



INSTITUTE FOR INTELLECTUAL PROPERTY & SOCIAL JUSTICE

"ADVANCING IDEAS ENCOURAGING ENTERPRISE PROTECTING PEOPLE"

COMMENTS SUBMITTED BY PROF. LATEEF MTIMA, DIRECTOR OF IIPSJ

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IIPSJ Additional 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. 81, 78636-01/Tuesday, November 8, 2015 (FR Doc. 2015-7), in connection with an ongoing 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 providing programs to empower historically and currently disadvantaged and marginalized communities through the development, protection, use, and exploitation of intellectual property.

II. General Comments

In light of the myriad responses received from the public in connection with its initial Request for Comments on the impact and effectiveness of the Safe Harbor provisions of the DMCA, the Copyright Office now seeks further public comment in order to better develop and clarify the issues and perspectives which the Office has identified as salient in the collective public discourse on the DMCA. For purposes of discussion and analysis, the Office has enumerated the current Request into categorical themes of inquiry, and accordingly seeks comments which discuss the Characteristics of the Current Internet Ecosystem, Operation of the Current DMCA Safe Harbor System, Potential Future Evolution of the DMCA Safe Harbor System, as well as Other Developments, including certain recent judicial decisions which interpret the Safe Harbor provisions and clarify prior DMCA Safe Harbor precedent. IIPSJ

welcomes this opportunity to comment on these themes in order to further elaborate on its position that the overall Safe Harbor structure of the DMCA has established and sustains a digital copyright stakeholder equipoise which fosters a “robust and innovative online environment”. The general strength and balance of the current structure notwithstanding, some aspects of the DMCA implementation process can be improved.

Accommodating the Diverse Nature of Stakeholder Identities, Needs, and Interests

IIP SJ commends the Copyright Office for its principal observation that the digital copyright stakeholder community cannot be summarily generalized into homogeneous “rights holder versus user” constituencies. Rights holders, creators, and content users from marginalized communities share a common struggle against ongoing IP/digital disparities and other systemic barriers to access to knowledge, civic engagement fora, community mobilization, and opportunities for socio-economic empowerment, which render mainstream “rights holder versus user” demarcations largely inapt. The copyright constituents of IP marginalized communities desperately require a balanced digital copyright legal framework that preserves and improves equitable access to and legitimate reuse of/comment upon copyrighted content, and that supports meaningful opportunities for the entrepreneurial development and dissemination of original content. Policies which generically favor certain kinds of online activities or interests over others impede the comprehensive socio-economic progress of many marginalized communities, which lack the variegated social resources that can compensate for imbalances in the digital legal infrastructure.

This is one reason that polarized mechanisms such as “notice and stay down” are inimical to the vital balance of public user and rights holder interests which the Safe Harbor provisions ensure and which is fundamental to the broader mandates of copyright social utility. Marginalized communities depend equally upon the protections afforded by fair use, which guarantee wide access to copyrighted content and legitimate user generated remix expression and endeavor, and the opportunities for digital entrepreneurship, self-determination, political activism, and economic empowerment offered by the Internet, which in tandem enable the members of such communities to participate in and contribute to the national and international creative discourse. As evidenced by numerous and impactful digital grassroots movements on the one hand, and the widespread presence and popularity of various minority social media artists, commentators, activists, and entrepreneurs on the other, marginalized communities cannot march forward in the digital information society with one leg favored and one leg bound.

Internet Eco-System Mechanisms Which Promote Copyright Social Utility

Under the Safe Harbor framework, the public has been encouraged to make robust use of copyrighted content in the cause of free speech and concomitantly focus the national attention on issues of social injustice and political controversy. At the same time, rights holders continue to enjoy the unprecedented capability to have content summarily removed from the Internet without judicial intervention or assessment of any kind. A key protection of the public interest which limits the potential chilling effects of this unilateral ability to curtail public access and use is that the public is free to use copyrighted material until a rights holder *expressly elects to object to a particular use of specific material*. Once a rights holder avails herself of the DMCA takedown

provisions in connection with a specific use, however, copyright social utility does not countenance a shift to a default presumption that any and all subsequent uses are infringing (or for that matter, unauthorized or even objected to by the rights holder). The public interest in legitimate use of copyrighted works warrants greater protection than that which would permit a single and untested take-down notice to effectively divest the entire public of all fair use and other rights to use copyrighted material.

Limited Stakeholder Resources and the Counter-Notice Procedures

As IIP SJ noted in its response to the initial Request for Comments, the problem of the inability of some stakeholders to avail themselves of some DMCA mechanisms and processes due to limited resources is an issue which traverses stakeholder constituent categorizations. In IIP SJ's view this challenge is best addressed by developing a broader range of dispute resolution options, as opposed to altering the fundamental rights and protections provided by the Safe Harbor system.

