copyright that demanded a response within 3 days. Several emails were exchanged between Pagina 66, Digital Ocean and Article19.

The notice incorrectly identified the author of the article as Humberto Herrera Rincon Gallardo, not Daniel Sanchez. PAGINA 66 responded:

Hi,

This case looks strange, the owner of pagina66.mx is Mr. Daniel Sanchez (we attach his ID card and who is of pagina66.mx) if you check the screenshot attached to this email, you can see his credits in the note, Mr. Humberto Herrera is claiming copyrights for information generated and published for Mr. Daniel Sanchez owner of pagina66.mx. The real infringement of copyrights is by Mr. Humberto Herrera for copy the content of my client Mr. Daniel Sanchez.

We consider you need desestimated this petition because the real owner of the info are Mr. Daniel Sanchez, if you need some additional information to validate the veracity of this information we can send you all you need.

Regards

PÁGINA 66 heard nothing from their web host until late February, when Digital Ocean wrote to inform them

that their site had been taken down because “after we received a valid DMCA complaint, [and] forwarded it to you for review, [we] did not receive a confirmation that the issue had been resolved.” Digital Ocean told PÁGINA 66 that in order to have its site restored, it would need to delete the allegedly infringing content.

Given the urgency of the situation and the fact that earlier attempts to explain that the DMCA notice was fraudulent had proven ineffective, PÁGINA 66 removed the article and notified Digital Ocean that it had done so, while also continuing to protest that the web host was enforcing a fraudulent order that was intended to censor information, not protect a valid copyright.

As the situation currently stands, PÁGINA 66 would need legal representation to be able to republish its article. Simultaneously, it is looking for alternative web hosts in Mexico to avoid potential other legal claims in the US.



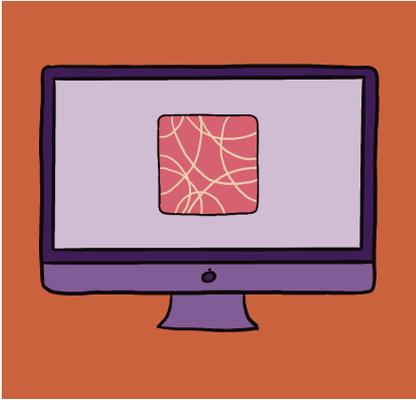
BRAZIL

Ever since President Jair Bolsonaro took office in 2019, he has been notorious for his populist and aggressive comments against journalists and the media, his calls for a return to order and discipline, and his open attacks on activists, human rights defenders, women, the LGBT+ community and Brazil's indigenous population.

Further, during 2020, despite widespread concerns about its adverse effects on human rights, Brazilian Congress has moved forward to approve a "Fake News" bill, formally titled "The Brazilian Internet Freedom, Responsibility and Transparency Act", which seeks to curb the spread of disinformation online. If approved, even while not restricting specific content, such legislation would entail severe implications for freedom of expression and privacy. The proposal would hinder users'

access to social networks and applications, abolish anonymity by requiring the construction of massive databases of users' personal data, and make it mandatory for companies to keep track of users' private communications.

Restrictive legislations on freedom of expression and privacy, added to the President's antagonistic rhetoric against journalists, activists and human rights defenders, creates an adequate scenario to abuse any resource to silence voices in both the physical and digital realms. In this scenario, where journalists rely on their social networks to inform communities and report on social mobilizations, Brazil now ranks 107 out of 180 countries in Reporters Without Borders' 2020 World Press Freedom Index. In this sense, the abuse and misuse of DMCA increases their risk of becoming a victim of censorship.



CASE: INTERVOZES

In Brazil, a human rights organization saw its videos, which were critical of discriminatory content on TV networks, removed from YouTube, purportedly for copyright reasons. Intervozes - Coletivo Brasil de Comunicação Social is an organization that works for the realization of the human right to freedom of expression in Brazil. Intervozes has among its purposes the strengthening of the public sphere, as well as of citizens as social actors, by promoting 1) a participatory democracy, 2) the transformation of the Brazilian communication system, 3) the democratization of communication, 4) the protection of public and social heritage, and 5) the rights of users of communication and telecommunications services.

