IIPSJ Comments Regarding the Safe Harbor Provisions of the Digital Millennium Copyright Act

I.  Commentator Information

These comments are submitted by the Institute for Intellectual Property and Social Justice (IIPSJ) by its Director, Prof. Lateef Mtima, and IIPSJ’s Associate Director for International Programs, Prof. Steven D. Jamar, in response to the request of the United States Copyright Office for Public Comments, as published in the Federal Register, Vol. 80, No. 251 /Thursday, December 31, 2015 (FR Doc. 2015–32908), in connection with a public study to evaluate the impact and effectiveness of the DMCA safe harbor provisions contained in 17 U.S.C. 512. IIPSJ was established to address the social justice implications of intellectual property law and policy both domestically and globally. IIPSJ's work ranges broadly, and includes the scholarly examination of intellectual property law from the social justice perspective; advocacy for social justice-cognizant interpretation, application, and revision of the intellectual property law; efforts to increase the diversity of the intellectual property legal bar; and programs to empower historically and currently disadvantaged and marginalized communities through the development, protection, use, and exploitation of intellectual property.

II.  General Comments

The Internet and Democratic Ideals of Freedom of Expression

With the opening of the Internet to the public in the 1990s, Americans first experienced the empowering liberty of instantaneous self-publication. For the first time in human history, private individuals could personally disseminate their ideas, knowledge, opinions, and creative expression beyond their immediate communities. With the rapid expansion of connectivity throughout the world and with the development and implementation of the World Wide Web and social media, individuals could engage people virtually anywhere in the world. From the humble
beginnings of the technologically primitive e-bulletin boards and Internet “chat rooms” to Wikipedia, Facebook, YouTube, and other Internet-based social media, reinforced by an ongoing communications revolution in smartphones, text messaging, wifi, and phone-based social media, the world become connected as never before. Information ranging from 144 character tweets to disquisitions on any topic imaginable flows through the Internet constantly.

Connections mediated by the Internet range from the personal moments shared with friends and family to social and political matters of national and international import. National and international grassroots cyber-mass movements on matters ranging from the Ice Bucket Challenge and the Anti-SOPA/PIPA Campaign to the Arab Spring and Black Lives Matter depended so heavily on the Internet and social media that they are almost unimaginable without them. These populist initiatives to promote democratic ideals and ecumenical human rights were dependent upon communications networks that in turn are dependent not only on technology, but equally importantly, on the legal frameworks which fostered them. Without an effective legal infrastructure, development of the Internet into the global engine for free speech could have been stymied. Absent an appropriate legal space in which to flourish, the current vibrant cyberspace marketplace of ideas, in which anyone can voice her thoughts, feelings, and perspectives in almost whatever manner or fashion she might choose to speak and to everyone willing to listen, would not exist.

Simply put, the legal regulatory framework for the Internet affects important interests in addition to protection of parochial intellectual property rights. Protection of those rights are important, and if mediated through proper legal strictures such rights will contribute to the burgeoning of communication, information transfer, and realization of democracy, social justice, and human rights. It is from our perspective all a matter of balance.

A significant aspect of the United States regulatory scheme for cyberspace is The Digital Millennium Copyright Act, particularly the safe harbor provisions within it, codified at 17 U.S.C. § 512. Adopted by Congress to bring American copyright law into sync with the revolutionary opportunities offered by digital information technology, the DMCA has also promoted the public’s awareness of the function and importance of copyright as a social ordering tool. Prior to the advent of the Internet and the passage of the DMCA, the average American was largely oblivious to the import of copyright and its role in promoting culture, education, and the dissemination of information generally. This was largely due to the fact that in the analog society, the public interaction with copyrighted material was essentially one-dimensional and

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1 See e.g. Susanna Monseau, *Fostering Web 2.0 Innovation: The Role of the Judicial Interpretation of the DMCA Safe Harbor, Secondary Liability and Fair Use*, 12 J. Marshall Rev. Intell. Prop. L. 70, 78-79 (2012). “YouTube and other video and photo sharing sites, Facebook and all of the other online social networks, along with sites like Twitter, Tumblr, the newer Pinterest, and a bewildering number of blogs, wikis, and other interactive or collaborative sites have quickly come to stand at the forefront of the global communications landscape. These technologies have fundamentally changed how people interact with each other and use the medium. Facebook is currently the most visited website in the U.S., and YouTube was the second most searched term on Google in 2011. The benefits of an internet on which users are not merely passive viewers of information, but can participate, create, and collaborate in using information have been divided by some scholars into three main types: communication, community, and identity. Facebook and YouTube exemplify the benefits of the participative internet. These sites enable communication between many individuals (communication), the formation of groups of like-minded individuals (community), and the dissemination and collection of reputational information (identity).”
uni-directional. As a practical matter, copyrighted works could only be used in the manner accommodated by the format in which they were distributed, without regard to the fact that alternative uses might be permitted and even encouraged by the copyright law. Thus copyright flowed one way – from the copyright holders to the users.

