

WHO HAS YOUR BACK?

**Protecting
Your Speech**

from Copyright & Trademark Bullies

An Electronic Frontier Foundation Report

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Who Has Your Back: When Copyright and Trademark Bullies Threaten Free Speech, 2014

Executive Summary

When somebody wants to silence speech, they often use the quickest method available. When the speech is hosted on a major online platform, that method is usually a copyright or trademark complaint. For many years, EFF has worked with people whose lawful speech has been unfairly targeted by these sorts of complaints. We've observed that some approaches tend to work better than others in preventing that sort of deliberate abuse, as well as the casual censorship that comes from haphazard and dragnet approaches to policing online infringement.

In the copyright context, the contours of service provider policies are generally set by the safe harbor provisions of the Digital Millennium Copyright Act.¹ Those provisions outline the practices to which online service providers must adhere in order to avoid copyright liability for the actions of their users. But services have some flexibility in how they implement those requirements, and can make decisions that optimize for defending user speech—or instead for minimizing their own legal costs, reducing engineering requirements, or building relationships with rightsholder groups, for example.

When it comes to trademarks, the absence of a detailed statutory safe harbor can mean more uncertainty for service providers, but also more flexibility. Some service providers are very conservative in their response to trademark complaints, taking down content quickly when there's a complaint, even where there's little real risk of liability. But other service providers choose to adopt policies that accept that a small degree of legal risk is worthwhile to protect their users. For example, they can require trademark complaints to be complete and valid, can make sure that content is only taken down after human review and consideration, and can give users a chance to challenge those complaints.

And with respect to both copyright and trademark, services can work to ensure that their policies are exercised in an open and transparent manner, so that users can better understand the scope and scale of copyright and trademark complaints and company responses.

Major online platforms have become the hubs for so much of our speech. The result is that their policy decisions can have an outsized impact on what speech enters the

¹ The safe harbor provisions are codified in 17 USC § 512.

public discourse, and what gets silenced or relegated to secondary status. As users choose which platforms will host their updates, writing, images, and videos, they ought to know which of these services have made explicit commitments to defend that speech against bullies that would try to take it down.

As with our April "Who Has Your Back" report, which addresses government requests for personal data, the categories we evaluate in this report are based on objectively verifiable, public policy statements. In order to preserve that quality, we've chosen not to award stars unless we can cite a public policy, even in cases where internal policies may meet our evaluation thresholds. We've also chosen not to award stars in cases where we've learned that a company has not heeded its own public policies. If users believe that a company's actions don't match its policies, and can provide specific examples, please let us know.

We compiled the information in this report by examining each company's published terms of service, copyright and trademark policies, and transparency reports where available. As part of our evaluation, we contacted each company to explain our findings and to give them an opportunity to improve their public stances.

Evaluation Criteria

We evaluated the following five criteria for each service:

1. **DMCA takedown notices.** Services earn a star in this category for requiring a formal, complete, and valid DMCA notice for copyright-based takedowns of content. Services must also commit to forwarding the information contained in that notice to the affected user. In some cases services make that information available only upon request; where a service has made a public promise to do so, we have awarded a star.
2. **DMCA counter-notices.** In order to earn a star in this category, services must have a publicly documented counter-notice procedure that includes a commitment to promptly restoring all counter-noticed works after the required 10-14 days of downtime. Additionally, services must commit to excluding counter-noticed works from "repeat infringer" policies.
3. **Trademark complaints.** As with the first category, services earn a star here for requiring a formal notice of trademark complaint, including information about the relevant trademark, and forwarding that information to any user whose uploads are affected.
4. **Trademark disputes.** In order to earn a star in this category, services must outline a procedure by which users can contest trademark complaints, or commit to additional human review of the takedown. In the services we've evaluated, we've awarded a star to companies that provide a documented

internal dispute resolution process that includes the user and to companies that require complainants to obtain a court order for takedown.

5. **Publishing a transparency report on copyright and trademark complaints.** Finally, services earn a star here for publishing information on takedown requests. We've intentionally left this category flexible, but in future editions may increase the requirements to include some of the best practices we've observed, like publishing compliance rates, breaking down information about non-compliance, and forwarding actual notices to the Chilling Effects database.