Intervozes analyzes media content related to the representation of citizens that make up Brazilian society,

denouncing the discriminatory and disrespectful treatment of black people, the elderly, the LGBT+ community, women and minorities. In this regard, Intervozes made a series of videos published on social media, including YouTube, between 2013 and 2017 which pointed out and denounced such abuses committed by television networks in their soap operas. It should be noted that these videos were produced as part of a human rights training program, which also resulted in an educational manual.

Many of these videos were removed by YouTube without prior notice, including videos titled “The representation of the elderly population in the Brazilian media” and “The representation of women in the Brazilian media”, as well as a third video related to the criticism of the improper use of television drama to convey a false message about the process of media regulation in Brazil.

The takedown of these contents was carried out privately and unilaterally by YouTube. Intervozes was only notified after the content had already been removed. The notification informed Intervozes that the videos had content from TV Bandeirantes and Organizações Globo, which would have blocked them “based on copyright”.¹⁴ However, there was no evidence that suggested a complaint being made by these television stations or any

reference to the copyright being infringed. In fact, all the segments used in the videos made by Intervozes can still be found published in several social media platforms, including YouTube, by other users. This suggests, according to Intervozes, that there may not have been genuine copyright issues, because if there were, the posts, performed interchangeably by various Internet users, should also have been targeted for DMCA takedown notices from the platform; nevertheless, they are still available on the Internet.

Intervozes responded to the notification in May 2018, through the channels provided by YouTube, presenting its legal argument and demonstrating that the takedown of the content was illegal. They argued that the motivation behind the takedown was private censorship of the criticism of soap operas and humorous programs produced by television networks, which contained discriminatory portrayals of marginalized social groups. However, Intervozes' appeal was not successful, and to this day the content has not been restored.

Intervozes believes that Google's conduct violates Brazilian law. The organization filed a representation at the Federal Prosecution Service

against Google, on September 25, 2019, requesting the opening of a Civil Inquiry. It argues that Google has imposed regulations on Brazilian citizens that are not only inadequate with the Brazilian legal system in terms of copyright protection, but also contrary to the express provisions of the Internet Civil Framework and the Consumer Code. Further, the Federal Constitution of 1988 and the Civil Framework of the Internet (Marco Civil da Internet) should prevent the takedown carried out by YouTube, insofar as they contain express provisions whose purpose is to protect freedom of expression and prevent censorship, in order to give concrete shape to democratic guarantees, which structure the foundations and principles of the rule of law.

The harm of this private censorship is felt not only by those who seek to create and disseminate content, but also in that Google, by censoring the content, begins to exercise an inadmissible power of control over the flow of information. It negatively impacts the information rights of millions of Brazilians and platform users around the world, who no longer have access to various stories, beyond those that dominate Brazilian television channels.

◀¹⁴ Intervozes, *Intervozes protocola ação no MPF contra a Google, October 10, 2019*, <http://intervozes.org.br/intervozes-protocola-acao-no-mpf-contra-a-google/>



VENEZUELA

CONTEXT: ONGOING CRISIS

As Venezuela is in the midst of a multi-dimensional crisis, individual cases of copyright takedowns online must be understood in context. The crisis has progressively eroded the institutions that guaranteed the fundamental rights of the population. While international systems for the protection of human rights require that guarantees of the right to freedom of expression be preserved in digital spaces, in Venezuela it was the limitations that were adapted to the dimensions of the web, with negative implications also for the rights to participation, peaceful demonstration and free association.

The current crisis has deep roots. At the beginning of 2000, the political powers-that-be officially branded the critical media as “enemies”; this gave rise to a wave of unjustified administrative

sanctions and legal proceedings against independent journalists. The induced shortage of newsprint, following its state monopolization and the consequent discretionary sale, put at least 40 newspapers out of circulation in five years. Between 2017 and 2019, the growing political instability brought with it a historic increase in the number and diversity of means to repress the free dissemination of information and ideas, building on prior strategies to add arbitrary detentions and physical confrontation in general.

Faced with a reduction in the traditional media ecosystem (radio, television and print), the digital “alternative” became the main option for maintaining journalistic work. At least 33 online media outlets were founded in Venezuela in the last six years, and

citizens began to use social networks as a tool for finding information.

