ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

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Register of Copyrights
U.S. Copyrights Office
Library of Congress
101 Independence Avenue SE
Washington, DC 20559

RE: Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7

The Information Technology and Innovation Foundation (ITIF) is pleased to respond to the U.S. Copyright Office request for public comment concerning the impact and effectiveness of the section 512 safe harbor provisions contained in the Digital Millennium Copyright Act (DMCA).[1] ITIF's comments primarily address the notice-and-takedown process, including the effectiveness of counter notifications, and the technical measures that online service providers can use to identify or protect copyrighted works.

ITIF is a nonprofit, non-partisan public policy think tank focusing on a host of critical issues at the intersection of technological innovation and public policy. Its mission is to formulate and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress.

THE DMCA BALANCES THE RIGHTS OF COPYRIGHT OWNERS, ONLINE SERVICE PROVIDERS, AND USERS

Congress passed the DMCA in 1998 to modernize U.S. copyright law for the digital era and foster the growth of Internet services. One important provision of the DMCA is section 512 which attempts to balance the rights of content owners with those of users and online service providers. This provision shields online intermediaries from copyright infringement liability if they follow certain rules to stop and prevent infringement.[2] For example, after a copyright holder notifies an online service provider of infringing material, the service provider must take steps to remove or disable that content, stop "repeat infringers," and put

[1] Library of Congress, "Section 512 Study: Notice and Request for Public Comment," *Federal Register*, December 31, 2015, https://www.federalregister.gov/articles/2015/12/31/2015-32973/section-512-study-notice-and-request-for-public-comment.
[2] Public Law 105-304, 112 Statute 2860 (1998).

"standard technical measures" in place to identify or protect copyrighted works.[3] If they follow these rules, online intermediaries are not liable for copyright-infringing activities taking place on their services. This process allows copyright owners to resolve instances of infringement without having to go through the time and expense of pursuing each takedown in court.

Many copyright owners use the "notice-and-takedown" process to protect their works, and the number of take-down requests has dramatically increased over time, partly due to automation of these processes. For example, in 2008, Google received only a few dozen takedown notices during the year, but by 2015, the company was fielding over 100,000 links to takedown every hour.[4] Indeed, Google received over 210 million URLs to remove in February 2016 alone.[5]

Some advocacy organizations have voiced concerns over abuses of this system fearing that it may constrain fair use or limit free speech.[6] While there have certainly been a few cases where this process was used inappropriately, such as for obvious fair use of a copyrighted work or to adversely silence criticism or commentary, there are protections in place to mitigate these abuses.[7] The DMCA allows users to challenge a takedown request. To do so, they must submit a counter notification to a service provider, requesting that the content be reposted.[8] The service provider must then repost the content within 10 to 14 business days unless the party who submitted the original takedown notice informs the service provider that they will be challenging the counter-notification in court. If the party who sent the takedown notice knowingly misrepresented the material they were trying to get taken down, then this party could be held liable for monetary damages.

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[3] 17 U.S.C. 512(a)-(d).

[4] Daniel Seng, "The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices," *Journal of Law & Technology*, 369, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411915; "Transparency Report," *Google*, March 16, 2016, https://www.google.com/transparencyreport/removals/copyright/?hl=en.

[5] "Transparency Report," *Google.*

[6] Mitch Stoltz, "Copyright Shouldn't Be Free Speech's Blind Spot," *Electronic Frontier Foundation*, January 18, 2014, https://www.eff.org/deeplinks/2014/01/copyright-shouldnt-be-free-speechs-blind-spot.

[7] For example, see, Jacqui Cheng, "NFL fumbles DMCA takedown battle, could face sanctions," *Ars Technica*, March 20, 2007, http://arstechnica.com/business/2007/03/nfl-fumbles-dmca-takedown-battle-could-face-sanctions/ and Music Publisher Tries to Muzzle Podcast Criticizing Akon," *Electronic Frontier Foundation*, accessed March 16, 2016, https://www.eff.org/takedowns/music-publisher-tries-muzzle-podcast-criticizing-akon.

[8] Each counter notification must include: the signature of the subscriber; identification of the material that was removed and the location where it had appeared; a statement that the subscriber has a "good faith belief" that the material was removed as a result of a mistake or misidentification; and the subscriber's contact information along with a statement that the subscriber consents to the jurisdiction of the federal district court and agrees to accept legal action from the party that provided the takedown notice. See, 17 U.S.C. 512(g) (3).