The Internet and the digital revolution reshaped the public landscape for copyrighted works. Prior to the digital age, uses to which even material in the public domain could be put were, for the ordinary consumer or user, limited by the physical embodiment of the copyrighted work. With the proliferation of the Internet many Americans were surprised to find themselves accused of breaking the law when they used copyrighted works in ways commensurate with their analog habits and customs. Sharing a book with a friend by way of the Internet could result in a lawsuit for copyright infringement, although to the average person, this was an innocuous, non-commercial activity that people have freely engaged in for centuries. Moreover, the advent of digital technology and digital copies of works transformed the sorts of uses to which consumers and users could put copyrighted works. With the introduction of digital formats and powerful electronic tools to create and manipulate digital works, ordinary users became productive creators and disseminators of works based on pre-existed material.

During this period of transformation, the litigation strategies of some rights holders exacerbated uncertainty and posed a threat to the realization of the social justice vehicle that the Internet was becoming. In response to individual acts of infringement by some users, some rights holders essentially tried to “sue the Internet” by targeting Internet Service Providers (ISPs) and the broader category of Online Service Providers (“OSPs”), in the hope of conscripting them to become the enforcers of their rights by requiring ISPs and OSPs to monitor and regulate user online behavior. At the same time, other rights holders sought to deploy copyright to censor public expression, often instigating copyright litigation in order to quell unfavorable commentary and unflattering disclosures. The result was a patchwork landscape of legal uncertainty that bewildered and intimidated the public and threatened to stunt the growth of the Internet as an engine for cultural development, freedom of expression, self-actualization, and social justice.

The Judicial Precedent to the DMCA Safe Harbors

Confronted with an ever growing variety and quantity of rights-holder litigation claims, courts undertook to balance the important, wide-ranging, and often conflicting social interests implicated by the use of copyrighted works online. Almost from the outset, courts recognized that in the absence of at least partial immunity from liability for the conduct of individual Internet users, OSPs would have no choice but to severely restrict access to the Internet and scrutinize and censor the online activities of private individuals. To avoid these chilling results, in assessing OSP responsibility for subscriber activities, courts invoked and adapted long-accepted agency and tort principles of secondary liability, which turn on actual knowledge of and genuine capability to control the specific conduct of individual Internet users. Under this widely adopted approach, only those ISPs and OSPs who actively collaborated in and directly benefited

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4 Ibid.
from unlawful subscriber activities could be held responsible for violations of copyright holder rights. Perhaps even more importantly, both copyright holder rights and user rights in the digital environment became better clarified and the public understanding of copyright greatly improved.

**Congress Adopts Judicial Precedent to Establish the DMCA Safe Harbors**

Guided by the direction blazed by the courts, Congress crafted the OSP (including ISP’s in that broader category) safe harbor provisions of the DMCA. Rather than burden OSPs (and ultimately, all law-abiding Internet users) with the costs and responsibility of policing rights holder interests, Congress determined that the most socially productive course would be to require OSPs (1) to warn subscribers against engaging in infringement activities and (2) to expeditiously remove infringing material once notified of its presence. Given that rights holders are in the best position to know whether their works are being used improperly, and moreover, when it might best serve their interests to refrain from objecting to uses they did not authorize, the responsibility to monitor Internet use of their works remained on the rights holders themselves.

While the DMCA safe harbor structure provides some succor to OSPs, more importantly, it serves the public interest by assuring democratized access to the Internet, with all of the benefits that democratization carries. Moreover the DMCA safe harbor provisions protect OSPs and the public interest without diminishing the rights of copyright holders. The DMCA’s provisions not only keep fully intact the rights of copyright holders to proceed directly against users who infringe upon their rights, but the take-down provisions bestow upon rights holders a new, and powerful, “no questions asked” mechanism for removing material from the Internet, even in the absence of any actual showing of infringement. Once a purported copyright owner identifies and requests the removal of specific material, an OSP who wishes to retain its safe harbor immunity takes that material down and notifies the person who posted it of the action period. Consequently, a copyright holder can enforce her rights without recourse to litigation or other expensive processes. There are costs of compliance both for the OSP and the copyright holder, but the process is more efficient than litigation and balances the pertinent, competing interests better than an all-or-nothing approach. Of course this process ultimately shifts the burden to Internet users to demonstrate their right to use copyrighted material, thereby imposing significant costs in time and resources that can chill legitimate uses of copyrighted works. Nonetheless, Congress has deemed this a necessary compromise to assure a free and open Internet.