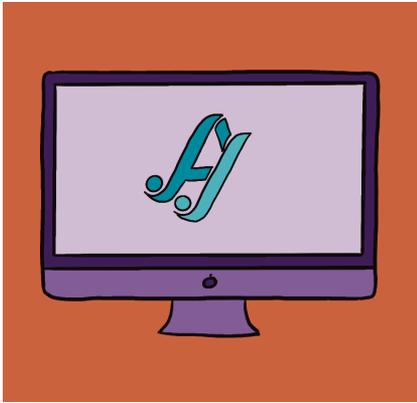
There was a corollary expansion of government limitations. Between 2009 and 2018, more than 50 people were arrested for publishing on social networks, mainly through Twitter; most of the content was opinions on political issues or the social and economic crisis, the exposure of alleged cases of corruption, and even astrological predictions involving senior public officials¹⁵. Consequences include the initiation of flawed judicial processes, with investigations that do not conclude and indefinitely prolong restrictions on the accused's freedom of movement and expression. Computer blockages and attacks, mostly over HTTPS, DNS and

DDOS, increased by more than 100% between 2018 and 2019, targeting the media's ability to timely disseminate news stories. The technical complexity of online blocking resulted in the application of different types of blocking simultaneously, as well as the initiation of massive blocking from different platforms (Twitter, Instagram, Periscope, YouTube) at the same time, especially during public demonstrations¹⁶. The persecution of journalists, critics of the government, and social and human rights organizations through these means is compounded by the technique of securing the removal of content for alleged copyright violations, in order to prevent the dissemination of critical information.

¹⁵ *Espacio Público*, May 2019. *Detenciones en línea. Presos por usar las redes sociales.*

<http://espaciopublico.org/detenciones-en-linea-presos-por-usar-las-redes-sociales/>

¹⁶ *Espacio Público*, April 2019. *Internet amurallado: acceso restringido en Venezuela.* <http://espaciopublico.org/internet-amurallado-acceso-restringido-en-venezuela/>



CASE: ACCESS TO JUSTICE

In December 2019, Access to Justice, a nonprofit civil organization that since 2010 has been dedicated to monitoring the Venezuelan justice system and the rule of law, received a first complaint for intellectual property violations. The alleged original publication, an analysis of a Supreme Court of Justice ruling, was uploaded to a blog and dated the day before it was issued by the judicial body. This blog was used to allege copyright infringement. Oddly, the referenced publication contained a text regularly used by the organization: Access to Justice Commentary. This may imply that the alleged “original source” was in fact, copied from the organization’s website rather than some external site.

GoDaddy, Access to Justice’s web host, received a second complaint

on March 30, 2020. Although this second complaint did not refer specifically to any page content, GoDaddy nonetheless responded by suspending access to the whole of the organization’s website. In this second instance, the content described as infringing was a copy of a ruling issued by the Supreme Court that had been republished on the Vlex-Venezuela website, a local branch of a global platform called Vlex, “the largest collection of legal knowledge in the world”. To be clear, this means that the allegedly infringing content was not even on the website of the organization being targeted with the takedown notice. Furthermore, the complaint was presented in Portuguese; under the name of a Canadian congresswoman; and with a contact address and telephone number that correspond to a shopping center located in the city of Valencia, in the center of Venezuela.

After 15 days, access to the website was reactivated by the hosting but without the link to the entry that was reported. After the claim of allied organizations of Access to Justice towards GoDaddy, the hosting service pointed out in a private communication that they would implement checks to stop possible abuses by actors covered by the DMCA that could harm legitimate

practices. Acceso a la Justicia did not receive a direct response from the hosting company regarding the reports of the irregularities.

The practice of fraudulent copyright takedowns, which take advantage of US law to target Venezuelan civil society, could represent an emerging method for preventing the free flow of information,

in particular, complaints of human rights violations. These takedowns are an unfortunately effective way of preventing access to information about events of public interest, censorship by means of preventing the dissemination of content, especially but not exclusively of a political nature, in the midst of one of the continent's most serious crises.



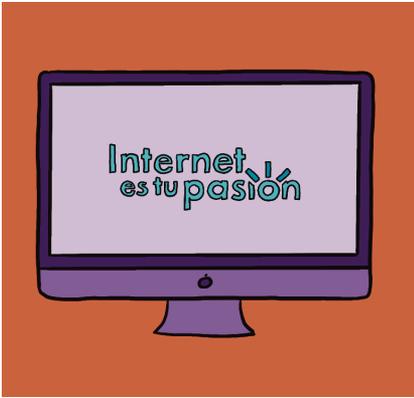
COLOMBIA

In Colombia, over the last 10 years, civil society has advocated that copyright legislation should not increase the restrictions that are required by trade agreements such as the Free Trade Agreement signed with the United States. There have been many attempts by the government through a process known as #LeyLLeras, which represents more than 5 attempts to modify copyright laws in the country.