Results Summary

EFF arrived at the evaluation criteria after careful consideration of actual industry practices, the state of copyright and trademark law, and experience with users who have dealt with abuse from copyright and trademark bullies. We were pleased to find that services have been largely receptive to our concerns, and in many cases were able to point to policies that met these criteria, or, where their “star-worthy” internal practices were not reflected in their public policies, to revise their public-facing statements so that users would know about those practices.

We should be very clear: we believe that these five evaluation criteria are floor, not a ceiling. These are minimum standards for what a service can do to defend its users' speech against copyright and trademark bullies. For example, even a robust, user-friendly DMCA takedown policy can still present problems for speech, because of flaws in the statute itself. Even policies that earn all five stars cannot prevent all bullies.

We also note that some services have gone above and beyond the evaluation criteria in this report. Automattic, the parent company behind Wordpress, has filed lawsuits in response to abusive takedown requests. Etsy prepares educational materials and blog posts about the public's right to use trademarks and copyrighted works. Twitter has issued a thorough Transparency Report every six months for over two years. And YouTube has occasionally proactively restored content targeted by a DMCA notice, ahead of the DMCA's 10 business day waiting period, where that content was clearly non-infringing.

Still, the report can be read to reflect a broad commitment across many of the services we've surveyed to handle takedown requests in a way that recognizes the right and responsibilities of users as well as senders.

2014 Results Table

| | Requires a DMCA Notice and forwards info | Documents a DMCA counter-notice process | Requires a formal trademark complaint and forwards info | Documents a trademark dispute process | Posts a transparency report with takedown information |
|-----------|--|---|---|---------------------------------------|---|
| Etsy | ★ | ★ | ★ | ★ | ★ |
| facebook | ★ | ★ | ★ | ★ | ★ |
| flickr | ★ | ★ | ★ | ★ | ★ |
| Go Daddy | ★ | ★ | ★ | ★ | ★ |
| imgur | ★ | ★ | ★ | ★ | ★ |
| Instagram | ★ | ★ | ★ | ★ | ★ |
| Pinterest | ★ | ★ | ★ | ★ | ★ |
| namecheap | ★ | ★ | ★ | ★ | ★ |
| tumblr | ★ | ★ | ★ | ★ | ★ |
| Twitter | ★ | ★ | ★ | ★ | ★ |
| vimeo | ★ | ★ | ★ | ★ | ★ |
| WordPress | ★ | ★ | ★ | ★ | ★ |
| YouTube | ★ | ★ | ★ | ★ | ★ |

In Depth: Specific Criteria

Here's a closer look at the criteria we used with specific examples from public policies.

DMCA Takedown Practices

In this category we evaluated whether services publicly commit to (1) requiring complete and valid takedown notices before removing content, and (2) forwarding the relevant contents of those notices to users. Only services that commit to both criteria were awarded the star.

The law requires that services take down content when they have received a valid notice of infringement. This procedure is frequently abused—there are myriad examples of companies and individuals sending improper takedown notices—but it has some important checks built in. For example, takedown senders must identify specific content, certify under penalty of perjury that they have a good-faith belief that it is actually infringing, and can be sued under the DMCA's section 512(f) for material misrepresentations. In practice, these checks have proven difficult to enforce, but they are still a major improvement over opaque and privately negotiated takedown systems.

For example, YouTube did not get a star in this category because it has publicly admitted that contractual agreements with rightsholder groups like Universal Music allow for takedowns without the legally described notice.² As a result, people affected by these extralegal takedowns may be left with little information and even less recourse.

Similarly, we declined to give GoDaddy a star in this category after being notified that the host will take down material not specifically identified in a notice. In particular, we were contacted by an individual who had dozens of domains suspended because of an accusation of infringement on a single site.

One limitation of this report format is that we depend on information from the public about those sorts of situations. Where we become aware that a service takes down content without receiving a proper notice, we may decline to grant a star in future reports.

² For more information, see, e.g., "Universal Music Group and YouTube Agree to Forget About Fair Use," *Public Knowledge*, June 27, 2014: <https://www.publicknowledge.org/news-blog/blogs/universal-music-group-and-youtube-agree-to-forget-about-fair-use>

The second component in this category is a commitment to forwarding the contents of a takedown notice to the affected user. We believe this is an essential step at creating accountability for takedowns for two reasons. First, if users don't reliably have information about which rightsholder is complaining about which particular piece of content, their ability to appeal is severely restricted. And second, users who send a counter-notice are required by law to provide full identifying information to the original takedown sender; they should have access to the same level of information in making that decision.