In sum, the DMCA safe harbor provisions achieve far more than limited immunity for OSPs – the safe harbor framework removes the Internet, and culturally valuable social network platforms like YouTube, Facebook, and Reddit, from the middle of copyright holder/Internet user conflicts. Both the courts and Congress understood that OSPs lack important, pertinent

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5 Religious Technology Center at 1365-66.
6 See e.g., Lenz v. Universal Music Corp., 801 F.3d 1126 (2015).
7 See Annemarie Bridy, Is Online Copyright Enforcement Scalable? 13 Vand. J. Ent. & Tech. L. 695, 712 (2011) (“The legislative history of the DMCA frames the statute as a means of ensuring the continued global growth of the Internet. To facilitate that goal, the statute was crafted to minimize obstacles to growth for both content providers, who would not expand the digital distribution of their works without assurances that they would be protected from “massive piracy,” and service providers, who would not expand their sites and networks without assurances that
facts to take an informed position regarding what material is protected by copyright and what material, even if protected, should be allowed to continue to be posted. They also are not courts and do not have the legal power to affect copyright holders’ and users’ rights on their own. And most importantly from a public policy perspective, OSPs simply are not structured or built or operated to adequately protect or even to take into account the public interest in such disputes. Indeed, under the current copyright regime, the low threshold of copyright eligibility and the lengthy duration of copyright protection make it impossible for OSPs even to ascertain the various rights at issue, including in some instances, who actually owns a work. Consequently, without the DMCA safe harbors, OSPs would likely act as most businesses do when confronted with such uncertainty with indeterminate upside risk of liability – they would err on the side of caution and curtail important public rights, including fair use.

The most important social benefit provided by the DMCA is that it promotes the public’s legitimate rights to make digital use of copyrighted works and thereby preserves the social utility balance mandated by the copyright law. The DMCA fosters two vital social justice values: inclusion and empowerment, particularly with respect to historically and currently marginalized groups. It helps give voice to those who need one but who lack the massive resources needed for certain sorts of activities, including speech.

III. Specific Comments

General Effectiveness of the Safe Harbor Provisions

Congress crafted the DMCA safe harbor framework to ensure that OSPs could provide the public with unrestricted access to online services, uninhibited by concerns over copyright infringement liability which could arise in connection with the activities of OSP subscribers. Similar to telephone utilities, OSPs have no control over how their subscribers acquit themselves on the Internet – OSPs can no more prevent subscriber infringement than the telephone company can prevent obscene phone calls or telephone consumer scams. At the same time, however, both Congress and the courts correctly observed that OSPs can nonetheless play an important role in impeding and curtailing subscriber infringement activity, by taking appropriate action once alerted to the improper use of their services. Thus in a sense, the DMCA safe harbor provisions proscribe rules of “good cyber-citizenship” for OSPs. OSPs who obey these rules are granted limited immunity from liability for the actions of their subscribers; OSPs who ignore these rules risk sharing responsibility for any reparations due rights holders for injuries resulting from subscriber infringement of their rights.

To protect the Internet as an open but lawful public frontier, Congress has imposed certain, specialized obligations on OSPs that the law has not previously required of publishers, distributors, or common carriers. Among other things, the DMCA requires all OSPs to accommodate standard technical measures employed by rights holders to protect their works.

they would be protected from massive liability for copyright infringement. In light of the legislative history’s focus on promoting Internet growth, the DMCA can be understood as a mechanism for simultaneously scaling up online copyright enforcement and scaling back online copyright liability—a unified solution designed to give rights owners the security necessary to expand content distribution and service providers the security necessary to expand applications and network infrastructure.”
OSPs are therefore obliged to assist rights holders in ensuring the efficacy of such measures. OSPs are further required to adopt and inform subscribers of anti-infringement policies, and to implement policies that deter repeat infringers. Some OSPs have additional obligations. For example, if an OSP stores and makes available works, it must implement a notice and take down procedure, through which the OSP can be notified of the presence of and act expeditiously to remove infringing material. Given that such “take downs” occur without judicial intervention, however, the DMCA requires that actionable notice identify specific material and also affirm that said material has been posted without authorization. These requirements not only enable OSPs to promptly locate and remove subject material, but also help to protect the public against copyright misuse and other unlawful interference with the public’s right to make legitimate use of copyrighted works.