In 2018 an initial reform was approved, in the year 2021 the National Directorate

of Copyright has the mandate to convene a public hearing to evaluate the exceptions and limitations that should be taken into account by this legislation.

From Karisma Foundation we continue to monitor and gather evidence to promote the public interest vision in these discussions. We are currently developing a strategy known as #LiberenLaCultura (Free the Culture) where we allow diverse initiatives in the cultural field to express their experiences.



CASE: FINDINGS FROM INTERNET ES TU PASIÓN REPORT

In the year 2019, the Karisma Foundation published the report “Internet is your passion: copyright as a limit to freedom of expression on the Internet”¹⁷. The report described problems that derived from the control of Colombian social media content through the application of the Digital Millennium Copyright Act (DMCA). These problems are global: the report was the result of Karisma’s participation in the Project Understanding The Socio-Economic Impact of Copyright in the Digital Economy (CODE Project, 2016), in which different NGOs and academics working on copyright issues and the Internet in the United States, Brazil, India, Chile, and Colombia collaborated.

This Colombia section relies on Karisma’s report, for which the research was conducted in 2016, so it is possible that there are changes in the procedures for implementing the DMCA by the platforms since then. The research included follow up on the cases of 11 people whose Internet intermediaries (such as Facebook, Twitter, Instagram, Youtube and Vine) blocked, closed or deleted their accounts or content for alleged copyright infringements committed on their channels, although in some cases the “infringing content” was their own original creations.

The follow-up of these cases involved documenting the notifications received, the counter notifications made, the cancellation and reopening of accounts, understanding the users’ decisions about whether to continue seeking to retrieve their content and accounts, the possibilities for users to follow up on their cases, etc. Among the conclusions of the report are the following:

1. Jurisdiction: Having to agree to initiate a legal action before the jurisdiction of the American courts (See “What Should I Consider before Sending a Counternotice?” in Part 3)

¹⁷ <https://karisma.org.co/internetestupasion/acerca-de/>

inhibits, intimidates and persuades users not to defend their rights because of possible legal sanctions that imply high economic costs and the need to follow a legal case in a language other than their first language.

2. Language: although most platforms have terms and conditions in Spanish, we found great problems with the handling of English at the time of receiving notifications as it represents a barrier to access for people who do not know the language and much less have tools to deal with a text with legal and technical terms. We also found that for the notification and counter-notification process, the platforms did not have standardized use of Spanish or English and that, within the cases analyzed, there was a greater possibility of success in the counter-notification if it was done in English.

3. Response to the counter notification: as established by the DMCA, the platforms should send the counter notification received to the complainant and wait 10-15 days to know if he or she is going to take action in court, if not, the platform must re-establish the blocked content or account. We find that this process is not effective and is not used by the platforms.

4. Follow-up to the procedure: In the absence of information on the

counter notification, we found that the Internet intermediaries had no mechanism to follow up on the counter notifications made. In these cases, it was evident that there were no protocols to make effective the obligation to inform the affected party of the response of the denouncer. In one of the cases the affected party counter-notified and then received an e-mail from the platform informing that the complainant maintained that there was an infringement, but did not provide evidence that legal proceedings had been initiated. The platform took the word of the alleged owner, violating the terms of the DMCA, to the detriment of the rights of the person whose content was removed.

5. Transparency reports: During the investigation, concerns were sent to the intermediaries. Twitter's response referred to its transparency report where there is a section dedicated to DMCA-related notifications and counter-notifications that may affect users. The others did not respond. This highlighted the importance of transparency reporting by these platforms.

6. Cancellation of accounts: A problem was found related to the lack of information on the number of complaints justifying the cancellation of accounts. It is not clear how many notifications are necessary for

a platform to decide to close a user's account.; nor did we identify information that would allow us to know if this criterion was consistent. It seems that there is a high level of subjectivity which can affect some people more than others.