THE U.S. COPYRIGHT OFFICE SHOULD FOCUS ON ADDRESSING ONLINE INFRINGEMENT

Given the pervasiveness of online infringement—one report estimates that as of December 2015, 57 million U.S. citizens engage in online piracy—policymakers should not take steps that would weaken protections for rights holders.[9] Doing so would increase theft of online content. While the notice-and-takedown process is not perfect, there are clear societal benefits to removing infringing content from the Internet. Widespread piracy has a negative economic impact, seriously harming the artists who create content and the technicians who produce it. Piracy limits the ability of content producers to create legitimate business models for selling digital content. It hurts U.S. competitiveness as the U.S. economy has a competitive advantage in content industries. And it hurts law-abiding consumers who must pay higher prices for content (or have access to less content or lower-quality content in the marketplace) to compensate for the costs of piracy.[10] And while innovative, legitimate alternatives to piracy have continued to blossom on the Internet in recent years, piracy has also continued to grow. File sharing increased in North America by 44 percent from 2008 to 2014, and while some of this sharing is legitimate, a 2013 study found that 78 percent of music file sharing and 93 percent of television file sharing involved infringing content.[11]

As such, when evaluating the effectiveness of the notice-and-takedown process to remove this infringing content, the U.S. Copyright Office should examine two types of errors that could result from this system. False positives occur when the notice-and-takedown system is misused and errant takedown notices result in the removal of non-infringing content. False negatives occur when infringing content is not identified, and therefore not taken down. Given the widespread and growing prevalence of online piracy, this is clearly a substantial problem. Undoubtedly, both types of errors should be minimized as much as possible, but the available evidence suggests that the problem of false negatives vastly outweigh false positives.

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[9] Russ Crupnick, "Bad Company, You Can't Deny," *MusicWatch*, February 22, 2016, http://www.musicwatchinc.com/blog/bad-company-you-cant-deny/.

[10] Regarding competitiveness, see Secretary of Commerce Penny Pritzker, who said, "copyright intensive industries contributed 5.1 million jobs and grew by 46.3 percent between 1990 and 2011, outpacing other IP-intensive industries as well as non-IP intensive ones. This vital contribution is a tribute to the Founders' vision in providing for the protection of creative works." See, Michael O'Leary, "Federal Task Force Offers a Vision of a Digital Future that Encourages Creativity and Copyright Protection" *MPAA*, 2013, http://www.mpaa.org/federal-task-force-offers-a-vision-of-a-digital-future-that-encourages-creativity-and-copyright-protection/.

[11] Robert Steele, "If You Think Piracy Is Decreasing, You Haven't Looked at the Data…," *Digital Music News*, July 16, 2015, http://www.digitalmusicnews.com/2015/07/16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/; David Price, "Sizing the piracy universe," *NetNames*, September 2013, http://www.netnames.com//sites/default/files/netnames-sizing_piracy_universe-FULLreport-sept2013.pdf.

While some notable false negatives generate headlines, the occurrence of this type of error is actually quite rare. A study that analyzed the number of section 512 notices sent by the U.S. film industry during six months in 2013, found that of the 25 million notices these companies sent, the relevant online intermediary only received eight counter notices.[12] A more recent review of the notices sent to Twitter shows a similarly low numbers of counter notices. From July to December 2015, Twitter received 35,000 notices, but only 121 counter notices.[13] And during the prior six months, Twitter received 18,000 notices and only 27 counter notices.[14]

While any case of misuse of the notice and takedown process should be addressed, this minimal number of false positives indicates that the U.S. Copyright Office should not weaken existing protections. Doing so would only increase the number of false negatives. Instead, it should focus on policies that reduce false negatives (i.e. undetected online infringement).

U.S. COPYRIGHT OFFICE SHOULD ENCOURAGE AUTOMATED RESPONSES TO INFRINGING CONTENT

Unfortunately, for rights holders, the notice-and-takedown process has resulted in a constant game of "whack-a-mole," where they request a website to take down infringing material, only to find it quickly back up on the same site or another one. For example, during a Congressional hearing, a representative from Elsevier recounted how the same genetics book was taken down 571 times from the same website after being repeatedly uploaded illegally.[15] And as the head of the Recording Industry Association of America noted, "Every day we have to send new notices to take down the very same links to illegal content we took down the day before. It's like 'Groundhog Day' for takedowns."[16] The expense of pursuing and responding to so many takedowns exacts a financial toll on content owners and online service providers, expenses which are ultimately passed on to consumers in the form of higher prices.