Needless to say, violations of copyright do happen on the Internet. Some of these violations are intentional; some are the result of ignorance; some are the result of the difficulty and costs of complying with the law; and some are simply the result of a felt sense of the imbalance between the scope and weight of copyright rights and the ordinary uses of works in daily life. The breadth and duration of copyright protection and the lack of mandatory rights registration make it easy to run afoul of someone’s rights. Indeed, virtually any Internet communication, even a simple email, can be eligible for copyright protection. Even where there is little doubt as to the copyright status of a work, the fair use doctrine may authorize its use without the rights holder’s permission. Accordingly, Congress wisely concluded that OSPs should not be in the business of presiding as private tribunals in rights holder/user conflicts. If OSPs were required to make such determinations, in light of the potentially inestimable liability risks, the likely result would be OSP constriction of the public’s right to make legitimate albeit rights holder-unsanctioned use, including fair use, of copyrighted works.

The DMCA safe harbor provisions accomplish what Congress intended: they strike a socially productive balance between the rights and interests of rights holders and users. Moreover, by providing relatively simple rules of conduct for OSPs, the DMCA has spurred and continues to support the development and utility of the Internet as a socially transformative invention.

The Notice and Takedown and Counter Notification Procedures

The notice and take down and counter notification procedures are designed to address online infringement by providing both rights holders and users with specific mechanisms through which they can police and protect their respective rights and interests. To some extent the current system favors rights holders, in as much it provides for summary take down of purportedly infringing material without any hearing. Although the provisions do require OSPs to provide the party who posted such material with notice of the take down so that she can file a counter notice and request that the material be restored, unless the user is prepared to back her counter notice through litigation, the take down will remain in effect. Consequently, even where a user has a

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8 See 512(g)(2). Users with limited resources may simply chose to abandon their counter notification rights, even where they believe their use is permissible under the law. “The lack of clarity surrounding the scope of [fair use] causes many defendants simply to capitulate when faced with a copyright infringement claim rather than argue that their particular use constitutes fair use. Individual defendants, such as the creators of UGC, often ‘lack the resources
fair use right to use copyrighted material online, a rights holder can secure summary and permanent removal of such material merely by filing a take down notice.

Despite these benefits, some rights holders assert that the notice and take down process is unduly onerous. Their principal complaint is that although a proper notice will achieve an initial take down, the notice does not preclude the re-posting of the subject material, sometimes referred to as the “whack-a-mole” problem. Consequently some rights holder argue that the notice and take down procedure should be modified in to a “notice and stay down” procedure, whereby upon receipt of a proper notice, OSPs would not only be obliged to remove the subject material, but would have a perpetual obligation to search for and remove such material in the event it is re-posted.

It should be clear that a “notice and stay down” process does not solve the “whack-a-mole” problem but merely shifts the costs of policing rights holders’ interests from the rights holders themselves to OSPs (and ultimately to all Internet users). However, shifting this burden would not change the fact that OSPs typically lack the necessary information to determine whether a subsequent posting violates the law. For example, in some cases material identified in a take down notice has been licensed to one or more users, while posting by non-licensee users could be infringing. However, the OSP will be unable to distinguish between the two - the entity in possession of that information is the rights holder. In other cases where previously removed material is subsequently posted by a different user, the latter user may have fair use rights that were not at issue in the prior use, or she may have the resources to raise and pursue fair use rights that the prior user could not afford to defend. In short, the “notice and stay down” approach presumes that a single notice can anticipate and properly preclude any and all future uses of the subject material not authorized by the rights holder, and would therefore undermine the rights holder’s obligation to consider the applicability of fair use in each individual case.

A more useful assessment of the current DMCA provisions – both the notice and take down and counter notification procedures – concerns the impact of the provisions on the rights and interests of small and individual copyright constituents – whether they are rights holders or copyright users. The Request for Comments properly recognizes that rights holder interests are no more homogeneous than those of copyright users. Indeed, small rights holders may often have more in common with small copyright users, at least with respect to the practical options for availing themselves of the rights bestowed them under the copyright law.

and knowledge to defend themselves from threats of copyright action . . . .’ Many individuals do not challenge DMCA take down notices on the basis of fair use because it requires resources and legal knowledge to do so. It is easy to see why many creators of UGC do not even attempt to reuse or recycle existing copyright materials because they fear lawsuits or DMCA takedowns.” Susanna Monseau, footnote 1, supra, at 89.