7. Digital guides and tools: ISPs do not have guides and tools to facilitate counter-notifications, while they do have forms, tutorials and guides to support the notice and takedown process. This absence is felt and significantly unbalances the ability of journalists, advocates, and others to act in support of their positions and their rights.



CASE: DIEGO GÓMEZ

In Colombia, domestic copyright law has been used alongside the DMCA to

threaten freedom of expression. Diego Gómez is a Colombian biologist doing research to save endangered species. In 2009, he was a student at the Universidad del Quindío, which is located in a province of Colombia where access to knowledge and scientific articles in general was complicated. The situation hindered the research process, and thus it was common among students and researchers to ask national and international colleagues to share scientific resources through the Internet. In 2009, Gómez shared on the Internet a master's thesis from the National University that he had found useful for his study group¹⁸.

In 2014, the prosecution filed charges against Gómez using Colombia's strict copyright laws, denouncing the violation of copyright to the criminal justice system, and identifying Gómez as the responsible party. At the time, Gómez was the only known student in the world facing criminal charges for publishing an academic paper online. Since then, Karisma Foundation has supported Gómez's case through a national and international campaign that brought together thousands of people under the slogan "Sharing is not a crime".

¹⁸ <https://web.karisma.org.co/compartir-no-es-delito-sharing-is-not-a-crime/>

In 2017, Diego Gómez was declared innocent after more than three years of proceedings in a criminal process that could have meant 4 to 8 years in prison and a million-dollar fine for sharing an academic document on the Internet. In the words of Carolina Botero, Director of Karisma Foundation, “The judge’s decision was an important step that aligns Colombian criminal law with international standards where this weapon is reserved for the fight against piracy. The case should be the trigger for an in-depth discussion in the country about the meaning and

relevance of open access.” In the end, justice was done in an absurd case that could set a bad precedent for access to knowledge in Colombia and the world.

Karisma’s “Sharing is Not a Crime” campaign managed to highlight the serious problem of having exaggerated copyright laws that do not consider the dynamics of the digital world. In addition to supporting Gómez, it served to promote the importance of open access to knowledge and to advance in the search for new legal paths that will not allow what happened to him to happen again.

PART 3:

WHAT HAPPENS WHEN SOMEONE
SENDS A TAKEDOWN NOTICE
ABOUT MY CONTENT, AND HOW
SHOULD I RESPOND?



WHAT'S INCLUDED IN A TAKEDOWN NOTICE?

DMCA takedowns occur when a copyright owner submits a notice to the online service provider, notifying the provider that a particular piece of content on their site is infringing. The person sending the takedown notice must either be the owner of the copyright or someone with the right to act on behalf of the copyright owner. They

send the takedown notice in writing to the designated agent of the online service provider. To take advantage of the DMCA safe harbor, an online service provider must have a designated agent whose contact information is available to the public and the Copyright Office. Contact information for a designated agent is often found in FAQs, help sections of websites, or in the terms and conditions for use.

The takedown notice must include a set list of information specified in the text of the law:

1

The original copyrighted content (for example, a link to the original website).



2

The alleged infringing content to be removed (again with a link or other sufficient information to allow the service provider to find the content and take appropriate action).



3

Contact information for the copyright owner including address, telephone number, and email address, if available

**4**

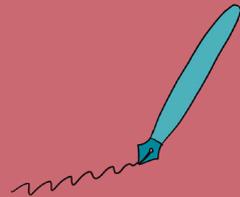
Statement of a good faith belief that use of the content or material is not authorized by the copyright owner, fair use, or otherwise.

**5**

Statement under the penalty of perjury that all of the information in the takedown notice is accurate and the person sending the takedown notice has the right to act on behalf of the copyright owner.

**6**

Signature (physical or electronic) of the copyright owner or their representative.



HOW DO ONLINE SERVICE PROVIDERS RESPOND?