Namecheap's terms provide a good example of a compliant policy:

If we receive a DMCA notice from a copyright holder, here's what we'll do:

- a. Make sure the notice is DMCA-compliant;
- b. Forward that notice to you, the user, and make it clear how to proceed

At least for this year, we've also allowed services to forward notices (or the essential information in a notice) upon request, as long as they make it clear in their policy that they will do so. For example, Vimeo, states it "will provide a copy of the original DMCA takedown notice upon request."

DMCA Counter-notice Practices

When a user's content is the target of a copyright complaint (or something purporting to be a copyright complaint), that user must then decide whether to file a counter-notice. In this category, we evaluated whether each service gives users a fair chance to file that counter-notice, and what happens to the targeted content. Specifically, we checked three criteria: (1) that the service publicly documents its counter-notice procedure, (2) that it commits to restoring counter-noticed works after the legally prescribed waiting period, and (3) that it excludes counter-noticed works from consideration of whether a user is a "repeat infringer."

Filing a counter-notice can be confusing and difficult, and many users are intimidated by the requirement that they agree to be sued in federal court if the rightsholder wants to claim copyright infringement (even though this is already true for users who are subject to the jurisdiction of U.S. federal courts). Users also may fear the significant expense of defending even a winning copyright case, allowing themselves to be silenced rather than facing the expense and risk of vindicating their speech in courts.

Those concerns are compounded if users can't readily find information about how to file a counter-notice or can't be certain their content will even be restored. For example, while Pinterest's terms outline a counter-notice procedure, they do not commit to restoring content if the person who filed the original complaint does not file a lawsuit. Similarly, Tumblr only says it "may restore" counter-noticed works.

By contrast, Facebook's policy clearly provides the necessary information:

If your content was removed under the notice and counter-notice procedures of the DMCA, you will receive instructions about the counter-notification process, including how to file a counter-notification, in the warning we send you.

When we receive an effective DMCA counter-notification, we promptly forward it to the reporting party. If the reporting party does not notify us that they have filed an action seeking a federal court order to restrain you from engaging in infringing activity on Facebook related to the material in question within 10-14 business days, we will promptly restore eligible content under the DMCA.

Finally, EFF has been contacted on numerous occasions by users who have had entire accounts suspended because of multiple bogus claims of copyright infringement. Facebook's policy addresses that concern and covers the third component of this category:

Restored content will not be counted against you if your account is ever reviewed for potentially violating our policies about repeat infringement.

Trademark Complaint Practices

Although there is no statutory counterpart in trademark law to the safe harbor that the DMCA provides for copyright liability, we have observed many services have taken a page from that law in crafting their trademark complaint procedures, in particular the notice and counter-notice provisions. In parallel with the first category, here we evaluated whether each service required a formal notice of trademark complaint and forwarded essential information to affected users.

Many of the services we looked at—such as Etsy, YouTube, and Vimeo—suggest trademark holders first try to resolve the issue with the user in question, and then, if the dispute cannot be resolved informally, outline formal requirements for escalating trademark complaints that echo, to some extent, the DMCA provisions for copyright complaints. We believe this strikes a good policy balance and helps give users a chance to understand and responds to threats against their own speech if necessary.

Services are also eligible for a star if they promise to notify users that have had content disabled due to a trademark complaint. Too often, speech is taken down without explanation, and it can be a significant burden to determine who is complaining and why. Instagram's policy describes a better approach:

If the content is removed, the party that posted the content will receive a warning letting them know that content they posted to Instagram was removed because of a claim of trademark infringement. We will also provide them with your contact information, including email address and the name of your organization or client, and/or the contents of your report.

Trademark Dispute Practices

Of course, in some situations a trademark holder and a person making a use of that trademark will not be able to resolve the dispute on their own. In those situations, it is important that services have in place fair and well-documented policies to help ensure that services either take care to avoid improper takedowns before the fact, and that users have a meaningful chance to get their content restored.

There are several kinds of policies that earned this star. Some companies explicitly promise human review of trademark complaints. See, for example, the WordPress policy:

Our team will review it and take action as appropriate if we consider the use of your trademark to be infringing.

Or that of Etsy:

Please reference our policy if you feel material on Etsy infringes your trademark(s) and you'd like to file a notice. Every notice Etsy receives is reviewed by our Legal Support team.

In its terms of service, Imgur notes that it may refuse to remove content that constitutes a fair use, or is otherwise not infringing trademark or copyrights:

We reserve the right to refuse to remove any material that in our view constitutes fair use.

