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"EMPTYING THE OCEAN – ONE TEASPOON AT A TIME"

A Review of Comments Filed in the U.S. Copyright Office's Study of the "Safe Harbor" Provisions of the Digital Millennium Copyright Act

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In December 2015, the U.S. Copyright Office (USCO) issued a Notice of Inquiry (NOI) and a request for public comments to evaluate the impact and effectiveness of the so-called "safe harbor" requirements of the Digital Millennium Copyright Act (DMCA). Comments were due April 1, 2016. Over 92,000 comments were filed on the docket. The NOI states that the USCO will use the comments to develop recommendations to Congress on reforms to the DMCA.

Positions among the commenting parties broke down on familiar lines. On one side, content creators argue that the DMCA is badly broken, ineffective at fighting piracy, and is badly in need of reform. On the other side, online service providers (OSPs), such as Google, argue that the DMCA is working just fine, and as Congress intended.

A coalition of organizations dubbed the "Music Community" consisting of, among others, ASCAP, BMI, SESAC, NARAS, NMPA, the RIAA, Screen Actors Guild, and SoundExchange told the USCO that the section 512 safe harbor provisions are not working as Congress intended. The Music Community said the DMCA has "failed to scale, rendering it increasingly obsolete and futile" as an enforcement tool. Universal Music Group (UMG), one of the world's largest record and music publishing companies, listed several problems with the Section 512 notice and take down process:

1. *Bailing the Ocean With a Teaspoon.* The Section 512 safe harbor system was never designed to handle the kinds of piracy volumes occurring today. The RIAA has sent more than 175 million infringement notices since 2012 to web site operators, web site hosting companies, and search engines. UMG cited Taylor Swift's "1989" album which has been illegally downloaded nearly 1.4 million times from bittorrent sites. The Music Community added, "what is expensive and difficult for large copyright owners is an impossible task for small copyright owners seeking to protect the value of their work." According to the Music Community, the reality is that there is no way to stop piracy of copyrighted material under the present safe harbor system. The Music Community described the problem as "something akin to bailing out an ocean with a teaspoon."

2. *The Whack-a-Mole Problem.* The Music Community quoted 3-time Grammy winning composer, band leader, conductor, and Minnesota native, Maria Schneider, who said, "[t]he DMCA makes it my responsibility to police the entire Internet on a daily basis. As fast as I take my music down, it reappears again on the same site—an

endless whack-a-mole game." UMG complained that search engines receiving take down notices only take down the URL specifically referenced in the notice. UMG wrote, "given the ease with which new URLs pointing to the same infringing content are created, taking down only a single URL that directs a user to infringing content is effectively meaningless."

3. *Slow on the Downtake.* Section 512 fails to impose any "clear or strict limits on how quickly an OSP must act in response to a takedown notice, resulting in lengthy and prejudicial delays in removing infringing content." UMG maintained there should be a maximum time in which OSPs have to take down infringing material, and it should be an "extremely short time" (though UMG proposed no specific time interval).

4. *Judicial Policy Making.* Many provisions of the act are unclear and much is left to judicial interpretation, thrusting the courts into the role of making policy with respect to Section 512. UMG and the Music Community cite to judicial decisions like *Lenz v. Universal Music Corp,* which arguably requires content owners to make a determination of fair use *before* issuing a take-down notice, increasing the burden of piracy enforcement placed on copyright owners and creators to impossible levels. The Music Community also cited the case of *Viacom, Inc. v. You Tube, Inc.* in which a federal district court in New York wrote that while a jury "could find that defendants . . . welcomed copyright-infringing material being placed on their website," the so-called "red flag" provisions of the DMCA require "knowledge of specific and identifiable infringements of particular items". Cases like this, the Music Community argues, create a perverse incentive where OSPs have an incentive to "willfully blind" themselves to piracy happening on their own services. The Music Community also argued that judicial decisions have expanded the scope of the safe harbor provisions to include more types of businesses than Congress intended. The Music Community argued that Congress's intent was for the DMCA to apply only to passive, innocent actors. Instead, court rulings require copyright owners to prove "deliberate intent" to circumvent the DMCA, rendering the DMCA ineffective at stopping repeat infringement.

5. *No Transparency.* There is no transparency regarding OSPs' compliance with Section 512 except through costly litigation. Content owners and creators should be able to obtain access to information regarding the full extent of infringement occurring on OSP sites, and the "nature, frequency, and treatment of takedown notices that the OSP receives."

The Music Community made several recommendations for how the notice and take down process could be improved, including the use of audio finger printing technologies, hash-matching technologies, meta-data correlation, and automatic removal and disabling of links that point to previously noticed infringement. The Music Community believes all of these solutions are technologically feasible and that OSPs are fully competent to deploy them. UMG argues that OSPs should be required to delist or at least demote websites that are the subject of "some non-trivial number of delist notices."