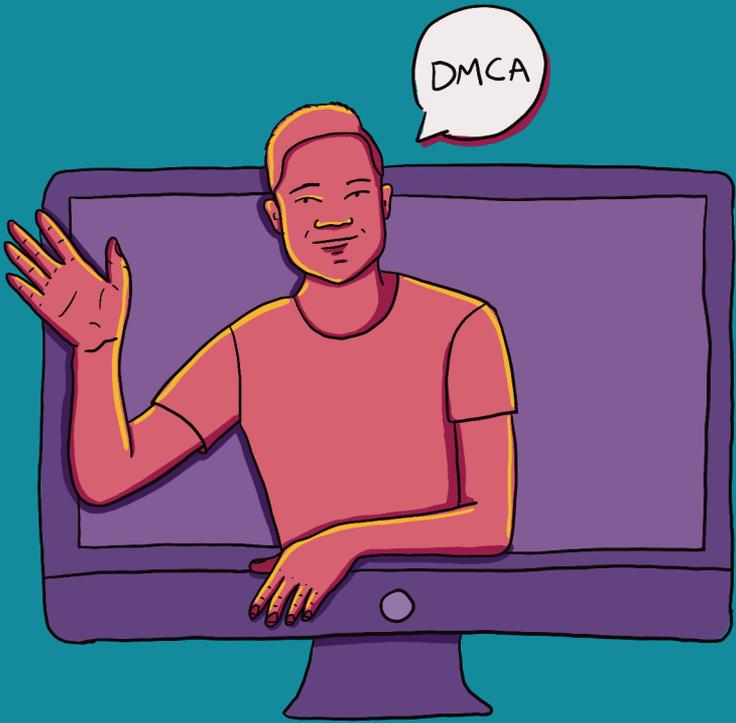
Online service providers do not have to comply with takedown notices that do not meet the statutory requirements. If the online service provider determines that the takedown notice “fails to comply substantially”, then the service provider is not considered to have actual notice of the infringing activity and is not required to take the content down. On the other hand, if a notice is sufficient under the terms of the statute and a provider does not comply, they can lose access to the Section 512 safe harbor and become liable for copyright infringement when unauthorized material is posted to their site.

Generally, because many online service providers receive a lot of takedown notices and have a strong incentive to maintain their access to the safe harbor, this means that if a notice looks reasonable on its face, they will take the content down. They must then notify the person who posted it that they have done so.

WHAT CAN I DO IF A SERVICE PROVIDER TELLS ME THAT THEY’VE TAKEN MY CONTENT DOWN BECAUSE OF THE DMCA?

Sometimes the DMCA is used legitimately, when people (accidentally or intentionally) post others’ content without permission. But increasingly, we have seen it used fraudulently, when the content that’s taken down belongs to the person who posted it—or, in any event, not to the person who fraudulently submitted the takedown notice. What options do you have if your content is targeted with a fraudulent takedown notice?

Service providers are required to notify their users if their content has been taken down and ensure they have an opportunity to challenge the decision if their content was wrongly removed. Such a challenge is called a “counter notice,” which is effectively a request to the service provider to replace the content that was taken down.



WHAT'S REQUIRED IN A COUNTER NOTICE, AND WHEN DO I NEED TO SEND IT?

Under Section 512, the requirements for a counter notice are similar to the requirements for a takedown notice. A counter notice must include:

1. The content that was removed, showing where it was located before the removal (for example, a link).

2. Contact information for the user including name, address, and telephone number.

3. Statement under penalty of perjury that the user has a good faith belief that the material was removed or disabled as a result of mistake or misidentification.

4. Statement that the user consents to the jurisdiction of any judicial district in which the service provider may be found (or, if the user has a U.S. address, the jurisdiction of the Federal District Court for the judicial district in which the copyright owner's address is located), and that the subscriber will accept service of process from the person who sent the takedown notice.

5. Signature (physical or electronic) of the user.

The counter notice has to be sent to the designated agent of the site that removed the content. If their contact information is not provided to you when you learn that your content has been taken down, it is generally not too difficult to find. You can search for the service provider's name and "DMCA agent," or, as noted above, find it on the provider's website, such as in a help section or at the bottom of the home page. If all else fails, there is a list of the DMCA registered agents on the US Copyright Office website: <https://www.copyright.gov/dmca-directory/>

Although there is no certain time limit for sending a counter notice, you should not delay it unreasonably. Service providers are required to replace your content in approximately 14 business days from the time you send your counter notice, unless the copyright owner files a lawsuit to stop them. If the copyright owner brings a lawsuit before the content is back up, the service provider cannot put back the disputed content until the court reaches a decision.

WHAT SHOULD I CONSIDER BEFORE SENDING A COUNTER NOTICE?

Before sending a counter notice, you need to consider how it would impact your rights.