And finally, Namecheap requires more than a simple complaint before taking down content:

If we receive a trademark complaint from a trademark holder, here's what we'll do: [...]

Refrain from taking any action in reference to trademark complaints alone (i.e. with no court order), and encourage the parties to resolve the dispute amongst themselves

Transparency Report

Our final star is awarded to services that compile and publish a transparency report about copyright and trademark complaints they receive. In the last several years, we have started to see many companies publishing similar reports about government requests for user data. Although it's still a relatively uncommon step for services to do the same for copyright and trademark, we hope that is changing. Transparency reports are a tremendously valuable source of information for groups like EFF, as well as journalists, policy-makers, and others who want to make sound evidence-based policy.

To pick a good example: Twitter has published a transparency report on copyright takedown requests every six months for over two years, and has now produced an important body of knowledge about trends in not just the number of takedown notices getting sent, but also how frequently those notices are rejected or contested by users.

Wordpress expanded on that trend, recently publishing its first copyright and trademark transparency report and including a "Hall of Shame" for bogus takedowns it wished to highlight. We like the idea of a Takedown Hall of Shame—we've run our own for years³—and by publishing it along with full number Wordpress is able to provide both quantifiable evidence and illustrative anecdotes.

Additionally, some services forward takedown notices to Chilling Effects, a public database that aggregates from many different sources. While we applaud that step, we didn't consider that alone to qualify for a star in this category.

References and Resources

Etsy

- Copyright and Intellectual Property Policy:
<https://www.etsy.com/help/article/482>
- Filing a Notice for Trademark Infringement:
<https://www.etsy.com/help/article/5599>
- What should I know about DMCA counter-notices?:
<https://www.etsy.com/help/article/5598>

Facebook

- Reporting Copyright Infringements:
<https://www.facebook.com/help/400287850027717/>
- Reporting Trademark Infringements:
<https://www.facebook.com/help/440684869305015/>

³ EFF's Takedown Hall of Shame is available at <https://www.eff.org/takedowns>.

Flickr

- Copyright and Intellectual Property Policy: <https://info.yahoo.com/copyright/us/details.html>
- Counter Notification: <https://info.yahoo.com/legal/us/yahoo/copyright/en-us/counter-notification/>

GoDaddy

- Go Daddy: Trademark/Copyright Infringement: https://www.godaddy.com/agreements/showdoc.aspx?pageid=TRADMARK_COPY

Imgur

- Terms of Service: <https://imgur.com/tos>

Instagram

- Reporting Copyright Infringements: <https://help.instagram.com/454951664593304>
- Reporting Trademark Infringements: <https://help.instagram.com/188234407991837>

Namecheap

- Copyright and Trademark Policies: <https://www.namecheap.com/legal/copyright-and-trademark/copyright-trademark-policies.aspx>

Pinterest

- Copyright: <https://about.pinterest.com/en/copyright>
- Trademark: <https://about.pinterest.com/en/trademark>

Tumblr

- Terms of Service: <https://www.tumblr.com/policy/en/terms-of-service>
- DMCA Copyright Notifications: <https://www.tumblr.com/dmca>

Twitter

- Copyright and DMCA policy: <https://support.twitter.com/articles/15795-copyright-and-dmca-policy>
- Trademark policy: <https://support.twitter.com/articles/18367-trademark-policy>
- Transparency Report: Copyright notices: <https://transparency.twitter.com/copyright-notice/>

Vimeo

- Vimeo DMCA (Copyright) Notifications and Counter-Notifications Process: <http://vimeo.com/dmca>
- Vimeo Trademark Complaint Form: <http://vimeo.com/help/violations/trademark>

Wordpress

- Digital Millennium Copyright Act (DMCA) Notice:
<http://automattic.com/dmca-notice/>
- DMCA Counter-Notice: <http://automattic.com/dmca-counter-notice/>
- Trademark Policy: <http://automattic.com/trademark-policy/>
- Transparency Report: Intellectual Property:
<http://transparency.automattic.com/intellectual-property-2014-h1/>

YouTube

- Counter Notification Basics:
<https://support.google.com/youtube/answer/2807684?hl=en>
- Support for users affected by copyright claims:
<https://support.google.com/youtube/topic/2778545?hl=en>
- Legal policies: <https://support.google.com/youtube/answer/2801979?hl=en>