9 As we have argued in prior public comments (see IIPSJ Comments Regarding the Third Joint Strategic Plan on IP Enforcement by the Federal Government, filed October 16, 2015) the inequitable exploitation of small and marginalized rights holders by institutional rights holders is a rights enforcement problem that is both pervasive and systemic. For example, although the rights of authors to terminate their copyright agreements are granted by the law, these rights are often stymied by music recording companies and other institutional licensees. Disingenuous mischaracterizations of license agreements as work-for-hire relationships, combined with debilitating litigation tactics, not only frustrate the legislative intention to level the bargaining field between creators and corporate licensees, but also exacerbate the pecuniary injustices characterized by questionable royalty accounting and payment methodologies. The rights and interests of small and marginalized rights holders should receive the same protection
For example, as discussed above, the counter notification process may not provide adequate protection for the rights of small and marginalized copyright users. In the highly publicized *Lenz* case, wherein the fair use claims of the user plaintiff were ultimately upheld by the courts, the lawfulness of the initial take down was litigated for more than a decade and has yet to be fully resolved.\(^\text{10}\) A particular weakness of the current system is that it promotes litigation as the means for resolving contested uses, which of course favors corporate and well-resourced parties, whether they be rights holders or copyright users. The notice and take down and counter notification procedures would better serve the rights and interests of smaller copyright rights holders and users if 1) the time for commencing litigation in connection with contested uses was expanded, and 2) the parties were required to engage in good faith discussions of their respective positions prior to initiating such litigation. Particularly with respect to small and marginalized rights holders and users, the DMCA should preserve litigation to resolve contested uses as the means of last resort.

**Legal Standards**

The DMCA safe harbor provisions and notice and take down procedures are predicated on OSP knowledge of infringing activity. Accordingly, an OSP is required to take responsive action only when it has actual or “red flag”\(^\text{11}\) knowledge of such activity. The courts have construed both categories of requisite knowledge as mandating knowledge of specific instances of infringement.\(^\text{12}\)

Although some rights holders have argued that the categories of knowledge that can trigger an OSP’s remedial obligations should be expanded to encompass “general awareness” that particular websites or platforms have been used to post infringing material, the courts have not accepted these arguments. Courts have instead concluded that “if merely hosting material that falls within a category of content capable of copyright protection, with the general knowledge that one’s services could be used to share unauthorized copies of copyrighted material, was sufficient to impute knowledge to service providers, the § 512(c) safe harbor would be rendered a dead letter: § 512(c) applies only to claims of copyright infringement, yet the fact that a service provider’s website could contain copyrightable material would remove the service provider from § 512(c) eligibility.”\(^\text{13}\)

The courts’ refusal to accept general awareness theories in satisfaction of the DMCA’s knowledge requirements seems consistent with the statutory objectives of promoting the proliferation of the Internet. Given the ubiquity of social media, it is common knowledge that at any given moment, infringing material is present *somewhere* on the Internet. However, whereas such general awareness does not assist an OSP in locating and removing infringing material, a general awareness legal standard could promote “cyber-profiling” and otherwise inhibit the legitimate expression of certain groups or communities. For example, remix artists and fan-

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11 See § 512 (c)(1)(A)(ii).


13 *UMG Recording, Inc.*, 718 F. 3d at 1022-23.
fiction authors are generally known to make use of copyrighted material. A general awareness standard would encourage OSPs to target such communities, notwithstanding the fact that their activities rely heavily on case-by-case applications of fair use. The fact that fair use determinations can be difficult to predict, however, coupled with the potential loss of safe harbor immunity, would provide OSPs with strong incentives to “stop and frisk” the “usual suspects” first, and ask questions later.

IV. Concluding Comments and Recommendations

The Internet has evolved and flourished under the DMCA. In addition to enhanced access to knowledge and information, the public has benefited from new channels for expressive dissemination and exchange, including culturally important social media platforms, as well as unprecedented opportunities to interact with commercially distributed and other copyrighted materials in non-passive ways. Care must be taken to avoid stunting this social progress to assuage special interest infringement concerns.

The democratizing effects of the Internet have been especially significant to historically marginalized groups and communities. The Internet can place expressive power in the hands of these communities, and also improve their awareness of and participation within the copyright system. In assessing the social impact of the DMCA, special attention should therefore be paid to their copyright needs and concerns, particularly the opportunities presented for their socio-economic empowerment through copyright endeavors. In this regard, we would recommend that the Copyright Office commission a study to ascertain how such groups have fared under copyright generally, and not just the DMCA, in the digital information society.

The prime objective of copyright in the United States is to promote the advancement of culture. A free and open Internet that promotes dissemination of expression that is broad and inclusive, including the fair use of copyrighted material, advances that mission.

Respectfully Submitted,
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Endorsing Organizations:

Alternate Roots
Arts & Democracy
Appalshop
MPAC Performing Arts Collective
The Museum for Black Innovation and Entrepreneurship
U.S. Department of Arts and Culture