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[12] Bruce Boyden, "The Failure of the DMCA Notice and Takedown System," *Center for the Protection of Intellectual Property*, December 2013, http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf.

[13] See, 2015: July 1 to December 31. "Transparency Report: Copyright Notices," *Twitter*, accessed March 16, 2016, https://transparency.twitter.com/copyright-notices/2015/jul-dec.

[14] See, 2015: January 1 to June 30. Ibid.

[15] Paul Dada, "Section 512 of Title 17," *House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet*, March 13, 2014, https://judiciary.house.gov/wp-content/uploads/2016/02/031314-Testimony-Doda.pdf.

[16] Cary Sherman, "Statement for the Record of Cary Sherman, Chairman and CEO, Recording Industry Association of America on 'Section 512 of Title 17'," March 13, 2014, http://www.riaa.com/wp-content/uploads/2016/01/Sherman-DMCA-testimony-3-13-14-002.pdf.

The best way to minimize the cost of sending and responding to so many notices of infringement is to use automated techniques. In particular, online service providers can use automated filtering systems that check content as it is uploaded to stop a user from reposting infringing content.[17] There are two primary techniques for automatically filtering content. First, online intermediaries can use a hash-based compliance system that uses unique identifiers to spot identical files, thereby preventing users from re-uploading infringing content without any manual review. Companies like DropBox use this technique.[18] Although this method is useful at stopping some infringement, it can be circumvented by making a minor modification to the file before re-uploading. Another method online intermediaries can use is automated content identification, provided by software companies like Audible Magic, which can match uploaded content that sounds or appears similar to content previously marked as infringing. These systems are harder to circumvent, although it is still possible.

While some organizations have criticized these automated techniques because they incorrectly assume that they will curtail legitimate file sharing—the U.S. Copyright Office should encourage efforts like this because they reduce costs for all parties, including consumers, while better protecting the rights of copyright owners.[19] Despite these concerns, the U.S. Copyright Office should encourage continued innovation in automated notice-and-takedown technologies and filtering because improving these processes could result in fewer overall false positives and false negatives.

A MULTI-STAKEHOLDER DIALOGUE COULD IMPROVE BEST PRACTICES FOR ADDRESSING ONLINE INFRINGEMENT

While the DMCA envisioned industry stakeholders developing "standard technical measures" to reduce copyright infringement, relatively little consensus has emerged. Instead, the tools and techniques used by online service providers to prevent and stop infringement vary widely. To address this problem, the U.S. Copyright Office should launch a multi-stakeholder working group to identify additional practices that online service providers and content owners should adopt to reduce infringement and lower compliance costs for all parties. For example, stakeholders could standardize notice-and-takedown processes across multiple service providers and provide performance guidelines for automated technologies used to identify and filter

[17] Joe Karaganis and Jennifer Urban, "The Rise of the Robo Notice," *ACM*, Vol 58, No. 9, 28-30, http://cacm.acm.org/magazines/2015/9/191182-the-rise-of-the-robo-notice/abstract.
[18] Greg Kumparak, "How Dropbox Knows When You're Sharing Copyrighted Stuff (Without Actually Looking At Your Stuff)," *TechCrunch*, March 30, 2014, http://techcrunch.com/2014/03/30/how-dropbox-knows-when-youre-sharing-copyrighted-stuff-without-actually-looking-at-your-stuff/.
[19] Joe Karaganis and Jennifer Urban, "The Rise of the Robo Notice."

infringing content to reduce both false positives and false negatives. The U.S. Copyright Office should encourage a wide array of stakeholders to participate to ensure that responses to infringement are appropriate, effective, and efficient; but it should also recognize that some stakeholders have little interest in expanding copyright protections for rights holders and that in some cases progress should trump consensus.

CONCLUSION

By upholding strong copyright protections, encouraging new and innovative approaches to protect rights holders, and convening a multistakeholder dialogue on the notice-and-takedown process, the U.S. Copyright Office can ensure that the DMCA protects intellectual property, while not sacrificing user freedom and commercial innovation online.

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