For example, under current implementation of the Safe Harbor framework, the sole means for resolving even minor or good faith disputes is costly litigation. Once an OSP has complied with the proper invocation of the take-down and restoration provisions, further resolution of disputes is in the context of a rights holder/user adversarial legal confrontation. The Copyright Office could help to establish a more level playing field by promulgating guide lines for voluntary mediation and other dispute resolution alternatives where small/individual stakeholder rights are at issue, particularly in the counter-notification process. The Copyright Office could make such guidelines publically available, promote their use through public education campaigns, and further suggest to courts that they consider such options and affirmatively inquire as to whether parties before them are amenable to such alternatives in lieu of proceeding immediately with full judicial disposition of all claims and matters before.

Overall, the DMCA Safe Harbor provisions implement the Congressional intent to strike a socially productive balance between rights holders and users interests in the digital copyright infrastructure. As is the case for any other system, the system is not perfect, but it does provide relatively simple rules of conduct for OSPs as well as and clear direction to rights holders and users alike, and has consequently spurred and continues to support the development and utility of the Internet as a socially transformative invention.

III. Specific Comments

Characteristics of the Current Internet Ecosystem

One of the principal points of debate regarding the current Internet ecosystem that has emerged in the collective public commentary is whether there are any viable means for incorporating a "notice and stay-down" mechanism in to the Safe Harbor system. As stated above, IIP SJ believes that the adoption of any "notice and stay-down" mechanism would thoroughly destabilize the fundamental OSP limited liability framework and cripple the Internet as a mechanism for public free expression and creative exchange.

While “notice and stay-down” is often strategically couched as a means for assisting small rights holders in responding to the “whack-a-mole” problem of content re-postings subsequent to a successful notice and take-down request, “notice and stay-down” is first and foremost an attempt to incorporate in to the Safe Harbor system a perpetual OSP obligation to monitor the Internet for infringing content. As Congress understood, however, the principal problem with OSP policing is that OSPs have neither the incentive nor capability to differentiate between infringing and non-infringing uses of copyrighted material. Whatever the resources of a particular rights holder, they do not alter the fact that OSPs lack the information, much less the authority, to determine whether a subsequent posting violates that rights holder’s legitimate interests. Whether the subject material has been duly licensed to other users or whether a subsequent user has fair use rights that were not at issue in the prior notice and take-down are questions beyond an OSP’s province to assess or decide. OSPs are not courts and are simply not equipped to serve as the custodian of the public interest in such rights holder/user disputes.

Moreover, “notice and stay-down” does nothing to insulate small rights holders from multiple re-postings of their works. No matter whom has the responsibility to monitor for infringing uses, unauthorized re-postings will continue to occur and re-posted content will remain posted until identified. What “notice and stay-down” does eliminate is the opportunity to investigate and act upon the relevant facts, and otherwise utilize judgment and discretion in deciding whether an unauthorized use is fact an infringing use. A single notice of alleged infringement, even if completely valid and wholly accurate, cannot anticipate and properly preclude any and all future uses of a work, including any future uses that might be subsequently authorized by the rights holder herself. “Notice and stay-down” would provide rights holders with a permanent end-run around fair use by eviscerating their affirmative obligation to consider the applicability of fair use *in each individual case*.¹

The Copyright Office has prudently emphasized the importance of weighing the affect upon the public at large in shaping these aspects of the Internet ecosystem. The introduction of the Internet has transformed the public landscape for all kinds and uses of copyrighted material. Everyday users became productive creators and disseminators of wholly original works and also works based on pre-existing material. While some rights holders expressed legitimate concerns about abuse of the new digital freedoms, other rights holders saw only the opportunity to annex digital expressive functionality as an exclusive right.

Congress recognized the social significance of finding a proper balance between the public’s expressive freedom and rights holder expectations, and the importance of providing a legal framework in which a cyberspace marketplace of ideas could flourish. “Notice and stay-down” disrupts that balance, and consequently should not be in any way incorporated in to the Internet ecosystem.

Operation of the Current DMCA Safe Harbor System

The current procedures for pursuing Counter Notices should be augmented to render them more accessible to copyrights users who have limited resources. The principal weakness of the current Counter Notification process is that it contemplates federal litigation as the only

¹ See *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (2015).

means for pursuing claims based upon the wrongful removal of content from the Internet. Litigation is of course a costly remedy and a remedy contingent upon the availability of extensive resources is illusory for those who lack them.