Filing a counter notice impacts your rights because it requires you to consent to the jurisdiction of the US court where the service provider is located. After you file a counter notice, the sender of the original takedown notice has the option to file suit to prevent the material from being reposted. If you consent to jurisdiction and they do file such a suit, it may be difficult for you to defend yourself in US court. Note that many counter notices do not result in such lawsuits; it's by no means certain that you'll face one even if you do submit to a US court's jurisdiction. Moreover, even if a suit is filed and decided against you, the parties would likely have to sue again in the country where you're located to enforce that judgment (for example, to force you to pay monetary damages). Each individual will have to balance these factors for themselves.

Second, you'll need to ask yourself whether there's any chance the takedown notice is legitimate. If you are going to send a counter notice, you will be representing that you believe that the takedown notice was mistaken. If your content was taken, in part or in

full, from another source, it may be useful to consult a lawyer to help you determine whether there is infringement. In the event you are quoting from other material for the purpose of comment or news reporting, your post may be considered "fair use" under US law. Fair use allows for the use of copyrighted works without liability if certain factors are met. The doctrine promotes societal discourse and seeks to allow users access to copyrighted works while balancing the rights of a copyright owner, but is complex and sometimes requires a lawyer's assistance.

WHAT ARE THE ALTERNATIVES TO FILING A COUNTER NOTICE?

There are a couple of things that you can do instead of, or in addition to, filing a counter notice.

First of all, one potential option is to post your material on multiple sites online so that in the event that content on one of them is taken down, the material is still available somewhere else. If you select an online service provider that is not based in the US, the DMCA will not apply to them, although there are other problematic laws in other jurisdictions. If you stay with a US host, WordPress and Blogger have good reputations as US companies that protect speech from frivolous DMCA takedown notices.

Additionally, as described in Part 2, many of the DMCA takedown notices that journalists have received are fraudulent, meaning that the person who sent them was not the owner of the copyright. For example, in the Notigodinez case in Mexico, the journalist had reposted an article from another newspaper, and although the takedown notice purported to be from that newspaper, the person identified on the notice did not work there, and the email address provided was fake. In such cases, the takedown notice is deficient, because it is not authorized by the content owner and some of the information it contains is inaccurate. While outreach to the service provider in that case was unavailing, if you know that the

notice is fraudulent, it may be worth your time to informally point that out, to see if the service provider might restore your post without you having to file a formal counter notice.

Furthermore, if the notice is fraudulent, Section 512 (f) provides consequences for people who, even though they know that they are not the copyright owners, still send takedown notices. They can be held liable for any damages, costs, and attorney fees that the alleged infringer or the service provider suffers related to the removal of the content. However, getting relief under subsection (f) requires you to locate or identify the person who sent the notice. In the Notigodinez case in Mexico, this was not possible.

CONCLUSION

If you've received a takedown notice, know that you are not alone. There are a few concrete steps to follow:

1



Reacquaint yourself with the content that was taken down, and evaluate whether there's a chance it was actually infringing.

2



Research the information you have about the takedown notice and whether it is likely fraudulent.

3



Consider consulting an attorney, whether personally or if you work with a bigger organization, one on staff.

4



Evaluate whether to challenge the takedown notice with a counter notice, and if desired, compose one that complies with all the requirements discussed in Part 3.

5



Explore proactive steps, like posting content to multiple sites, or migrating your content to a site that is not based in the US or US sites that are known to be more protective of their users.

Factors like lack of knowledge, miscommunication, and the intimidating process mean that the DMCA take-down process can be abused to target journalists and legitimate reporting. It is our aim to throw light on this fraud and discourage the people who are committing it. We want to educate journalists about your rights, and give you the tools you need to protect your right to free expression and perform your essential role in society.

It is also worth noting that the system itself may change, though not

necessarily for the better. Recently, the US Congress has begun considering how DMCA Section 512, is working, and what changes might be advantageous in light of all the technological development. On May 21, 2020, the US Copyright Office published a report about the Section 512 system which concluded that the system is unbalanced, and while it did not require wholesale change, did need to be updated in some respects. This may mean that we are on pace to see revisions of the law in the near future.

ARTICLE¹⁹

INDELA

»|>|<: **CYBERLAW CLINIC**
HARVARD LAW SCHOOL | BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY

Fundación
Karisma


espacio
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