For its part, Google argued that the purpose of the DMCA was to: (i) stimulate investment in the internet "that would otherwise be discouraged by overbroad copyright infringement liability; and

(ii) provide remedies for infringement while facilitating collaboration between OSPs and content owners. Google, SoundCloud and others say the DMCA has appropriately struck that balance. Google and SoundCloud claim the Act has increased accessibility to content. Google says it has paid over $3 billion to the music industry. Google also claims the internet has resulted in more content being created and made available by more people. SoundCloud describes the phenomenon as an "open, democratic platform" which allows unknown artists to upload their music and share it globally within seconds. SoundCloud argues every artist has the same opportunity to be discovered using its service. SoundCloud further argues that record companies, recording artists, and songwriters post content to SoundCloud on a daily basis "voluntarily and with no expectation of remuneration," and do so for the promotional value SoundCloud's platform provides.

Google further argues that the DMCA safe harbor regime "imposes more copyright enforcement obligations on OSPs than previous technology vendors were ever faced." Google cites the tape deck, the VCR, and the personal computer as examples of technologies that had less onerous copyright enforcement obligations. Google touts You Tube's "Content ID" system as a robust video piracy policing system. Using Content ID, Google says copyright owners can identify infringing uploads, and exercise one of several options: (i) block the content; (ii) leave the infringing content up "for promotional value"; or (iii) monetize the infringing content with advertising. Google claims the vast majority of content owners who find infringing content on You Tube choose option 3 (monetize). SoundCloud claims it has invested heavily in content filtering. However, content filtering, SoundCloud notes is dependent on reference files and data that can only be supplied by content owners and creators. SoundCloud calls for greater cooperation between content owners and creators and OSPs.

Google also claims it employs several other tools for battling piracy: (i) a "demotion signal" in its search algorithm to demote sites receiving a high number of valid removal notices; (ii) coordination with the federal Office of Management and Budget, the Interactive Advertising Bureau (IAB), and other "leading ad networks," to develop best practice policies for piracy, and to ban websites principally dedicated to engaging in piracy from participating in ad network programming; (iii) a web form to submit take down notices; (iv) the Content Verification Program (CVP) through which "trusted notifiers" search for and identify infringing content, and (v) the trusted copyright removal program (TCRP).

Google argues the DMCA's notice and take down process is "effective and efficient." Google argues that the increased volume of use of its notice and take down interface supports this statement. Google claims it processes more takedown notices faster than any other search engine. Google argues the certainty of the safe harbor law has allowed Google and other OSPs to make the notice and take down process cheaper, more streamlined, and scalable. Further, Google argues, that the "stability of the safe harbor law has . . . led to the creation of a thriving market for enforcement vendors . . . ." Google acknowledges the notice and takedown framework has not been a "silver bullet" but "it was always meant to be part of a larger collaborative strategy, "led by rightsholders and buttressed by other efforts." SoundCloud argued that identifying "red flag" material is easier said than done because it involves subjective decision making as to who is authorized to upload a copyright owner's content. Often content is uploaded by an artist's manager, producer, or agent rather than the artist causing uncertainty as to whether such uploads are authorized by the content owner.

Google opposes a "notice and stay-down" regime advocated by many content owners. Google

argues this system would place an extraordinary burden on OSPs to ensure that removed content does not reappear on their service. Google claims such a system would not work because only the rightsholder knows whether subsequent uploaders are licensed to upload the content, and whether the same infringing material is being uploaded. Google similarly resists implementation of "standard technical measures" to address online piracy, arguing that no such measures exist.

Google's only real call for reform pertains to the "crushing nature" of statutory damages under the DMCA applied against "intermediaries" pertaining to "the activities of a small minority of users."

Claims by OSPs that the Section 512 safe harbor system is working effectively, efficiently, and as Congress intended are simply not supported by the evidence of an internet economy that is inundated with piracy. It seems clear that OSPs cannot and/or have chosen not to take effective steps to seriously address the high volumes of piracy that exist today. It also seems clear that Congress could not have envisioned a creative internet economy which consists of a vast black market of pirated creative content. Congress certainly did not state a policy of tolerance for rampant piracy as the sacrificial price for stimulating investment in internet commerce.

Claims of OSPs that content creators should simply tolerate piracy as the price of on-line promotion are akin to live music presenters not paying musicians for performances because the band should be willing to perform for free for the "exposure." Musicians are tired of such arguments, and will eventually start to turn away from the internet as a tool for music distribution, as many major artists have started to do with legitimate streaming services, if the DMCA is not fixed. This would be an unfortunate lose-lose scenario for OSPs and content creators because the relationship is symbiotic. OSPs cannot provide a quality service without quality content. And the internet is an unbeatable tool for music distribution.

And yet, Congressional inertia makes reform unlikely and the outcome unpredictable. A better solution will result if industry stakeholders come together and craft a solution to this problem, recognizing that it is in everyone's best interests to do so. A combination of technological tools and stronger cooperative enforcement are the key elements of a solution. However, if an industry crafted solution remains elusive, the USCO should recommend that Congress take action to provide a better tool than the DMCA teaspoon for emptying an ocean of piracy.