A threshold issue is the limited time frame in which Counter Notification litigation must be commenced under the Safe Harbor provisions, which provides insufficient time in which to pursue alternative, less expensive methods for resolving contested take-down disputes. The Copyright Office could help mitigate this situation by recommending to Congress that it expand the time for commencing litigation in connection with contested take-down disputes, which in some cases might obviate the need for litigation altogether.

Along these same lines, the Copyright Office could help to level the Counter Notice playing field by promulgating guide lines for voluntary mediation and other dispute resolution alternatives where small/individual stakeholder rights are at issue. Such guidelines could include educational materials explaining the application of rights holder exclusive rights to the digital context and the elements of fair use. The guidelines might further include a registry of pro bono mediators experienced in copyright issues, who could offer parties independent, non-binding assessments of fair use claims and other asserted bases for the unauthorized use of copyrighted material. The availability of such information and third party evaluations could result in inexpensive and in some cases even amicable resolutions, and possibly identify potential opportunities for compromise and mutually beneficial collaboration between the parties.

Potential Future Evolution of the DMCA Safe Harbor System

IIPSIJ commends the Copyright Office's consideration of enhanced public education regarding the DMCA, the Safe Harbor framework, and the social value of digital copyright in the modern society. Among other things, the public must become better informed as to the purpose and nature of fair use and the importance of appropriately building upon preexisting expression in the cause of creative exchange, social empowerment, and cultural progress.

Equally commendable is the promotion and pursuit of voluntary measures from within the Internet community to ensure the continued vitality and progressive evolution of the DMCA Safe Harbor system. Various Internet constituencies have voluntarily confronted numerous social deficiencies in cyber-society and successfully instituted "good practices" which curtail counterproductive and divisive behaviors and customs, and such efforts should be encouraged and supported.

Other Developments

The Request for Additional Comments references recent court decisions which interpret the Safe Harbor provisions and clarify prior DMCA Safe Harbor precedent. In *Capitol Records, LLC. v. Vimeo, LLC.*,² the Second Circuit had occasion to further delineate its prior analysis of the prerequisites to OSP secondary liability predicated upon specific knowledge of infringing activity, including "red flag"³ knowledge. The court therein reiterated that "red flag" knowledge

² 826 F.3d 78 (2d Cir. 2015)

³ See 512 (c)(1)(A)(ii).

requires knowledge of specific instances of infringement, and further held that such knowledge cannot be extrapolated from the implementation of affirmative efforts to detect infringement merely because such measures fail to detect all instances of infringement.

The court's continued refusal to accept general awareness theories in satisfaction of the DMCA's knowledge requirements is consistent with the statutory objectives of promoting the proliferation of the Internet. To impute knowledge of infringement to an OSP where voluntary efforts to detect infringing activity did not identify all instances of infringement would contravene both the letter and the spirit of the DMCA, and moreover, discourage voluntary initiatives to collaborate in the development of Internet good practices.⁴

IV. Concluding Comments and Recommendations

The democratizing effects of the Internet have placed expressive power in the hands of the public, including many historically marginalized groups and communities. The Internet gives voice to many who otherwise lack the social and other capital often needed to disseminate their views and other expressive contributions to the societal discourse. Overall, the DMCA Safe Harbor system has fostered these and other important social goals, not the least of are the paramount social justice values of ecumenical access, inclusion, and empowerment.

Respectfully Submitted,
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Endorsing Organizations:

Alternate Roots
Arts & Democracy
Appalshop
Digicolor
MPAC Performing Arts Collective
National Hispanic Media Coalition
The Lawyers' Committee for Civil Rights Under Law
The Museum for Black Innovation and Entrepreneurship
U.S. Department of Arts and Culture
WYZ Girl Entertainment Consulting LLC

⁴ The Court of Appeals further held that the DMCA Safe Harbor provisions apply to state-based as well as federal intellectual property protection. There is nothing in the DMCA express framework or statutory objectives that would support a contrary conclusion; indeed, a contrary result would only lead to the kind of uncertainty and confusion that the Safe Harbor system was promulgated to avoid. "[T]here is every reason to believe that Congress meant exactly what it said....[W]hat Congress intended in passing § 512(c) was to strike a compromise under which, in return for the obligation to take down infringing works promptly on receipt of notice of infringement from the owner, Internet service providers would be relieved of liability for user-posted infringements of which they were unaware, as well as of the obligation to scour matter posted on their services to ensure against copyright infringement... To construe § 512(c) as leaving service providers subject to liability under state copyright laws for postings by users of infringements of which the service providers were unaware would defeat the very purpose Congress sought to achieve in passing the statute." *Capitol Records* 826 F. 3d at 90.