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Copyright 'Notice and Takedown' System Needs Fixing

by

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Internet streaming is fast becoming the most popular way to access music and movies. Yet a massive amount of online piracy continues to cause substantial harm to copyright holders. Infringing audio and video content can also be accessed readily through search engines and on user-uploaded websites.

To combat online copyright infringement, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The statute established a "notice and takedown" system as a means of removing copyright-infringing content from the Internet. But the system is now severely strained, and, in its current form, it fails to provide adequate protection from online infringement to copyright holders. Indeed, the International Federation of the Phonographic Industry's (IFPI) recently released report states that, last year, 94 percent of all of the "take down" notices sent by IFPI pertained to "recordings uploaded repeatedly" to sites that already had been notified that the content was posted without permission.

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The DMCA gives online service providers legal immunity when their users engage in copyright infringement. By limiting the liability of online service providers for infringing posts by their users, the statute, rightly, was intended not to restrict lawful online speech and expression. The law's core principles – protection for copyright holders and immunity for online service providers who expeditiously remove infringing content – are solid. But the implementation of those principles needs revamping.

To receive legal immunity, online service providers must meet certain "safe harbor" requirements contained in Section 512 of the act. One of those safe harbors is the "notice and takedown" provision. Under Section 512, copyright holders are entitled to give notice to an online service provider when infringing content or activity takes place on its networks or website. An online service provider receives immunity if it "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing."

But it is hardly surprising that almost 20 years later the DMCA needs updating, given how much the Internet has changed since the days of dial-up Internet service. Back then, there were – by many orders of magnitude – significantly fewer Internet users and services allowing user-posted content.

Today, user-upload services websites such as SoundCloud, YouTube and Vimeo make massive amounts of music and video content available. Regrettably, users of those websites post lots of infringing content. Just since 2012, the music recording industry has sent takedown notices for over 17 million infringements.

User-upload services that draw revenues from Internet ads may have financial disincentives to comply expeditiously with takedown requests. High website traffic – even if prompted by access to infringing content – boosts online ad revenues. Internet search engines drive added traffic by linking to infringing content. This raises a question as to whether Section 512's safe harbor should continue to apply to user-upload websites in the same manner it does today.

Also, it has become increasingly burdensome for copyright holders to obtain takedowns of infringing content. Judicial interpretations of the DMCA have restricted the scope of available protections. For example, even when infringement of a particular copyrighted work is clearly known to be rampant across a given website, some courts have required copyright holders to provide notice and identification for each individual webpage address. Repeat infringers often change webpage addresses and immediately repost the infringing content.

Right now, commendably, the U.S. Copyright Office is conducting a needed review of notice and takedown system. As part of that review, the Copyright Office sponsored public roundtables on Section 512 earlier this month in New York. Additional public roundtables are set for May 12 and 13 in San Francisco. Hopefully, the Copyright Office's review will prompt either the stakeholders themselves or Congress to address the system's shortcomings to improve its efficacy.

The Constitution's Intellectual Property Clause, contained in Article I, Section 8, provides Congress power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In order to adequately secure copyrights in music, movies and other media, the notice and takedown system needs to be fixed to comport with today's digital realities.

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