

NOTICE AND TAKEDOWN AROUND THE GLOBE

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NOTICE AND TAKEDOWN – GENERAL

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- Enormous volume of infringement on the Internet threatens to overwhelm legitimate commerce.
- Notice and takedown regimes are just one means to help reduce infringement – not an end in and of itself.
- Some systems are statutory, some set by case law on duties of care, and others are purely voluntary.

NOTICE AND TAKEDOWN – US & DMCA

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- Digital Millennium Copyright Act (**DMCA**) enacted in 1998, before Napster, Grokster, YouTube, BitTorrent, cyberlockers, etc.
- Provides safe harbors for online service providers (Sec. 512)
- Section 512 was intended to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”
- Bad actors have used 512 as a shield.
- Improvement and increased cooperation is possible.

- Notice:
 - ▣ Under penalty of perjury
 - ▣ List of specified elements (id work, id infringing material, good faith belief use is not authorized)
 - ▣ Directed to service providers' designated agent
 - ▣ Failure to comply substantially with the requirements means that the notification will not be considered in determining the requisite level of knowledge by the service provider

- Obligations of Intermediaries/Service Providers:
 - Promptly remove OR block access to infringing material upon discovering it on their own or upon receiving takedown notices
 - Terminating the accounts of “repeat infringers” in “appropriate circumstances.”
 - Service Provider must promptly notify its subscriber that it has removed or disabled access to the material.

- Counter-Notice:
 - ▣ Meant to protect against erroneous or fraudulent notices.
 - ▣ Subscriber has the opportunity to respond to the notice and takedown.
 - States under penalty of perjury that material was removed or disabled through mistake or misidentification.
- In absence of an action by the copyright owner against the subscriber, the service provider must put the material back up within 10 business days.

- **Impact of “knowing material misrepresentations in either a notice or a counter notice”:**
 - ▣ Liability for resulting damages, including costs and attorneys’ fees.
 - ▣ Litigation around:
 - Whether objective or subjective good faith required (*Rossi v. MPAA* says subjective)
 - Whether a fair use evaluation required (*Lenz* says yes, *Tuteur* says no)
- **Who can bring a claim?**
 - ▣ Alleged infringer.
 - ▣ Copyright owner or licensee.
 - ▣ The Service Provider.

- **How rampant is abuse?**
 - ▣ Abuse claims infinitesimal fraction of literally millions of takedown notices sent each month.
 - ▣ While likely are ways to work to reduce inaccurate and misplaced notices, this problem is small compared to the need to reduce piracy.

- EU Member States have notice and takedown obligations that are drawn from broad duties or care, safe harbor/liability exception requirements, and/or case law, versus detailed statutory schemes such as DMCA (e.g., UK and Germany).
 - ▣ *L’Oreal v. eBay*, Article 18 of the E-Commerce Directive requires Member States to allow “for the rapid adoption of measures designed to terminate any alleged infringement **and to prevent any further impairment of the interests involved**” (“stay down”)
- Some countries have administrative or judicial processes that may result in takedown but ultimately provide for orders against websites and/or service providers (Italy/AGCOM).

- *Stoererhaftung* provides duty of care with certain obligations.
- This duty applies to sites as well as hosting providers.
- Obligations:
 - Remove infringing material without undue delay upon discovering it on their own or upon receiving takedown notices.
 - Secure the future stay down of the specific infringement (e.g., the same file).
 - Ensure that similar infringements of same work do not occur (ex. Word filtering).

- The liability exceptions for service providers apply where they are without knowledge or control of the information submitted or, arguably, of the infringing nature of the operation.
- Obligations when notified of a specific infringement:
 - Expeditiously remove infringing material or disable access to the material.
 - If the service provider cannot remove or disable access, it maybe be required to suspend service to the site to stay within the liability exceptions.

NOTICES: Not Sufficient by Themselves

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- Notice-and-takedown alone does not solve the infringement problem and is resource intensive, particularly where no “stay down” requirement.
 - ▣ Volume of infringement simply too large to keep up.
 - March-Aug. 2013, 6 MPAA members: 13.2M notices to non-UGC sites (e.g., cyberlockers) and 12M to search.
 - ▣ Infringing material quickly re-posted (the “whac-a-mole” problem), creating an endless process or “re-notification.”
 - Fox sent 33,048 DMCA notices re “The Wolverine” just to cyberlocker Rapidgator.net from July 2013 to Feb. 2014—an average of 173 notices per day—and yet additional copies were still posted daily.

Voluntary Initiatives

- **Recognition of Shared Responsibility.**
- **Streamlined Notice Practices:** Automatable functions and the use of representative lists should be the standard in notices, and would result in faster, more efficient takedowns.
- **Filtering:** Automated detection of infringing material to prevent re-posting or facilitate removal of additional copies.
 - ▣ Facilitates “take-down, stay-down”
 - Upon receipt of a notice, site can add work to filter, and thus prevent re-upload of same work
 - E.g., filter dramatically reduced infringement on RapidShare
 - Filter can also be applied to existing works on system
- **Repeat Infringers:** There should be obligations to implement repeat infringer policies and common understanding on how to identify, track and handle repeat infringers.